



# EMPLOYMENT TRIBUNALS

**Claimant:** Ivan D'Almieda  
**Respondent:** Tesco Stores Limited  
**Sitting At:** London South  
In Person  
**Before:** Employment Judge N Cox  
Sitting Alone  
**On:** 3 and 4 November 2022  
**Appearances:**  
**For the Claimant:** Mr Ijezie, solicitor advocate  
**For the Respondent:** Ms Wheeler, Counsel  
**Interpreter:** Mr Fakhar, Hindi Language

## RESERVED JUDGMENT

The claimant was not unfairly dismissed and therefore the complaint fails and is dismissed.

## REASONS

### Claims and Issues

1. The claimant was dismissed from his employment with the respondent on 25 April 2020 for gross misconduct.
2. The claimant complains that he was unfairly dismissed. He filed a complaint on 2 September 2020, and the respondent filed its response on 30 September 2020.
3. The parties agreed that the reason for the claimant's dismissal was conduct.
4. The issues arising from the claim to be determined at this hearing were discussed and agreed to be as follows:-

### Unfair dismissal

5. Was the reason for the claimant's dismissal (conduct) a substantial reason of a kind which can justify dismissal within s 98 of the Employment Rights Act 1996?
6. Did the respondent's managers genuinely believe the claimant was guilty of gross misconduct?
7. Did they have in their minds reasonable grounds on which to justify their belief ?
8. At the stage that that belief was formed on those grounds, had the managers carried out as much investigation as was reasonable in the circumstances?  
As to this :-
  - 8.1. should the managers have called witnesses, including those making allegations for cross questioning at the disciplinary meeting ?
  - 8.2. Did the Investigating officer improperly use leading questions ?
  - 8.3. Did the investigating officer fail to investigate a matter raised by the claimant which was said by him to be highly relevant to the disciplinary - namely that other staff, including a complainant, had been keeping products behind the counter to enable them to acquire them at a discount as their use by date neared ?
9. Did the decision to dismiss fall within the range of reasonable responses ?  
In other words was dismissal a fair sanction?

### Remedy

10. If the claimant succeeds:
  - 10.1. Should the Tribunal order reinstatement or re-engagement ?  
Whether reinstatement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just to so order ? What should the terms of any re-engagement order be?
11. What compensation, if any, is owed to the claimant ?
  - 11.1. What financial losses has the dismissal caused the claimant?
  - 11.2. Has the claimant the claimant mitigated his loss by taking taken reasonable steps to replace his lost earnings? If not, for what period of loss should the claimant be compensated ("Period of Loss")?
  - 11.3. Should any compensation be reduced to reflect contributory conduct on behalf of the claimant? ("Conduct Adjustment")
  - 11.4. Is there a chance, and if so what percentage chance, that the claimant would have been fairly dismissed anyway if a fair procedure had been followed (Polkey Adjustment) ?

- 11.5. Should an uplift be applied to any compensatory award to reflect the respondent's unreasonable failure to comply with the ACAS Code of Conduct on Disciplinary and Grievance Procedures ("ACAS Adjustment") ?
12. The parties agreed that in this hearing I would determine whether the claimant was unfairly dismissed and if necessary in light of my conclusion on unfair dismissal give directions and list the matter for a separate Remedy Hearing. It was agreed that I would make findings of fact in this hearing relating to the Polkey Adjustment, the Conduct Adjustment and the ACAS Adjustment.

### **Procedure and Evidence**

13. The claimant can speak basic, and understand simple English. The Tribunal had previously approved the claimant's request for a Hindi language interpreter. The start of the hearing was delayed by the late arrival of the interpreter, Mr Fakhar.
14. Both parties were anxious not to lose the listing because the matter had taken a long time. I therefore clarified with the parties which matters were agreed and which were in dispute before briefly adjourning to make inquiries about the interpreter. During this time the parties agreed a list of issues and a pre-reading list. I took time to read the key documents to which I had been referred.
15. After Mr Fakhar arrived I explained to the claimant what had occurred before the break. The claimant gave his evidence and participated in the hearing with the assistance of a Hindi language interpreter..
16. In his witness evidence the claimant had complained of stress related symptoms and depression. I inquired through his representative what, if any, adjustments might be necessary to ensure he could participate fully in the hearing and give his best evidence. I agreed with both parties that regular breaks would be taken and that cross-examination of the claimant would be conducted in an appropriately sensitive manner, and that I would intervene if appropriate. The hearing was conducted in this way. I am satisfied that the claimant was able fully to participate in the hearing and give his evidence effectively.
17. There was an agreed bundle of 236 pages and a witness bundle. The claimant consented to the late service of a supplementary bundle of job advertisements on which the respondent wished to rely to support its argument about the period over which a compensatory award should be paid. A clip of CCTV footage from the store showing the claimant passing his mobile phone to a colleague was viewed during the hearing. The parties accepted late submission of an internet-sourced copy of TikTok's policy which the claimant relied upon to show that sexually explicit content was moderated.
18. For the respondent I heard oral testimony from:

19. Mr Phil Britton, a Store Director who employed by the respondent at the time was responsible for several stores in the South London area, and who also conducted the appeal from the disciplinary decision (the parties agreed to hear Mr Britten's evidence first so that he could attend to other commitments on the second day of the hearing);
20. Mr Van Gaever, the Grocery and Home Shopping Manager at the Respondent's New Malden store who conducted the initial investigation into the allegations against the claimant;
21. Mr Robert Wynter, the New Malden Store Manager, who conducted the disciplinary meeting.
22. I also heard oral testimony from the claimant and on his behalf from Mr Kaushalkumar Joshi, a friend and former colleague of the Claimant.
23. The Claimant's evidence before me was given through a translator. I took full account of the fact that English was not his first language both in weighing his oral evidence and in considering his responses during the investigation, disciplinary and appeal stages of the procedure preceding his dismissal. For example, I formed the view that the claimant would often find it easier simply reply 'no' to lengthy questions. I was careful not to draw adverse conclusions readily from this sort of answer. I also took account of the fact that he had reported difficulty in recalling matters accurately or in detail was a symptom of the stress-related conditions and depression that he claimed to have suffered from during the investigation and dismissal.
24. Both parties provided oral submissions on the conclusion of the evidence. I was not referred to any authorities.

### **Findings of Fact**

25. Having assessed the evidence to which I was referred and considered both oral and written testimony and the submissions made by the parties I find on the balance of probabilities the following to be the relevant facts. I have not repeated every single point. Nevertheless, I have borne in mind everything which was submitted and drawn to my attention.
26. The respondent is a large employer with approximately 300,000 employees in over 3,400 stores nationally.
27. The claimant commenced employment with the respondent in May 2007. He was continually employed until 25 April 2020. Prior to the events in this case he had had an unblemished employment record.
28. At the date of his dismissal he was employed by the respondent as a full time customer assistant on the daily hot counter at its 'Tesco Extra' store in New Malden. That store employs approximately 600 people.
29. The latest version of the claimant's relevant terms and conditions of employment were signed by him on 28 November 2018. His terms and conditions of employment at all material times referred to the respondent's

Disciplinary and Grievance Procedures Policy. The applicable Disciplinary Policy and Procedures Policy (i.e, the version with effect from January 2019):-

- 29.1. Described gross misconduct and its consequences, and included an act of harassment as an example (paragraph 11);
  - 29.2. Provided that the respondent would “always carry out a thorough investigation” and described the process”. Suspension was described as “a last resort”.
  - 29.3. Envisaged that meetings will be chaired by an impartial Tesco manager trained to an appropriate level. Being impartial means that the manager has no other involvement in the matter (eg they are not a witness to any events) and have no interest in the outcome of any meeting. An investigating manager could be your line manager. The disciplinary manager and the Appeal managers would be different people.
  - 29.4. Paragraph 8 provided:” What happens at a disciplinary hearing ?...The manager will ask you questions and may challenge your version of events – this is what they need to do to form a clear understanding. You and your representative can also ask questions, you can ask for specific colleagues to be interviewed or any other evidence to support your case to be obtained ‘.
  - 29.5. Paragraph 9 provided: “What are the possible outcomes of a disciplinary hearing ? The purpose of any disciplinary outcome is to make you aware of unacceptable conduct and how to improve. One of the following outcomes can be given ... [a list of sanctions is then set out from No warning at one extreme to Dismissal at the other ].Dismissal – if the offence is a serious gross misconduct issue, you may be dismissed for a first offence ;
30. The claimant was generally aware of the Disciplinary and Grievance policy because he had signed terms and conditions of employment which referred to them. The document was available on an employee on-line resource.
  31. The respondent also maintained a Social Media Policy dated October 2018. The Social Media Policy referred to all forms of social media use. Social media was described as “*a platform that allows you to interact with others through private communications such as private messages*”. It provided that “*in the context of your duties with Tesco [you must not] use photos, videos that...contain nudity or images of a sexual nature, or that could be seen as harassment*”. It was further provided that ‘*Any breach of this policy will be investigated and could result in disciplinary action being taken which may result in your dismissal*’.
  32. The claimant was aware that showing sexually explicit photographs or videos to colleagues while at work could constitute gross misconduct.

33. On 6 February 2020 CCTV footage was recorded which showed that the claimant was in conversation with a female colleague, Ashleigh Johnson-Sands (“Ashleigh”) who worked on an adjoining counter. Ashleigh was distractedly lifting the glass countertop up and down while talking across the claimant’s counter in an apparently relaxed fashion with the claimant while he worked behind his own counter wrapping goods. At one stage the claimant removed his mobile phone from his pocket and handed it to Ashleigh to show her a video clip which Ashleigh watched apparently to its conclusion. Ashleigh continued to speak to the claimant, who made gestures with both raised arms opened and raised to shoulder height, before looking at her own phone then walking away from the counter. She did not exhibit visible signs of distress or discomfort. Her facial expression on leaving was enigmatic – perhaps a smile, perhaps bafflement.
34. It was not possible to see what was on the mobile phone from the CCTV footage.
35. A text was sent by Ashleigh to her colleague Antonia Stephani (“Antonia”) telling her that the claimant had shown her (Ashleigh) an inappropriate video. I infer that that text was sent on 6 or 7 October 2020.
36. On 7 February 2020 Antonia lodged a grievance form with Mr Gaever. Antonia’s grievance form focussed mainly on complaints about the claimant’s behaviour towards her while they worked together, including deliberately making her upset. However, she also reported that her female colleague (which I find was Ashleigh) had recently told her that the Claimant had shown her an inappropriate video. She went on to report that ‘before Christmas’ (I infer this was December 2019) while they were working together the claimant had shown her (Antonia) an inappropriate picture of a naked woman on his mobile phone.
37. On 8 February 2020 Ashleigh lodged a grievance form with Mr Gaever. In it she stated that she said she was lifting the glass counter top up and down while they were talking. The claimant had asked if she thought she was strong, and then proceeded to show her the video clip with the words “watch this video my friend sent me, this woman is strong”. Ashleigh reported that the video made her feel uncomfortable. She reported feeling disgust and emotion at the time. After she had left to go to her own counter she said that she felt shock. On the following day she came in to work, but complained that she kept having flashbacks of the video she had seen. She complained that she felt uneasy and scared and didn’t want to work with the claimant any more and that he was nearly a 50-year-old man showing a video with explicit content to a 21-year-old girl.
38. By letter of 10 February 2020 the claimant was formally invited to attend an investigation hearing to discuss four allegations:
- 1) creating an uncomfortable work environment
  - 2) showing a colleague inappropriate picture with sexual content on his mobile phone,

3) showing a video with sexual content and

4) communicating in an intimidating and aggressive way towards a colleague.

39. In the event this meeting took place on 22 February 2020. The claimant was not suspended at that time or at any time before his dismissal.

40. Mr Gaever personally handed the 10 February letter to the claimant and asked him if he knew what the investigation was about. The claimant asked him if it was about the video he had shown to Ashleigh. At that point Mr Gaever told the claimant not to say anything further but to await the investigation meeting. Before me the claimant denied that this conversation took place. However, I find that the conversation did take place as reported by Mr Gaever. This is because Mr Gaever referred to it in the course of an investigation interview with the claimant, and he would not otherwise have done so, and the claimant's recollection of the event was inconsistent. As set out below, the claimant admitted in an investigation meeting on 11 April 2020 that a conversation had taken place, but he could not remember being asked about the reason for the investigation or suggesting that it might have been about the video he had shown to Ashleigh.

41. Mr Gaever conducted grievance meetings with Ashleigh on 11 February 2020 and with Antonia on 14 February. He completed a Tesco standard form grievance procedural checklist before each meeting, prepared relevant questions in advance, kept notes of the questions and the responses. I refer to these documents in the bundle.

42. At the meeting on 11 February Ashleigh was accompanied by her mother. A note taker was present. I find that the notes of the meeting are accurate.

42.1. When asked about the video Ashleigh chose to write down a description of the content of the video rather than speak about it. She wrote that it depicted a woman in red underwear lifting up a man and performing oral sex on him to a soundtrack of bagpipes.

42.2. She said that she had seen the claimant show the video to a colleague – Erroll. She also reported that the claimant had previously made her feel uncomfortable by talking about women in a sexual context – specifically prostitutes.

42.3. Ashleigh was asked what she wanted to happen from the grievance and she said that the claimant loses his job.

43. On 14 February Mr Gaever conducted the grievance meeting with Antonia. Antonia is closer in age to the claimant. She was not accompanied at the meeting. Mr Gaever's notes record, accurately as I find, that:-

43.1. Antonia reported that Ashleigh had texted her that the claimant had shown her an inappropriate video. Mr Gaever looked at that text but did not take or preserve a copy.

- 43.2. She reported that before Christmas the claimant had shown her a picture of a naked woman and zoomed the picture in towards her vagina, Antonia reported that she had said that that was disgusting and the claimant had replied 'its natural'.
- 43.3. She reported that the claimant had on occasion (undated) mentioned to her about prostitutes which made her feel uncomfortable.
- 43.4. She made various complaints about the claimant's general way of speaking and conducting himself with her.
- 43.5. At the end of the meeting, when asked what she wanted from the grievance Antonia had said that she wanted the claimant to leave the girls alone and reiterated that she did not want to work with him.
44. Mr Gaever, as the claimant's line manager, conducted the initial investigation into the claimant's conduct. He had had relevant training and extensive experience of conducting investigations and knowledge of the respondent's disciplinary procedures.
45. On 22 February 2020 Mr Gaever held an investigation meeting with the claimant. He completed a standard form procedural checklist before the meeting, prepared relevant questions in advance and kept notes of the questions and the responses. The claimant was accompanied by a trade union representative. A note taker was present. The notes, which I find were accurate, record amongst other matters that:-
- 45.1. the claimant denied ever having mentioned prostitutes and denied creating an uncomfortable work environment. In this context when asked if he recalled any occasion when he had left a colleague crying, the claimant replied by recalling a day when Mr Gaever had visited the counter and had asked about chicken strips being kept behind the counter by other staff members. He (Mr Gaever) had told the member of staff that they were not allowed to keep stock back for themselves. Following that the claimant says that the staff member blamed him for telling managers about the chicken strips and accused him of being 'nasty'. When Mr Gaever asked him about the relevance of this the claimant replied that he was trying to establish what had led up to a member of staff leaving the counter crying.
- 45.2. The claimant denied showing colleagues at counters explicit pictures on his phone. He admitted showing other staff members photos which were 'tik tok or something funny, nothing sexual', He denied showing the video.
- 45.3. Mr Gaever asked the claimant if he recalled the conversation they had had when Mr Gaever had handed the claimant the investigation letter and the claimant replied 'no'.
- 45.4. Mr Gaever asked why he thought that two separate grievances had been filed against him. The claimant replied (as noted) "*since the*



*holding the chickens for themselves*'. Mr Gaever noted the point made by the claimant and asked why did the claimant think two grievances have come in. The claimant replied "*I don't know it just seems they have both come in since that day*".

45.5. Mr Gaever asked the claimant who he had shown the 'tiktok' video to. The claimant replied that Ashleigh had asked him what he was watching and the claimant said that he had said that he was watching a funny video, Ashleigh had asked to see it. The claimant said he could not remember the video and that he had deleted it.

45.6. After a short break Mr Gaever said he would adjourn to a further hearing to enable him to continue investigations. When summarised the meeting, the claimant repeated that '*It happened since you found out people were holding the chicken*'. Mr Gaever replied that '*some of the grievances were put in before the hot chicken issue*'.

46. Mr Gaever's comment that some of the grievances were 'put in' before the 'chicken issue' I find was inaccurate.

47. The misconduct to which the claimant was referring in the investigation interview was a practice of hiding chicken products behind the counter so that they came close to their expiry dates. Family members of the staff member would then come into the store and be given the produce which could then be bought at a substantial discount. The 'staff member' that the claimant was referring to in relation to the retaining of stock behind the counter was Antonia. In regard to this practice I find that:-

47.1. It occurred on a date unknown before February 2020;

47.2. Mr Gaever himself had found chicken products stored improperly behind the claimant's counter;

47.3. He had asked the claimant whose they were and the claimant informed him (truthfully as he believed) that they were Antonia's;

47.4. The only member of staff involved was Antonia.

47.5. I do not accept the claimant's evidence before me that the stored products had names on them and that Ashleigh's name was on some products and that she was also involved in the practice. Had the products been named, Mr Gaever would not have asked the claimant whose they were.

47.6. Mr Gaever spoke with Antonia about this misconduct at the time. No further formal action was taken against Antonia. The claimant did not himself make a formal complaint about the practice or what Antonia had said to him about his conversation with Mr Gaever.

48. On 25 February 2022 Mr Gaever interviewed Errol Laine ("Errol") about the allegation that a member of staff had in the past few weeks shown him a video of a woman doing a sex act. A note taker was present and the signed

note was in the bundle before me. Errol admitted that he had been shown a video on a mobile phone in which "*the man's private part going into a ladies mouth*". Mr Gaever asked who was the member of staff. Erroll replied: "*I don't know his name I just know what he looks like*". Mr Gaever then showed Errol a picture of the claimant and Erroll confirmed 'yes that is the person' who had shown him the video.

49. On 28 February 2020 Mr Gaever interviewed Maxine Atkins ("Maxine") who said that no-one had shown her any explicit materials.
50. Also on 28 February 2020 Mr Gaever interviewed Dale Stow ("Dale"). A note taker was present and the notes were signed and appear in the bundle before me. Mr Gaever asked if anyone on the counter had shown Dale sexually explicit material on a phone. Dale replied that the claimant had shown him a photo 'a year plus' ago but he could not remember what. He also stated that no member of counter staff had said to him that they visit prostitutes, but he reported that Antonia and another staff member, Mr Paul Frewer ("Paul") had said to him that the claimant had mentioned prostitutes.
51. On the morning of 29 February 2020 Mr Gaever interviewed Paul. A note taker was present. The notes record that Paul told Mr Gaever that the claimant had mentioned visiting prostitutes to him maybe a year or two years previously.
52. Also on 29 February 2020 Mr Gaever resumed the investigation interview with the claimant. The claimant was accompanied by the same union representative. Note taker was present. I accept that the signed note of the meeting is accurate.
  - 52.1. At the meeting, following a further discussion and denials by the claimant of showing photos or videos of an explicit nature or having mentioned prostitutes to members of staff., Mr Gaever informed the claimant that he had decided to 'move this forward to a disciplinary' on the basis of allegations 2 (showing an inappropriate picture) and 3 (showing an inappropriate video) on his mobile phone.
  - 52.2. Mr Gaever did not refer allegations 1 and 4 for disciplinary action lack of evidence.
53. Mr Gaever noted his decision and the reasons for it in manuscript on his internal investigation checklist. These documents were in the bundle before me and I accept them as an accurate record of Mr Gaever's rationale..
54. At this stage Mr Gaever had to self-isolate due to the coronavirus pandemic.
55. In early March 2020 Mr Wynter was asked by the New Malden store manager to conduct the disciplinary meeting. Mr Wynter was appropriately trained and had extensive prior experience in the conduct of disciplinary meetings. Mr Wynter did not know the claimant beforehand. He was provided with a disciplinary pack including Tesco's Disciplinary Policy, the

CCTV footage and the documents I have referred to above. Mr Wynter reviewed the documents and spoke to Mr Gaever, who was also unknown to him, by telephone. In light of his review and conversation with Mr Gaever, Mr Wynter concluded that some further points should be clarified as part of the investigatory process. These were i) to ask the claimant about the conversation he had with Mr Gaever when the investigation letter was handed to him and ii) to ask the claimant to comment on the CCTV footage.

56. There was some delay while the claimant was on holiday and a different investigation manager was found due to Mr Gaever's need to self-isolate.

57. A further investigation meeting was held on 9 April 2020 to clarify the points identified by Mr Wynter. This meeting was conducted by the replacement investigation manager, Ms Lou Lambert. I heard no evidence from Ms Lambert.

58. On 9 April 2020 the claimant attended the further investigation meeting with Ms Lambert. He was accompanied by his union representative and a note taker was present. The notes were signed. The claimant recalled being given the letter by Mr Gaever and opening it and being told he shouldn't say anything until the investigation had begun. Ms Lambert put to him that Mr Gaever had asked him what it could be about and that the claimant had asked '*is this about the video I showed Ashleigh?*'. The claimant said it was too long ago and he could not remember.

59. On 11 April 2020 Lou Lambert held a further investigatory meeting, attended by the claimant and his union representative and a note taker, for the purpose of viewing the CCTV footage. At that meeting:-

59.1. The claimant's union representative said that he saw "a colleague looking at her own phone while on the shop floor while the claimant worked. The Claimant passes her his mobile phone and she shows mild interest, bafflement and a slight smile. He could not see any clear image of what was on the phone. The footage showed only basic interest. No shock or emotional reaction."

59.2. It was agreed that it was not possible to see what was on the phone. The claimant said that he only showed a tiktok video, nothing sexual;

59.3. At the union representative's request Ms Lambert gave details of the descriptions of the video content given by two witnesses (in fact Ashleigh and Errol) and of the photograph given by one witness (in fact Antonia).

59.4. After a 25 minute break, Ms Lambert told the claimant that 'based on all evidence provided during the investigation I will move to disciplinary.'

60. There is no record of Ms Lambert's separate analysis or considerations of reasonableness and the balance of convenience. I infer that on the balance

of probabilities during the break during the investigation meeting on 11 April she reached her own decision on referring the matter to a disciplinary hearing '*based on all [of the] evidence provided during the investigation*'.

61. Mr Wynter reviewed the additional evidence and concluded that no further investigation was necessary before the disciplinary hearing.

62. On 24 April 2020 Mr Wynter wrote to the claimant inviting him to a disciplinary meeting on 25 April 2020. The letter set out the two allegations against the claimant that were being considered. He prepared for the hearing by following an in-house checklist

63. On 25 April 2020 the disciplinary meeting took place attended by Mr Wynter, the claimant and his union representative and a note taker. The notes were signed. I accept them as accurate. The notes of the meeting show that:-

63.1. The claimant's representative expressed surprise that the claimant had not been suspended. Mr Wynter said that the senior team at the time had discussed suspension but decided it was not necessary and that point was not relevant.

63.2. As regards the first allegation (i.e: showing an inappropriate photograph to Antonia before Christmas 2019) the claimant accepted that showing a photo of a naked woman was not acceptable conduct; but denied that he had done so and suggested he might have shown Christmas pictures.

63.3. Mr Wynter asked if there was any reason he believed that multiple colleagues would describe similar situations. The claimant said '*people are hiding food behind the counter*'. At this point his representative intervened to say "*this has been delved into. Robert [Wynter] is asking about the acceptability of showing pictures. The other issue has been dealt with. Going off track.*' Mr Wynter said that he was not aware of the situation, and asked the claimant if he had any mitigating reasons. The claimant said that this had all been stated before, and went on to say that in connection with Antonia's allegation that she had said to him '*I will teach you a lesson*'. Mr Wynter asked why this express threat had not been stated before by the claimant during the investigation. He replied that he had forgotten.

63.4. Mr Wynter asked hypothetically why, if Antonia had threatened to teach him a lesson, Ashleigh, Dale and Errol had made allegations about showing sexual content, and whether they were all trying to teach him a lesson. The claimant said he had no idea and, when asked, he had no other comments to make about the first allegation.

63.5. As regards the second allegation (showing a video with sexually explicit content to Ashleigh) the claimant was allowed to re-view the CCTV footage. The claimant accepted that showing such content was unacceptable behaviour in the workplace. When Mr Wynter asked if

Ashleigh was Involved in the activity of storing chicken behind the counter the claimant replied 'no'.

63.6. Mr Wynter explained he would make a decision based on the evidence and anything the claimant said. When asked if he had anything else to add, the claimant no. He said he was tired of the investigation and Mr Wynter should make his decision. Mr Wynter emphasised the importance of the claimant taking the opportunity to put forward his evidence/defence. He referred to this being taken into account when considering the balance of probabilities and to the seriousness of the matter and the possibility of dismissal, but that no decision had yet been made. The claimant replied that he had nothing to add.

63.7. Mr Wynter summarised the evidence, and the claimant's representative mentioned the '*difference in prices and location*' – I take this to be a reference to the claimant's point that the incident involving storing of products behind the counter could have led to the allegations being made.

64. Mr Wynter adjourned the meeting for 45 minutes. He noted his rationale on a prescribed checklist at the time. On resuming the meeting Mr Wynter notified the claimant that he had decided to dismiss him summarily for gross misconduct. The reasons he gave were:-

64.1. He took account of all of the evidence, the four witness statements, the two grievances, four investigation meetings, the claimant's input at the disciplinary meeting, the CCTV, the allegation Antonia was alleged to have made - I infer this was a reference to her having accused the claimant of reporting on her misconduct in relation to retaining chicken products – and the claimant's point that she had said she would teach him a lesson, and the appearance of Ashleigh's reaction to seeing the video on the CCTV.

64.2. On the basis of this he concluded that on the balance of probabilities the claimant did show sexual content to colleagues involved in both allegations.

65. On 27 April 2020 the claimant received a disciplinary outcome letter.

66. On 9 May 2020 the claimant sent in an appeal letter (dated 7 May 2020) to his store manager. In his letter he referred to his long and unblemished service history. He said that the CCTV footage did not prove that the images/video he showed to Ashleigh had any sexual content, and he repeated that the video was a funny tiktok video and that he was innocent of the allegations.

67. On 26 June 2020 the New Malden store manager acknowledged the appeal letter and that conduct of the appeal had been given to Mr Britten.

68. The appeal hearing took place on 21 July 2020 and was attended by Mr Britten, the claimant, the claimant's union representative (remotely) and by a note taker. Mr Britten was appropriately trained and experienced in the conduct of employment appeals. I refer to the notes of the Appeal Meeting which were in the bundle and, as I find, are an accurate record.
69. He considered that his function on an appeal was to consider if there had been any error in procedure beforehand, to consider if the previous decision was correct and to give the appellant the chance to provide new evidence or point out any discrepancies in the disciplinary hearing. The notes disclose, and I find:
- 69.1. The claimant emphasised his long serve and clean record, and twice mentioned the matter of the chicken products being kept behind the counter. He denied showing an inappropriate video, but could not recall the content of what he had shown.
- 69.2. He could not offer an explanation why Ashleigh would make up the allegation she had made. He denied showing sexual content to Errol and Antonia. When asked why they would make the allegations he referred again to the retention of the chicken products. When asked why Errol would make up the story the claimant said that it was because Errol did it too sometimes.
- 69.3. Mr Britten explained the difficulty of allowing the appeal without evidence of the matters he was referring to. He asked the claimant if he had raised the business of the products with anyone. The claimant replied 'no'.
70. Mr Britten adjourned the meeting for 15 minutes. On his return he observed that the claimant was unable to give answers as to why the witnesses would make up the allegations that were made. He told the claimant that he had decided to uphold the decision to dismiss.
71. On 21 July 2020 the claimant was notified that his appeal had been unsuccessful.

### **Relevant Law**

72. Under section 94(1) of the Employment Rights Act 1996, an employee has the right not to be unfairly dismissed by his employer.
73. Under s98(4) '... the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) 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 shall be determined in accordance with equity and the substantial merits of the case.'
74. Tribunals must consider (1) did the respondents genuinely believe the claimant was guilty of the alleged misconduct? (2) did they hold that belief

on reasonable grounds? (3) did they carry out a proper and adequate investigation? Finally, tribunals must decide whether it was reasonable for the respondents to dismiss the claimant for that reason.

75. It is not for the Tribunal to substitute its own decision as to the reasonableness of the investigation and the decision to dismiss. The Tribunal's function is to determine whether, in the particular circumstances of the case, the decision to dismiss fell within the band of reasonable responses which a reasonable employer might have adopted. The objective standards of the reasonable employer must be applied to all aspects of the question whether an employee was fairly and reasonably dismissed (Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23, CA). The question of whether a reasonable investigation was carried out is judged according to that employer's belief in the alleged misconduct.
76. Tribunals must also take into account whether an employer or employee has unreasonably failed to comply with the ACAS Code on Disciplinary and Grievance Procedures and may increase or reduce compensation awards by up to 25%.
77. If a dismissal is found unfair by reason of procedural defects, then the fact that the employer would or might have dismissed the employee anyway goes to the question of remedy and compensation reduced to reflect that fact.
78. Section 122(2) of the Employment Rights Act 1996 provides that where the Tribunal finds that any conduct of a Claimant before the dismissal was such that it would be just and equitable to reduce the amount of the Basic Award, the Tribunal must reduce that amount accordingly.
79. Section 123(6) of the Employment Rights Act 1996 provides that where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the Claimant, it must reduce the amount of the compensatory award by such proportion as it considers just and equitable.

### **Conclusions**

80. The parties agreed, and I find, that the reason for dismissal was conduct. Conduct is a potentially fair reason justifying dismissal.
81. In summary the claimant had shown an inappropriate picture with sexual content on his mobile phone to a female member of staff (Antonia) in December 2019, and had shown an inappropriate video on his mobile phone to another female co-worker (Ashleigh) on 5 February 2020.

Did the respondent genuinely believe that the claimant was guilty of that misconduct?

82. I find that the respondent genuinely believed that the claimant was guilty of that misconduct.

83. That conduct of this kind could constitute misconduct was clear from the Disciplinary Policy and the Social Media Policy.

84. I find that each of Mr Gaever, Mr Wynter and Mr Britten had a genuine belief that the claimant was guilty of the misconduct alleged. Each of them kept contemporaneous notes of their reasoning and conclusions based on the balance of probabilities and those notes are consistent with such a belief.

85. I reject in the absence of any evidential basis the claimant's contention, introduced for the first time during his testimony, that there was some wider conspiracy on the part of the respondent to get rid of him because they wanted to introduce flexible working and he was an established full-time worker.

Did the respondent conduct a sufficient investigation in all the circumstances?

86. In determining this issue I have taken into account :-

86.1. the fact that the respondent's Disciplinary and Grievance Policy expressly provided that a 'thorough' investigation would always be carried out;

86.2. the allegations against the claimant were of a serious nature and merited an appropriately thorough investigation;

86.3. the respondent is a very large employer with considerable administrative resource available to devote to the conduct of disciplinary investigations.

87. I find that the respondent's investigation in all the circumstances was sufficient. My reasons are as follows.

88. I reject the claimant's contention that the investigation was flawed because the witnesses making allegations against the claimant were not made available during meetings to be questioned directly by the claimant. The respondent's disciplinary and grievance policy provides that "*[the claimant and his] representative could ask questions, ask for specific colleagues to be interviewed or any other evidence to support [his] case to be obtained*". There was no provision in the Disciplinary Policy that colleagues would be made available for direct cross questioning by an accused employee during investigatory or disciplinary meetings. Each of the respondent's witness told me that there was a policy – albeit not one that was formally recorded in any material before me – that this would not be done in any disciplinary case. I accept that such a practice existed. There would be self-evidently good reasons for such a practice in most if not all cases of conduct dismissals. I find that there was no basis for an expectation on the part of the claimant and no requirement in this case that witnesses should have been put up for questioning by the claimant directly in order for there to be a sufficient investigation or a fair procedure. The claimant was provided with copies of the statement made against him at the disciplinary meeting and neither he nor his representative said that fairness required that questions be put to



the witnesses. Neither the claimant nor his representatives asked for questions to be put to colleagues.

89. I reject the claimant's argument that Mr Gaever's style or tone of questioning of the claimant or any of the witnesses was inappropriate. The respondent's internal investigation checklist envisaged a variety of questioning techniques including probing and closed questions. I am satisfied on the evidence before me that Mr Gaever's questioning techniques did not undermine the sufficiency or fairness of the investigation.

90. I reject the argument that Mr Gaever effectively 'led' Errol to incriminate the claimant as the person who showed him the inappropriate video by not presenting him with a variety of choices of photographs of other members of staff. Mr Gaever said, and I accept, that he had been told by Ashleigh that the claimant had shown the material to Errol. It was appropriate to investigate that allegation. When Errol said that he was unsure of the name of the person involved, some means had to be adopted to ascertain if it was the claimant or not. The individual was known to Errol, though not by name. This was not a case of identifying a random stranger to a criminal standard, so that the equivalent of a police 'line up' would be required as a matter of fairness. It is easy to foresee all manner of complexities if Mr Gaever were required to select a variety of staff photographs for consideration in a case such as this. The claimant had not suggested that Errol was involved in any conspiracy to falsely accuse him. There was no reason at all for Mr Gaever to doubt that Errol would lie and say that the claimant was the person involved if he was not, and every reason to think that he would not tell such a lie. The claimant did suggest that Errol was also involved in hiding chicken goods, but this point was not made until the Appeal meeting and was unsupported by either evidence or a prior complaint.

91. In regard specifically to the investigation of the malicious reporting defence I note that the claimant raised this allegation at each stage of the disciplinary process. However, I find that the respondent's investigation into this issue was sufficient. My reasons are:

91.1. A sufficient investigation and a fair process does not necessarily require that an allegation of malicious reporting is accepted just because it is made, nor is it required that allegations are only fairly and sufficiently investigated if they are put directly to witnesses. The issue before me is whether the investigation that was conducted in relation to this issue was within the range of reasonable responses in the circumstances facing the respondent.

91.2. At the initial investigatory meeting, Mr Gaever was shown the text from Ashleigh to Antonia telling her that the claimant has shown her an inappropriate video. It is possible that it might have indicated or corroborated a plan to target the claimant or to fabricate an allegation to get him dismissed. The standard checklist envisages that copies of texts etc could be amongst the information needed to make a decision. That text should have been but was not was not copied and Mr Gaever could not recall what it said. I find on balance that if there was any

material in the text which suggested malicious conspiracy to harm the claimant, Mr Gaever would have taken greater notice of the text at the time.

91.3. Mr Gaever in fact dismissed the suggestion peremptorily on the grounds that some of the complaints had been made before the chicken hiding misconduct had come to light. This was a mistake by Mr Gaever. In his oral evidence Mr Gaever at one stage said that he did not investigate this matter further because he did not consider it relevant to Ashleigh and Antonia's grievances. Later in his testimony he accepted that he should have treated Antonia's grievance with caution because of this background, but said that that was why he interviewed other staff members to get the big picture and that he couldn't rely on just one person. I find that on balance Mr Gaever failed to apply his mind to the possibility of a malicious complaint by Antonia and that was why he did not investigate the matter further. I find he was likely influenced by his knowledge that only Antonia was involved in the matter when he became involved and by the interchange with the claimant (when he handed him the notice of investigation and the claimant asked him if it was about the video he had shown to Ashleigh). I think that if he had applied his mind to it, he would have asked Antonia about the claimant's allegation and that he would have kept a copy of the text as a precaution.

91.4. At the disciplinary stage, the position was also somewhat unsatisfactory at the outset. Mr Wynter accepted in his evidence before me, and I find, that it would be relevant to the decision to dismiss the claimant, and therefore important to consider and if necessary investigate, whether a complaint had been brought falsely or maliciously. In the disciplinary meeting, when the claimant sought to raise the issue of hiding chicken produce again. Mr Wynter said he did not know about this. At this point the claimant's representative said that the matter had already been looked into (he may have understood that the claimant was simply trying to introduce a counter allegation against one of his accusers) and that the claimant needed to move on with the disciplinary process. The claimant then referred to an express threat from Antonia – to teach him a lesson. When asked why he had not mentioned this before his reply was that he had forgotten. Mr Wynter then asked why four people would make allegations against him, and whether he thought they were all trying to teach him a lesson, and the claimant said he did not know and, when asked, he had no other comments to make.

91.5. At the appeal stage, Mr Britten had asked the claimant about the malicious allegation suggestion. The claimant could not offer any explanation as to why Ashleigh would make up an allegation of misconduct against him. When asked why Ashleigh, Antonia and Errol would make the allegations he referred again to the retention of the chicken products. When asked why Errol would make up the story the claimant said that it was because Errol did it too sometimes. Mr Britten

explained the difficulty of allowing the appeal without evidence of the matters he was referring to. He asked the claimant if he had raised the business of hiding the chicken products with anyone. The claimant replied 'no'.

91.6. A sufficient investigation and a fair process does not necessarily require that an allegation of malicious reporting is accepted just because it is made, nor is it required that allegations are only fairly and sufficiently investigated if they are put directly to witnesses. The issue before me is whether the investigation that was conducted in relation to this issue was within the range of reasonable responses in the circumstances facing the respondent. As to this:

91.7. The claimant's allegation was that Antonia had believed that he had reported on her and had threatened to teach him a lesson. The allegation that a direct threat was expressly made was only introduced for the first time at the disciplinary meeting;

91.8. Although he initially said otherwise, he subsequently accepted that Ashleigh was not in fact involved in the practice of hiding chicken produce;

91.9. In weighing up factors for and against the claimant, Mr Wynter at the time of the disciplinary decision expressly considered the claim that Antonia had threatened him as weighing against the truth of the allegations against the claimant;

91.10. The claimant only suggested that Errol had been involved in the practice of hiding chicken produce at the appeal stage. He never suggested that any other individuals who had spoken about his conduct had been involved in that practice.

91.11. He had not complained about the practice, nor about the threat to 'teach him a lesson' during the investigation stage and he did not produce any evidence at all of any wider conspiracy against him;

91.12. Neither he nor any of his representatives ever asked that questions be put to witnesses to test this defence;

91.13. In the circumstances, it was within the range of reasonable responses for the respondent to rely on the evidence of the four witnesses as being to some extent corroborative of the allegations, and it was not outside of the range of reasonable responses to conclude that in the absence of any documentary proof, and in light of the claimant's changes of story in relation to Ashleigh's involvement, and the late and unsupported allegation against Errol, that further investigation of the allegation of a conspiracy against the claimant was unnecessary for the purpose of conducting a sufficient and fair process.

92. Mr Britten was challenged in cross examination that his decision was unreasonable because he did not himself view the CCTV footage. I am

satisfied that in light of the material and arguments before him his decision that it was not necessary to review the CCTV footage himself in order to perform his appeal functions was within the range of reasonable responses.

93. Stepping back, I note that the investigation was conducted generally in accordance with the provisions of the respondent's disciplinary procedures, by independent and appropriately experienced and trained managers, contemporaneous notes of meetings and deliberations were kept. There were examples of shortcomings in the process – for example allowing the claimant and his representatives to review CCTV footage and witness statements - but these were the subject of reflection and corrective action.

Did the respondent have reasonable grounds for its belief in the claimant's conduct ?

94. The allegations against the claimant involved showing a photograph of a naked woman to Antonia and showing a video with sexual content to Ashleigh. The claimant denied in both cases that the content of the material was inappropriate and that he would never show material of that kind.

95. As regards the allegation by Antonia, the claimant submitted that there were no witnesses, that the incident occurred before Christmas and was not reported at the time, and that there was no evidence of what the claimant had shown. I have dealt with the allegation of malice above.

96. As regards the allegation by Ashleigh the claimant submitted that there was no direct evidence of the material allegedly shown. The CCTV evidence did not show the content. In his oral evidence before me the claimant said for the first time that some memory related problem with his phone meant that he had had to delete all records of what he had accessed on his phone. He also submitted that the reaction of Ashleigh was not consistent with her having seen or been shocked by what she saw on the phone, and that that had been raised by his representative during the dismissal process.

97. The existence of reasonable grounds for belief in the claimant's misconduct therefore depended upon the reasonableness of inferences of guilt drawn from the witness evidence.

98. I am satisfied that the grounds in fact relied upon by the respondent's managers are as set out in their contemporaneous written notes and the signed notes of meetings. Those grounds were confirmed and further explained in their evidence before me, which I accept. I am satisfied that each manager approached the evidence and their functions and decisions independently of each other and with an open mind. I record that in reaching that conclusion I have taken into account that Mr Gaever and Mr Britten had worked together at some point in the past.

99. I am satisfied that the respondent's managers had reasonable grounds for their beliefs in the claimant's misconduct.

- 99.1. Mr Gaever concluded from the descriptions given by Ashleigh and Errol that the video they had each seen was the same one. He concluded that the claimant had spoken about prostitutes to each of Ashleigh, Antonia, and Paul. He considered that the CCTV footage was consistent with the account of events given by Ashleigh. When put to him in cross-examination that Ashleigh's reaction was not consistent with shock or disgust, he said that people's reactions to such things could differ, and that he took account of the expressions of disgust by Ashleigh and Antonia in their interviews, and the conduct and emotion shown by Ashleigh during her interview as supporting the allegations made in the grievances. He made his recommendation to refer the matter to a disciplinary hearing on the basis of his assessment of the truth of the allegations on balance of probabilities and in light of the totality of the evidence he had accumulated which he concluded, in essence, was mutually self-supporting. He concluded that the claimant's behaviour could amount to harassment. I find Mr Gaever had reasonable grounds for his beliefs and conclusions.
- 99.2. Ms Lambert, I find did independently consider whether to refer the claimant to disciplinary after considering the claimant's comments regarding what he had said to Mr Gaever and what he had to say about the CCTV. These did not significantly alter the evidential basis for a referral, and so I find that her decision was supported by reasonable grounds.
- 99.3. In light of the documentary evidence before me in the bundle and having heard Mr Wynter's oral testimony I find that he applied his own mind to the evidence from the investigation and to the additional points made by the claimant during the disciplinary meeting. His rationale is recorded in his contemporaneous notes. He reached his decision on the balance of probability on the basis of all of the factors set out above. He weighed points both 'for' and 'against' the claimant in the manner recorded in his contemporaneous checklist. He was satisfied that the investigation was thorough, having himself initiated further investigative steps to clarify some matters before the disciplinary meeting. He the conduct amounted to harassment of Antonia and Ashleigh. I am satisfied the material to which he referred disclosed reasonable grounds for his belief in the claimant's misconduct.
- 99.4. The conduct found proven was of at least two instances of the unwanted showing of material with sexual content to female colleagues, and in the case of Ashleigh a much younger female colleague, and that the complainants experienced discomfort in their working environment. I am satisfied also that it was reasonable for Mr Wynter to conclude that the claimant's conduct amounted to harassment.
- 99.5. Mr Britten, I find, concluded that there had been a sufficient investigation (including specifically upon in relation to the allegation of malice) and that reasonable grounds existed for the decision to dismiss the claimant. Mr Britten was challenged in cross examination that his decision was unreasonable because he did not himself view the CCTV

footage. I am satisfied that in light of the material and arguments before him his decision that it was not necessary to review the CCTV footage himself in order to perform his appeal functions. In the face of no new evidence or argument from the claimant his decision was based on reasonable grounds.

Was dismissal within the range of reasonable responses? Was dismissal a fair sanction?

100. Mr Wynter considered, and Mr Britten did not disagree, that the claimant's conduct was serious and amounted to harassment and constituted gross misconduct. Harassment was given as an example of conduct that could be treated as gross misconduct.
101. The claimant himself accepted that showing unwanted sexual images to colleagues could constitute gross misconduct.
102. Mr Wynter's and Mr Britten's contemporaneous notes record that both took account of the length of the claimant's service and his hitherto clean record.
103. I accept Mr Wynter's evidence that respondent would have genuine concerns that if the claimant had not been dismissed the respondent might be giving the appearance of endorsing or failing to treat seriously the showing of inappropriate images.
104. I find that in those circumstances dismissal for gross misconduct was within the range of reasonable sanctions that the respondent could have applied.
105. For the above reasons I find the claimant was not unfairly dismissed.

**Remedy**

106. In light of my conclusion it is not necessary for me to make findings or express a view on remedy. However, if I am wrong I record the following additional findings and make the following observations.

Reinstatement:

107. On the basis of the written and oral testimony before me I find as a fact that the claimant's job still exists but that it has been split, and is currently filled. I was told, and I accept, that the relationship of trust and confidence broken down. For those reasons I would not have ordered order reinstatement or re-engagement.

Polkey

108. The only aspect of the procedure which might have had, in my judgment, realistic prospect of succeeding concerned the shortcomings in Mr Gaever's

conduct of the investigatory stage. I have explained above that those shortcomings were addressed effectively during the later stages of the dismissal process.

109. If I am wrong, I would have applied a Polkey reduction of 70%.

Conduct

110. I find on the balance of probabilities:

110.1. That Ashleigh's account of the exchange with the claimant was consistent with the CCTV clips, the claimant's account was inconsistent with it. I prefer the account of Ashleigh and consider that her account of what she saw on the claimant's phone was true;

110.2. The claimant's explanations and details of his defences changed and developed over time during the investigation and disciplinary meetings. I find that the records on his phone had been deleted. I did not believe the explanation he gave in his oral evidence as to the reason for that being a technical, memory related issue. I consider that he deleted the content because he did not want it to be investigated because it would be likely to undermine his claims that the material was merely amusing or Christmas related content.

111. In addition to the Polkey adjustment above, I would also reduce any basic and compensatory award which might otherwise have been made by 75%.

ACAS Adjustment

112. There were no grounds upon which an adjustment would be just and equitable for the failure by either party to follow the ACAS procedure.

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Employment Judge N Cox  
Date: 8 December 2022

Sent to the parties on  
Date: 14 December 2022

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