EMPLOYMENT TRIBUNALS

Claimant: Mr Mohammed Sheikh

Respondent: Currys Group Limited

Heard at: Leeds Employment Tribunal (remotely by CVP)

On: 4 and 5 May 2023

Before: Employment Judge Wilkinson

Representation
Claimant: Yusuf Lunat (solicitor)
Respondent: Anisa Niaz-Dickinson (counsel)

JUDGMENT having been sent to the parties on 11 May 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. This is the claimant's claim for unfair dismissal.

2. The claimant is Mohammed Sheikh. I shall refer to him as the claimant. He has been represented by Mr Lunat.

3. The respondent is Currys Group Limited. I shall refer to the company as the respondent. It has been represented by Miss Niaz-Dickinson of counsel.

4. This has been a remote hearing by way of CVP. There were some minor technical issues which arose but they were resolved and they did not interfere with the conduct or smooth running of the hearing. I ensured that there were regular breaks from the screen throughout the hearing. I am satisfied that the hearing was fair to all parties and neither party sought to argue otherwise either during the course of the hearing or in closing submissions.

5. In reaching my decision I considered the witness statements filed by both parties and the documents referred to in the hearing bundle. I re-read some of

those when considering my decision. I also considered the closing submissions made on behalf of both parties.

6. All of the witnesses who gave written evidence were challenge in cross-examination. The witnesses from whom I have heard were:

    a. For the respondent: Saad Ahmed (general manager at the respondent's Leeds Central store. At the material time he worked as a senior sales manager at the Leeds Birstall store) and Raymond Baldwin (who was and is the general manager of the respondent's Leeds Birstall store); and

    b. For the claimant: him alone.

The claims and the parties' positions

7. The claimant brings a claim for unfair dismissal.

8. The respondent accepts that there was a dismissal. It asserts that the reason for dismissal was a potentially fair reason, namely; some other substantial reason arising from its having lost trust and confidence in the claimant. It relies upon the following matters in support of this:

    a. The claimant failing to notify it of bail conditions which it says impacted upon the claimant's ability to carry out his work for a significant period of time;

    b. The actual impact of the claimant's bail conditions upon his ability to carry out his work;

    c. The risks posed to other employees and to customers arising from the charges; and

    d. The risk of reputational damage to the business.

9. The respondent asserts that the decision to dismiss was fair and that it acted reasonably and fairly in all of the circumstances.

10. The claimant's case is that he was unfairly dismissed. He asserts that the respondent is attempted to "dress up" what is properly a conduct dismissal as some other substantial reason to avoid the process which was undertaken being properly scrutinised. The claimant asserts that the dismissal itself was unfair in that other options which were less serious could have been considered. It is also asserted on his behalf that none of the reasons relied upon by the respondent stand up to scrutiny. In all of the circumstances the claimant asserts that no fair process was followed and that the decision to dismiss was unreasonable and unfair.

11. The issues before the tribunal can therefore be summarised as follows:

    a. What was the reason for the dismissal – has the respondent proved that the reasons relied upon were (either together or separately) a substantial reason capable of justifying dismissal?

b. If so, by reference to all the circumstances and in accordance with equity and the substantial merits of the case, did the respondent act reasonably or unreasonably in treating that as a sufficient reason for dismissing the claimant?

Preliminary matters

12. At the outset of the hearing I dealt with applications by the claimant to rely on further evidence. I refused those applications and gave brief oral reasons. Written reasons for those decisions were not requested but for the sake of completeness I dealt with the applications as follows:

    a. The claimant sought to rely on 28 pages of Google searches for the claimant's name in order to support his contention that he was not well known and the risk of reputational damage was limited. It appeared that this was a search carried out by his solicitors. In my judgment the evidential value of a random Google search with the claimant's name was limited if any. It carried no evidential or probative weight. It was noteworthy within the proposed disclosure that when the search term was changed to 'mohamed sheikh batley' the first search item that came up was the link to a local news item relating to the criminal charges.

    b. The claimant also sought to rely on a job offer as a 'Sales Colleague' in Manchester for an unidentified employer. This was undated. The claimant asserted that it was a role from May/June 2022 at the respondent's Manchester store. This was not something that was raised in the claimant's witness evidence or indeed at any time before the start of the final hearing before me. There was no clear information as to (i) where the advert came from; (ii) who the employer was; or (iii) when it was from. There was no supporting witness statement confirming the provenance of it. I could see no evidential value whatsoever of this single screenshot.

    c. Both of those applications were opposed by the respondent.

    d. In respect of both of the above matters I considered the order of the tribunal that all documents must be served on the other side by 24 January 2023. The claimant had not previously served those documents upon the respondent and Mr Lunat could give no real reason why the order had not been complied with. I considered my general case management powers in rule 41 of the Employment Tribunal Rules of Procedure and also the overriding objective in rule 2 of those rules. I determined that it was not in the interests of justice to allow those documents to be relied upon in the circumstances where there was no reason for non-compliance with the tribunal order and where the proposed evidence had limited probative value.

    e. The final additional document which the claimant sought to rely upon was a 17 page pdf document showing that the claimant had applied for a number of other jobs. This was relevant to remedy if appropriate. Given that I proposed to deal with the claim by

determining liability in the first instance I adjourned my decision in respect of this document until after my determination on liability indicating that I would consider any submissions at that stage. Both parties were content to deal with this document on that basis.

The legal framework

13. The law which I need to apply in this matter is well established and was uncontentious between the parties.

14. The starting point is section 94 of the Employment Rights Act 1996 ("the Act") which states that: 'an employee has the right not to be unfairly dismissed by his employer.'

15. When determining whether a dismissal was fair or unfair the provisions of section 98 of the Act apply which states:

    (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.

16. There is therefore a two-stage test which must be considered. I remind myself at this stage that in respect of the first stage of the test (section 98(1) of the Act) that the burden is on the respondent to show that the reason for dismissal is potentially fair and that thereafter the general test as to whether the decision was fair or unfair (section 98(4) of the Act) is a neutral burden.

17. When considering the fairness or unfairness of the dismissal there is a wealth of authority which has established that I must consider the range of reasonable responses; namely does dismissal fall within a range of reasonable responses – *Iceland Frozen Foods v Jones* [1982] IRLR 439.

18. I must be careful not to substitute my own view as to fairness looking at things now, but rather must consider the position faced by the respondent at the time.

19. In respect of cases where some other substantial reason has been asserted, falling under s. 98(1)(b) of the Act, the decision of the Employment Appeals Tribunal in *Harper v National Coal Board* [1980] IRLR 260 is helpful in which Lord Macdonald said as follows (at [9]):

> It was argued before us that it was not sufficient to bring a case within this category simply to show that the employer for reasons of his own regarded the reason as a substantial one. There must it was said be facts which indicated that the employer was entitled to regard the reason as being substantial. We were referred in this connection to *Hollister v The National Farmers' Union* [1979] IRLR 238. This again may be correct but within certain limits. Obviously, an employer cannot claim that a reason for dismissal is substantial if it is a whimsical or capricious reason which no person of ordinary sense would entertain. But if the employer can show that he had a fair reason in his mind at the time when he decided on dismissal and that he genuinely believed it to be fair this would bring the case within the category of another substantial reason. Where the belief is one which is genuinely held, and particularly is one which most employers would be expected to adopt, it may be a substantial reason even where modern sophisticated opinion can be adduced to suggest that it has no scientific foundation (*Saunders v Scottish National Camps Association Ltd* [1980] IRLR 174).

20. I remind myself that the standard of proof for any disputed factual matter is the civil standard of proof; namely the balance of probabilities. That is I must be satisfied that it is more likely than not before making any finding.

21. This claim has been dismissed by my earlier judgment. I therefore do not need to consider the legal principles relating to remedy within these additional written reasons.

Relevant facts and my findings in respect of disputed matters

Preliminary observations

22. As with any case such as this there are a large number of factual matters referred to and disputed facts which have arisen from the evidence. I do not deal with all of them within these reasons but rather limit my consideration to those factual matters which are probative to the issues in the case and pertinent to my decision.

23. In this case a significant amount of the factual background is agreed between the parties. Where there is a disputed factual matter I will indicate this and give my reasons for preferring one parties' case over the other.

24. Before turning to the facts I deal briefly with my assessment of witnesses:

    a. Mr Ahmed's evidence was short and focused on a narrow period of time. Although he was asked some exploratory questions by Mr Lunat his factual evidence was not challenged in any significant way.

I found him to be an accurate historian and clear in his evidence. His written statement was not significantly undermined. I accept his evidence as accurate.

b. Mr Baldwin's evidence was challenged in material aspects. Although factually his account of the events at the relevant time was not fundamentally disputed by the claimant Mr Baldwin was cross-examined in respect of his approach to the issues leading to the dismissal, the procedure that was followed and the reasons and reasonableness of the decision making at the relevant time. On the whole I found his answers to be consistent with his written evidence and the documentary evidence in the bundle. His approach to matters withstood much of the cross-examination. I found him to be a fair witness. In my assessment of him as a witness I did not find him either dogmatic or hostile to the claimant. He came across as wholly reasonable in his approach.

c. The claimant did not disagree with the factual matrix. He made some concessions during the course of cross-examination by Ms Niaz-Dickinson which undermined his own case. I found these to be a genuine acceptance of the situation as it was at the time because a significant amount of the concessions were consistent with the claimant's responses to matters which were raised contemporaneously during the investigatory process. I shall refer to specific examples during the fact finding element of these reasons below. The claimant appeared inconsistent and unclear when asked about material discrepancies in what he said at the time and his case before the tribunal. I found that he was unable to give clear answers on significant factual matters for example: why he initially gave the wrong date for his arrest, why he initially did not mention telling his team leader about his arrest and changed his position later and his position regarding the approach taken about his bail conditions. I will give further reasons in respect of how this impacts on my factual conclusions below.

The facts and my findings

25. The claimant was employed by the respondent from 9 September 2016 to 6 June 2022 as a sales colleague at the Birstall store. The claimant lived and worked in Birstall and he was well known in the local area for both living and working for the respondent. I make this latter finding based on the claimant's own evidence which he volunteered rather than agreeing with a question put in cross-examination.

26. The respondent is a large national retailer of electrical goods. It is one of, if not the largest electronics retailers in the United Kingdom.

27. It is an agreed fact, which I accept, that the claimant was good at his job. He was subject to some disciplinary procedures which were not live at the material time, but overall it was the evidence of the respondent that the claimant performed to an "outstanding" level.

28. In June 2019 the claimant was arrested for two alleged serious sexual offences including one allegation of rape. He was subject to bail conditions which included not to have any (my emphasis) unsupervised access to persons under the age of 18 without express permission from social care. For ease I shall refer to this bail condition as 'the no contact bail condition' during the course of these reasons.

29. The claimant accepted when asked about this that this could have implications for his work. His own evidence was that he ought to have told senior managers about the bail conditions. I accept and find that the bail conditions were serious matters which ought to have been reported to the claimant's managers. I find this as the claimant himself accepted it both during his oral evidence to the tribunal and during the investigatory process whilst he was still employed by the respondent.

30. On 25 October 2021 the claimant was charged with the offences and the bail was confirmed by the police (it having remained in place throughout the intervening 28 months). The claimant was charged with a group of over 40 co-defendants. The trial is due to take place at the Crown Court sitting at Leeds in January 2024.

31. I remind myself of the legal truth that a person is to be presumed innocent unless and until proven guilty. I proceed on this basis when approaching this case and the claimant's alleged criminal activities have not influenced my decision.

32. On 25 October 2021 the claimant was late for work. He met with Saad Ahmed in the car park and told him of the charges. Mr Ahmed's evidence was not factually challenged by the claimant and I accept it as accurate on the balance of probabilities. Mr Ahmed invited the claimant inside the store for a more formal meeting. The minutes of that meeting along with the minutes of all further meetings in this matter were contained within the trial bundle. The claimant accepted that each of the sets of minutes were accurate. He has never sought to suggest otherwise and indeed on many of them he agreed them as accurate at the time. I therefore accept and find that the recorded minutes of the conversations between the claimant and his managers are accurate.

33. The following points flow from Mr Ahmed's evidence and the minutes, and I make the following findings of fact (which in any event are agreed):

    a. The claimant told Mr Ahmed about his arrest for rape and the other sexual assault.

    b. He told him that he had first been arrested in 2020. This was not truthful.

    c. The claimant told Mr Ahmed at the time that he had not told any other of the respondent's employees about his arrest.

    d. The claimant mentioned his bail conditions including the no contact bail condition.

34. Mr Ahmed handed the matter over to Raymond Baldwin. Mr Ahmed's oral evidence was that this was because he did not feel sufficiently experienced or senior enough to deal with the obvious potential consequences flowing from what the claimant had told him. I accept this evidence and find that it was an entirely reasonable and proper course of action from Mr Ahmed.

35. There followed a short meeting between the claimant and Mr Baldwin at the end of which Mr Baldwin made the decision to suspend the claimant on full pay.

36. The reason for the suspension was criticized by Mr Lunat during cross-examination of Mr Baldwin and in his closing submissions. Mr Lunat suggested that there was an inconsistency in respect of the reason for the suspension. I do not accept this submission. I find that the reason was made plain to the claimant at the time. This is clear from a full consideration of Mr Baldwin's witness statement to the tribunal where at paragraphs 16 and 17 he set out his reasoning thoroughly. Furthermore within the letter confirming the suspension dated 26 October 2021 the letter makes clear in broad terms that the suspension was to allow for a 'thorough investigation' following the alleged criminal offences. This is an important contextual matter however in my judgment this issue is secondary to the primary issue in the case; namely the dismissal.

37. Following the suspension two meetings were arranged between the claimant and Mr Baldwin to review the suspension on 6 and 26 January 2023.

38. On 6 January 2023 the claimant confirmed that the bail conditions remained in place. He was asked by Mr Baldwin about giving the incorrect date of his first arrest to Mr Ahmed – i.e. 2020 rather than 2019. In my judgment the claimant's response to Mr Baldwin was unclear and inconsistent. He suggested that he had been confused when discussing this with the date for a separate arrest which stemmed from a domestic abuse incident. The claimant was given the opportunity to reflect upon this in cross-examination by Ms Niaz-Dickinson and I found his reply to be unclear – in short he was unable to explain at all why he had not been clear with Mr Baldwin or Mr Ahmed when this was raised in October 2021 and January 2022. I find that the claimant was evasive and unclear when asked about this by Mr Baldwin.

39. On 6 January 2022 the claimant suggested to Mr Baldwin that he could attempt to have the no contact bail condition removed. I find as a fact that the claimant specifically did <u>not</u> suggest that the no contact bail condition was limited to domestic settings only.

40. On 26 January 2022 the claimant again discussed the bail conditions and his arrest. He told Mr Baldwin that he had told a colleague, Saeed Kagzi ("Sid") about his bail conditions. This was not something he had mentioned previously including when specifically addressing this with Mr Ahmed on 25 October 2021 when the claimant said explicitly that he had not told any other colleague. The claimant accepted during the meeting that Sid was not a manager dealing with HR functions. This was something he again conceded in cross-examination. As I have already found as a fact the claimant ought to have told such a manager. I am further satisfied and find as a fact, based upon the claimant's own concessions, that he was aware that this was the case.

41. Again at this meeting the claimant raised the possibility of having the no contact bail condition removed. Again he did not mention that it was only applicable to a domestic setting (as opposed to the workplace).

42. In respect of whether the claimant did in fact tell Sid of his bail conditions, the evidence before the tribunal is unclear. The tribunal did not hear directly from Sid in the form of a formal witness statement but he was spoken to as part of the appeal process. The following points flow from the evidence:

    a. The claimant only mentioned this for the first time on 26 January 2022. It was neither mentioned on the 25 October 2021 nor on the 6 January 2022.

    b. When asked specifically by Mr Ahmed on 25 October 2021 the claimant said he hadn't told anyone.

    c. The claimant's evidence to the tribunal was unclear. Over the course of both days on which his evidence was given he said when asked that he had told Sid of the arrest but not about the bail conditions. This position changed when confronted with a written record in which the claimant suggested he had in fact told Sid of the bail conditions. The claimant conceded when asked by Ms Niaz-Dickinson that he was changing his evidence to fit with the documentary evidence. I accept this candid admission from the claimant and find that his evidence on the point was neither consistent nor credible and cannot be relied upon.

    d. When Sid was spoken to as part of the appeal process he said that the claimant had not mentioned the details of the allegations or the bail conditions to him. I have seen the record of that conversation in the bundle.

43. From that evidence I am satisfied and find the following on the balance of probabilities:

    a. Whilst Mr Baldwin did not speak to Sid before making the decision to dismiss, the appeal manager did speak to him, at the claimant's request. Sid's response is that the claimant did not tell him of the bail conditions.

    b. The claimant did not, despite being asked if there was anyone who he wanted Mr Baldwin to speak to, ask that Sid be spoken to.

    c. In any event at the material time Sid was no longer working for the respondent.

    d. Whilst Mr Baldwin may have been able to speak to Sid, any deficiencies were in my judgment remedied by Sid being spoken to as part of the appeal process.

    e. Given Sid's response and the claimant's own less than clear evidence to the respondent (and to the tribunal) on the point the

respondent was in my judgment entitled to come to the conclusion that the claimant had not in fact told Sid of the details of his bail conditions and this was a reasonable belief to have formed.

f. Additionally I am satisfied that in any event Sid was not an appropriate person for the claimant to have told. Sid had no HR responsibilities and the claimant accepted this both during the investigatory process and during his evidence.

g. I am not satisfied in any event given all of the evidence before me that the claimant did tell Sid of his bail conditions.

44. I am however satisfied that the claimant knew that he ought to have to told his manager – Mr Baldwin – as soon as the bail conditions were in place. I make this finding because the claimant knew that they had potentially impacted upon his work (he accepted as much in his evidence before me). Secondly the claimant accepted both at the time and in his evidence that he ought to have done this. Whilst I acknowledge the submission made by Mr Lunat that there is no legal obligation for the claimant to have informed his employer about the bail conditions, that submission in my judgment misses the point. The point is that a reasonable employer reasonably ought to expect that in such circumstances they would be notified. This particular premise was conceded by the claimant in his evidence and I have no hesitation in finding as a fact that the respondent reasonably ought to have expected that they would have been notified in the proper many in the circumstances.

45. On 26 May 2022 a further meeting took place between the claimant and Mr Baldwin. In advance of that meeting a letter was sent which the claimant does not assert that he did not receive. I have seen the letter dated 24 May 2022 and it made clear the serious consequences which could flow from the meeting on 26 May 2022; namely that the outcome of the meeting could be the claimant's dismissal.

46. I have seen the minutes of the meeting on 26 May 2022. They are not disputed and I accept that they are accurate and can base my findings of fact about this meeting on them. At the meeting it was made clear to the claimant that the respondent had concerns about the claimant not having disclosed his bail conditions, the impact of the bail conditions on him being able to carry out his role and the risks to customers and colleagues flowing from the alleged criminal acts. It was made explicitly clear by Mr Baldwin that this was a 'trust and confidence' issue and not a misconduct matter. I am satisfied and find as a fact that Mr Baldwin approached this matter on the respondent's behalf as a trust and confidence issue from as early as May 2022.

47. During the course of the meeting on 26 May 2022 a number of matters were raised which form the basis of the decision to dismiss and which were the subject of the evidence and submissions in this case. I set out my findings in respect of each of these below.

48. During the meeting Mr Baldwin suggested that he had complaints and/or received concerns from other members of staff in respect of the allegations faced by the claimant. It is right to observe, as Mr Lunat does on the claimant's behalf, that there is a discrepancy in the written and oral evidence as to the

precise numbers of complaints and that Mr Baldwin's account for this under cross-examination was less than clear. However I do not accept Mr Lunat's submission that this undermines this factor contributing to the respondent's assertion that the relationship of trust and confidence had broken down. I make that finding for the following reasons:

a. I do not accept that Mr Baldwin was being dishonest about having received concerns from other members of staff. This was alluded to on the claimant's behalf but not specifically put to Mr Baldwin in cross-examination. There is no reason advanced as to why Mr Baldwin would lie or be inaccurate about this and I accept his evidence that he received such concerns at the time.

b. It is correct to set out that the precise nature and details of the allegations were not provided to the claimant or to the tribunal however in my judgment this is not fatal or sufficient to undermine the respondent's argument:

    i. The claimant accepted during the course of the meeting on 26 May 2023 that 'I understand they [his colleagues] will be cautious. They are not going to be happy considering the allegations.' The claimant therefore accepted that it was entirely likely and understandable that given the nature of the allegations complaints, which were self-evident, would have been raised.

    ii. The claimant accepted in his evidence that given that he works and lives in the local area he is well known – it is therefore highly likely in my judgment that these concerns would have related specifically to the claimant and that his colleagues in store would have been aware of the allegations.

    iii. It is perhaps axiomatic that in circumstances where news travels in local communities by word of mouth in respect of such allegations that people would feel uncomfortable with the subject of such allegations regardless of the truth of them and regardless of the position in law regarding the presumption of innocence.

49. I therefore find as a fact that the respondent did receive such concerns, that it was clear to the claimant the nature of them regardless of not having been provided with the full details and that the respondent acted reasonably in responding to those concerns given its duty of care to all staff members.

50. The second matter raised by the respondent was the issue of media scrutiny; namely that there were reports in the local press and that it was possible or likely that the claimant's place of work would be referred to. The respondent asserts that it acted reasonably in reaching this conclusion and that it therefore reached the ultimate conclusion as to the dismissal fairly.

51. There were reports of the charges in the local press. I have seen a copy of reports from the Yorkshire Evening Post website which give the claimant's name, his age and his place of residence. The claimant suggested that

because the reports in the press referred to his first name, whereas informally at work and in his personal life he is referred to by his second name, that there could be no possible link between the name in the press and him as an individual. I do not accept that assertion. The claimant's evidence and my finding is that the claimant (and his place of work) were well known in the local area. Given that the media reports referred to both the claimant's name, his age and his place of residence I am satisfied that the respondent was entitled to reach the view that it was likely that the claimant could have been identified. I do not accept that simply because the claimant was known by his informal second name in the workplace that the respondent could have been reasonably expected to know (or indeed find out in any proper manner) how the claimant was known more widely in the community.

52. I pause to deal with the possibility of reputational damage which the respondent relies upon. Mr Lunat submitted on the claimant's behalf that there was no evidence of any actual harm to the respondent's reputation as the claimant had not been named in the press as working for the respondent. I do not accept this submission. I find as a fact that the respondent was entitled to look to the risk of reputational harm. I make this finding because in many ways if there needed to be actual harm suffered then it would be too late – the horse would already have bolted. I am satisfied that in approaching matters in this way the respondent acted reasonably in the circumstances. I base this finding on my finding above in respect of the claimant's name having been reported in the local press and my finding that the claimant and his employment was well-known in the local area.

53. In his closing submissions Mr Lunat sought to persuade me that never has a convicted rapist, let alone someone accused of the crime, been linked with his place of work in the press. Consequently said Mr Lunat the respondent ought to be found to have been unreasonable in reaching this assumption. I reject that submission as wholly ill-founded. As I explored with Mr Lunat during the course of his closing submissions there was no evidential basis whatsoever for that submission and it risked Mr Lunat straying into the territory of giving his own opinion evidence to the tribunal.

54. I am bolstered in my finding that the respondent reasonably formed its view in respect of this matter by the claimant's own evidence to the tribunal. The claimant himself accepted when asked by Ms Niaz-Dickinson, that there was a risk of the respondent being named in the press particularly as the time of the trial drew closer and interest inevitably grew.

55. The claimant again referred to his bail conditions on 26 May 2022 and suggested that the no contact bail condition could be changed. It is pertinent to find as a fact at this stage that despite the claimant having raised this matter at the previous two meetings, and despite having been aware since October 2021 that this was a key bar to his continuing at work, he had not acted upon his desire to change his bail conditions.

56. In respect of the change to the no contact bail condition, the claimant asserts that Mr Baldwin never encouraged him to change the bail conditions and showed disinterest when the matter was raised. Mr Lunat for the claimant submits that the respondent, given its size and resources in particular, ought to have been more proactive. The claimant referred to both the police and his

criminal solicitors having told him that the bail conditions could be changed and it is submitted that the respondent ought to have made enquiries of either the police or the criminal solicitors to clarify this. Doing so, says Mr Lunat, would have put the issue to bed. The claimant also asserted during his evidence that the no contact bail condition only applied to the domestic setting. Mr Lunat submits that this is a well-known principle of criminal law and that no reasonable employer would have thought otherwise.

57. In his initial pleadings the claimant made the factual assertion that rather than simply not respond to the suggestion that he change his bail condition, Mr Baldwin actively told the claimant 'not to do it'. This was not relied upon by the claimant in either his evidence or as part of his case before the tribunal. It was not put to Mr Baldwin in cross-examination. I specifically do not accept or find that Mr Baldwin told the claimant not to do this.

58. The respondent's case through Ms Niaz-Dickinson is that the respondent cannot be expected to speak directly to either the claimant's solicitors or the police and to expect any employer to do so, regardless of the size of the company, would not be reasonable. Ms Niaz-Dickinson submits that the contractual relationship is between the claimant and the respondent. It was up to the claimant to get information from either his criminal solicitors or the police in writing to give to the respondent and that the claimant had ample opportunity to do so during the course of the eight month period prior to dismissal. The respondent also asserts that the claimant through his own agency ought to be expected to seek to change his bail conditions. He knew it was an issue and raised the possibility of doing so from 6 January 2022 onwards, without acting upon it. Ms Niaz-Dickinson refutes the submission that the respondent's ought essentially to be imputed to have known how specific bail conditions work in practice.

59. My finding of fact is that the respondent did not act unreasonably in not speaking directly to the police or to the claimant's criminal solicitors. I reach that conclusion for the following reasons:

    a. I accept Ms Niaz-Dickinson's submission that the contractual relationship was between the claimant and the respondent. The respondent had not contractual relationship with either the police or the criminal solicitors.

    b. Both the police (who were carrying out a live investigation) and the criminal solicitors (who had a relationship underpinned by legal privilege) had a distinct role. In my judgment and in my finding it was not reasonable to expect the respondent to seek to usurp that role of its own volition. There is no suggestion or evidence that the claimant gave authority or in any way actively encouraged the respondent to make those enquiries.

    c. In those circumstances it was open to the claimant to have provided direct information from either the police or his criminal solicitors. It was further open to the claimant to make his own application to amend his bail conditions. He chose to do none of these things.

d. I accept Mr Baldwin's evidence to the tribunal that he felt that this was not a matter which ought to concern him. I accept that he formed a reasonable opinion and view that he ought not to become involved in the criminal investigation. His evidence was genuine and clear to the tribunal and I accept it. I do not find that he was being deliberately obtrusive or obstructive in not following up these issues independently.

60. Further I find that the respondent was not unreasonable in forming the view that the clear wording of the no contact bail condition applied equally to the workplace. The wording is unambiguous. Whether the position in fact is that it only applied to the domestic setting is something that was raised for the first time by the claimant during the course of his evidence. He did not raise it in any meeting with either Mr Ahmed or Mr Baldwin. This was not therefore a matter which was in the contemplation of the respondent at the material time, nor ought it to have been. Whilst Mr Lunat suggested that Mr Baldwin could have spoken to the respondent's in-house legal team I do not accept that this was a reasonable thing for them to have done in all the circumstances. Even if he had done I am not satisfied that it would have made matters clearer.

61. Mr Lunat further submitted that 'general legal knowledge' included a working knowledge of how such bail conditions worked. When Mr Baldwin was asked about this his clear evidence to me was that he did not have such knowledge. I accept his evidence as truthful. The tribunal specifically does not and cannot take judicial notice as to the operation of the criminal law and criminal law principles nor in my judgment can such knowledge be imputed to the respondent. To do would be wholly unreasonable.

62. The final matter which is relied upon by the respondent which was raised at the meeting and formed part of the decision to dismiss was the effect of the bail conditions on working with people under 18 years of age as precluded by the no contact bail condition. It was the position of the respondent that:

    a. There was other employee known to Mr Baldwin at the time who was aged 17 years; and

    b. Customers aged under 18 years regularly came into the store and it was impossible to either (i) know their ages; and (ii) fully supervise the claimant at all times.

    c. In those circumstances the respondent asserted that the bail conditions precluded the claimant from carrying out his role.

    d. Over and above the breach of the bail conditions there were issues flowing from the potential risks to customers and staff members from the allegations were the claimant to remain unsupervised.

63. The claimant's case was that there was always another colleague or colleagues on a busy shop floor and therefore he would never have been unsupervised. It was submitted on his behalf that there had been no suggestion that he had breached his bail conditions between June 2019 and October 2021 nor was there any suggestion that he had committed any further offences in that time. It was also submitted that because of the length of time

since the alleged offences had taken place (the allegations relate to 2002-2003, so around 20 years earlier) the risks were minimal. Mr Baldwin was also cross-examined that he ought to have carried out his own investigation by speaking to the claimant and possibly others to make his own assessment of risk.

64. I find that the respondent acted reasonably in forming the view that:

    a. The bail conditions may preclude the claimant from carrying out his work due to coming into contact with any person under 18 years old in an unsupervised manner; and

    b. There may be risks posed to other employees and customers to whom the respondent owed a duty of care.

65. In making that finding I have borne in mind that this is a large employer but in my judgment notwithstanding that the following matters are pertinent:

    a. I have already found that the wording of the bail conditions were clear and unambiguous. For the reasons I have already given I am satisfied that it was not unreasonable for the respondent to take them at face value.

    b. In those circumstances the respondent found itself in an invidious position – it could not allow a situation to subsist in which the bail conditions which were in its knowledge were allowed on the face of it to be breached.

    c. I accept Mr Baldwin's evidence that due to the limited number of employees and the fact that they had other things to be doing (i.e. the work for which they were employed) they could not be expected to supervise the claimant.

    d. Furthermore whilst processes could have been put in place in respect of the one fellow employee aged under 18, I find that it would simply be impossible to ascertain the ages of customers in store. I do not accept the claimant's sweeping generalisation that most under 16 year old children entered with their parents. I say that for two reasons: (i) it does not deal with those aged between 16 and 18; and (ii) how could the claimant possibly know that given that customers are not routinely asked for proof of their age when entering the store.

    e. I do not accept that the claimant had not breached his bail conditions between June 2019 and October 2021. The reality is that no-one knows this. I accept Ms Niaz-Dickinson's submission to me that this issue is a red herring as at that time, because the claimant chose not to tell his employer, the respondent was unaware of the existence of the bail conditions.

    f. In respect of risk, I reject Mr Lunat's submissions. Risk is a fluid concept. It is difficult to assess risk. The simple fact of the passage of time is insufficient, in my judgment to determine that the risks are

extinguished. It would be unreasonable for an employer to make such decisions, regardless of the size of the employer.

g. In terms of considering the claimant's position, I have reconsidered the minutes of the meetings with Mr Baldwin. At multiple points within them Mr Baldwin asks the claimant about the allegations. The claimant denies them. It cannot therefore be asserted that the claimant's position was not explored. The suggestion that the respondent could have determined the veracity of the allegations or formed its own view does not hold water. This would require the forensic process that the criminal trial will follow. The respondent was in my judgment entitled to rely upon the existence of bail conditions as sufficient for considering the possibility of risk without further detailed investigation. It did not act unreasonably in doing so.

66. In all of the circumstances I find that the claimant was made well aware of the concerns of the respondent during the meeting on 26 May 2023. The claimant accepted as much in his evidence. I am satisfied and find therefore that at the meeting on 26 May 2022 the claimant was fully appraised of the concerns and the case against him. The claimant has never suggested either at the time or in his evidence, despite the case advanced on his behalf, that he was left in the dark. I therefore find on the balance of probabilities that he was well aware of the case against him and the issues raised by the respondent.

67. At the conclusion of the meeting on 26 May 2022 Mr Baldwin made it clear to the claimant that he had reached the view that the claimant's position in his current role was untenable.

68. As part of its consideration of what to do the respondent set out during the course of the meeting alternative roles that could be considered. These were explored before me in this hearing. They can be summarised as follows:

a. Alternative customer facing roles – the respondent made clear that working in alternative stores was not an option. Whilst the claimant would not be in the local area all of the matters which caused the breakdown in trust (the lack of honesty about the bail conditions, risk of reputational damage, working with under-18s and the views of other staff members) were all present. I find as a fact that this would be the case, relying upon all of my reasons set out above. I am satisfied that the respondent reached this view reasonably based upon the evidence before it at the time.

b. The option of a non-customer facing role in the warehouse in Newark was discussed as a potential option and the claimant was offered this role. The claimant sought time to consider his position and therefore the meeting was adjourned until 6 June 2022.

69. As part of his case before the tribunal the claimant asserted that he could have been offered a role at the Birstall store working on a system called Shop Live. Mr Baldwin gave agreed evidence that Shop Live was a system which was introduced during the national lockdown caused by the Covid-19 pandemic. It allowed customers to make purchases remotely. The claimant's oral evidence to the tribunal was that at the time of his dismissal there were other colleagues

still working on Shop Live, in store at Birstall but working solely from a back room (so not customer facing). This was something which the claimant raised for the first time in his oral evidence. He had not mentioned it in any of the meetings nor did he refer to it in his written evidence.

70. Mr Baldwin's evidence was that Shop Live had essentially been wound up as a fully remote service by June 2022. This was a decision taken at nationwide strategic level rather than on a store by store basis. Customers had started to return to shopping in store. It was therefore not an option. Mr Baldwin gave evidence that whilst Shop Live was still active it involved hybrid workers, with those employees allocated to Shop Live working on the shop floor serving customers but then breaking off to deal with Shop Live customers as and when required. Mr Baldwin was not cross-examined on the claimant's assertion that there were employees in the Birstall store working fully on Shop Live, albeit this was not surprising as the claimant only raised it for the first time during cross-examination by Ms Niaz-Dickinson.

71. I reject the claimant's evidence on this point. I accept Mr Baldwin's evidence. The claimant had not mentioned this previously. Mr Baldwin was very clear in his evidence as to how Shop Live progressed and what the current arrangements involved. I accept his evidence and prefer his evidence as he is the store manager with detailed knowledge of the processes. I do not accept that he would not be honest with the tribunal about this. I find that at the time of the claimant's dismissal Shop Live involved a significant element of customer-facing interactions and was to all intents and purposes no different from another shop floor based position.

72. On 6 June 2022 the meeting which had been postponed from 26 May 2022 resumed. The claimant indicated that he did not wish to accept the role at the Newark warehouse due to the travelling distances involved. The claimant was therefore dismissed on that date.

73. The claimant subsequently appealed that decision and an internal appeal, conducted by a manager of a different store was undertaken. Whilst some reference was made to the contents of that appeal (for example, the interview with Sid) the claimant makes no real criticism of it. He accepted in his oral evidence to the tribunal that he had the opportunity to fully put his case and have all of his appeal points fully considered. The outcome of the appeal was to uphold the original decision of Mr Baldwin. This was communicated to the claimant by way of letter dated 2 September 2022.

74. Early conciliation commenced on 16 August 2022 and the certificate was issued by ACAS on 27 September 2022. The ET1 was issued on 26 October 2022.

Discussion and analysis

75. I turn to my analysis of the factual findings that I have made set against the legal principles that I need to apply.

76. The reason for dismissal relied upon is 'some other substantial reason'; namely a loss of trust and confidence stemming from the matters I have set out at paragraph 8, above. The claimant asserts that this reason is being relied upon

due to some significant procedural errors in respect of a misconduct case – i.e. the respondent is attempting by smoke and mirrors to divert the tribunal's attention from the real reason to avoid scrutiny of its procedural failings.

77. I am satisfied that the real reason for dismissal is some other substantial reason as asserted by the respondent. I reach that conclusion for the following reasons:

    a. From as early as 26 May 2022, before these proceedings were even contemplated it was made clear by Mr Badlwin during his meeting with the claimant on that date that the issue for him was a loss of trust and confidence.

    b. Whilst it is correct that in its grounds of resistance appended to the ET3 the respondent asserts misconduct as an alternative reason, this was (i) the alternative pleading – it was never the primary pleading; and (ii) this ground was abandoned at the outset of the hearing before me. I do not find that this was done to avoid scrutiny; rather the respondent was hanging its case on the real reason which is borne out both by the evidence and my findings of fact above.

    c. Whilst it is correct that the initial suspension was to investigate potential misconduct this was at the very outset. As I have already had cause to observe this is not a case where I am considering the suspension but the dismissal. By the end of its investigatory process I am satisfied that the respondent had reached the genuine position that it had lost trust and confidence in the claimant. This was doubtless a view formed in part by the claimant's lack of candour and inconsistent statements during the meetings in January 2022.

78. Having reached the view that this was a case which falls within 98(1)(b) of the Act I must consider whether the reason is in fact substantial, as opposed to whimsical or capricious and which no person of ordinary sense would entertain.

79. The respondent asserts that each of the four matters set out above taken individually or together were reasonably held and amount to a substantial reason.

80. In respect of each of those matters I have made findings of fact above. I am satisfied as follows:

    a. That in respect of each of the four matters the respondent reasonably came to the view that it did based upon the information available to it at the time.

    b. That each of the four reasons taken individually amounted to a substantial reason and the respondent would have reasonably treated each as sufficient reason to come to the conclusion that the relationship of trust and confidence had broken down.

    c. Taken in their totality I am wholly satisfied that the respondent did not reach a decision which was either capricious or whimsical. It

cannot be said against the factual background that I have established that no person of ordinary sense would have reached the decision that the respondent did.

d. In particular I am wholly satisfied that:

   i. It is fundamental to the relationship of trust and confidence that employees are honest about such matters – this was accepted by the claimant in his evidence.

   ii. The respondent reached a reasonable conclusion that the no contact bail condition had a direct impact upon the claimant's ability to carry out his role.

   iii. The respondent reasonably came to the conclusion that there was a possibility of placing other staff members or customers at risk.

   iv. The respondent reasonably came to the view that there were risks of reputational damage to the brand.

81. Mr Lunat explored the procedural irregularities as part of his cross-examination of Mr Baldwin. Whilst this may have had direct relevance if the reason for dismissal was one of misconduct in my judgment they are of less importance in the circumstances of this case where my decision is that there is some other substantial reason for the dismissal. I therefore determine that there is no probative value in me considering these in great detail.

82. The issue for me is whether the respondent acted reasonably in the circumstances (and bearing in mind the size and administrative resources of its undertaking) in treating the reason for dismissal as sufficient reason for dismissal bearing in mind the equity and substantial merits of the case. In doing so I must consider whether the respondent's decision fell within the range of reasonable responses, rather than substituting my own views.

83. It is perhaps self-evident from the reasons I have given so far that I am more than satisfied that the respondent acted reasonably in all of the circumstances and that dismissal falls well within the range of reasonable responses. I base this conclusion on the following:

   a. My findings in respect of the bail conditions and it being reasonable for the respondent to take the no contact bail condition at face value.

   b. My findings in respect of the investigatory process – namely that the respondent acted reasonably in not directly contacting the claimant's criminal solicitors or the police – this was a matter for the claimant.

   c. My finding that the respondent acted in reasonably in meeting with the claimant and giving him the opportunity to put forward his position.

d. I also bear in mind that the respondent fully explored the claimant's inconsistencies with him and explained at all stages that it was concerned as to his lack of candour.

e. The respondent was clear at an early stage what its concerns were in respect of the lack of honesty and the impact of the bail conditions on the claimant's ability to carry out his role.

84. I remind myself that the respondent can only act upon the information that it knows at the time. It was faced with a situation where the claimant was being inconsistent, unclear and evasive and therefore it acted reasonably in factoring this into its decision making process.

85. I also bear in mind that the respondent acted reasonably in seeking to find alternative employment for the claimant. The respondent offered the claimant another role which he declined. For the reasons I have given above I am satisfied that another customer facing role would have carried the same issues as the claimant's role in the Birstall store. The respondent was entitled to come to this decision and therefore did not act unreasonably in not offering such other roles.

86. In short this respondent placed the claimant on paid suspension for an eight month period. It regularly met with him to gain his views. It then offered him alternative employment and gave him the opportunity to consider this before finalising its decision. The claimant refused that option. To keep the claimant on paid leave until early 2024 until after the criminal trial would have been financially unviable. I am not satisfied that unpaid suspension was something that ought reasonably to have been considered. The claimant did not raise that as an issue until the latter stages of the hearing before me in any event which in my judgment is indicative of it not being a realistic option.

87. Accordingly I am satisfied that the respondent fully considered all options available to it before arriving at its decision to dismiss. It did not act precipitously but considered the situation before it at the time. I am therefore satisfied that in all of the circumstances of the case the respondent acted reasonably and that the decision to dismiss for the reason that I have found was well within the range of reasonable responses.

Conclusion

88. For all of the reasons set out above I am satisfied and find that:

a. The respondent dismissed the claimant for a substantial reason and that the reason was of a kind to justify the dismissal of an employee holding the position which the claimant held.

b. That having regard to all of the circumstances, and in particularly the equity and merits of the case the decision to dismiss falls well within the range of reasonable responses and that the employer acted reasonably in treating the reason for dismissal as a sufficient reason to dismiss the claimant.

89. Accordingly the claim must fail and is dismissed.

90. Those are my reasons.

Employment Judge **Wilkinson**

Date: 19 May 2023