EMPLOYMENT TRIBUNALS

Claimant: Mr S Mawejje

Respondent: Atalian Servest Limited

Heard at: London Central (by video using the Cloud Video Platform)

On: 7 & 8 October 2021, 15 – 18 August and 23 November 2022

Before: Employment Judge Khan (sitting alone)

Representation
Claimant: Ms R Omar, counsel
Respondent: Mr J Bryan, counsel

Interpreter
Mrs E Hutchins (15 – 18 August 2022)

RESERVED JUDGMENT

The judgment of the tribunal is that:

(1) The claimant was unfairly dismissed. It is just and equitable to reduce any basic and compensatory award by 100% because of the claimant's culpable conduct.

(2) The claimant was not wrongfully dismissed and his claim for breach of contract fails.

(3) The respondent failed to provide the claimant with a statement of changes in failing to the notify him of the date on which his continuous service began. No award is made because of the 100% reduction to the compensatory award.

(4) The claim for holiday pay is dismissed on the claimant's withdrawal.

REASONS

1. By an ET1 presented on 14 April 2021 the claimant brought claims for unfair dismissal, notice pay (i.e. breach of contract), holiday pay and a failure to provide a statement of changes to his employment particulars. The respondent resisted these claims.

2. The claimant withdrew the claim for holiday pay.

The issues

3. I was required to determine the following issues:

1. Unfair dismissal

1.1 What was the reason for dismissal?

a. The respondent asserts that it was for a reason which related to conduct which is a potentially fair reason under section 98(2) of the Employment Rights Act (ERA). It must prove it had a genuine belief in the misconduct and that this was the reason for dismissal.
b. Alternatively, was the claimant dismissed for an SOSR? The respondent relies on there being an irretrievable breakdown of trust and confidence.

1.2 Was the decision to dismiss a fair sanction i.e. was it within the band of reasonable responses available to a reasonable employer?

1.3 If conduct is found to be the reason for dismissal, this will involve consideration of:

a. Whether the respondent had reasonable grounds for that belief?
b. Whether the respondent carried out a fair investigation, applying the band of reasonable responses test?
c. Whether the respondent acted reasonably in treating the conduct identified as a sufficient reason for the dismissal, applying the band of reasonable responses test?

1.4 If the dismissal was unfair:

a. Does the respondent prove that if it had adopted a fair procedure the claimant would have been fairly dismissed in any event, and if so, when?
b. Would it be just and equitable to reduce the amount of the claimant's basic award because of any blameworthy or culpable conduct before the dismissal, pursuant to section 122(2) ERA; and if so to what extent?
c. Did the claimant, by blameworthy or culpable actions, cause or contribute to dismissal to any extent; and if so, by what

proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award, pursuant to section 123(6) ERA?

d. Did the respondent fail unreasonably to comply with a relevant ACAS Code of Practice? The claimant contends that the respondent breached paragraphs 5, 6, 7, 8 & 27 of the Code.[1]

2. Breach of Contract

2.1 It is not in dispute that the respondent dismissed the claimant without notice.

2.2 Does the respondent prove that it was entitled to dismiss the claimant without notice? This requires the respondent to prove, on the balance of probabilities, that the claimant actually committed the gross misconduct alleged.

2.3 It is agreed that the claimant's contractual entitlement was for 12 weeks' notice.

3. Failure to provide a statement of changes (section 4 ERA 1996)

3.1 Did the respondent notify the claimant in relation to (1) changes in the identity of the employer and (2) the date on which his continuous service began, in accordance with section 4(8) ERA?

The evidence and procedure

4. The case was heard over seven days. The respondent's evidence, in the main, was heard over two days in October 2021 and the claimant's evidence was heard over three days in August 2022, when one of the respondent's witnesses was recalled and interposed to give further evidence. Closing submissions were heard in November 2022.

5. The likelihood of there being a lengthy delay in reconvening the hearing in 2022 was discussed with the parties at a preliminary hearing for case management on 15 December 2021, when the parties declined the option of restarting the evidence with a different judge, the claimant's request for a Lugandan interpreter was agreed, four additional days were listed to complete the final hearing and the respondent was ordered to disclose additional material.

6. The bundle consisted initially of 136 pages to which I permitted the respondent to add four pages of documents without objection from the claimant. When the hearing resumed in August 2022, the amended bundle consisted of 221 pages, having incorporated additional documents by agreement and/or further to my order. By consent, a further 45 pages were added. I read the pages to which I was referred.

[1] I should record that these were the paragraphs which claimant's counsel confirmed were being relied on, on the second day of the hearing. In closing submissions, claimant's counsel also referred to paragraphs 2, 3, 4, 9, 18, 22 & 23 of the Code. I am bound to consider any parts of the Code which appear to me to be relevant (as required by section 207 TULR(C)A 1992).

7. I also viewed five video files which I had ordered the respondent to disclose and which had not been made available for the first two days of the evidence.

8. The first three days of the hearing were conducted by video using the Cloud Video Platform (CVP) under rule 46 with no evidence being heard on day three. The hearing was then converted by consent to a hybrid format in which the parties and counsel attended the hearing for the remaining three days of evidence and Mrs Hutchins participated via CVP. Closing submissions were heard via CVP.

9. For the respondent, I heard evidence from: Catriona Stewart, HR Business Partner; Cova Montes, Contract Director (City of London Corporation contract) and formerly, Regional Operations Manager – Trains; Simon Vitali, formerly Regional Operations Manager; and Mark Allen, Account Director (LNER contract). Ms Montes was recalled and interposed at the start of day five.

10. The claimant gave evidence with the assistance of an interpreter, Mrs Hutchins.

11. I also considered the written and oral closing submissions which the parties made.

12. The claimant made an application for specific disclosure on day three for material relating to the respondent's receipt of CCTV footage which I refused for the reasons I gave with reference to the guidance set out in *Santander UK PLC & Ors v Bharaj* UKEAT/0075/20/LA.

13. For the reasons I gave, I also: granted the respondent's application to recall Ms Montes, although in relation to only one of the three factual issues sought; refused the claimant's application to question Ms Montes when she was recalled; and refused the claimant's application to recall Mr Vitali to question him in relation to the same factual issue.

14. On day five, towards the end of his cross-examination, the claimant alluded to new evidence and a potential new witness which his legal representatives were not cognisant of and invited me to allow him to rely on this new evidence. The claimant was not in a position to make an application via his counsel, nor, without my leave, to provide his instructions to his counsel in order for such an application to be made. I decided that it was necessary to complete the claimant's evidence before any application could be made, against the claimant's objection, for the reasons I gave. I also decided that the parties would not be required to make their closing submissions the next day owing to the likelihood that the claimant would make such an application. On day six, following the end of the claimant's evidence and an adjournment, the claimant's counsel confirmed that she was not in a position to make an application to admit new evidence. I therefore made orders in relation to the disposal of this putative application and also in relation to closing submissions. The claimant subsequently confirmed that an application would not be pursued.

15. The circumstances in which it had been necessary to list additional time to hear closing submissions is the subject of the respondent's application for costs which remains to be determined.

16. I should also record that in connection with this application for costs, the respondent's representative wrote to the tribunal on 4 January 2023 to contend that the claimant's evidence which was relied on to resist this application revealed that he had discussed his case whilst under oath, in breach of that oath, and I was invited to take account of this when assessing the credibility and reliability of the claimant's evidence on the basis that this discussion had contaminated the evidence he had given.

17. References below to [ ] and [X/] are to pages in the hearing bundle and to paragraphs in the witness statements, respectively.

The facts

18. Having considered all the evidence, I make the following findings of fact on the balance of probabilities. These findings are limited to facts that are relevant to the legal issues.

19. The respondent is a provider of outsourced facilities management services. It has around 18,000 employees in the UK.

20. The claimant's employment transferred to the respondent on 20 November 2019 when it won the LNER train cleaning contract for Kings Cross Station. At the date of his dismissal, the claimant had accrued over 21 years' service, from 24 April 1999 until 22 December 2020 throughout which he was employed as a Train Cleaner based at Kings Cross Station.

Statement of changes

21. The claimant's transfer to the respondent was confirmed by letter dated 20 November 2019 [139-140] which explained that the transfer of the LNER cleaning contract from ISS UK to Atalian Servest Group Ltd would take place on this date, the claimant had been identified as being in scope of this transfer; and identified the measures that the respondent intended to make in connection with this transfer. This letter did not specify the date on which the claimant's period of continuous service began. It made reference to several enclosures, including a TUPE FAQs document, which were not in the hearing bundle.

22. I find that the claimant was residing at the address to which this letter was sent because on his own evidence, he did not move out of this address temporarily until several months before the alleged incident in November 2020. He was therefore notified of the transfer, the date of the transfer and the identity of his new employer on that date. I find that the claimant was not also notified of the date on which the period of his continuous employment began, as the letter made no reference to this and the respondent did not adduce any evidence to show that the claimant was provided with this information by other means.

The Disciplinary Policy

23. The respondent's Disciplinary Policy [100-105] provides for the following measures to be taken under 'Formal Action':

    a. Full investigation: HR will identify an investigating officer who will have had no direct or indirect involvement in the incident under investigation and who will be responsible for providing HR with: the full facts of the case, recommendations on whether or not it is appropriate to proceed to a formal disciplinary proceeding and notes, statements and any other evidence gathered.
    b. Suspension: The respondent has the right to suspend an employee on full pay in order to conduct a disciplinary investigation.
    c. Notification: An employee who is being investigated will be advised in writing of the nature of the issue under investigation, that a formal hearing will be held and their right to be accompanied and they will be provided with any supporting documents on which the respondent relies.
    d. In most cases a member of the HR team will be consulted and may attend the hearing. They may also be involved in the decision-making process.
    e. The employee will be advised in writing of the decision taken and the reasons for this. They will also be advised of their right of appeal.

    Under 'Sanctions' this policy provides [103]:

    > "In cases where an investigation indicates gross misconduct, the Company is entitled to summarily dismiss without notice or any payment, in lieu of notice…"

    This policy enumerates a non-exhaustive list of examples of gross misconduct which includes theft [104].

    The alleged incident of theft on 12 November 2020

24. The allegation which resulted in the claimant's dismissal was that he committed an act of theft on 12 November 2020. It is not disputed that during his shift on this date (which was from 14.30 to 22.30), the claimant left a large container of liquid under an LNER information desk near to platform 1 at Kings Cross Station which he collected at the end of his shift. The dispute is about what was in this container. As will be seen, the respondent dismissed the claimant because it concluded that the liquid in the container was soap and the claimant's actions amounted to theft and gross misconduct, warranting his summary dismissal. The claimant maintained (and maintains) that it was a container of orange juice which he was given by a charity via Great Ormond Street Hospital where he also worked part-time as a cleaner.

25. In his oral evidence, Simon Vitali, Regional Operations Manager, South Region, told the tribunal that at around 21.09 he was approached by Sahr, a duty manager, who informed him that the claimant had been seen acting suspiciously by an agency worker. Mr Vitali referred to this in a handwritten note which he completed the following day [115] when he provided the following account:

> "At approx 21.09 my duty manager Sahr reported to me that he had been made aware that a member of my team (identified as Stone) was seen putting a 5 ltr container of chemical into the LNER stand near to platform 1. This is strange because this is not our cupboard and there was no reason for the member of staff to have 5 LTRs of chemical. Having checked the chemical was still in place I stationed myself where I could see the cupboard and waited. At approx 22.23 I observed Stone who was now off duty approach the cupboard and leave with a white carrier bag and an orange Sainsbury [sic] bag. The stand was checked and the chemical was gone. Above the stand are 2 CCTV cameras. The CCTV was viewed on 13/11/20 and shows Stone putting the chemical in the cupboard and returning. Network Rail will be sending stills from the CCTV on Monday."

26. Mr Vitali's oral evidence was that he did not in fact view the CCTV footage on 13 November. It was a deliberate misstatement which Mr Vitali reiterated when he met the claimant the next day. His evidence was that he requested this footage from Network Rail and sent it to his line manager, Asieh Ahamdzade, Head of Operations, on a date between several days and two to three weeks after the incident. His evidence was also that he did not view this footage on a later date, which I do not accept for the reasons set out below.

27. As the respondent conceded, the contents of the container are not visible from the CCTV footage so that it did not show the claimant "putting the chemical in the cupboard". Consequently, Mr Vitali's account, was the only direct evidence that the container which the claimant placed under the stand on 12 November was of soap and not orange juice.

28. In his witness statement for these proceedings, Mr Vitali added the details that he and the duty manager, presumably Sahr, looked under the LNER stand and "identified the liquid as being 5ltrs of Pink Pearl soap" [SV/3] and that they both checked the stand after the claimant had left "and the Pink Pearl Soap was gone" [SV/6]. However, as I find below, the CCTV footage does not show Mr Vitali or anyone else inspecting the stand to check that the container was in situ nor anyone other than Mr Vitali checking the stand after the claimant had left the station at the end of his shift. The respondent agreed that there is no footage of Mr Vitali opening the cupboard in the stand or of him bending down.

29. Mr Vitali did not take a photograph of the container nor contact security to alert them about this potential incident of theft. He told the tribunal that he did not take a photo of the container because he assumed that it would be caught on the CCTV, which is plausible, and also because he did not want to draw attention to the fact that the stand was being kept under observation, which is inconsistent with his evidence that he and Sahr looked under the stand. Noting that Mr Vitali had therefore implied that he had access to his phone, I find that his stated reason for not contacting security at the time because he did not have his phone on him is both inconsistent and unreliable. His evidence, which was not directly challenged, was that he stood outside the station with a direct view of the stand for over an hour and waited for the claimant. It is evident that Mr Vitali had decided to take matters into his own hands and rather than confronting the claimant was hoping to catch him in flagrante.

The initial investigation meeting and suspension of the claimant on 14 November 2020

30. Mr Vitali held an investigation meeting on 14 November when the claimant was next at work. Not only was this the stated purpose identified in the record of the meeting [46-48], it was how Mr Vitali introduced the meeting to the claimant. It is also evident from the record of this meeting that it took the form of an investigation meeting and, as will be seen, the respondent treated it as such. Although this record referred to Mr Vitali and the claimant only, it is not in dispute that a second (unidentified) manager was also present to take a note.

31. Mr Vitali began by informing the claimant that the purpose of this meeting was to discuss the events on 12 November. Before providing any further detail, Mr Vitali asked the claimant if he had any idea what these events were. He then showed the claimant a five-litre container of pink soap and asked him "Any idea now?" The claimant said that he did not. Mr Vitali then told the claimant that he had been seen at around 2100 on 12 November "placing a 5LTR container of product under the LNER stand cupboard at the top of platform 1", the cupboard had been checked and this item found there, the stand had been kept under observation and the claimant had been seen returning to it at the end of his shift, bending down and leaving with a white and orange bag. He did not say who had observed this. The claimant denied this. He told Mr Vitali that he had left a five-litre container of orange juice under the stand which he retrieved at the end of his shift at 10.25pm. He explained that between 6.00 and 6.30pm he had brought this juice to reception, by which I find he was referring to the LNER Reception Parcel area, when he had been told that he could not store the item there and had instead left it under the LNER information stand. Mr Vitali replied that there were two CCTV cameras above the stand and:

> "the footage has been viewed and it is quite clear what you have done. I will have the CCTV sent to me. I believe I have enough evidence to call the BTP and have you arrested on suspicion of theft. Before I do anything you want to add?"

This was deliberately misleading. Mr Vitali had not viewed the CCTV footage. Nor had anyone else. As he explained to the tribunal, it was his practice to make insinuations as he found this could yield results. He had therefore falsely asserted that there was CCTV evidence to substantiate this allegation and threatened to report the claimant to the BTP to elicit the claimant's confession. Mr Vitali did not report the claimant to the BTP nor did anyone else. I find that his conduct of this meeting was oppressive as well as dishonest.

32. Mr Vitali told the claimant that he was being suspended pending an investigation into this allegation of theft. Although the claimant was subsequently informed by a letter dated 18 November [116-117] that the decision to suspend him had been made by at Asieh Ahamdzade, Head of Operations, pending an investigation into alleged gross misconduct which would be conducted by Ms Ahmadzade, I accept Mr Vitali's evidence that he made this decision. This is because there was no evidence that Ms Ahmadzade was involved at this date, Mr Vitali was directly involved and had the seniority to make this decision on his own, and Ms Stewart agreed

in her evidence to the tribunal that the decision had been made by Mr Vitali, notwithstanding what the letter, which she had written and signed on Ms Ahmadzade's behalf, stated.

33. This letter was sent by email and by post to the claimant's home address. The Disciplinary Policy was enclosed with it. I accept the claimant's evidence that he did not receive this letter by post because he was not residing at his home address at that date. The email attaching this letter was not disclosed, it is likely that it was sent to the correct email address because the claimant received a second letter which Ms Stewart sent to him by email and by post (to the same address) one week later.

34. Mr Vitali also told the claimant that he would be required to remain available to take part in the investigation. The claimant therefore understood that he would not be able to travel abroad as he had planned to do during the period of leave he had booked. Although I do not find Mr Vitali to be a credible or reliable witness in several important respects, I accept his evidence that he did not agree to reimburse the claimant's holiday costs, in preference to the claimant's evidence to the contrary, because I do not find the claimant's evidence that he itemised what these costs were (i.e. air travel, accommodation, storage and dental treatment) to be plausible. I observe that had Mr Vitali been fully appraised of these costs, as is claimed, it is even more unlikely that he would have agreed to reimburse the claimant, even had he the authority to do so.

35. The claimant concluded from what Mr Vitali had told him that the investigation had already been completed. It had not, because further investigatory steps were taken, initially by Mr Vitali.

36. On 16 November, Sahr and a second duty manager, Saiful Islam, interviewed Sam and Fred, security staff who worked at the LNER Reception Parcel area, to verify what the claimant had told Mr Vitali at the investigation meeting. It is likely that this was done at Mr Vitali's direction because the record of this interview which Mr Islam set out in an email dated 16 November headed 'witness statement' was sent to Mr Vitali only [119] and he forwarded this to Ms Ahmadzade the next day [71-72] . In this email, Mr Islam recounted that having confirmed that they were both on duty on 12 November, neither Sam nor Fred could recall the claimant asking them to store an item by the reception area on this date, although Sam was recorded as stating:

> "Stone was doing this almost every time before, but I warned him categorically not to do this ever again, since then he stopped but again on last Tuesday or Wednesday, definitely not on Thursday [12th] he came again with a 5 litre plastic jar (container) with pink coloured liquid and tried to keep it here. I reminded him Stone! You have been warned before not to keep anything in this Parcel Area – why have you come again? Stone then left the place with the jar. This was on Tuesday or Wednesday, definitely not on Thursday [12th]."

When asked whether the pink liquid could have been orange juice, Sam was reported as replying "no way, that seemed to me cleaning chemicals". Mr Islam also noted that Sam had told the claimant not to store items in reception at least one month before and the reception area was covered by

CCTV. The respondent did not adduce any evidence to show that this footage was obtained and none of the respondent's witnesses gave evidence that they reviewed this footage.

37. Ms Stewart wrote to the claimant on 25 November 2020 [118] to invite him to attend a disciplinary investigation meeting which would be conducted by Ms Ahmadzade. She wrote "This meeting has been arranged because I am in the process of investigating allegations of theft on 12/11/20". I accept Ms Stewart's oral evidence that this wording was based on a standard letter template and her intention was to convey that Ms Ahmadzade was investigating the claimant. This letter was sent to the claimant by email and by post. It was evidently received by the claimant as he attended the meeting the following day.

The second investigatory meeting on 26 November 2020

38. At the investigatory meeting with Ms Ahmadzade on 26 November, the claimant was accompanied by his RMT representative, Donald Appiah. Mr Islam was also in attendance to take notes. I accept Ms Stewart's oral evidence, that there was a limited availability of managers on site because of the restriction on key workers. Although Mr Islam had provided a statement in the form of his email dated 16 November it is clear from the notes of the meeting that he took no active part in this meeting nor was I taken to any evidence of any other involvement he had in the investigation process.

39. According to Mr Islam's note of this meeting [74-78], this was a relatively short meeting which lasted for 23 minutes. When Ms Ahmadzade asked the claimant to explain the events on 12 November, he referred to a written statement (which was not disclosed in these proceedings). When he was pressed for a response, the claimant explained that he had already told Mr Vitali "I had a large bottle of juice for a charity work" [75]. This information was not recorded in the note of the investigation meeting with Mr Vitali and I find that it is more likely that this was the first time the claimant made reference to this. The claimant showed Ms Ahmadzade a photo on his phone. Although this is consistent with the claimant's oral evidence that during his suspension he sent a photo of the bottle to a supervisor called Andrea by WhatsApp, he made no further reference to this photo at the subsequent disciplinary and appeal hearings and nor did he disclose this photo for the purposes of these proceedings.

40. The claimant told Ms Ahmadzade that he had brought the juice from Great Ormond Street Hospital and although he was unable to recall what time this was he said that it was during his break. He went on to explain that he had taken it initially to reception but had not been permitted to leave it there so he placed it on his trolley because it was too big to fit into his locker. Ms Ahmadzade told the claimant [52-53]:

> "we have seen the CCTV footage. And that does not [look like] the same picture you [have] just shown to me. Rather it looked like 5 litre pink coloured soap. We also interviewed security and other witnesses. Got statements. It was not juice…I have to take into consideration all I have seen – from CCTV footage from different angles, witness statements. Even we have seen footage which shows you did not go to security area."

She then told the claimant that based on all of the evidence the respondent had informed the police about this theft. Much of this was incorrect and/or misleading: the CCTV footage did not show the contents of the container, the respondent had not reported the claimant to the BTP, and the respondent did not obtain the CCTV footage of the LNER Reception Parcel area.

41. Ms Ahmadzade emailed Ms Stewart, Mr Vitali and Mark Allen, Account Director, LNER contract, (the latter of whom would go on to have conduct of the claimant's appeal), the next day with what Ms Stewart treated as an investigation report [155A]. Ms Ahmadzade went further than finding that there was a disciplinary case to answer, in concluding that the claimant had committed an act of theft and she queried whether the claimant could now be dismissed because "2 separate investigations are already carried out" by which she was referring to Mr Vitali's "initial investigation" and her own investigation. She explained:

> "I mentioned to him the CCTV has been viewed where he took the container and people saw the product which was the company goods, but he didn't comment on. I explained that people saw you trying to hide the product. He didn't comment. I explained the case has been raised with BTP and they will be in contact. I explained that BTP will be given access to CCTV. He didn't add anything.
>
> Based on the number of investigations carried out, and evidences [sic] provided, I can conclude that the product was 5litre pink soap liquid that belong [sic] to the company. I can confirm Stone removed the goods without company permission. Therefore, stolen by Mr Stone Mawejje."

It is difficult to reconcile Ms Ahmadzade's statements about the CCTV footage with the actual content of this footage and I find that it is likely that she did not view the footage herself but relied instead on Mr Vitali's statement that he had observed the container of soap in situ, and his false assertion that he had viewed the footage which substantiated the allegation of theft. I also find that she relied primarily on the steps taken by Mr Vitali to investigate this allegation and her own investigation was limited to this meeting with the claimant, the quality of which was impaired by the erroneous and misleading way in which she had questioned the claimant. It is also notable that in going further than she was mandated to act under the Disciplinary Policy and concluding that the claimant had committed theft warranting dismissal, she had failed to put the evidence to the claimant on which she purported to rely. Overall, I find that Ms Ahmadzade's approach to this investigation suggests that she had not kept an open mind but treated this an open and shut case based primarily on Mr Vitali's evidence.

42. Notwithstanding Ms Ahmadzade's findings, Ms Stewart proceeded to arrange a disciplinary hearing, as was required by the Disciplinary Policy. She wrote to the claimant on 2 December to invite him to a meeting on 7 December in relation to an allegation that he had stolen a five-litre bottle of pink liquid soap [79-80]. The claimant was warned that if this allegation was proven he could be dismissed by reason of gross misconduct. He was informed of his right to bring a companion. He was invited to provide any evidence he wanted to be considered at the hearing and a witness statement via email to Ms Stewart. Enclosed with this letter were the notes

of the investigation meetings on 14 and 26 November, Mr Vitali's handwritten statement dated 13 November, Mr Islam's email dated 16 November (which Ms Stewart referred to as a witness statement), and a copy of the respondent's Disciplinary Policy. No arrangements were offered to enable the claimant to view the CCTV footage. The letter confirmed that the hearing would be conducted by Cova Montes, then Regional Operations Director – Trains, with Ms Stewart also in attendance to take notes. I accept Ms Stewart's unchallenged evidence that she was the only HR officer available because other members of the HR team were on furlough or flexi-furlough. She was also the only HR professional who had been assigned to the LNER contact. She was therefore the only member of the HR team to attend any formal meetings as note-taker. This letter and these enclosures were sent by email and by post to the claimant's temporary address. He agreed that he received this letter by email.

43. Ahead of this meeting, Ms Stewart forwarded "investigation reports and investigation notes", a copy of the Disciplinary Policy and a meeting template to Ms Montes [157]. I therefore find it likely that this included a copy of Ms Ahmadzade's investigation report. As will be seen, Ms Montes was not provided with the CCTV footage in advance of the disciplinary hearing.

44. Ms Montes conceded that she did not consult the Disciplinary Policy in relation to the process she conducted.

The disciplinary hearing on 7 December 2020

45. At the disciplinary hearing on 7 December, the claimant was again accompanied by Mr Appiah [81]. According to Ms Stewart's handwritten note of the hearing [81-87] it lasted for 40 minutes. A typed record which Ms Stewart completed later that day contained more detail [88-90A]. I have considered both documents from which I find that it is evident that the claimant was able to respond to the questions which Ms Montes put to him.

46. At the start of this hearing, Ms Montes stated "We have evidence and proof for this meeting today…including CCTV" [88]. This echoed Ms Ahmadzade's report. When Mr Appiah noted that the respondent had not disclosed the CCTV footage, Ms Montes explained that this was client property and the respondent would need to seek permission to share it with the claimant. Although this final detail is not in the handwritten version of the record, I find that this is more likely an omission rather than an invention, which confirmed that Ms Montes' intention was to share the footage with the claimant if permitted. The typed note also records that at the end of this hearing, Ms Montes confirmed that she would need to check whether the footage could be shared with her as well [90]. She had not therefore seen the footage she had purported to rely on and agreed, when giving oral evidence, that the only evidence she had reviewed were Mr Vitali's and Mr Islam's statements. Mr Appiah confirmed that he and the claimant had also been provided with these statements.

47. The claimant was insistent throughout the hearing that the item in question was juice, not soap. He repeated the explanation he had given to Ms Ahmadzade that he had obtained the juice from a charity and confirmed that

at "about 6 something, that is after the break" [88A] (which because of this added detail consistent with what the claimant told Mr Vitali and Ms Ahmadzade is likely to be more accurate than the handwritten note which recorded "After 6pm" [83]) he attempted to leave the container with security staff when he was told that this was not allowed, he put it on his trolley. When Ms Montes asked the claimant why he had left the item on the platform he explained that his locker was too small and he was not allowed to leave it on top of his locker or on his trolley, and he had not wanted to miss the train, by which I understand he was referring to an incoming train that he was required to clean. As I find below, this is not consistent with the CCTV footage.

48. According to the typed version of the notes, Ms Montes asked the claimant whether he had permission to put the item in the cupboard to which the claimant's response is recorded as "SM said that he didn't ask" [89], although this is not in the handwritten version, I find that this exchange is consistent with the same question being put to the claimant (for the second time in the typed version) when the claimant's response is recorded as "said that he is not allowed" [84 & 89]. I therefore find that it is likely that the claimant confirmed that he was not authorised to store the item in or under the stand and had not sought permission to do this.

49. When Ms Montes referred to the statements, Mr Appiah asked whether Mr Vitali had taken a photo of the chemicals to which Ms Montes responded "the Manager said that the chemical container was there" [89].

50. When taken to Mr Islam's statement, the typed note records that the claimant explained "there is one guy Francis, I come myself, I ask to put my stuff there, then he changed my mind I'm not allowed" and added "Fred said that I'm not allowed to keep my stuff there" [89A]. The handwritten record includes the following detail: "Francis finished at 7pm then Fred says I'm not allowed" [86]. Mr Appiah noted that this statement referred to Tuesday or Wednesday and not Thursday so "You have all got muddled up what day he came in with the bottle" [90]. Ms Montes agreed to "ask the question and refer to the CCTV" [90].

<u>The claimant's evidence to the tribunal</u>

51. The claimant's oral evidence was that the orange juice had been distributed by a charity at Great Ormond Street Hospital to support people during the pandemic. His evidence was also that he made enquiries at the hospital about obtaining evidence of the donation and was told many organisations had made donations, the implication being that no such evidence was likely to be forthcoming.

52. At his meetings with Mr Vitali, Ms Ahmadzade and Ms Montes the claimant had consistently stated that he had brought the bottle of juice into work during his break, and although he was unable to recall the time at the second investigation meeting, he told Mr Vitali this was between 6.00 and 6.30pm and Ms Montes that it was about 6pm. However, in his witness statement [C/2], the claimant stated that he brought the bottle of juice into work when he started his shift at 2.30pm having already collected it from the hospital. The claimant also says in his statement that he went

immediately to security where he asked to store his bottle which was refused. When giving oral evidence, the claimant maintained that he took his bottle to the Reception Parcel area at the start of his shift, but added the detail that he left the bottle there with one of the security guards before a second guard found him and gave him back his bottle and told him he could not leave it there. He then put the bottle on his trolley. Although this is in one respect consistent with what he told Ms Montes i.e. that Francis had agreed that he could store the bottle in Reception before Fred told him, presumably after Francis' shift had ended at 7pm, that this was not permitted, it is not only inconsistent with the claimant's statement [C/2] but with the account he gave consistently to the respondent. I do not accept the claimant's evidence that he gave the same explanation at the other two meetings he attended with his union representative, as he claimed, because I do not find it credible that these details, if given, would have been omitted from the record of those meetings.

53. When giving oral evidence, the claimant appeared to accept the premise that he had therefore placed the bottle on his trolley close to the start of the shift so that it had been on his trolley for as many as six hours before he stored it under the LNER stand. Although the claimant was not taken to the note of the disciplinary hearing [86] which may have led him to give a different response, this revealed a lack of clarity about his own case on this point. It is also notable that when he was asked to explain why it was that he deposited the bottle under the stand some hours after he had placed it on his trolley, the claimant's evidence was that this was because there were fewer trains to clean. This contradicted the explanation he gave to Ms Montes.

54. When taken to the record of the disciplinary hearing and his concession that he knew that he did not have permission to store his bottle under the LNER stand, the claimant's oral evidence was that he may not have understood the question which Ms Montes put or the question may have been put to him in a different way to how it had been recorded, and he had in fact spoken to an LNER employee at the ticket barrier who agreed that he could leave the bottle under the stand, just before he stored the bottle. I find this evidence to be wholly lacking in credibility. As I have found, the records of the disciplinary hearing are reliable on this point. The dismissal letter was equally clear in stating that the claimant had made this concession. The claimant had not disputed this until the tribunal hearing. Nor, as I find below, does the CCTV footage show any interaction between the claimant and an LNER employee at the barrier (or elsewhere) immediately before he deposited the bottle under the stand.

55. When giving oral evidence, the claimant initially stated that he had put the container inside the LNER cupboard which was open before clarifying his evidence that he placed it underneath the stand in a corner. It did not appear to be in dispute that the cupboard was locked. When I asked the claimant to demonstrate the position in which he had placed the item under the stand, he positioned an object underneath the front left corner of a table (in the tribunal hearing room). His evidence was that the container was visible from underneath the stand.

56. The claimant's evidence to which I have referred at paragraphs 52, 53 and

54, in particular, has caused me to question his credibility and reliability. In considering this, I have taken account that the claimant was assisted in these proceedings with an interpreter which was a facility that was not available to him during the investigation, disciplinary and appeal proceedings conducted by the respondent and also the fact, as will be seen, that both Ms Montes and Mr Allen had concerns about the claimant's ability to comprehend the questions being put to him. From the records of the meetings, I am satisfied that the claimant understood what the allegation was and that he was required to account for his actions on 12 November 2012, and the timings he gave for when he brought the bottle of juice into work were consistent and, at the disciplinary hearing, the question of whether he had permission to store any items under the LNER stand was one which was clearly put and answered by him. I also take account of the claimant's oral evidence, that at the second investigation and disciplinary meetings when he had been accompanied by Mr Appiah, his representative had been able to explain the questions which were put to him. For completeness, I do not find that any of these discrepancies – between what the claimant told the respondent at these meetings and his evidence to the tribunal – can be explained by the defective way in which the two investigation meetings were conducted.

57. I also observe that even with the benefit of an interpreter, the claimant was extremely reluctant to answer questions directly, including with a "yes" or "no", and I had to intervene on several occasions to direct the claimant to do so, without success so that I found that the claimant was an evasive witness at times.

58. I should add that I do find that the claimant's witness statement, provided in relation to the respondent's costs application, had the effect of materially contaminating his evidence on liability in one respect because in that statement the claimant referred to an allegation that HR had circulated the CCTV footage to other colleagues which was a matter that the claimant alluded to when giving evidence on 17 August 2022 (after he had referred to the existence of new evidence) in relation to the circumstances in which he had attempted to watch the CCTV footage in January 2021. I have also taken account of the fact that the claimant's witness statement made no reference to such an attempt to view the footage that month. I have therefore given no weight to that discrete part of the claimant's evidence (see paragraph 77).

Ms Montes' further investigation

59. Ms Montes agreed in oral evidence that she had carried out further investigation after her meeting with the claimant and failed to give him an opportunity to respond to the additional evidence she considered.

60. She viewed the CCTV footage together with Ms Stewart and Mr Vitali on Mr Vitali's laptop straight after the hearing on 7 December. Her initial evidence was that she had to ask the client for permission and accessed this footage from Kings Cross Station Security within hours of the hearing which she watched with Ms Stewart only. However, when recalled to give evidence, she was able to recollect the circumstances in which she had viewed the footage. Although I found Ms Montes to be a credible witness in many

respects who made several concessions during cross-examination, she was not a wholly reliable witness because she was unable to recollect some events and in respect of other events her recollection was confused. This is to be contrasted with Mr Vitali who I find gave deliberately misleading evidence to the tribunal under oath when he stated that he had not viewed the CCTV footage at any time, because I do not find that this was a genuinely mistaken recollection in the circumstances in which the footage was stored on his computer which was the same device on which both Ms Montes and Mr Allen viewed it.

61. Of the five videos disclosed by the respondent in these proceedings and which have been entitled "Staff Theft" (1)-(5), and which I shall refer to instead as V1-5, Ms Montes confirmed that she viewed V2, and passages of each of V3-5 as part of her investigation. Her evidence was that she had received training on identifying suspicious behaviour and packages when she joined the railway industry. She referred to a 'hot protocol'. She agreed that the contents of the container under the stand could not be seen in the footage. Her evidence was that she felt that the claimant's movements and body language were suspicious in the way he had positioned his trolley in relation to the CCTV camera when he left the item under the stand, that he was hiding something, he was looking, going down and going up again and that he "ran very very fast" after he collected the item from the stand.

62. Having reviewed the CCTV footage, I make the following observations.

    - V1 (camera on platform 1): 20:47:59 to 21:00: The claimant can be seen wearing a green tabard wheeling his cleaning trolley towards the top of platform 1. He stops at the LNER stand. There is another attendant wearing a green tabard. The claimant bends down. A second attendant in a green tabard walks past and looks on. At 20:50 the claimant walks off with his trolley to the front of the stand. At 20:58 a group of attendants in tabards emerge from another door to the left of the stand and onto the platform, and the claimant walks off with his trolley.

    - V2 (camera above stand on platform 1): 20:45:59 to 20:48:52: The claimant can be seen approaching with his trolley. There is another attendant wearing a green tabard with a vacuum cleaner. The claimant wheels his trolley to the side of the stand and waits by the stand and watches. The other attendant takes a pair of gloves from the claimant's trolley.

    - V3: (camera on platform 1 closer to stand): 20:45:59 to 21:00:00: The claimant is seen pushing his trolley towards the stand (2:05). He reaches the stand and wheels his trolley to the side of it, the view is blocked by the other attendant with the green tabard (2:30). The other attendant approaches the trolley further blocking the view of the claimant (2:47). More attendants approach and leave through a door to the left of the stand, including the other attendant in green (3:38). There is a partial view of the claimant bending down in front of the stand (3:49). Another attendant in a green tabard walks across and past the stand and appears to be looking in the direction of the claimant as he is bending behind the stand and maintains this focus

on the stand area as he walks on and looks back towards the stand before he walks away (4:01). The claimant wheels his trolley from the side to the front of the stand where he remains standing on the spot (from 4:08 to 5.26). After he wanders over to a barrier, the claimant walks through the door to the left of the stand along with other attendants in green tabards, his cleaning trolley remains in front of the stand (5.51). The claimant and other attendants emerge from behind the same door onto the platform (12:26). He returns to his trolley and wheels it away (12:33).

- V4 (same angle as V3): 10:22:59 to 10:30:00: The claimant is seen walking towards the stand carrying two bags, one white and one orange (00:44). He walks behind the stand, out of view (00:52). He walks out from behind the stand with one bag in each hand (1:24). He is striding (not running) as he walks through the barriers and towards the exit (1:33). Mr Vitali can be seen walking through the ticket barriers and towards the stand (4:47). He walks around to the back of the stand (4:59). He comes back out and stands on the spot by the front of stand (from 5.05 to 5.28). Mr Vitali is seen walking away (5:34).

- V5 (same angle as V2): 10:22:59 to 10:30:00: The claimant walks towards the stand with an open orange bag and walks around to the back of the stand (it is unclear whether he is bending) (00:49). He emerges and walks back in the direction he came from, with a bag in each hand (1:24). Mr Vitali can be seen walking towards the stand and looks behind it, he does not bend down (4:53). He stands by the side of the stand and looks in different directions (5:03). Mr Vitali is seen walking away and out of the frame (5:27).

63. The video evidence establishes that the claimant placed the item in the area of the LNER stand at the top of platform 1 between 20:48 and 20:50 when another attendant in a green tabard was present; and he collected the item at around 22:25. Its contents cannot be seen. There is no video evidence of the claimant interacting with an LNER employee immediately before he placed the item under the stand. Nor does it show the claimant leave the stand area immediately after he has deposited the item. There is no video evidence of Mr Vitali checking the stand before 22:25. There is no video evidence of Mr Vitali bending down and inspecting the stand, or underneath it (although on the claimant's own evidence this would not have been necessary because the bottle was not entirely hidden). There is no video evidence of Sahr checking the stand. The video evidence does not show any attempt being made by Mr Vitali to follow the claimant after he had collected the item.

64. Although this footage is therefore inconsistent with some of the evidence which Mr Vitali gave I find that it is consistent with his handwritten statement (written before he viewed the CCTV footage) that he observed the claimant approaching and leaving the stand with one white and one orange bag at the end of his shift. I also find that this is consistent with his evidence that he was watching the stand because he was seen walking towards and checking the stand within minutes of the claimant leaving it. Equally, I find that this is consistent with Mr Vitali having a reason to watch the stand and

his evidence that he had been informed that the claimant had acted suspiciously by placing a container under the stand. From the footage, it is likely that another attendant in a green tabard observed the claimant placing the item under the stand. I agree that this was likely to have raised suspicion.

65. This footage does not show the claimant running once he has collected the item, as Ms Montes maintained, although it does show him striding at pace. The footage also shows that the claimant was watching and waiting before he bent down to deposit the item.

66. I was also taken to several photos of a computer screen showing paused CCTV footage dated 12 November 2020 [131-136] which neither Ms Montes nor Mr Allen considered. At 20.48 the claimant is seen walking his cleaning trolley towards the LNER information stand at platform 1. He stops, leaving the trolley by the side of this desk and bends down in front of it. At 20.50 he returns to his trolley and walks away. There is then a series of three photos taken at 22.27 the second of which, shows the claimant bending and reaching beneath the stand. In none of these photos is there a clear image of a container.

67. Ms Montes and Ms Stewart inspected the information desk on platform 1. Ms Montes saw that the information stand was on wheels. There was a cupboard underneath the stand which was locked so she concluded that the claimant would have had to store the container underneath the stand on the platform floor. She found that this was suspicious.

68. Ms Montes spoke to Mr Vitali to ask him to explain his movements during the time caught by the CCTV footage. I find that it is likely that Mr Vitali provided this commentary when they watched the footage together. He told her he had seen the soap under the stand. Ms Montes also spoke to Sam who confirmed that the colour of the liquid in the container he had seen looked like chemicals. She made no record of these interviews. She did not speak to Fred or Francis although she already had Mr Islam's statement which recorded that neither Sam nor Fred recalled that the claimant had attempted to store a bottle in Reception on 12 November.

69. Ms Stewart emailed the claimant and Mr Appiah on 8 December 2020 [151] to enclose her note of the disciplinary hearing and to make arrangements for the CCTV to be viewed. The claimant did not receive this email because it was sent to an incorrect email address.

70. Having completed her further enquiries and reviewed all the evidence, Ms Montes upheld the allegation of theft and decided to dismiss the claimant by reason of gross misconduct. Before being sworn in to give evidence, Ms Montes corrected her witness statement to change the date when she made this decision from 17 December to 7 December 2020. In fact, Ms Montes made her decision on 17 December 2020 as confirmed by her email of this date [156], which was not originally disclosed by the respondent.

71. In this email, Ms Montes explained her decision in the following terms:

> "After my disciplinary hearing with Stone and having read all witness statements, seeing CCTV footage and checking myself the cupboard on

> platform 1, plus information provided by Security at Kings Cross Station, I believe that he intentionally and deliberately was hiding the chemical from the company and took it home at the end of the shift. I reasonably believe that he was taking items from the company and not a juice that was given as a gift for free, therefore I consider he is guilty of the alleged accusations against him.
>
> I therefore would like to follow company policy and apply gross misconduct leading to his immediate dismissal.
>
> His body language on the video, his answers and the evidences provided by the statements and his acts make me believe he is not being genuine and hiding liquid on the floor underneath a cupboard which belongs to LNER instead of putting this clearly and openly in our common areas or making visible and transparent what he was doing. His acts are suspicious and his testimony contradicts all reports from his supervisors, security, his line manager and the CCTV footage recorded…"

72. Ms Montes also agreed when giving evidence that the CCTV footage was integral, she knew that the claimant had not reviewed it and she made her decision to dismiss the claimant without giving him the opportunity to watch it and make any representations in relation to the footage. She conceded that this meant that her decision could be "wrong" and she should have adjourned and not made a decision until the claimant had seen this footage, and had an opportunity to put his case. She also agreed that she had "failed" by not taking a note of her discussion with Sam nor giving the claimant an opportunity to respond and she should have taken a note of her discussion with Mr Vitali and taken statements from Sahr and Mr Islam.

73. I accept Ms Montes' oral evidence that she took the decision to uphold the allegation of theft and to apply the sanction of dismissal on her own and without any input from Ms Stewart because the dismissal letter which Ms Stewart sent to the claimant on Ms Montes' behalf was based on the rationale she had set out in her email dated 17 December. I was not taken to any evidence that Ms Montes had reviewed the claimant's previous disciplinary record. However, I find that it is likely that she concluded that this was unnecessary because she had found that the claimant had committed an act of gross misconduct.

<u>The dismissal letter dated 22 December 2020</u>

74. This decision to dismiss the claimant by reason of gross misconduct with immediate effect was confirmed by letter, dated 22 December [98-99]. As with the letter of 18 November, it was written in the first person and signed by Ms Stewart. I accept Ms Stewart's evidence that she wrote this letter on Ms Montes' behalf, whose name and job title appeared underneath her own, although she neglected to "pp" her signature. This letter was predicated on Ms Montes' email, although Ms Stewart added references to Mr Vitali's and Mr Islam's statements, and the claimant's concession that he did not have permission to store the item under the LNER desk. Ms Stewart also added the details of the allegation, the process which had been conducted, the arrangements for payment of the claimant's final salary and holiday pay, and his right of appeal. This letter erroneously stated that the claimant had been invited to view the CCTV but had not taken up this opportunity, although this was likely to have been an inadvertent misstatement because

an email had been sent albeit to the incorrect address. I find that it was also misleading for Ms Stewart to state that mitigation and alternative sanctions had been considered when Ms Montes' email made no reference to either and there is no other evidence that they were considered. However, I find that it is likely that had Ms Montes considered alternatives to dismissal, she would not have concluded that a lesser sanction was warranted in the circumstances in which she had concluded that the claimant had stolen company property.

75. This letter confirmed that the allegation that the claimant had stolen five litres of liquid soap had been upheld for the following reasons:

    a. It was found that the claimant "intentionally and deliberately hid the chemical from the company and took it home from the end of a shift" based on the witness statements, CCTV footage, checking the desk on platform 1, and the information provided by Security staff.
    b. There was a reasonable belief that he had taken an item belonging to the company and not a bottle of juice, as the claimant had claimed. This was supported by Mr Vitali's statement that the bottle contained chemicals not juice.
    c. There was also the belief that the claimant's acts were not genuine which was supported by the fact that he had hidden the liquid on the floor underneath the desk instead of openly in the common areas or acting visibly and transparently. The claimant had agreed that he did not have permission to store his personal items in this area.
    d. The claimant's acts were found to be suspicious and his testimony was contradicted by the other evidence. The claimant had said that he had stored the container of juice under the LNER desk because security had refused to allow him to store it in the "Security Office" (i.e. the Reception Parcel area) but the witness statement from Mr Islam confirmed that he had not gone there on 12 November.

<u>The claimant's appeal</u>

76. The claimant wrote to appeal this decision on 24 December 2020 and he submitted a second letter of appeal on 4 January 2021.

77. Ms Stewart wrote to the claimant on 14 January 2021 [123] to invite him to an appeal hearing which would be conducted by Mr Allen when she would also be in attendance to take notes. She confirmed that arrangements would be made to enable the claimant to view the CCTV footage upon his request. She also referred to this in her email attaching this letter [158]. It was also sent by post. The claimant agreed that he received this letter. This was the first time he had been invited to view this footage. I do not accept the claimant's oral evidence that he came into work at around this time to view the footage for the reasons I have given above (see paragraph 58).

78. Mr Allen's evidence was that he looked at the Disciplinary Policy beforehand he held the appeal hearing. His evidence was also that he seldom conducted appeal hearings and had chaired three appeals in the previous five years.

The appeal hearing on 20 January 2021

79. The appeal hearing took place on 20 January 2021 when the claimant was accompanied by George Welch, RMT representative. A friend of the claimant's was also in attendance. As the notes of this meeting [124-130] confirmed, it lasted for 40 minutes.

80. At the start of the hearing, Mr Welch clarified the claimant's six grounds of appeal which Mr Allen addressed in his outcome letter:

    a. The dismissal letter was sent by HR – the point being made by Mr Welch was that it had been signed by Ms Stewart which suggested the decision was made jointly with Ms Montes.
    b. The disciplinary manager had stated at the disciplinary hearing that she had evidence and proof for the meeting but nothing was provided – the point being made was that the evidence to which Ms Montes had referred at the hearing did not prove the allegation, which led him to query whether she had seen evidence which had not been disclosed.
    c. The disciplinary manager had re-investigated the case – the point being made was that this demonstrated that the investigation and disciplinary process had not been fair or thorough because Ms Montes should have referred back to the investigating manager to conduct any re-investigation instead of doing this herself.
    d. The claimant had not viewed the CCTV footage.
    e. The manager who had seen the act did not take any action – the point being made was that Mr Vitali had allowed the claimant to commit a potential act of gross misconduct instead of preventing it.
    f. The outcome was predetermined – this related to the foregoing point and the suggestion that Mr Vitali had wanted to gather evidence to dismiss the claimant.

81. Mr Allen said that he knew that the CCTV footage was offered to the claimant to view on "a number of occasions" [126]. He agreed to clarify the dates when the claimant had been invited to view the footage. When Mr Allen asked the claimant where he had got the juice from, his friend explained that it was from a charity called UK Positive Living which came to Great Ormond Street Hospital where the claimant worked nights on Saturdays and Sundays [128]. At the end of the hearing, Mr Allen confirmed that he would view the CCTV footage and review the statements, and the claimant's grounds of appeal. He explained that he would need to ask someone from Kings Cross Station to send him the CCTV footage in order to view it.

82. In fact, Mr Allen watched the CCTV footage on Mr Vitali's laptop. He also interviewed Ms Montes, Ms Stewart, Mr Vitali and Sahr although he made no notes. Like Ms Montes, he proceeded to make his decision in the knowledge that the claimant had not viewed the footage and he did not give the claimant an opportunity to respond to any of the additional evidence he gathered and relied on.

83. Mr Allen wrote to the claimant on 5 February 2021 to confirm that he had dismissed all six grounds of appeal [91-92].

84. He found that the evidence which Ms Montes had relied on was: Mr Vitali's statement that he had seen the container of soap underneath the stand and had waited "for someone to come and collect it"; the CCTV footage which showed the claimant place an item under the stand, return to retrieve this item and place it in a Sainsburys bag, and Mr Vitali return to the stand to find that the soap had gone; and Mr Islam's statement that the claimant had brought in a container which "seemed to be cleaning chemicals". In his oral evidence, Mr Allen said that he gave limited weight to Mr Islam's statement although it supported Ms Montes' decision, and concluded, primarily from Mr Vitali's statement and the CCTV footage, that the evidence was conclusive and Ms Montes had formed a reasonable belief that the claimant had committed theft.

85. Mr Allen confirmed that Ms Montes had told him that "she was unsure that the claimant had fully understood the questions that had been asked" and it was her right to re-examine the evidence presented and examine any new evidence obtained, in order to give the claimant a fair hearing. His oral evidence was that he shared Ms Montes' concern which was why he had agreed that the claimant could be accompanied by his friend at the appeal hearing in addition to Mr Welch. On his own evidence, Mr Allen failed to appreciate that Ms Montes had gathered any new evidence as he was unaware that she had spoken to Sam after the disciplinary hearing. He therefore failed to fully investigate this ground of appeal. However, had he understood this at the time it is likely that he would have found this was justified because he had already concluded that Ms Montes had the right to examine any new evidence and when asked to comment about Ms Montes' re-investigation, his evidence was that she had done nothing wrong.

86. Mr Allen knew that the claimant had not viewed this footage but concluded that the claimant had been given "numerous occasions" to view this material. His letter did not explain how he had reached this conclusion. In his oral evidence, he explained that he relied on what Ms Stewart had told him, which was that she had emailed the claimant more than once and he had not asked to see any evidence to substantiate this because he trusted his management team. Although his letter included an offer to arrange for the claimant to view the footage, Mr Allen agreed that this would have been of little use to the claimant after he had made his decision, which he had confirmed was final.

87. In response to the complaint that Mr Vitali had failed to intervene, Mr Allen confirmed that he had spoken to both Mr Vitali and the duty manager on shift (i.e. Sahr) and had been told that "they [Sahr] had been unsure of who the person was, and CCTV was not available at that point". In his oral evidence, Mr Allen agreed that this contradicted and undermined Mr Vitali's contemporaneous evidence that Sahr had identified the claimant by name before he checked the LNER stand, although Mr Allen did not appear to give any consideration to this. Mr Allen therefore proceeded on the basis that the identity of the alleged perpetrator had not been known until Mr Vitali saw the claimant retrieving the item from under the stand at the end of his shift. I should record that when he was recalled to give evidence on this point, Mr Vitali was adamant that Sahr had told him that the claimant had been identified by an agency worker although he was not asked about what he told Mr Allen about this. Mr Allen's letter also stated that Mr Vitali had

attempted to catch up with the claimant after he had taken the item in order to discuss this with him. It is likely that Mr Vitali directly conveyed this additional detail to Mr Allen because it was not in his original statement. However, it did not tally with the CCTV footage which Mr Allen failed to consider. This was another piece of evidence given by Mr Vitali during the internal proceedings which brings his credibility and reliability into question. Mr Allen did not therefore take account of the totality of the evidence which related to this ground of appeal and also the related ground that there was premeditation. However, had he done so it is unlikely that this would have had any impact on the appeal outcome because the primary focus was on the claimant's conduct not on whether Mr Vitali could or should have intervened and his reasons for not taking such pre-emptive action.

The relevant legal principles

Unfair dismissal

88. If the employer is able to show that it had a potentially fair reason for the dismissal the general test for fairness under section 98(4) ERA must then be applied. This provides:

> 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.

89. The test to be applied in a conduct dismissal was articulated by the EAT in British Home Stores v Burchell [1980] ICR 303 as follows:

> "What the tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case."

90. The first element of the Burchell test is relevant to the requirement under sections 98(1) and (2) ERA for the employer to show that it had a potentially fair reason for the dismissal. In respect of the second and third elements of the Burchell test which are relevant to the fairness of the dismissal under section 98(4) ERA the burden of proof is neutral.

91. As to the standard of proof, the respondent is not required to show that it had conclusive evidence of the misconduct alleged, it is only required to show that it had formed a reasonable belief on the balance of probabilities, based on a reasonable investigation, when it dismissed the claimant.

92. If the respondent establishes that it dismissed the claimant for a potentially fair reason, I must go on to consider whether it was reasonable for the employer to have treated it as a sufficient reason to dismiss the employee i.e. whether this was within the band of reasonable responses which a reasonable employer might have adopted (see Iceland Frozen Foods v Jones [1982] IRLR 439).

93. The band of reasonable responses test applies equally to my assessment of the investigation and other procedural steps carried out by the employer to dismiss the employee (see Sainsbury's Supermarkets v Hitt [2003] ICR 111). The procedure followed by the respondent must be viewed as a whole, so that any deficiencies in the disciplinary process are capable of remediation by the appeal process.

94. There is no strict delineation of between procedural and substantive fairness. The reasonableness of the dismissal process should be considered together with the reason for dismissal (see Taylor v OCS Group Ltd [2006] IRLR 613, CA; and Sharkey v Lloyds Bank Plc [2015] UKEAT/0005/15).

95. I remind myself that I must not substitute my own views and consider whether a lesser sanction would have been reasonable. I must instead consider whether or not the dismissal was reasonable in the particular circumstances of the case.

96. Under section 207 of the Trade Union and Labour relations (Consolidation) Act 1992, the ACAS Code of Practice on Disciplinary and Grievance Procedures (2015) shall be admissible in evidence and any of its provisions which appear to the tribunal to be relevant to a question arising in the proceedings shall be taken into account in determining that question.

Adjustments to award: contributory fault and Polkey

97. Under section 122(2) ERA a basic award shall be reduced where a tribunal is satisfied that this would be just and equitable with reference to any conduct of the claimant which preceded the dismissal.

98. Section 123(1) ERA provides that:

> *…the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in the all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.*

99. A tribunal will be expected to consider making a reduction of any compensatory award under section 123(1) ERA where there is evidence that the employee might have been dismissed if the employer had acted fairly (see Polkey v AE Dayton Services [1988] ICR 142, HL; King and ors v Eaton (No.2) [1998] IRLR 686, Ct Sess (Inner House); and also Software

200 Ltd v Andrews and ors [2007] ICR 825, in which the EAT provided the following guidance:

> "(1) In assessing compensation the task of the tribunal is to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice. In the normal case that requires it to assess for how long the employee would have been employed but for the dismissal.
> (2) If the employer seeks to contend that the employee would or might have ceased to have been employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for him to adduce any relevant evidence on which he wishes to rely. However, the tribunal must have regard to all the evidence when making that assessment, including any evidence from the employee himself…
> (3) However, there will be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so unreliable that the tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on the evidence can properly be made.
> (4) Whether that is the position is a matter of impression and judgement for the tribunal. But in reaching that decision the tribunal must direct itself properly. It must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence.
> …"

100. Under section 122(6) a tribunal shall reduce the compensatory award by such amount as is just and equitable where it is satisfied that the claimant's conduct was culpable or blameworthy and that this conduct caused or contributed to his dismissal. It is for the tribunal to determine, as a matter of fact, whether the employee committed the impugned conduct and, if so, how wrongful it was, see Steen v ASP Packaging [2014] ICR 56, in which the EAT identified the following four questions which a tribunal shall address:

    (1) What was the conduct which is said to give rise to possible contributory fault?
    (2) Was that conduct blameworthy irrespective of the employer's view of the matter?
    (3) Did the blameworthy conduct cause or contribute to dismissal?
    (4) If so, to what extent should the award be reduced and to what extent would it be just and equitable to reduce it?

Wrongful dismissal

101. The reasonableness of the employer's decision to dismiss the employee is not a relevant consideration. The tribunal must consider, on the balance of probabilities, whether the employee's conduct was so serious as to amount to a repudiation of their contract of employment entitling the employer to terminate it without notice.

102. Unlike the exercise I am required to undertake in relation to the unfair dismissal claim, I must evaluate and weigh all the evidence before me, including any evidence which was not considered by the respondent at the time when it dismissed the claimant and rejected his appeal.

Written statement of particulars

103. The legal requirement to provide workers with a written statement of their employment particulars is set out in sections 1 to 6 ERA 1996.

104. Under section 4 workers have the right to be notified of any changes made to any of these particulars by means of a written statement containing particulars of any changes made.

105. Where there is a change in the identity of the employer and there is no change to the worker's continuity of employment, provided there are no other changes in relation to any matters which must be specified in a section 1 statement, the new employer is only required to notify the worker of this change. This written notification must be provided not more than one month after the change has taken effect and specify the date on which the worker's continuous employment began (sections 4(5) to (8) ERA).

106. Under section 38 of the Employment Act 2002 ("EA") there is no free-standing right to claim compensation for a breach of these provisions. A tribunal may only make an order for compensation if there is also a successful claim brought under one of the jurisdictions listed in Schedule 5 EA which include a claim for unfair dismissal (section 111 ERA). In such a case, this is treated as an adjustment to the compensatory award (section 118(1)(b) ERA) which is to be applied before any reduction for contributory fault is made (section 124A ERA).

Conclusions

Unfair dismissal

The reason for dismissal

107. I find that find that Ms Montes held a genuine belief that the claimant had stolen company property and this conduct was the reason for his dismissal. The entire focus of the investigation and disciplinary process was the allegation that the claimant had committed an act of theft. This warranted an investigation and the claimant's suspension pending its outcome. It was the reason why the claimant was subjected to a disciplinary process and the reason why Ms Montes dismissed the claimant and Mr Allen rejected his appeal.

108. It is not therefore necessary to consider the respondent's alternative ground for dismissal.

Fairness of dismissal

109. I find that the claimant's dismissal was unfair.

(1) The investigation was initiated and initially conducted by Mr Vitali who was directly involved in the incident under investigation and was the principal witness against the claimant. He conducted the initial investigation meeting oppressively and dishonestly with the objective of eliciting a confession from the claimant. Mr Vitali's

involvement in the investigation process was also in breach of the Disciplinary Policy.

(2) Ms Ahmadzade failed to conduct a meaningful investigation, the quality of which was impaired by the erroneous and misleading way that the evidence was presented to the claimant. She had failed to keep an open mind.

(3) The investigation failed to gather all of the evidence i.e. the CCTV footage on which the respondent purported to rely in finding there was a disciplinary case to answer. I also find that this was in breach of paragraph 5 of the Code. This was also in breach of the Disciplinary Policy.

(4) Ms Ahmadzade went beyond her mandate in concluding that the allegation of theft was well-founded and querying whether the claimant could now be dismissed.

(5) Ms Montes failed to ensure that the claimant had the opportunity to view the CCTV footage and respond to it before she made her decision. I also find that this was in breach of paragraph 9 of the Code. It was also in breach of the Disciplinary Policy.

(6) Although I do not find that Ms Montes acted unreasonably in conducting a further investigation, her failure to record and provide the claimant with the additional evidence she gathered and considered and to afford him the opportunity to respond to it before she made her decision was unreasonable.

(7) The appeal conducted by Mr Allen failed to remedy these defects and added to them.

(8) The disciplinary process was therefore outwith the band of reasonable responses. I also find that this was in breach of paragraph 23 of the Code.

(9) These procedural failings were so fundamental that the respondent has failed to show that it had formed a reasonable belief that the claimant had committed an act of theft.

110. It is agreed that the claimant's suspension was not reviewed. I agree with the respondent that any review would have been futile because of the nature of the allegation under investigation.

Contributory fault

111. Because of my findings below, I find that justice would be served by reducing any basic and compensatory award by 100% by reference to the claimant's conduct. I am satisfied that the claimant's conduct was culpable and that it was this conduct entirely that caused his dismissal.

Wrongful dismissal

112. I remind myself that the onus is on the respondent to show that the claimant's conduct was such that it amounted to gross misconduct warranting summary dismissal. I also remind myself of the standard of proof which I must apply, which is the balance of probabilities, so that conclusive evidence of the claimant's misconduct is not required.

113. I find that the respondent has discharged the burden of establishing that the claimant committed an act of theft, on the balance of probabilities, for the following reasons:

    (1) The claimant was seen storing an item under the locked LNER stand at around 20:48 to 20:58 on 12 November 2020.
    (2) I find that this raised a genuine suspicion about the claimant's conduct which was brought to Mr Vitali's attention because I accept his evidence that he waited outside the station and saw the claimant returning to the LNER stand to retrieve the item he had stored. As I have found, this is consistent with the CCTV footage.
    (3) I also find that this footage showed the claimant acting suspiciously in that he watched and waited before depositing the item under the LNER stand.
    (4) I have found that the claimant was an evasive, unreliable witness lacking in credibility – particularly in relation to the time he says he brought the bottle of orange juice to work, the reason for depositing the bottle under the stand at the time he did, and whether he had sought or obtained permission to store the item under the stand – and I do not accept his evidence that he brought a bottle of orange juice to work on 12 November.
    (5) Because of the issues with the claimant's credibility, I give greater weight to the hearsay evidence obtained by Mr Islam that the claimant had not attempted to leave a container at the Reception Parcel area on 12 November, and that he had attempted on another day that week to leave a bottle of pink liquid which looked like chemicals in that area with the security staff; and I also accept Ms Montes' evidence that she verified that the colour of the liquid in the container which Sam had seen that week was pink.
    (6) I therefore find that it is more likely than not that the item which the claimant stored under the desk on 12 November was a 5-litre container of pink liquid soap and that in retrieving this item at the end of his shift and removing it from the station, the claimant committed an act of theft.
    (7) I find that this amounted to gross misconduct which permitted the respondent to dismiss the claimant without notice, in accordance with the Disciplinary Policy and the terms of his contract.

114. I should record that the issues with the credibility and reliability of Mr Vitali's evidence gave me much pause for thought. As I have found, he made several dishonest statements in his handwritten statement, at the initial investigation meeting and to Mr Allen, and whilst he conceded his dishonesty in respect of the first of these matters when giving evidence to the tribunal, I have also found that he gave dishonest evidence when he stated that he had not viewed the CCTV footage at all. However, I have also found that other parts of the evidence which Mr Vitali gave are reliable because they are consistent with the CCTV footage and with some of the actions he took that are not directly challenged by the claimant. I also find that his actions, including attempting to elicit a confession from the claimant on 14 November 2020, oppressive though that was, to be entirely consistent with the holding of a genuine belief that the claimant had stolen soap. Equally, the fact that Mr Vitali failed to alert security to his suspicion that the claimant had stored company property under the LNER stand with the intent

of removing it from the station or intervened pre-emptively, and instead watched and waited for the claimant to take this next step, does not alter what the claimant did of his own motion nor exculpate the claimant's conduct. I therefore find, on balance, that Mr Vitali did see the container of soap under the stand on 12 November. However, even without this additional evidence, I have found that the respondent has established that the claimant committed an act of gross misconduct, for the reasons set out above.

Failure to provide a statement of changes

115. I have found that the respondent failed to provide the claimant with a statement confirming the date on which his period of continuous employment began within one month of the date on which his employment was transferred to the respondent.

116. No award is made because of my finding on contributory fault.

117. Finally, I would like to apologise to the parties for the very lengthy delay in promulgating this judgment.

Employment Judge Khan

19.08.2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

21/08/2023

FOR EMPLOYMENT TRIBUNALS