EMPLOYMENT TRIBUNALS

Claimant: Mr Mubashir Riffat **v** **Respondent:** One Stop Stores Limited

Heard at: Reading **On:** 15 and 16 June 2023

Before: District Tribunal Judge Shields (sitting as an Employment Judge)
Mrs C Bailey
Mrs J Smith

Appearances
For the Claimant: In person
For the Respondent: Ms A Akers (counsel)

RESERVED JUDGMENT

The unanimous judgment of the tribunal is that:

1. The claimant was not unfairly dismissed. His complaint under the Employment Rights Act 1996 fails and is dismissed.
2. The claimant was not directly discriminated against on the grounds of his race, colour, nationality or ethnic origin or perceived race, colour, nationality or ethnic origin. His complaint under the Equality Act 2010 fails and is dismissed.

REASONS

Claim and response

1. The claimant was employed by the respondent from 1 June 2017 to 1 March 2022 as the shift manager of one of its stores.

2. In a claim form presented on 15 April 2022 after a period of ACAS Early Conciliation from 13 April 2022 to 25 April 2022, the claimant brought complaints of unfair dismissal and a claim for direct race discrimination.

The claimant also ticked the box for ‘other payments’ but he confirmed at the Case Management hearing on 7 December 2022 that there were no such payments outstanding and the claim for an unauthorised deduction from wages was dismissed.

3. The response was presented on 5 July 2022. The respondent defended the claims.

Hearing and evidence

4. The final hearing took place at Reading Employment Tribunal on a face to face basis.

5. The claimant had not provided a witness statement to the respondent or the tribunal as directed. The tribunal took the claimant’s claim form and his appeal letter (page 132) as the basis of his witness statement. The claimant was cross examined by the respondent's counsel.

6. The respondent’s evidence was provided by their three witnesses. The evidence was contained in witness statements. The three witnesses that gave oral evidence were: Keith Spittal, Jay Yalamanchili and Debbie Dobbs. The respondent’s witnesses were cross examined by the claimant.

7. An HMCTS appointed Urdu Interpreter was present throughout both days of the hearing to translate the proceedings for the claimant. The claimant confirmed at the start of each day that he understood the interpreter and at the end of the hearing stated that he had understood the proceedings. The claimant commented that the interpreter on the second day was a better standard that the one supplied on the first day. However, at no time did the claimant indicate on day one that there was any issue understanding the interpreter on day one.

8. At the start of each day of the hearing, the Claimant provided a number of documents to the Tribunal that were not in the Tribunal bundle and asked for them to be taken into account.

9. On the first day, the Tribunal received some of the documents from the claimant in order to progress to review whether they were relevant for the hearing. The tribunal handed back some handwritten notes to the claimant without reviewing them because they were clearly his preparatory notes and were not to be copied for the tribunal or the respondent.

10. On the first day of the hearing, the claimant handed over 5 pages of notes which were his notes on the respondent’s witness statements.

11. The Claimant was asked if he was sure that he wanted to provide these notes to the respondent’s Counsel and he confirmed that he did. This was checked for a second time with the claimant before the copies of the notes were supplied to the respondent’s Counsel.

12. Having double checked the position with the claimant regarding his notes on the respondent's witness statements he stated that he wished the respondent to have the documents which contained his 5 pages of his notes, effectively his cross examination of the respondent witnesses, because his command of English was not so good and he wanted the respondent and the tribunal to have them.

13. The tribunal explained that if he had made notes on the respondent's witness statements then these were questions that he would need to put to the witness at the cross-examination stage of the hearing (his opportunity to ask questions to the respondent's witnesses on their defence).

14. The tribunal gave time for the Respondent to review the documents and raise any issues about the contents of the additional documents before they were considered by the tribunal.

15. The tribunal decided as follows on the additional evidence. We accepted the five pages of witness statement notes but rejected the other handwritten notes (without reviewing the contents of the latter because they appeared to be his own thoughts on the case and were not for the review of the Tribunal or the respondent).

16. A letter dated 22 February 2022 was a duplicate copy of the suspension letter that was contained within the tribunal bundle and therefore did not need to be added again.

17. We accepted and added to the bundle the 9 March 2022 invitation letter to a face to face meeting because this was not a duplicate of a copy in the bundle. The difference being that the face to face meeting replaced the teams invitation meeting. We accepted into the bundle, the ATM policy, of which there was no objection from the respondent. We further admitted the WhatsApp messages into the bundle because they were relevant to the disciplinary issues raised against the claimant by the respondent.

18. On day one of the hearing, the claimant produced confidential payroll information in relation to third parties. The claimant argued that the payroll documents were relevant because, whilst he was suspended from the respondent, the respondent was not supposed to recruit anyone and showed that someone else was doing his job. The respondent vigorously argued that the information was highly confidential to their employees and that the claimant should not be in possession of it at all. They further stated that the information was completely irrelevant because they needed to cover the role of the claimant whilst the claimant was suspended but the confidential payroll information was not relevant to that decision.

19. We did not admit the confidential payroll information about third parties. We stated that we would revisit that decision if the document became relevant during the hearing, and if the claimant asked us to reconsider the admittance of the confidential payroll information. We were not asked to reconsider the decision and the tribunal concluded during its deliberations

that it did not need to see the confidential payroll information as we received oral evidence related to the payroll issues.

20. The claimant produced some additional documents at the start of the second day. These were screenshots of text messages regarding the broken freezer to Retail Support. The respondent did not object to the admittance of the text messages. We admitted the screenshots as they were relevant to the evidence on the disciplinary issues. We further admitted the “View Transactions” documents and discounts summary as they were again relevant to the issues and the respondent would have an opportunity to be cross examined on the contents. The respondent was given the right to further cross examine the claimant on the additional documents admitted on day two. However, Counsel for the respondent declined to cross examine the claimant following Mr Spittal’s evidence as she did not consider it necessary to do so.

21. No schedule of loss was supplied by the claimant in accordance with the case management order dated 7 December 2022. He provided oral evidence on his losses and remedy at the end of his evidence on day one.

22. The respondent conceded the jurisdictional issue of whether the direct race discrimination claim was submitted within the statutory time limit. The tribunal did not deal with this issue.

23. On day one of the hearing, the claimant was cross examined by the respondent’s counsel. The tribunal was able to ask the claimant any additional questions that they had. The claimant was then released from the witness box. On being cross examined, the claimant was reminded on numerous occasions that he was to answer the question put to him. On completing the cross examination, the tribunal explained to the claimant that he was now to ask his questions to the respondent's witnesses and explained that with the notes that he had produced on their statements, he needed to put his notes into the form of a question in order to challenge the evidence of the respondent.

24. The respondent then called its first witness, Mr Yalamanchili. His evidence was completed at the end of the first day and he was released from the witness box and was not required any further.

25. At the end of the first day, the tribunal explained the steps that the claimant needed to prepare overnight in order for the claimant to be properly prepared for the hearing on day two. It was explained that he needed to prepare and focus the list of questions that he had for the respondent’s remaining witnesses. We explained that if he did not agree with the respondent’s witness statement, he needed to challenge the evidence by asking a question about it. Further, the tribunal explained the purpose of his closing comments (or statement) and that he needed to put his best points of evidence forward in support of his case, explain his case to the tribunal in summary and that he should write it down, in order to be prepared for the final part of the hearing.

26. On day two of the hearing, the respondent's counsel called its witnesses in the following order: Mrs Dobbs and then Mr Spittal. Both witnesses were questioned and then released from the witness box. The claimant had acted on the points raised by the tribunal at the end of day one and had prepared questions for the witnesses and subsequently a closing statement.

27. Ms Akers and the claimant made closing comments (statements) on the afternoon of day two.

28. There was insufficient time within the two days for us to make our decision and deliver judgment, and so we reserved judgment. The judge apologises to the parties for the delay in the promulgation of this reserved judgment, this reflects the general pressure of work in the employment tribunals at present, prior sitting and prior leave commitments.

Issues

29. A discussion to identify the issues took place at a preliminary hearing on 7 December 2022.

30. A list of issues for determination was produced (pages 42 to 43 of the bundle). This is set out below with the original numbering retained for ease of reference. The issues were agreed by the parties.

    1. Unfair Dismissal

    1.1 Fairness –

    1.1.1 Did the Respondent conduct a reasonable investigation and disciplinary process?

    1.1.2 Did the Respondent have reasonable grounds to believe that the Claimant was guilty of the misconduct?

    1.1.3 Did the Respondent believe that he was guilty?

    1.1.4 Was dismissal within the range of reasonable responses open to the Respondent?

    1.1.5 Did the Respondent and the Claimant comply with the ACAS Code of Practice?

    2. Remedy for Unfair Dismissal

    2.1 If the Claimant's claims are upheld:

    2.1.1 What remedy does the Claimant seek?

2.1.2 If the Claimant seeks re-instatement or re-engagement, is it practicable for the Respondent to comply with such an Order?

2.1.3 What financial compensation is appropriate in all of the circumstances?

2.1.4 Should any compensation awarded be reduced in terms of Polkey v AE Dayton Services Limited [1987] ICR 142 and, if so, what reduction is appropriate?

2.1.5 Should any compensation awarded be reduced on the grounds that the Claimant's actions caused or contributed to their dismissal and, if so, what reduction is appropriate?

2.1.6 Has the Claimant mitigated their loss?

3. <u>Discrimination - Race</u>

3.2 Direct Discrimination

3.2.1 Was the Claimant's dismissal less favourable treatment on the grounds of being of national ethnicity of Pakistani, in that the Claimant claims:

a. Peter Malcsiniaolov made exactly the same type of mistakes as the Claimant did, but was not disciplined or dismissed for similar mistakes;

b. Was the Claimant replaced with another internally promoted Manager, Peter Malcsiniaolov who was offered more money than the Claimant was previously earning, despite the fact that the Claimant asked for a similar salary that had been denied to him by his Area Manager Keith Spittal?

3.2.2 The Claimant's actual comparator is Peter Malcsiniaolov whose circumstances are materially the same as the Claimant's.

3.2.3 Was the Claimant treated less favourably than the comparator was or would have been?

3.2.4 If so, was the reason for the treatment the Claimant's race, colour, nationality or ethnic origin or perceived race, colour, nationality or ethnic origin?

3.3 Remedy for race discrimination –

3.3.1 If the Claimant's claims are upheld:

a. What remedy does the Claimant seek?

b. What financial loss has the detrimental treatment caused the Claimant?
c. What injury to feelings has the detrimental treatment caused the Claimant and how much compensation should be awarded as a result?
d. Is it just and equitable to award the Claimant compensation?

3.3.2 Although the Claimant claimed re-instatement in his claim form, the Claimant confirmed during the course of the Case Management Hearing, that it is no longer pursued. Particularly as the Claimant has found alternative employment with an income of the same rate of pay as he previously earnt with the Respondent.

Findings of fact

31. We make the following findings of fact about what happened. We have not included here everything that we heard about during the hearing. Our findings focus on aspects of the evidence which we found most helpful in determining the issues set out above. Where there is a dispute about what happened, we consider the evidence we have heard and the documents we have read, and we decide what we think is most likely to have happened.

The claimant's role

32. The claimant commenced his employment with the respondent on 1st June 2017. At the date of his dismissal, his role was shift manager. He was acting in a step up manager capacity at the date of dismissal. His dismissal was effective on 1st March 2022.

33. He was employed at the Chippenham One Stop store. The store required a new store manager as their outgoing store manager had commenced a secondment in a different store. The claimant's direct Line Manager was Keith Spittal who held the role of area manager at the claimant's date of dismissal.

34. The respondent's Disciplinary Procedure is at pages 47-60 of the tribunal bundle. Gross misconduct is defined on page 49 and an example given is misappropriation of company stock and a serious breach of any Company policy, procedure or legal requirement in connection with your employment. Gross misconduct is "a serious breach of contract and includes misconduct which the company believes, is likely to prejudice the business or reputation or irreparably damaged the working relationship and trust between the company and colleagues. Gross misconduct will be dealt with under the disciplinary procedure and will normally lead to dismissal without notice."

35. The claimant and Mr Spittal met to discuss the potential to promote the claimant to the role of store manager in the future. Mr Spittal proposed the management secondment opportunity to the claimant. Management

secondees are paid at the rate of 90% of the full store manager's salary. The reason for the 10% reduction is due to the role being on a temporary basis. The tribunal finds that Mr Spittal did explain to the claimant that if his secondment into the store manager role was successful then there would be the possibility of him being appointed to a full-time store manager role on the full salary.

36. The claimant declined the opportunity to be seconded into the Store manager role. It is accepted that the store still required a store manager on an urgent basis. In January 2022, the claimant agreed to temporarily stand in, acting in the role of a step up manager until somebody suitable was found to fill the role of store manager on a permanent basis. The claimant was paid an additional sum of £50 per week as a management duty premium in addition to his normal salary. He continued to have the opportunity to earn overtime whilst acting as a step up manager.

37. The claimant was fully trained in the respondent's policies and procedures including, the fresh date checking and markdown policy, the chilled and frozen deliveries process, the colleague shop policy, the health and safety policy. The claimant agreed and the respondent asserted that he had completed all the e-learning modules on the policies stated.

38. Mr Spittal provided evidence that the Chilled and Frozen Deliveries Process, Fresh Date Checking and Markdown Process and Reducing the Amount of Waste Policy were important policies for the company. In particular, the correct and proper storage of chilled and frozen food was of paramount importance to the company due to the public health and safety issues at stake and could have a bearing on their reputation. This was accepted by the Tribunal.

<u>25 January to 21 February 2022: the suspension and investigation process</u>

39. On 25 January 2022, a telephone call complaint from a colleague (Rakeeb) of the claimant was made on the respondent's confidential reporting line. This was escalated from human resources to Mr Spittal.

40. On 25 January 2022, a frozen food delivery arrived at the store at 10:45 AM. The claimant placed some of the delivery in the freezer on the shop floor. The remainder of the delivery was left on the floor in the back of the store until 11:56 AM. The delivery report contained a number of items, mainly chips, other potato-based products and peas. The value of the delivery was approximately £200. A copy of the delivery report is at pages 88 to 89 of the bundle.

41. It is a breach of the fresh and frozen food storage policy to leave the food outside the refrigerator or freezer for more than 30 minutes. The respondent’s witnesses gave evidence as to the importance of chilled and frozen foods being stored and maintained at the correct temperature for health and safety reasons. This was accepted by the tribunal.

42. A freezer at the shop had broken down. The claimant did report the freezer breakdown in accordance with page 72 of the fresh date checking and markdown policy.

43. During the morning of 25 January 2022, a female arrived at the store and the claimant handed her black bags with items in them. The tribunal decided that the black bags contained ice cream from the freezer. The female then left the store. During the same morning, a Mercedes C-Class car pulled up outside the store, the male driver remained in the car. The claimant placed five black bags in the boot of the car. The tribunal decided that the black bags contained ice cream from the freezer.

44. The tribunal found that the claimant knew both the female and the male driver of the car. Further, the tribunal found that no money or payment was exchanged from the female or male to the claimant. The tribunal accepted that the ice cream was provided to a local school and a charity. Additionally, the claimant wrote off the ice cream rather than the potato-based products, chips and peas because they were more likely to sell such products to their customers in January from the store.

45. The claimant did not attempt to contact his line manager, Keith Spittal regarding the freezer breakdown nor about donating the products to a charity or community group. He would have had difficulty contacting his line manager, in any event, because at that time his line manager had a problem with his work phone and the personal mobile number given was incorrect. The finding of fact is that the claimant did not attempt to contact his Line Manager at all. The claimant should have attempted to contact his line manager. This was a breach of the fresh date checking and markdown policy on page 72.

46. The claimant completed a waste report on 25 January 2022. The report was part of the Stock Adjustments and Wastage Detail reporting process. Frozen products to the value of £890.81 were written off on that date. A copy of the waste report is at pages 84-87 of the bundle. The majority of the written off products were ice cream. The reason for the write off was refrigeration breakdown. The difference between the write off for the potato-based products and the ice-cream was £690.00. There was a further sum of £16.90 of products that had been written off as either out of date or damaged. The waste report was completed during the evening of 25 January 2022. The waste report should have been completed much earlier in the day when the product was actually written off and disposed of. The product should not have been provided to a third party without the Line Manager's sign off. This is a breach of the fresh date checking and markdown policy.

47. On 30th January 2022, Mr Spittal met with the claimant. A copy of the meeting notes are at pages 76-83 of the bundle. We found these were an accurate record of what was discussed during the meeting. Mr Spittal asked relevant questions of the claimant during the meeting. After an adjournment, he recapped the evidence with the claimant and outlined the

next steps he would take. The claimant was informed that he was subject to an ongoing investigation and that he was placed on paid suspension pending the outcome of the investigation.

48. A letter dated 3 February 2022 was sent by Mr Spittal to the claimant to confirm that he had been placed on paid suspension from 30 January 2022 whilst a formal investigation took place. A copy of the letter is at page 90 of the bundle.

49. The tribunal accepted Mr Spittal's evidence that he was not specifically searching for the claimants' adherence to policies and procedures. He investigated further CCTV footage for the days following 25th January 2022 to identify whether the claimant's conduct was an isolated incident on 25th January 2022 or whether there was a pattern of behaviour.

50. On 26 January 2022, the claimant marked down sandwiches in the morning. The correct time for marking down sandwiches is between 2:00 to 3:00 PM on the day. See page 69 of the bundle. This is a breach of the fresh date checking and markdown policy on page 72

51. On 26 January 2022, the claimant received a fresh milk delivery at 07.07 AM. The milk was not placed in the refrigerator cabinets until 11.07 AM. Milk must not be left out of the refrigerator for any longer than 30 minutes. Otherwise, it must be written off as waste and disposed of appropriately as it is not considered fit for sale based on health and safety grounds. This is a breach of fresh and frozen food storage policy.

52. On 27 January 2022, the claimant brought in a newspaper delivery at 6:00 AM. He booked this internally before checking that the invoice was aligned with the items delivered. Newspaper invoices were to be checked before the delivery is logged internally, in order to ensure that the figures are correct.

53. On 7 February 2022, Mr Spittal invited the claimant to attend a reconvened investigation meeting on 10 February 2022. A copy of that letter is at page 91 of the bundle.

54. On 10th February 2022, Mr Spittal met with the claimant. The meeting notes on pages 92-103 of the bundle are accepted by the Tribunal as an accurate record of what was discussed at the meeting. The claimant answered questions at the meeting on why he left the frozen delivery out of the fridge, why he decided to preserve the ice cream over regularly sold products, why the ice cream was kept in the freezer. He was further asked questions on the milk delivery of 26 January 2022. The claimant blamed two unnamed colleagues with regards to the issues under investigation. The claimant answered questions on the marking down of sandwiches and he stated that the first markdown was in the morning and then once in the evening. It was pointed out to him that this was incorrect.

55. The claimant stated that the ice cream had gone to charity and he received a letter of gratitude, page 104 of the bundle. The letter from Ms McGuire at page 104 is somewhat confusing. The CCTV showed that the claimant gave the ice-cream to a female and a male at the shop. Yet, the letter refers to the claimant bringing the ice-creams to the daycentre. The claimant further stated that he had not taken anything from the store for personal use.

56. The clamant admitted he had breached the policies and procedures of the respondent when they were drawn to his attention.

57. Mr Spittal adjourned the meeting to consider his decision. The tribunal accepted the evidence of Mr Spittal that he considered the claimant had demonstrated poor decision making for somebody of his role and experience and that on several occasions the claimant had incorrectly followed policies and procedures of the respondent. He went on to decide that he was recommending the matter be progressed to a formal disciplinary hearing and that the claimant would remain on paid suspension pending the outcome of the disciplinary hearing. This was confirmed in writing to the claimant and a copy of the letter is at page 109 of the bundle.

58. On 19 February 2022, Mr Spittal took a witness statement from the colleague of the claimant (Rakeeb) who had originally made the telephone report. A copy of that statement is it page 105 to 108 of the bundle. The statement refers to the colleague overhearing the claimant asking a third party if they wanted to purchase ice cream. The colleague further stated that the sum of £60 was mentioned in exchange for the ice cream when the female came to collect the ice cream. The colleague did not see any money being exchanged. The respondent did not call the colleague as a witness in the case. The Tribunal accepted that the evidence was collected from the colleague. The respondent did not rely on the evidence from the colleague in support of its response to the claim.

59. The Tribunal accepted that although the evidence was collected from the colleague, this was not the reason for the claimant's dismissal, and it was accepted that the respondent placed little weight on the colleague's statement.

60. The Tribunal found that the claimant did not make any personal gain from the ice-cream donation to a local school and charity. The claimant did not "sell " the ice-cream, nor receive any cash, as alleged by the colleague.

61. Mr Spittal did not interview or take a statement from Raheem who was potentially a witness in the allegations against the claimant.

62. Mr Spittal gave evidence that the comparator (Peter) that the claimant alleges made the same mistakes as the claimant, but did not receive the same treatment, was denied. There were no examples or evidence offered by the claimant that another employee had made the same

mistakes and been treated differently. The claimant could not provide any examples to support his claim. The Tribunal found that the allegations raised were generalised breaches of policies and procedures that did not involve a named individual or a date or time. Therefore, the respondent could not investigate them whether at the investigation, dismissal or appeal stage.

63. Further, Mr Spittal denied that the comparator was offered or paid a higher salary than the claimant. The evidence accepted by the Tribunal was that the comparator was offered the same rate of 90% of a Store Manager's pay rate and that this was identical to that offered to the claimant who refused the offer made. This evidence was accepted by the tribunal.

<u>22 February to 04 March 2022: the disciplinary procedure</u>

64. The invitation letter to the disciplinary hearing originally specified Janaka Abeysinghe as the store manager that would hear the disciplinary hearing. The tribunal accepted the evidence of Mr Spittal that Mr Janaka Abeysinghe was replaced by Mr Yalamanchili because Mr Abeysinge knew the claimant whereas Mr Yalamanchili did not.

65. The claimant asserted that Mr Spittal manipulated the appointment of the decision-maker so that it would adversely affect the claimant. The Tribunal did not accept that. The tribunal preferred the evidence of Mr Spittal that Mr Abeysinghe knew of the claimant and raised this with the respondent, with Mr Abeysinghe preferring not to hear the disciplinary. Mr Yalamanchili did not know the claimant and therefore Mr Yalamanchili stated that he could be impartial when making his decision.

66. Mr Yalamanchili took his responsibility seriously and did not rush his decision-making process. He received the disciplinary pack. Mr Yalamanchili amended his witness statement to say that he did not review the CCTV footage ahead of the hearing nor at the hearing. The key was not available for him to be able to obtain access to the CCTV. He declined to speak to the investigating manager, Mr Spittal, as he was satisfied with the investigation procedure that had taken place and had no queries to raise with him. The tribunal did not consider the fact that Mr Yalamanchili had not seen the CCTV footage for himself was material to the outcome of the dismissal. It was also not material that the CCTV was not watched on the day with the claimant because the claimant admitted to the breaches of policies and procedure that were captured on the CCTV video. Watching the CCTV together on the day would not have materially changed Mr Yalamanchili's decision. Mr Yalamanchili had relied on Mr Spittal's investigation and conclusions on the CCTV but additionally, the claimant did not deny the allegations against him in relation those captured on the CCTV at any time. Therefore, the tribunal did not consider it was material as to whether Mr Yalamanchili had watched the CCTV, whether with or without the claimant.

67. Mr Yalamanchili met with the claimant on 1st March 2022. The tribunal accepted the hearing notes at pages 110-125 of the bundle as an accurate summary of the hearing that took place.

68. The claimant admitted that he had breached the company's policies and procedures. Specifically, he admitted that the milk delivery had been left out of the fridge for four hours, the frozen food delivery had been left out of the freezer, he had written off the ice cream by providing it to a charity and a school without his line manager's permission, he had incorrectly followed the markdown policy with respect to sandwiches, he had incorrectly accepted a newspaper delivery and he had not written off the perishable foods at the correct time.

69. Mr Yalamanchili noted that at no point did the claimant apologise for his errors. He noted that the claimant sought to provide a number of different excuses for his conduct which had not been raised previously and lacked consistency. Mr Yalamanchili gave evidence that the claimant did not indicate in his behaviour or in response to the allegations that he would not breach the policies and procedures of the company again. This led Mr Yalamanchili to determine that he would not change his conduct in the future. He did not find that the clamant made a personal gain from either the misappropriation of company stock or the failure to follow the company's policies and procedures.

70. Mr Yalamanchili proceeded to consider the possible sanctions to be applied with respect to the clamant and it is noted on pages 125-126 that he considered mitigation issues relevant to the dismissal. Having taken a break to consider the evidence before him, Mr Yalamnchili reconvened the disciplinary meeting and terminated the claimant's employment with immediate effect on the grounds of gross misconduct. The grounds were for misappropriation of company stock and for not following company processes and policies. A letter confirming the termination of employment was sent to the claimant on 4 March 2022. A copy of the letter is at page 126.

71. In his evidence to the Tribunal, the claimant admitted that he had completed the e-learning modules for training on the respondent's policies and procedures and he admitted that his actions were in breach of the respondent's policies and procedures.

72. The claimant was offered a right of appeal.

73. During the suspension and the disciplinary procedure, the tribunal found that the respondent did take steps to ensure that the shop had sufficient staffing levels to remain open to customers.

74. The Tribunal accepted the respondent's evidence that given the claimant's suspension and the loss of other employees they were obliged to obtain a Secondee Manager and obtain further employees to cover the shifts that the claimant and another employee (who had left) had been working. The

Tribunal accepted this was a business necessity and that the Secondee Manager was offered the same rate of pay and banding that was offered to the claimant by Mr Spittal but rejected by the claimant. The Secondee Manager was Peter (Petar) Malciniaolov.

Post 4th March 2022: the Appeal

75. The claimant appealed against the decision to dismiss him from his employment. His appeal reasons are at page 132-133 of the bundle.

76. The respondent appointed Mrs Debbie Dobbs to hear the appeal. An invitation letter was sent for a Teams meeting but the claimant requested a face to face meeting that was accommodated by Mrs Dobbs and the respondent.

77. Before the appeal meeting, Mrs Dobbs reviewed the information supplied to her by the respondent. She stated that she spoke to Mr Spittal before the appeal hearing. Mr Spittal has no recollection of that conversation. The Tribunal did not consider this was a material point but on balance thought it was more likely that Mrs Dobbs had spoken to Mr Spittal, as she puts it “briefly”, as this was part of her initial preparation whereas Mr Spittal had completed his actions on the matter, and this was a minor follow up action for him as he had not been involved in the disciplinary decision or the appeal. Mrs Dobbs set out her preparation in some detail. Her evidence was that she did not reinvestigate the evidence. She utilised the evidence available to her from the investigation and dismissal procedure.

78. The appeal hearing took place on 23 March 2022. The notes of the hearing are at page 135-153 of the bundle and the Tribunal found they were an accurate reflection of the meeting but did not record the meeting on a verbatim basis.

79. The appeal letter contains all the details that the claimant relied on in support of his claims before the Tribunal. Additional details or evidence were not put forward by him as part of his appeal meeting.

80. Mrs Dobbs set out her approach in her witness statement. She chose to adjourn the appeal hearing before making a decision in order for her to be able to consider the contents of the appeal hearing and all the documents relating to the investigation and dismissal procedure. Her statement details the next steps that she took in relation to reaching the appeal decision. The claimant did not challenge the process that she set out as part of her decision making.

81. Mrs Dobbs decided to review the fairness of the original decision in the light of the procedures followed rather than reinvestigating the entire allegation. She explained that she took this route because no new information came to light during the appeal process that led her to believe that it would make no difference to the outcome if she reinvestigated the issues. The claimant had admitted that he had breached the respondent’s

policies and procedures, and this had resulted in a loss to the respondent. He continued to show no remorse or contrition for the loss caused to the company or the breaches of the policies and procedures.

82. She considered the additional issues that the claimant raised were not relevant to the issues that were before her. The claimant did not raise any issues against other employees that were, in her opinion, similar to the dismissal allegations decided against him. She stated that the claimant could not add any details to his generalised allegations that other employees had breached the respondent's policies and procedures. He was not able to provide a specified allegation with details such as a time and date, in order for her to be able to go away and investigate the alleged comparable situation. Further, her evidence was that any allegations he did make of breaches of policies and procedure, did not also lead to a loss by the company, such as in the claimant's case, where there was a loss of stock to the respondent of £690.00.

83. The one specific timed and dated allegation was in respect of Peter leaving a cash delivery unattended. Mrs Dobbs dismissed the specific allegation because the claimant was the paid employee present and therefore Peter had not breached a policy or procedure because the cash was not left unattended, it was left in the presence of an employee, the claimant.

84. Mrs Dobbs also detailed the pay bandings of employees at the respondent. She gave evidence that there were set bands and rules relating to the pay of employees and the role they were undertaking for the respondent. This was accepted by the Tribunal. Her evidence agreed with that of Mr Spittal and was supported by the appeal minutes and appeal outcome letter.

85. The Tribunal accepted Mrs Dobbs evidence with respect to the appeal process and the outcomes that she details in her witness statement at paragraph 23.

86. Mrs Dobbs went on to consider the appropriateness of the sanction. Again, Mrs Dobbs considered the fact the claimant had admitted the breaches but maintained he had done nothing wrong, blamed others and alleged new unevidenced, unspecified behaviours against others led her to believe that a lesser sanction would not have been appropriate. Her concern was that he would continue to disregard policies and procedures in the future and that whilst this was not going to personally benefit him, it would cause a loss to the respondent.

87. Mrs Dobbs upheld the dismissal sanction for gross misconduct. She set out her reasons In a letter dated 5 April 2022 at page 154 of the bundle. She dismissed the claimant's appeal against his dismissal and his other allegations as detailed in his appeal letter.

88. The claimant gave evidence that he had written evidence regarding the pay of Peter (and other employees) and that it was higher than the pay he was in receipt of. He stated that he obtained the evidence from Rakeeb just before the hearing. Rakeeb was the employee who had telephoned the Confidential HR line to report him on 25 January 2022. The claimant stated Rakeeb was his friend and that he had supplied the highly confidential pay information to assist the claimant's case. The respondent argued that it was highly unlikely that Rakeeb was the claimant's friend and that wherever the claimant had obtained the highly confidential information it was not from Rakeeb. The claimant said he had recently spoken to Rakeeb in relation to his tribunal claim but he did not supply any evidence to support this contention.

89. On balance, the tribunal found that it was unlikely, given the circumstances of Rakeeb's initial report leading to the claimant's dismissal that indeed the claimant and Rakeeb were friends and that Rakeeb had supplied highly confidential payroll information to the claimant. However, the claimant obtained the information, the tribunal as stated above, was not asked by the claimant to view it as part of his case. Instead, the Tribunal received oral evidence from the claimant and the respondent's witnesses in relation to the pay issue.

The law

Unfair Dismissal

90. Section 94 of the Employment Rights Act 1996 confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under section 111.

91. The employee must show that he was dismissed by the respondent under section 95. In this case, the respondent admits that it dismissed the claimant (within section 95(1)(a) of the 1996 Act) on 1 March 2022.

92. The test for unfair dismissal is set out in section 98 of the Employment Rights Act 1996. Under section 98(1), it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal, and that it is either a reason falling within subsection (2), e.g.. conduct, or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

93. The reason for dismissal is 'a set of facts known to the employer, or it may be beliefs held by him, which cause him to dismiss the employee'. (Abernethy v Mott Hay and Anderson [1974] ICR 323, CA.)

94. In this case the respondent states that it dismissed the claimant because it believed he was guilty of misconduct. Misconduct is a potentially fair reason for dismissal under section 98(2).

95. Further, if the respondent shows that it had a potentially fair reason for the dismissal, the Tribunal must consider, without there being any burden of proof on either party, whether the respondent acted fairly or unfairly in dismissing for that reason.

96. Under s98(4) of the Employment Rights Act 1996 '… the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and shall be determined in accordance with equity and the substantial merits of the case.'

97. Tribunals must consider the reasonableness of the dismissal in accordance with s98(4). However, tribunals have been given guidance by the EAT in British Home Stores v Burchell [1978] IRLR 379; [1980] ICR 303, EAT.

98. There are three stages:
    98.1. did the respondents genuinely believe the claimant was guilty of the alleged misconduct?
    98.2. did they hold that belief on reasonable grounds?
    98.3. did they carry out a proper and adequate investigation?

99. Tribunals must bear in mind that whereas the burden of proving the reason for dismissal lies on the respondents, the second and third stages of Burchell are neutral as to burden of proof and the onus is not on the respondents (Boys and Girls Welfare Society v McDonald [1996] IRLR 129, [1997] ICR 693).

100. Finally, tribunals must decide whether it was reasonable for the respondent to dismiss the claimant for that reason.

101. The question is whether dismissal was within the band of reasonable responses open to a reasonable employer. It is not for a tribunal to substitute its own decision. It is immaterial how the Tribunal would have handled the events or what decision it would have made, and the Tribunal must not substitute its view for that of the reasonable employer (Iceland Frozen Foods Limited v Jones 1982 IRLR 439, Sainsbury's Supermarkets Limited v Hitt 2003 IRLR 23, and London Ambulance Service NHS Trust v Small 2009 IRLR 563).

102. The range of reasonable responses test (or, to put it another way, the need to apply the objective standards of the reasonable employer) applies as much to the question of whether an investigation into suspected misconduct was reasonable in all the circumstances as it does to other procedural and substantive aspects of the decision to dismiss a person from his employment for a conduct reason.

103. The objective standards of the reasonable employer must be applied to all aspects of the question whether an employee was fairly and reasonably dismissed. (Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23, CA)

104. In reaching their decision, tribunals must also take into account the ACAS Code on Disciplinary and Grievance Procedures. By virtue of section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992, the Code is admissible in evidence and if any provision of the Code appears to the tribunal to be relevant to any question arising in the proceedings, it shall be taken into account in determining that question. A failure by any person to follow a provision of the Code does not however in itself render him liable to any proceedings.

105. The Code is also relevant to compensation. Under section 207A, if the claim concerns a matter to which the Code applies and there is unreasonable failure by either the employer or the employee to comply with the Code, there can be an increase or reduction in compensation (respectively) according to what is just and equitable of up to 25%.

106. Under s122(2) of the Employment Rights Act 1996, the tribunal shall reduce the basic award where it considers that any conduct of the claimant before dismissal was such that it would be just and equitable to do so. Under s123(6), where the tribunal finds the dismissal was to any extent caused or contributed to by any action of the claimant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable.

107. Where the dismissal is unfair on procedural grounds, the tribunal must also consider whether, by virtue of Polkey v AE Dayton Services [1987] IRLR 503, HL, there should be any reduction in compensation to reflect the chance that the claimant would still have been dismissed had fair procedures been followed.

Direct Race Discrimination

108. Under s13(1) of the Equality Act 2010 read with s9, direct discrimination takes place where a person treats the claimant less favourably because of race than that person treats or would treat others. Under s23(1), when a comparison is made, there must be no material difference between the circumstances relating to each case. 'Race' includes race, colour, nationality or ethnic origin.

109. In many direct discrimination cases, it is appropriate for a tribunal to consider, first, whether the claimant received less favourable treatment than the appropriate comparator and then, secondly, whether the less favourable treatment was because of race. However in some cases, for example where there is only a hypothetical comparator, these questions cannot be answered without first considering the 'reason why' the claimant was treated as s/he was. (Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11; [2003] IRLR 285)

110. Decisions are frequently reached for more than one reason. Provided the protected characteristic or, in a victimisation claim, the protected act, had a significant influence on the outcome, discrimination is made out. (Nagarajan v London Regional Transport [1999] IRLR 572, HL)

111. The case law recognises that very little discrimination today is overt or even deliberate. Witnesses can even be unconsciously prejudiced.

112. Section 136 of the Equality Act 2010 sets out the burden of proof. The burden of proof provisions require careful attention where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or another. (Hewage v Grampian Health Board [2012] IRLR 870, SC.)

113. Under s136, if there are facts from which a tribunal could decide, in the absence of any other explanation, that a person has contravened the provision concerned, the tribunal must hold that the contravention occurred, unless that person can show that he or she did not contravene the provision.

114. Guidelines on the burden of proof were set out by the Court of Appeal in Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258. Once the burden of proof has shifted, it is then for the respondents to prove that they did not commit the act of discrimination. To discharge that burden it is necessary for the respondents to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of the protected characteristic, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive. Since the facts necessary to prove an explanation would normally be in the possession of the respondents, a tribunal would normally expect cogent evidence to discharge that burden of proof.

115. The Court of Appeal in Madarassy, a case brought under the then Sex Discrimination Act 1975, states: ‘The burden of proof does not shift to the employer simply on the claimant establishing a difference in status (eg sex) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal ‘could conclude’ that on the balance of probabilities, the respondent had committed an unlawful act of discrimination.

116. A false explanation for the less favourable treatment added to a difference in treatment and a difference in sex can constitute the ‘something more’ required to shift the burden of proof. (The Solicitors Regulation Authority v Mitchell UKEAT/0497/12.)

Conclusions

117. We have applied these legal principles to the facts as we have found them, to reach our decisions on the issues for determination by us. We have approached the issues in the following order:

Unfair Dismissal

118. Section 94 of the Employment Rights Act 1996 confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under section 111. The respondent admits that it dismissed the claimant.

119. This is a two stage process as to whether the dismissal was fair or unfair. The first stage is for the respondent to show a potentially fair reason for dismissal and secondly if that is done the question then arises whether dismissal is fair or unfair.

120. The first matter we've had to decide is what was the reason or principal reason for dismissal?

121. We were satisfied the respondent has shown that the reason for the dismissal was conduct and that this was based on the set of facts known to the respondent.

122. The conduct was not theft. The conduct was not dishonesty. The claimant should be clear from this decision that the tribunal did not find that the respondent terminated his employment on the grounds of theft nor dishonesty.

123. The respondent terminated his employment on the grounds of gross misconduct because he did not follow company processes and procedures and misappropriation of company stock. The misappropriation of company stock related to the claimant's failure to follow the processes and procedures and this resulted in loss of stock to the company. The claimant did not make any personal gain from the loss of stock to the company. The loss of stock was approximately £690.00.

124. This is a fair reason for a dismissal under section 98(2). The respondent has satisfied the requirements of section 98(2).

125. Turning to section 98(4), this deals with fairness generally and provides that the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and shall be determined in accordance with equity and the substantial merits of the case.

126. The respondent, through its management, Mr Spittal, Mr Yalamanchili and Mrs Dobbs held a genuine belief that the claimant was guilty of

misconduct. Their evidence was clear about why they recommended a disciplinary meeting take place, dismissed the claimant, refused the appeal and the dismissal and appeal letters were consistent and unequivocal. The claimant admitted that he had failed to follow the processes and procedures of the company. He showed no remorse for the failures nor indicated that he would change his behavior in the future. He stated that he knew the processes and policies and had received the training in relation to them.

127. It was reasonable that the respondent held that belief based on the evidence available to them. The claimant admitted the behaviour. There was CCTV to support the admittances.

128. Did the respondent carry out a proper and adequate investigation? Mr Spittal did carry out a reasonable investigation into the allegations.

129. Mr Spittal did not interview or take a statement from Raheem who was potentially a witness in the theft allegations against the claimant. The tribunal did not find that this omission would have made any difference to the decision of the respondent. The claimant wanted Raheem to be a witness to confirm that he did not accept money for the ice-cream. The respondent did not terminate the claimant's employment on that basis. The claimant admitted he did not adhere to the respondent's processes and policies and his employment was terminated on that basis. It was therefore proper and adequate for Mr Spittal not to interview Raheem.

130. The evidence from the claimant and Mr Spittal was that the claimant never attempted to contact his Line Manager as part of his disposal of the ice-cream. The difference in disposal of the ice-cream over the potato-based product was approximately £690.00. The respondent did not state this was theft or dishonesty. They were consistent from the commencement of the investigation through to the appeal that the allegations were that the claimant breached the respondents' policies and procedures and that this was evidence of poor decision making which led to a significant loss or in their words misappropriation of company stock. The latter being the disposal of stock causing loss. Mr Spittal gave clear evidence of the poor decision making involved.

131. Mr Spittal could have spoken with other witnesses about previous practises at the branch because these were raised by the claimant. He took a statement from the colleague who had reported the ice cream incident but subsequently placed little weight on the statement because in his words it did not add anything that was not already known and it made no difference to the decision.

132. The claimant was asked for, and gave, his explanation for his actions during the disciplinary and appeal hearings. I find that the opportunity to give the explanation cured any potential unfairness in failing to interview Raheem during the investigation or any other failings to widen the investigation into other previous practices at the branch. .

133. Mr Spittal undertook a careful and reasoned investigation into the allegations. He did not rush to reach a conclusion to the investigation. His notes and invitation letters to the claimant support the evidence he provided to the tribunal both in his written statement and in his oral evidence. The steps he took to investigate the issues were reasonable in all the circumstances of the case.

134. The claimant alleged that the change of decision maker on the disciplinary invitation letter was manipulated by Mr Spitttal. The tribunal found that this was not the case and accepted the evidence of the respondent's management that this was because the proposed decision maker knew of the claimant and declined to be he decision maker. The tribunal found that Mr Yalamanchili knew nothing of this and was able to reach an impartial decision, so the change of decision maker was irrelevant.

135. The claimant states that Mr Yalamanchili should have watched the CCTV himself. As the claimant admitted the behaviour alleged, it was adequate that Mr Yalamanchili relied on the investigation outcome of Mr Spittal and the claimant's admittances. It would make no difference to the decision for Mr Yalamanchili to review the CCTV available.

136. Mr Yalamanchili took an appropriate period of time to reach his decision, he adjourned the hearing to consider the issues and then recommenced the hearing after he had reached his decision. The Tribunal concluded that this was not rushed, predetermined nor decided by anybody but Mr Yalamanchili. Mr Yalamanchili stated that he took into account the claimant's long service. He considered the appropriate sanction and penalty to apply but took into account the fact that the claimant knew the correct policies and procedures and blamed others for his breaches. It was relevant to his decision that the claimant did not say sorry or seek to apologise for the loss. He gave evidence that there was nothing in the claimant's behaviour that would make him think that the claimant would not do it again. He further considered the mitigating factors put forward by the claimant. The contemporaneous notes and the dismissal letter support Mr Yalamanchili's oral evidence and written witness statement in this regard.

137. The decision to dismiss may have been a harsh decision on the claimant but it still fell within the band of reasonable responses that a reasonable employer might have adopted.

138. The appeal decision maker, Mrs Dobbs, explained why she did not reinvestigate matters for herself, and the Tribunal accepted her position in this regard. It is possible that another appeal decisionmaker might have reinvestigated some issues raised by the claimant. However, it is immaterial how the tribunal would have handled the events or what decision it would have made, and the tribunal must not substitute its view for that of the reasonable employer. It is clear from our findings of fact that the tribunal found the contemporaneous notes of the appeal and the appeal letter that was written by Mrs Dobbs was consistent with the oral

evidence provided by Mrs Dobbs and with her written statement. The appeal was a review of the fairness of the original decision in the light of the procedure that was followed. No new information came to light in the appeal and therefore the Tribunal accepted that it would make no difference if she had reinvestigated any matters.

139. The tribunal agreed with Mrs Dobbs that the allegations raised against other employees were almost all generic allegations, that were not capable of being investigated due to the lack of detail involved. The issues raised by the claimant against others also were not similar to those raised against the claimant nor involved loss arising out of the issues as compared with the disciplinary allegation against the claimant.

140. The evidence from Mr Yalamanchili and Mrs Dobbs was that the claimant was not prepared to adapt his behaviour in the future. Therefore, when considering the sanction to be applied and his mitigation against the disciplinary decision, they did not consider it was reasonable to reduce the sanction to lower than gross misconduct.

141. Taking into account the size and resources of the employer, we decided that we were satisfied with the procedure followed by the respondent.

142. The respondent acted reasonably and its responses fell within the band of reasonable responses that a reasonable employer might have adopted.

143. We find, therefore, that the claimant was not unfairly dismissed by the respondent within section 98 of the Employment Rights Act 1996 and the claim is dismissed.

144. The ACAS Code of Practice on Disciplinary and Grievance Issues was complied with.

<u>Race Discrimination</u>

145. The claimant’s comparator is Peter (or Peta) Malcsinialolv. This was detailed in the List of Issues.

146. The claimant did not raise any prima facie evidence that Peter (or Peta) Malcsinialolv made exactly the same type of mistakes as the Claimant did, but was not disciplined or dismissed for similar mistakes. The one mistake that he could specifically refer to was leaving a cash delivery unattended. The tribunal accepted the evidence of the respondent that the cash was not left unattended. Further, there was no loss arising out of the allegation in any event. There were no other specific evidential issues raised by the claimant in relation to Peter.

147. The Tribunal found that it preferred the evidence of the respondent in that Peter did not make the same type of mistakes as the claimant did. Therefore, that fact he was not disciplined or dismissed is not relevant and

the claimant's dismissal was not less favourable treatment on the grounds of being of national ethnicity of Pakistan.

148. None of the events which gave rise to the termination of the claimant's employment were tainted in any way by unlawful discrimination.

149. Further, the Tribunal preferred the evidence of the respondent with respect to the pay of Peter. The claimant had refused to accept the offer to act as a Secondee Manager at 90% of the pay banded for a Store Manager. He wanted to be a Step-Up Manager where he could also earn overtime at a similar rate of pay but without the Managerial responsibility.

150. Peter had accepted the role of a Secondee Manager and was therefore entitled to the 90% rate of a Store Manager's salary. This is the same rate offered to the claimant. Peter accepted the role and the claimant did not. On this basis, the claimant was not treated less favourably on the grounds of being of national ethnicity of Pakistan.

151. Therefore, the claimant's claim of direct race discrimination fails and the claim is dismissed.

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District Tribunal Judge Shields

Date: 8 September 2023

Sent to the parties on:
11 September 2023

For the Tribunals Office

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