



EMPLOYMENT TRIBUNALS

Claimant: Ms N Harrison

Respondent: Tesco Stores Limited

Heard at: Cardiff (CVP) **On:** 26 June and 12 October 2023

Before:

Representation

Claimant: In person

Respondent: Mr H Dhorajiwala (Counsel)

RESERVED JUDGMENT

The claim of unfair dismissal is not well founded and the claim is dismissed.

WRITTEN REASONS

Background

1. The claim before me is one of unfair dismissal arising from the dismissal of the Claimant on grounds of gross misconduct on 30 December 2022.
2. The tribunal had been provided with written statements which the parties had provided. There was a tribunal bundle of approximately 200 pages denoted by [] within these written reasons. The tribunal informed the parties that unless we were taken to a document in the bundle we would not read it.
3. This was a wholly remote hearing by video (CVP).
4. There had been significant connection issues at the June listing of this matter and the hearing did not commence until late morning, the Claimant and one of the Respondent's witnesses being unable to connect with their laptops. After assistance from the clerk, the Claimant was able to join by video through a laptop.
5. The Respondent sought permission to play a number of CCTV footage video and permission was granted, the Claimant not objecting to those videos being played. These videos were watched at the outset of the hearing and prior to witness evidence.

6. After the Claimant had been sworn in and had commenced giving evidence, it was then discovered that the clean copy of the bundle that the Claimant had before her was unpaginated as the Respondent had not provided the Claimant with a paginated bundle. At that point, I considered that it was in the interests of justice to postpone the hearing to another date to enable the Respondent to provide the Claimant with a paginated bundle.
7. The hearing was therefore re-listed as a part hearing before me on 12 October 2023 with directions being given to the Respondent to send to the Claimant two hard copies of a paginated bundle; one for her to use for preparing for the hearing and the second to be kept clean for use whilst the Claimant was giving evidence..
8. That hearing proceeded with no connection problems until the afternoon when again one of the Respondent witnesses had difficulty with their connection, which was quickly resolved. The Respondent with the consent of the Claimant was permitted to play a further set of CCTV videos and evidence was heard from the claimant and from the following witnesses on behalf of the respondents:
 - a. Dean Penny, Store Manager Llandrindod Wells and investigating manager; and
 - b. Richard Thomas, Store Manager Bridgend and disciplining manager.
9. Each witness was asked questions from the other party and the tribunal.

Claims

10. The Claimant entered into early conciliation on 2 January 2023 that ended on 6 January 2023 and [1] She filed her claim with the Employment Tribunal on 6 January 2023 [2] bringing claims of unfair dismissal and confirmed that she is seeking compensation only. At the outset of the June hearing, the Claimant had confirmed that she challenged the fairness to the dismissal on the following basis: that
 - a. She was not dealt with as a normal customer, that she was purposefully watched and not permitted to rectify her error;
 - b. her actions were not intentional;
 - c. The CCTVs shown were not the same and had changed from investigation to disciplinary and items were altered;
 - d. the Respondent had made up minds before the disciplinary and had based its decision on the Claimant's lack of emotion;
11. The issues flowing from this claim were set out in a list of issues agreed at the first hearing and set out in the record of hearing that was sent following the hearing listed on 26 June 2023. The Claimant was encouraged to have a copy of this before during her questioning of the Respondent's witnesses.

Facts

12. The findings of fact in this judgment are made on the basis of the evidence that was before this Tribunal and on the basis of probabilities

Background

13. The Respondent is a well-known nationwide retail company operating stores and distribution centres throughout the UK. It employs approximately 300,000 employees at over 3,400 different sites in the UK.
14. The Claimant started her employment on 12 July 2010 at the Respondent's Llandrindod Wells' store as a Customer Assistant. At the time of summary dismissal for gross misconduct on 30 December 2022, she was employed as a night shelf stacker and worked 16 hours per week on terms and conditions of employment signed by the Claimant on 4 September 2019 [36].
15. Those terms and conditions included references to a disciplinary policy which expressly stated that it did not form part of the contract but did set out standards of expected conduct and the process that would be followed if that standard was not met.
16. The policy provided for an investigation stage and possible outcomes of a disciplinary hearing including gross misconduct, confirming that if the offence was a serious gross misconduct issue, the employee may be dismissed. '*Theft of Tesco's, colleagues, or customer's property*' was indicated as a likely gross misconduct offence [37].

Incident.

17. On around 26 November 2022, an employee of the Respondent reported to Dean Penny, store manager for the Llandrindod Wells Store, that they had suspected the Claimant of not scanning or paying for items when shopping using the 'Scan as you Shop' device when she had visited the store as a customer on 26 November 2022.
18. Scan As You Shop allows customers to scan selected purchases as they shopped using a device provided by the store, bagging the items as they shop. To operate the device, the customer scans their Tesco Clubcard at a Scan As You Shop handset station that releases a Scan As You Shop device handset which the customer uses, scanning items as they move around the store shopping, scanning barcodes on the products. Once the shopping is completed, the customer scans a further barcode at the designated Scan As You Shop checkout which produces a list of the scanned items, allowing the customer to review their selection and then pay for their shopping at self service checkouts.
19. The Claimant believed that she had not been dealt with as a normal customer, that she had been purposefully watched and not permitted to rectify her error. Her evidence was that she had known customers who had 'brazenly stolen' and no action had been taken against them and that she had been allowed to walk out of the store with the employee knowing she had missed an item when staff only had to stop and ask her knowing that she would not 'kick up a fuss'. She didn't accept the Respondent's position that it was not store policy to stop customers.
20. On this point, I accepted the Respondent's evidence which was that it was not store policy to stop and question customers, particularly when using Scan as You Shop, if an employee suspects another person, including another work colleague, has deliberately not paid for goods and that any policy of

apprehending potential shop-lifters had ceased some years before. I therefore did not find that the Claimant had been treated in any way differently to any other customer in not being stopped and questioned about her purchases before she left the store.

Investigation

21. As a result of the concern regarding the Claimant's conduct, Dean Penny requested that an investigation be undertaken. An investigation team reviewed CCTV footage of the Claimant's visited the store on that date and further dates in November, comparing to what they saw on that footage with shopping receipts for the Claimant for such dates.
22. They prepared an Investigation Report [48] and within that report indicated that they had identified that the Claimant did not appear to have scanned all of her shopping on various dates in November; on 9, 14, 24, 26, and 27 November 2022, not just 26 November.
23. Mr Penny read that Investigation Report and also reviewed the relevant CCTV footage. He decided to suspend the Claimant. He was concerned with what he saw on the CCTV footage which indicated to him that the Claimant had deliberately not been scanning and then paying for some of the items.
24. On 5 December 2022, the Claimant was suspended from work on full pay with immediate effect. I accepted the notes of the suspension meeting as reflecting what the Claimant had been told at that meeting, which was that there had been an allegation of concealing items on 5 occasions over the past four weeks. She was told that the Respondent would keep her suspension confidential and that she was not permitted to enter the store during her suspension and not to speak to colleagues or report on social media [71]
25. A letter confirming that suspension was prepared that day which further confirmed to the Claimant that she had been suspended pending outcome of an investigation into allegations of intentionally not paying for goods through Scan as you Shop on 9, 14, 24, 26, 27 and 28 November 2022. She was invited to attend an investigation meeting on 12 December 2022 [66].
26. Despite the Claimant not having received that letter in advance of the meeting possibly as a result of postal strikes, she confirmed by telephone call that she would attend.
27. Dean Penny conducted that meeting and was accompanied by Rachel Burden. Notes of that meeting were contained in the Bundle [90], notes which were subsequently signed by the Claimant and I accepted as an accurate summary of the matters discussed. Prior to meeting he reviewed the Investigation Report and the CCTV footage that had been provided to him and concluded that there were further items that appeared not to have been scanned or paid for by the Claimant (on 24 and 27 November 2022).
28. At that meeting the Claimant confirmed that she was happy to proceed without accompaniment and understood why she had been asked to attend.

29. In general terms at the start of the meeting the Claimant assured Mr Penny that she always scanned everything and there were no times when she hadn't scanned items when using Scan As You Shop.
30. Save for 28 November 2022, which had been included in error in the invite letter, the specific occasions in question by date order, were then addressed individually and at various points during the meeting, the Claimant was shown by the CCTV relied on by the Respondent, either of the Claimant shopping in a particular aisle, or at the till finalising her scanning and paying for her purchases. She was also shown a copy of her till receipt for each occasion. The Claimant was asked for her comments on each.
31. In relation to the items of 27 November 2022, the Investigation Report had indicated that it appeared that the Claimant had not scanned two items, a pack of Oreo and a pack of Flake ice-creams. Dean Penny also questioned the Claimant regarding further items which appeared to him to be missing: a 4x500ml pack of monster drink and one ready meal. Whilst the Claimant initially stated that she remembered picking up and scanning a ready meal, packs of Oreo and Flake ice-creams and Monster Energy drink, after watching the CCTV and seeing a copy of her receipt, the Claimant accepted that the CCTV showed her:
 - a. scanning only one box, not two boxes of Monster drinks that were in her trolley, and that she had paid for only one;
 - b. placing four boxes of ice-cream in her trolley, and that she had paid for only two of boxes of ice-cream; and
 - c. having 3 ready meals in her trolley, and that the receipt indicated payment for two only.
32. She was unable to provide a reason for all the unpaid items that day, indicating that she always scanned everything.
33. In relation to the purchases on 26 November 2022, the Claimant accepted that the CCTV showed the Claimant's partner, placing a 24 pack of Pepsi and a box of Thorntons chocolates in the trolley, that had not been scanned and that the receipt, indicated to her that the items not been paid for. She stated that she had forgotten to scan them.
34. In relation to the purchases on 24 November 2022, the Claimant again viewed the CCTV footage which Dean Penny said indicated to him showed the Claimant not scanning a variety of products including Benylin cough mixture, a box of paracetamol tablets, two 2L bottles of Pepsi, two packets of meat and one pack of Monster drink. The Claimant again accepted that these items were not on her receipt and could not explain why the items had not been scanned.
35. In relation to purchases on 14 November 2022, after viewing the CCTV and receipt, the Claimant disagreed that a pack of Monster drink did not show on the receipt. Dean Penny agreed that this purchase would be checked and later in the meeting confirmed that this would not be included and would be disregarded.
36. In relation to the purchases on 9 November 2022, the CCTV was again shown to the Claimant had she was told that this showed a pack of Monster drink in

the trolley that was not listed on receipt. The Claimant did not deny that this appeared to be the position.

37. After an adjournment the meeting reconvened and the Claimant was shown additional CCTV footage of 24 November 2022 of her selecting paracetamol and her receipt indicating one packed of paracetamol only being paid for.
38. She was again asked for an explanation and was unable to provide one other than she would not jeopardise her job, that she must not have been paying attention and that she did not check receipts and had not noticed that the transactions were a lot cheaper than they should have been. She was questioned about her use of the scanner.
39. The meeting was again adjourned and on reconvening the Claimant was informed that she remained suspended and that she would be invited to a disciplinary meeting.

Disciplinary Meeting 30 December 2022

40. On 24 December 2022, the Claimant was sent a letter by email inviting her to a disciplinary hearing on 30 December 2022 [102]. The letter confirmed:
 - a. the allegation was that the Claimant had intentionally not paid for goods when using the Scan As You Shop device on 9, 14, 24, 26 and 27 November 2022;
 - b. that she had the right to be accompanied by a colleague or trade union representative; and
 - c. where the Claimant could locate the disciplinary policy.
41. That letter was also incorrect insofar as any allegation relating to 14 November 2022 had been excluded at the investigation stage as the receipt had indicated that the Claimant had in fact paid for all goods that day.
42. The disciplinary meeting was conducted by Richard Thomas, manager of the Bridgend Tesco store, who was accompanied by Rachel Burden, Team Manager, who took notes. Notes of the disciplinary meeting were provided in the Bundle [111] and signed by the Claimant. I accepted those notes as an accurate summary of the matters discussed.
43. In advance of that meeting Richard Thomas had been provided with the Investigation Report, minutes of the investigation meeting with the Claimant and the investigation outcome letter. In advance of the meeting, he also viewed the CCTV footage. Again the Claimant attended unaccompanied but confirmed that she was aware of the seriousness of the allegation and that dismissal could be a possible outcome.
44. At the disciplinary meeting the Claimant was asked to explain how she knew how to use 'Scan as You Shop' and questioned whether there had been a faulty device or whether she had been scanning too quickly. Richard Thomas formed a view that whilst the Claimant was providing various reasons for why the products had not been scanned, she had not informed a member of staff at any time that she believed the devices were faulty or that products had not been scanning.

45. After some initial discussion regarding 24 November 2022, the Claimant was asked if she had offered to pay for any items she had taken unintentionally. Richard Thomas was concerned that the Claimant appeared to show no remorse particularly as she had accepted that she had left without paying for items.
46. The hearing was adjourned for the CCTV footage to be watched again. Richard Thomas formed a view that the Claimant was reluctant to watch the footage again, telling him she was happy to wait in the meeting room until he had rewatched the footage on his own, as she would have to provide an explanation for each occasion.
47. After adjourning, each CCTV footage from the various dates was shown to the Claimant.
48. Whilst the Claimant now complains that the CCTV footage had changed from the investigation, I did not consider this to be likely. She did not complain at the time and I found that the footage that was used in the investigation and shown to the Claimant by Dean Penny, was more likely than not to have been the same footage that was shown to the Claimant by Richard Thomas at the later disciplinary hearing.
49. In relation to 9 November 2022, in relation to the Monster drink, the Claimant stated that she must not have been paying attention.
50. In relation to 24 November 2022, the Claimant accepted that she didn't scan the cough medicine but suggested that she sometimes placed items in her trolley and scanned them later. She had no explanation for why she did not scan two boxes of paracetamol and admitted to not paying for two meat products.
51. In relation to 26 November 2022, the Claimant explained that she had her back to her trolley when her partner had placed the Thornton's chocolates in the trolley. Richard Thomas did not accept this as an explanation finding that the Thorntons were picked at the front of the store when few items had been in the trolley and would have been clearly seen by her. He concluded that the Claimant had no clear explanation and that her explanation had changed.
52. In relation to 27 November 2022, the Claimant had no explanation for not scanning the branded Flake and Oreo items. She maintained that she scanned everything. Having reviewed the CCTV, Richard Thomas did not question the Claimant in relation to the non-payment of the ready meal having concluded that the CCTV footage did not clearly show the Claimant's actions in relation to that product.
53. The Claimant was asked if she had offered to pay for the items, was remorseful and regretted her actions. She stated that she had not offered to pay, but that she would and that she was ashamed, that she worked there, she should have known better.
54. The meeting was adjourned for Richard Thomas to deliberate and on reconvening he confirmed to the Claimant that he could not see clearly whether the Claimant had taken one or two packets of paracetamol (on 24 November 2022) and that he would not be including that allegation in his

decision. He confirmed that he did not accept the Claimant's explanation of not seeing the Thornton's chocolates in the trolley.

55. He concluded that whilst he could accept one occasion of not paying for items as human error, that there were too many occasions of not paying to accept that on each occasion, five separate occasions in total. He was satisfied that the weight of evidence showed a consistent pattern of behaviour from the Claimant and that her intentionally not paying was likely to be the reason. He did not accept that the Claimant had provided a valid explanation or had shown remorse or recognition of the impact of her behaviour.
56. I accepted Richard Thomas' evidence that when reaching his decision he did take into account the Claimant's length of service and clean disciplinary record but as he had lost trust in her as an employee, and that as the conduct of intentionally not paying for goods amounted to gross misconduct, dismissal was the appropriate sanction.
57. The decision was confirmed in writing in a letter to the Claimant dated 1 January 2023 and the Claimant did not appeal the outcome. The Claimant did not appeal as she believed that the only outcome would be to have her old job back, which she did not want.

Issues and Law

58. 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 employee must show that they were dismissed by the Respondent under section 95.
59. Section 98 of the 1996 Act deals with the fairness of dismissals. There are two stages within section 98. First, the employer must show that it had a potentially fair reason for the dismissal within section 98(2). Second, 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.
60. In this case the Respondent asserts that it dismissed the Claimant because it believed they were guilty of misconduct. Misconduct is a potentially fair reason for dismissal under section 98(2). In this regard, the Respondent bears the burden of proving on balance of probabilities, that the Claimant was dismissed for a reason that related to one the potentially fair reasons set out in section 98(2) Employment Rights Act 1996 (ERA 1996).
61. Section 98(4) then 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.
62. In misconduct dismissals, there is well-established guidance for Tribunals on fairness within section 98(4) in the decisions in **Burchell 1978 IRLR 379 and**

Post Office v Foley 2000 IRLR 827. When considering the fairness of the disciplinary process as a whole, the Tribunal also consider the employer's reason for dismissal as the two impact on each other (**Taylor v OCS Group Ltd 2006 ICR 1602 CA**).

63. The Tribunal must decide whether the employer had a genuine belief in the employee's guilt. Then the Tribunal must decide whether the employer held such genuine belief on reasonable grounds and after carrying out a reasonable investigation. In all aspects of the case, including the investigation, the grounds for belief, the penalty imposed, and the procedure followed, in deciding whether the employer acted reasonably or unreasonably within section 98(4), the Tribunal must decide whether the employer acted within the band or range of reasonable responses open to an employer in the circumstances. 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**).
64. If the Tribunal concluded that the dismissal was procedurally unfair, it should consider what adjustment, if any, should be made to any compensatory award to reflect the possibility that the Claimant would still have been dismissed had a fair and reasonable procedure been followed, in accordance with the principles in **Polkey v AE Dayton Services Ltd [1987] UKHL 8; Software 2000 Ltd v Andrews [2007] ICR 825; W Devis & Sons Ltd v Atkins [1977] 3 All ER 40; and Crédit Agricole Corporate and Investment Bank v Wardle [2011] IRLR**.
65. It was also agreed with the parties that if the Claimant had been unfairly dismissed, the Tribunal would address the issue of contributory fault, which inevitably arises on the facts of this case.
66. The Tribunal may reduce the basic or compensatory awards for culpable conduct in the slightly different circumstances set out in sections 122(2) and 123(6) of the Employment Rights Act 1996. Section 122(2) provides as follows:
- Where the Tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce that amount accordingly.*
67. Section 123(6) then provides that: Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

Conclusions

Reason for dismissal

68. In applying my findings to the issues identified at the outset, I needed to initially consider the reason for dismissal and whether it was potentially a fair reason for dismissal.
69. The Respondent has asserted that the reason for the dismissal was conduct and that the Claimant was dismissed as the Respondent believed that the Claimant had intentionally not been scanning items in her trolley through Scan As You Shop and had taken them without paying for them.
70. I was satisfied that the reason for dismissing the Claimant was her conduct in intentionally failing to pay for items, which is a potentially fair reason for dismissal. There was nothing in the evidence to suggest or indicate any other reason. The evidence from Richard Thomas, which I accepted, was clear that it was the Claimant's conduct when using Scan as You Shop was the reason for dismissal.
71. Conduct is a potentially fair reason for dismissal.

Overall Fairness

72. Moving on to assessment of overall fairness, in considering the section 98(4) test in the context of **BHS v Burchell** requirements outlined earlier, I deal with these in reverse order, dealing first with the investigation before moving on to the grounds and the belief

Investigation

73. With regard to the investigation, the range of reasonable responses test applies to the scope of the investigation undertaken by the employer, as it does to the dismissal decision as established in **Sainsbury plc v Hitt**.
74. I was ultimately satisfied that the investigation, in terms of the overall processes adopted by the Respondent, fell within the range of reasonable responses and was a sufficient independent investigation for the following reasons.
75. I did not accept the Respondent's evidence that she had she been a 'normal customer' she would not have been purposefully watched and would have been permitted to rectify her error. I had accepted the Respondent's evidence that there was no such policy of permitting customers to rectify any non payment after using Scan as You Shop, rather that the policy was not to approach customers. I did not conclude therefore that there was any unfairness in investigating the Claimant's conduct rather than intervening on 26 November 2022 as she had suggested.
76. In terms of the investigation that was undertaken, the Claimant was provided with the opportunity to respond to the specific allegations on each of the days in question and had the opportunity, at both the investigation meeting stage and disciplinary hearing, to review the CCTV evidence against copies of her receipts for purchases each day in question.
77. I did not consider that Dean Penny identifying further allegations to those contained in the Investigation Report led to unfairness to the Claimant as

during the investigation meeting she was provided with the opportunity to challenge all the evidence relied on. The Claimant accepted that the evidence indicated that she had not paid for items.

78. On the occasion where she did disagree with the evidence, in particular the pack of Monster drink on 14 November 2022, she successfully challenged that evidence and Dean Penny agreed to withdraw that allegation. This demonstrated fairness in the process.
79. Whilst that 14 November 2022 allegation did continue to appear on the invite to the disciplinary letter, Richard Thomas did not in fact continue to pursue that allegation against the Claimant and I concluded that this error did not in lead to unfairness to the Claimant.
80. I concluded that at the disciplinary hearing on 30 December 2022, the Claimant had a further opportunity to respond to the allegations and evidence relied on by the Respondent against her. I further concluded that Mr Thomas also withdrawing the allegation relating to the taking of a box of paracetamol, demonstrated reasonableness in the process and evidenced a willingness to be fair to the Claimant, not unfairness in the process.
81. Again, the Claimant had the opportunity to review the CCTV, CCTV which I had found was consistent and had not changed during the time of the investigation to the disciplinary. Use of the CCTV did not lead to any unfairness in the dismissal and was a reasonable use of the CCTV footage in the investigation at both the investigation and disciplinary hearing stage.
82. The Claimant was afforded a right of appeal and, for reasons of her own, chose not to take them.
83. In conclusion, I did consider that the Respondent had carried out a fair and reasonable investigation which would reach the standard required of a reasonable employer.

Reasonable grounds

84. Turning to the issue of whether the Respondent's belief was held on reasonable grounds, I find that it was. The dismissing officer had CCTV evidence of the Claimant taking items without scanning them through the Scan As You Go device, and receipts showing that the Claimant had not paid for some items as part of each shop.
85. I accepted the dismissing officer's evidence that the Claimant did not dispute that the evidence indicated that she had taken items without scanning them and that she did not provide a credible explanation for the amount and regularity of missed items. In particular, I did not consider that Mr Thomas' conclusion that the Claimant must have seen the box of Thorntons, to be an unreasonable one.
86. I also concluded that it was reasonable for him to have been satisfied that the weight of evidence showed a consistent pattern of behaviour from the Claimant and that her intentionally not paying was likely to be the reason. He did not accept that the Claimant had provided a valid explanation or had shown remorse or recognition of the impact of her behaviour. These were not

unreasonable conclusions and formed reasonable grounds for his belief in the guilt of the Claimant of intentionally taking the goods without payment as opposed to mistakenly removing goods.

87. In these circumstances, in the absence of a reasonable explanation from the Claimant for the amount and regularity of items that the Claimant had not scanned and paid for, I am satisfied that reasonable grounds had been made out for the belief in the gross misconduct of intentionally not scanning items

Genuine Belief

88. Finally, on the issue of genuineness of the Respondent's belief, did the Respondent reasonably believe that the Claimant committed the misconduct, i.e. that the Claimant intentionally removed items without scanning them? I find that they did. I was not persuaded that the Respondent had some pre-determined idea of dismissing the Claimant but rather that they had demonstrated through the investigation that was undertaken that Richard Thomas ultimately had a genuine belief of the Claimant intentionally not paying for goods through Scan as You Shop.
- a. I was therefore satisfied in overall terms that the **BHS v Burchell** test was made out and that there were grounds following a reasonable investigation to lead to a genuine belief that the Claimant had been guilty of the gross misconduct alleged.

Procedure Generally

89. As regards procedure generally, I find that the procedure followed was reasonable. The Claimant was notified in a letter in advance of the allegations against her; she was advised she could bring a companion; a hearing was held at which she was able to put his case; she was informed of the outcome and her right of appeal.

Sanction

90. Finally, the question is whether dismissal was a fair sanction. Could a reasonable employer have decided to dismiss for intentionally removing goods without paying for them? I found that that they could. Although the Claimant had a long record without any previous warnings, this was a very serious offence. Theft was noted in the disciplinary procedure as gross misconduct. As a retail operation, being able to rely on and trust store employees is a very important part of the Respondent's operation. Whilst this was conduct undertaken when the Claimant was a customer, she was a customer at the store which was her workplace and where that conduct impacted on her ability to carry out her role as an employee.
91. Turning to the issue of sanction and the need to consider the range of reasonable responses test as set out in **Iceland Frozen Foods v Jones**, whilst I accept that the Claimant may very well have been hardworking with no complaints about her conduct, previously bearing in mind the conduct related to intentionally removing items without paying for them, it could not be said that dismissal was outside the range of reasonable responses. In overall terms therefore my conclusion is that the dismissal was not unfair and the Claimant's claim for unfair dismissal should be dismissed.

Case No: 1600042/2023

Employment Judge R Brace

Date - 16 October 2023

RESERVED JUDGMENT & REASONS
SENT TO THE PARTIES ON 17 October

FOR EMPLOYMENT TRIBUNALS
Mr N Roche