



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr W Vasey

**Respondent:** Halfords Limited

**Heard at:** Newcastle Employment Tribunal via Cloud Video Platform (“CVP”)

**On:** 29 November 2023

**Before:** Employment Judge L Robertson

**Representation**

**Claimant:** In person  
The claimant’s partner, Helen Evans, was present as an observer for part of the hearing

**Respondent:** Mr A MacMillan, counsel  
Mr R Ford of the respondent (Mr MacMillan’s instructing solicitor) also in attendance

## RESERVED JUDGMENT

The claimant’s claim of unfair dismissal fails and is dismissed. The claimant was not unfairly dismissed.

## REASONS

### The claimant’s claim

1. By a claim form dated 13 July 2023, the claimant, Mr Vasey, brought a claim for unfair dismissal, which is a claim for ordinary unfair dismissal under Part X of the Employment Rights Act 1996 (“the ERA”).

### The Hearing

2. The claimant represented himself at the hearing. The respondent was represented by Mr MacMillan of counsel.
3. The claimant gave evidence on his own behalf.
4. The respondent called two witnesses:

- 4.1. Anthony Gibson, Store Manager of the respondent's Kingston Park branch;  
and
- 4.2. Ian Hunter, Store Manager of the respondent at the time of the claimant's employment, who remains in the respondent's employment as a Sales Service Advisor.
5. The parties had prepared an agreed bundle of documents consisting of 102 pages. After some discussion, it was established that all parties and witnesses had a copy of the bundle.
6. On the morning of the hearing, the respondent submitted a draft list of issues and a draft cast list and chronology. It appeared that the claimant had been sent these documents the previous day but he explained that he had been working and had not had the opportunity to review them. The case was stood down to allow time to review those documents; following which, the claimant confirmed that he was in agreement with them.
7. Based on our preliminary discussions at the start of the hearing, it was common ground between the parties that:
  - 7.1. The claimant had been an employee of the respondent and was dismissed by the respondent;
  - 7.2. The claimant had sufficient continuous service to bring a claim of unfair dismissal; and
  - 7.3. The claim had been brought in time.
8. The respondent relied on conduct as a potentially fair reason for dismissal. The claimant did not accept that was the genuine reason for dismissal. The claimant's position, in summary, was that his dismissal was unfair because the respondent had concluded that he had taken the parts without paying for them but had not searched the bin into which he had put them. The respondent's position was that the claimant's dismissal was fair because, in summary, the respondent had had reasonable grounds for believing that the claimant had stolen the items which were the respondent's property – the main evidence relied upon being CCTV and a significant inconsistency in the claimant's explanations as to what he had done with items he had been seen carrying on the CCTV.
9. The claimant had ticked the box on the ET1 indicating that he was seeking a recommendation for discrimination, and had referred to compensation for discrimination in his schedule of loss. I explained that a discrimination claim had not been brought in the ET1 and therefore was not part of his claim. The claimant confirmed that he was only pursuing a claim of unfair dismissal.
10. At the start of the hearing, we discussed that I would hear both issues of liability and remedy. However, in the event I only heard issues of liability. Due to time constraints (including the impact of difficulties with technology and accessing the bundle of documents during the course of the hearing), there was insufficient time to hear issues of remedy, the parties' submissions and for

deliberations. I discussed this with the parties and it was agreed that the parties would send any written submissions they wished to make to the Tribunal and the other side by Monday 4 December 2023 at 10am and judgment would be reserved. I explained that, if the claimant's claim were to succeed, a separate remedy hearing would be listed.

11. The agreed issues (to which I have made a small amendment to 11.2 to better reflect the wording of the legislation) as to liability to be determined are as follows:

11.1. What was the reason/principal reason for the Claimant's dismissal?

11.2. In particular, has the Respondent shown/proved the reason or principal reason for the dismissal and that the reason relates to the conduct of the claimant within s98 ERA?

11.3. If the Claimant were dismissed for conduct, was the Claimant's dismissal fair within the meaning of s98(4) ERA? In particular,

11.3.1. did the Respondent:

11.3.1.1. believe the Claimant guilty of misconduct;

11.3.1.2. have in mind reasonable grounds to sustain that belief;

11.3.1.3. at the stage at which that belief was formed on those grounds, had the Respondent carried out as much investigation into the matter as was reasonable in the circumstances?

*(British Home Stores v Burchell 1980 ICR 303, EAT)*

11.3.2. did the Respondent act reasonably in treating that reason as sufficient for dismissing the Claimant? Did the dismissal lie within the range of reasonable responses?

11.3.3. Was the dismissal conducted following a fair procedure?

### **Findings of fact**

12. The claimant was employed by the respondent between 1 July 2010 and 2 May 2023. Prior to his dismissal, he was employed as a Service Sales Adviser in the Team Valley, Gateshead store.

13. The claimant's role included work as a bike technician – and when doing that work, he worked in the bike hut desk area. There was another, more qualified bike technician called James working in the same store as the claimant – he worked in his own designated bay, known as the bike technician's bay or 'James' bay'.

14. Although, as Mr MacMillan's submissions note, we lacked a floor plan, I accept Mr Hunter's undisputed evidence that the bike hut area was on the left and James' bay area was on the right. There was also a separate warehouse,

accessed through a door from the area where the bike hut desk and James' bay are situated, between the two. In the warehouse, there were high racks containing bikes. There were several CCTV cameras throughout the premises. There was a bin behind the bike hut desk and a bin in James' bay. There was a third bin in the warehouse but it was not within sight of the CCTV.

15. Part of the respondent's business involved repairing customers' bikes. When parts were replaced on customer's bikes, the respondent's policy was that the part that has been removed was the respondent's property and must be returned to the manufacturer for the purposes of a warranty claim or otherwise destroyed. Mr Hunter acknowledged that, within a caliper, there were several nuts and bolts which the claimant liked to salvage for re-use; however, Mr Hunter was clear that, if employees were salvaging parts, they must make people aware what they were doing and that any salvaged parts were to be put in the technician's bay for reuse. Mr Hunter was also clear that it was not for employees to decide to take them for their personal use. I accept Mr Hunter's clear and cogent evidence in this regard which was not disputed by the claimant. Indeed, it was supported by the claimant's evidence that he had obtained the approval of Mr Tweddell (his Store Manager) to salvage parts. Further, there had been an issue with faulty 'retaining screws' on calipers on certain types of bike and this had led to an instruction from Mr Tweddell to check, repair or replace them and not to throw out those parts – at least not before those items had been stripped for useful parts.
16. The claimant worked a shift on Sunday 16 April 2023. On 19 April 2023, Mike Tweddell, Store Manager, carried out an investigation meeting with the claimant. The notes record that they were discussing allegations of theft of a brake caliper and cable and that those allegations had come to the manager's attention after viewing the CCTV. It appeared that another employee within the store might have made Mr Tweddell aware of the allegation but Mr Tweddell declined to inform the claimant of their name, if that was the case. It was also unclear on what date the allegation had come to Mr Tweddell's attention but I accept Mr Gibson's clear evidence, based on a discussion with Mr Tweddell, that it had been after 16 April.
17. The CCTV for 16 April showed the claimant go to the bin behind the bike hut desk at the start of his shift and remove the brake caliper in question from the bin. He was then shown putting it on the bike hut desk next to a coiled up brake or gear cable. He moved them slightly when he went for his break but left them on the desk. Towards the end of his shift, the claimant was shown picking up the caliper and cable from the desk and walking away from the desk area, leaving the shop floor and entering the warehouse still holding both items. The claimant was then seen walking past camera 12 still holding the two items and went off camera for around 12 seconds, after which he could be seen walking back in the opposite direction and onto the shop floor with nothing in his hands. He spent a few minutes on the shop floor appearing distressed and 'slamming' his tools, then got his jacket and left work. The CCTV did not show the claimant stripping the part that day. The CCTV footage was not before me but there was no dispute as to what the CCTV showed.
18. As to the investigation meeting, the notes record that the investigation related to an allegation of theft. The notes begin with a question about, "the brake caliper," and so it appears that there must have been a discussion with the claimant before the meeting began about the potential allegation. However, it

is unclear from the notes what exactly the claimant had been told in advance about what he was alleged to have stolen and when.

19. During the meeting, the claimant first responded that he had taken the caliper out of the bin, stripped the parts near the CCTV camera, left any parts in James' bay and then threw it into the bin behind the bike hut desk. Mr Tweddell then informed the claimant that, on CCTV, the claimant was seen to be walking into the warehouse with that part – the claimant then said that there were two of them and he had binned that second one in James' bay after replacing it and stripping the parts. When Mr Tweddell informed the claimant that CCTV showed the claimant walking into the warehouse with that part and walking back onto the shop floor without it, the claimant said that he binned it in one of the warehouse bins. The claimant responded that he had binned some in the bike hut bin, James' bay's bin and the warehouse bin. The claimant also said that he could use any bin in the store. His explanation for walking back out of the warehouse with empty hands was that he had stripped the parts before going into the warehouse. The claimant appeared to refer to several calipers but had told Mr Tweddell, in relation to each of the parts discussed up to this point, that he had stripped the part.
20. Mr Tweddell then made it clear that they were discussing what had happened on the Sunday before the investigation meeting (that is, 16 April). To the extent that the claimant had been unclear up to that point which caliper and which day Mr Tweddell was asking him about, this had now been clarified. Mr Tweddell went on to inform the claimant what he could see on the CCTV. The claimant then informed Mr Tweddell that the caliper had gone into the bin "out back," because he had already stripped the parts from it. The claimant's explanation for being unable to see the part being stripped on the CCTV after it was removed from the bin was that he had already stripped it – however, the CCTV showed that he had only removed it from the bin that morning and the CCTV did not show him stripping the part that day. He then said he could not recall when he had stripped it. The claimant's explanation for walking past the bin behind the bike hut desk to put it in the warehouse bin was that he just binned things wherever he was going.
21. They then watched the CCTV together. The notes refer to the part in question being visible at lunchtime and not being moved or stripped. Mr Tweddell referred to the claimant picking up the part at around 16:38 and walking into the warehouse past the camera. Mr Tweddell asked the claimant whether he was saying that he received a message from his niece and put the caliper and the cable in the bin in the warehouse because they were no good, and the claimant said, "yeah." The claimant again said that he could not remember when he had stripped it. Mr Tweddell asked the claimant to explain why the part was removed from the bin and stayed there all day and later was put back in the bin – the claimant responded that they were already broken and were not worth anything.
22. During the meeting, the claimant produced a bag from his locker in which he had several bike parts, to show that he was not removing spare parts from the respondent's premises and that he kept them for use by the respondent or its customers. The content of the notes were not disputed.
23. Following that investigation meeting, the claimant was suspended pending further disciplinary action. Mr Tweddell explained to the claimant, in summary,

that an independent manager would deal with the disciplinary process and come to a decision after reviewing everything. There is no reference in the notes to the claimant struggling with his mental health (which he raised subsequently).

24. The bins in the store were not searched on Sunday 16 April, and no other searches were carried out that day. However, Mr Tweddell only became aware of the allegation after that day. I accept Mr Gibson's clear evidence, which is supported by the contemporaneous evidence in the form of the disciplinary meeting notes, that the store manager had searched the three internal store bins once he was aware of the allegations. He had not been able to find the parts in question but the bins could well have been emptied so a search was not definitive. Neither Mr Gibson nor Mr Hunter worked in the Gateshead store but, in their experience, in a very busy store such as Gateshead the internal store bins would have been emptied between every two hours and every day.
25. The investigation report states that, on 16 April, the CCTV showed the claimant removing the part (this is a reference to the caliper) from the bike hut bin and putting it onto the desk at 9:58am and then at 4:38pm walking into the warehouse with that part and the cable and walking back out without nothing in his hands less than a minute later. The report also notes that the claimant's answers had changed several times and that he said that he stripped the part before putting it into the warehouse bin but the CCTV footage showed no evidence of that.
26. The following day, Mr Tweddell interviewed two of the claimant's colleagues – Billy Kennedy and Dan Maxwell. Mr Kennedy acknowledged that he had put the caliper into the bike hut desk bin by mistake and the claimant had removed it on Sunday 16 April, put it on the corner of the cycles desk and said that he would strip it for parts. Mr Kennedy also said that he had not seen the claimant strip the part. Mr Maxwell said that he had been in the technician's bay for most of his shift on Sunday 16 April and had not noticed the claimant stripping any bike parts or putting any parts into the technician's bay that day.
27. Mr Gibson was appointed to deal with the disciplinary hearing. Mr Tweddell wrote to the claimant to confirm his suspension. In the same letter, he invited the claimant to a disciplinary hearing on 2 May 2023 which was to be dealt with by Mr Gibson. The allegations were set out in the invitation letter as follows:
  - 27.1. An act of theft and dishonesty specifically on 16<sup>th</sup> April 2023 it is alleged that you removed a brake caliper and cable from the store without making payment for the items or seeking any authorization from the Store Management Team.
  - 27.2. The gross misconduct, as detailed above, brings into question your trust and integrity as a colleague.
28. The letter enclosed the documents which had been produced as part of the investigation and informed the claimant that he could watch the CCTV footage again on request. The claimant was advised that a possible outcome of the meeting might be the termination of employment for gross misconduct. He was also informed of his right to be accompanied to that meeting.

29. The disciplinary meeting took place on 2 May 2023. The claimant declined the right to be accompanied. The contents of the notes were not disputed.
30. During the meeting, the claimant asked for the respondent's evidence that the claimant had removed the items in question from the store. Mr Gibson informed the claimant that the manager (that is, Mr Tweddell) had said, "beyond doubt that the caliper isn't found in store."
31. The claimant explained to Mr Gibson that he strips any bike parts that are left and puts any spare parts into a black tub for future use as they are valuable or otherwise into the bin. The claimant accepted that he had walked past the camera and that did look suspicious. He also said that he had removed the part from the bin. When asked where he had stripped the caliper, the claimant replied, "on the shop floor," – implicitly accepting that he had stripped the component – and later said that he could not remember whether he stripped the caliper.
32. There followed a discussion which appeared to relate to different calipers and which was so confused that it is not possible to say which of the claimant's comments relate to the caliper in question and which comments relate to other possible calipers. It is understandable that the claimant dealt with several different calipers on different days as, from the discussions during the hearing, I understand that it is a brake part – and therefore many or all bikes will have such a part. The claimant's evidence before me was that he was "bamboozled" by the questions at the investigation meeting and mixed up the different calipers but, if that were the case, he did not advise Mr Gibson of this during the disciplinary hearing. I accept Mr Gibson's clear evidence that he gave the claimant time to think about the incident and 'regain' memory which he confirmed he had before Mr Gibson proceeded further.
33. Mr Gibson made it clear that he wanted to discuss the caliper from Sunday 16 April. At that stage, the claimant said that he had not taken that one out of the bin and stripped it on the shop floor or James' bay. He said that he had put the parts into James' bay and put the caliper into the bin. The claimant told Mr Gibson that he had moved the caliper and, just before he finished his shift, he had taken the caliper, put it into the bin and then received an upsetting phone call. He could not recall whether he had stripped it; he said that his mental health was struggling and he had been upset by the phone call he had received about his mother. Mr Gibson noted that the claimant could recall particular details - that he had kept specific components from the part and where he had put those – and yet he was also saying that he could not remember whether he had stripped it: the claimant acknowledged that this was confusing for Mr Gibson.
34. In summary, the claimant denied the allegations. The claimant thought Mr Tweddell had been inconsistent in his description of how he had come upon the potential allegation in that he said that he had stumbled upon the matter but also said that it was brought to his attention: in response to this, Mr Gibson said that only Mr Tweddell could answer who brought it to his attention. The claimant alleged that people wanted rid of him but gave no further information. He also queried why he had not been searched and Mr Gibson explained that that was the discretion of the investigation manager.

35. Following an adjournment, Mr Gibson confirmed that he had reached the decision to dismiss the claimant for gross misconduct. The notes record that, having reviewed all of the evidence, Mr Gibson's view was that the claimant had not provided sufficient evidence to prove that he did not take the item in question. Mr Gibson concluded that the caliper left the store in the claimant's possession and that constituted gross misconduct. Although the contemporaneous notes only refer to the caliper, I accept Mr Gibson's clear oral evidence that his decision was based on the allegation that the claimant had stolen both the caliper and the cable as he viewed them as being connected – a brake cable attaches to the brake caliper. This was also consistent with the letter confirming the decision.
36. Mr Gibson believed that the claimant seemed unable to give any clear explanation as to what he did with the parts and, after saying that he had stripped the part, appeared to change his version of events to say that he could not remember whether he had stripped the parts. Mr Gibson noted that the claimant said that he had stripped the caliper and then put it in the bin as it was broken, but the CCTV did not show the claimant stripping it and so Mr Gibson concluded that the claimant would not have known whether it was broken as it was not stripped. Mr Gibson considered that the claimant appeared to change his version of events continually both in the disciplinary meeting and the investigation meeting.
37. Mr Gibson gave oral evidence as to his thought process for determining whether the allegations were well-founded. This was pertinent in light of the notes that the claimant had not proved that he was not guilty of the allegations. I accept Mr Gibson's persuasive evidence that he believed that, on the basis of the CCTV and interview notes before him, he had more evidence to suggest that the caliper and cable did go missing than didn't. He considered it to be, "beyond reasonable doubt." He took into account that the claimant had received a distressing call and was having a difficult time and acknowledged that he might not recall all of the details. However, Mr Gibson was particularly concerned that the claimant's version of events had changed numerous times and was not supported by the CCTV. In other words, Mr Gibson did not believe the claimant's version of events. Mr Gibson did not consider the claimant's concern that people, "wanted rid of [him]," to be relevant as he (Mr Gibson) was only looking at the evidence before him.
38. Mr Gibson considered that his belief in the claimant's gross misconduct brought into question the claimant's integrity and trustworthiness as a colleague. He took into account that the respondent is a retailer of goods which has a zero-tolerance policy towards theft and reached the decision to summarily dismiss him for gross misconduct.
39. He confirmed his decision in a letter on 4 May 2023. The letter makes clear that Mr Gibson took into account the claimant's length of service and employment record and reached a decision that summary dismissal was the appropriate sanction. The letter informed the claimant of his right to appeal.
40. The claimant appealed. He set out three grounds of appeal, namely:
- 40.1. That he had been dismissed for removing the two items from store without any proof and without any search for the items which had been, "binned;"



- 40.2. The disciplinary hearing had not gone too well as the claimant had been told that he had not given sufficient evidence; and
- 40.3. He had only received seven of the nine pages of interview notes.
41. Mr Hunter was appointed to hear the appeal and visited the Gateshead store. He reviewed the CCTV as well as the notes and correspondence in relation to the claimant's dismissal and spoke to Mr Tweddell and Mr Gibson.
42. The claimant was invited to an appeal hearing by letter. That letter made clear that the purpose of the hearing was to discuss his appeal in more detail and informed him of his right to be accompanied.
43. Mr Hunter's appeal notes record that the claimant had been summarily dismissed for theft of a brake caliper and a brake cable. The notes also set out that the claimant wished to have his name cleared but did not want his job back as he believed he had been treated poorly during his employment.
44. The appeal hearing took place on 26 May 2023. The claimant declined the right to be accompanied.
45. Mr Hunter first dealt with the third point raised by the claimant. Mr Hunter gave the claimant a copy of the two missing pages and allowed him time to read them. Once the claimant confirmed that he had read them (it is unclear whether he already had copies on his phone), they moved to discuss the substantive appeal points. I accept Mr Gibson's cogent evidence that the claimant had not been sent these pages due to an administrative error by the HR department.
46. As to the claimant's first point, that he had been dismissed without any proof, the claimant explained that he did not believe that the investigation had been carried out properly as there was only CCTV and there had been no searches. The claimant told Mr Hunter that, "yer I removed the parts, cannot remember if I stripped them," – explaining that he had received a message from his niece about his mother being unwell – and had then gone back onto the shop floor, then into the warehouse, picked up his coat which was near the CCTV camera and then left the store without the caliper and cable.
47. Mr Hunter sought to clarify the claimant's previous references to putting the caliper in the bin behind the bike hut desk and to stripping it for parts, and described what the CCTV showed. The claimant explained that several calipers had been removed and stripped, with the components being put in James' bay. He said that the last caliper had been put into the bin by Mr Kennedy and the claimant had removed it from the bin to remove the parts – he said that he had left it in his bay all day and then, "went out the back," received the message from his niece, could not remember if he had stripped the part but had gone back to say goodbye to his colleagues, got his coat and left the shop.
48. Mr Hunter acknowledged that there could be several calipers. However, he asked the claimant to focus on the caliper he removed from the bin. Mr Hunter noted Mr Kennedy's statement that the claimant had told him that he was going to strip it for parts and asked the claimant why he had taken it out of the bin for most of the shift but then binned it without stripping it (there being no evidence

that he had stripped the part on the CCTV). The claimant acknowledged that he had initially intended to strip the part, but said that he had had a difficult day and had put the caliper and the cable in the bin at the back of the warehouse. When asked why he had gone past two bins on the shop floor to go to the furthest away bin, the claimant said that he was not restricted to one bin.

49. The discussions then moved onto the claimant's second point – that he had been dismissed because he (the claimant) had not supplied sufficient evidence. Mr Hunter referred to the evidence and asked the claimant whether there was anything else he wanted to mention. The claimant repeated his position and commented that he could not understand why the evidence was not sufficient.
50. At the end of the appeal hearing, Mr Hunter advised the claimant that he wanted to consider matters thoroughly before making his decision and so the claimant would receive the decision in writing.
51. Mr Hunter carried out a further interview with Mr Tweddell on 8 June 2023. This was because Mr Hunter wanted to understand more about the claimant having obtained a bag of spare parts from his locker during the initial investigation meeting. Although Mr Hunter thought that this interview had taken place before his appeal meeting with the claimant, it is clear from his contemporaneous notes that this discussion was on 8 June (pages 98 - 99). He did not discuss that interview with the claimant before reaching his decision. However, he was already aware of the claimant's position in relation to the parts in his locker.
52. In reaching his decision, Mr Hunter considered that, from the bike hut desk where the caliper had been put after being removed by the claimant from the bin, the claimant had to walk past two bins to reach the warehouse bin. Mr Hunter considered that the claimant had given different versions of events throughout the process which differed from the CCTV. Mr Hunter explained his rationale as being that the claimant was clearly passionate about salvaging parts for re-use and had taken the caliper out of the bin with that in mind. Mr Hunter noted from the CCTV that the parts (the caliper and a gear or brake cable) had remained on the desk for most of the claimant's shift and then the claimant had picked them up, walked through the warehouse door and through the warehouse between two high bike storage racks.
53. Mr Hunter noted that the CCTV showed the claimant, with the parts in his hands, going off camera briefly – there is a reference to 12 seconds – and then returning to camera view with nothing in his hands. The warehouse bin was not visible on the CCTV.
54. Although in his oral evidence, Mr Hunter thought that the claimant might have put his coat on during that short time off-camera, the contemporaneous evidence supports the claimant's account which is that his coat was put on afterwards. Mr Hunter gave evidence, which I accept, that the caliper was around half the size of the latest mobile phones and the cable was coiled into a small coil and, as such, they would have fit into a trouser or coat pocket. Mr Hunter was satisfied that the short period when the claimant was not in camera view was sufficient opportunity for the claimant to hide the parts on his person – in an inside pocket, coat or trouser pocket. Mr Hunter did not believe that, based on a difficult day, the claimant would have put the parts into the bin after the efforts to which he had gone to salvage the parts before that.

55. The value of a caliper was between £20 and several hundred pounds, although it appears that this one was used and could have had a lower value. There was no evidence as to the value of the cable. Mr Hunter considered them to be valuable – he describes them (page 97) as, “such valuable parts.”
56. The claimant’s case was that he had put the two parts into the bin and had not removed them from store. As such, he never indicated either that he had permission to remove them from store or that he had paid for them – but did not dispute that that was what the respondent required before any items of its property were removed from store. Mr Gibson and Mr Hunter reached their decisions with that in mind.
57. The claimant accepted in his oral evidence that his version of events appeared to change during the various meetings, and he referred to different calipers on different days which he accepted could be confusing and alarming to the managers involved.

### **Submissions**

58. After the evidence had been concluded, the parties filed written submissions addressing the issues in this case. It is not necessary for me to set out those submissions in detail here because they are a matter of record and the salient points will be obvious from my findings and conclusions. It is enough to say that I fully considered all the submissions made, together with the statutory and case law referred to, and the parties can be assured that they were all taken into account in coming to my decision.

### **Relevant law**

#### **Unfair dismissal**

59. Section 94(1) of the ERA provides that an employee has the right not to be unfairly dismissed by his employer.
60. Section 98 of ERA provides, so far as is relevant:

*(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show-*

*(a) the reason (or, if more than one, the principal reason) for the dismissal and*

*(b) that is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*

*(2) A reason falls within this subsection if it...*

*(b) relates to the conduct of the employee...*

*(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)-*

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

61. It is for the employer to show the principal reason for dismissal and that it is a reason falling within section 98(2) of the ERA or that it is for some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

62. A reason for dismissal is the set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee: *Abernethy v Mott, Hay and Anderson [1974] ICR 323, CA*. In a more recent analysis in *Croydon Health Services NHS Trust v Beatt [2017] ICR 1240, CA*, Underhill LJ said that the 'reason' for dismissal connotes the factor or factors operating on the mind of the decision maker which causes them to take the decision. It is a case of considering the decision-maker's motivation.

63. Section 98(4) of the ERA poses a single question namely whether the employer acted reasonably or unreasonably in treating the reason for dismissal as a sufficient reason for dismissing the claimant. It requires the Tribunal to apply an objective standard to the reasonableness of the investigation, the procedure adopted and the decision itself. However, they are not separate questions – they all feed into the single question under section 98(4). Whilst an unfair dismissal case will often require a Tribunal to consider what are referred to as 'substantive' and 'procedural' fairness, it is important to recognise that the Tribunal is not answering whether there has been 'substantive' or 'procedural' fairness as separate questions. The burden here is neutral.

64. The Tribunal must take as the starting point the words of s98(4). It must determine whether in the particular circumstances the decision to dismiss was within the band of reasonable responses which a reasonable employer might have adopted. In assessing the reasonableness of the response, it must do so by reference to the objective standard of the hypothetical reasonable employer (*Tayeh v Barchester Healthcare Ltd [2013] IRLR 387, CA @ para 49*). The Tribunal must not substitute its own view as to what was the right course of action.

65. In misconduct cases, the approach which a Tribunal takes is guided by the well-known decision of *British Home Stores v Burchell [1978] IRLR 379, EAT*. Once the employer has shown a valid reason for dismissal there are three questions for the Tribunal to consider:

65.1. Did the employer carry out a reasonable investigation?

65.2. Did the employer believe that the employee was guilty of the conduct complained of?

65.3. Did the employer have reasonable grounds for that belief?

## **Sanction**

66. When determining whether dismissal is a fair sanction, it is not for the Tribunal to substitute its own view of the appropriate penalty for that of the employer.
67. Consequently, there is an area of discretion within which management may decide on a range of penalties, all of which might be considered reasonable. In assessing the reasonableness of the employer's response, it must do so by reference to the objective standard of the hypothetical reasonable employer (*Tayeh v Barchester Healthcare Ltd [2013] IRLR 387, CA, para 49*). It is not for the Tribunal to ask whether a lesser sanction would have been reasonable, but whether dismissal was reasonable. However, this discretion is not untrammelled, and dismissal may still be too harsh a sanction for an act of misconduct.

### **Fair procedures**

68. A dismissal may be unfair because the employer has failed to follow a fair procedure. In considering whether an employer adopted a fair procedure, the range of reasonable responses test applies: *Sainsbury plc v Hitt [2003] I.C.R. 111, CA*. The fairness of a process which results in dismissal must be assessed overall.
69. Defects in the original disciplinary procedures may be remedied on appeal. For this purpose, it is irrelevant whether the appeal hearing takes the form of a rehearing or a review as long as the appeal is sufficiently thorough to cure the earlier procedural shortcomings: *Taylor v OCS Group Ltd 2006 ICR 1602, CA*.
70. All the above requirements need to be met for the dismissal to fall within the band of reasonable responses. If the dismissal falls within the band, it is fair. If it falls outside the band, it is unfair.

### **Conclusions**

71. The claimant was dismissed by the respondent. The effective date of termination was 2 May 2023. The claim was brought in time.

### **Reason for dismissal**

72. The reason or principal reason for dismissal was the claimant's conduct. Although the claimant wondered whether there was an ulterior motive for his dismissal, there was no persuasive evidence of this. I conclude that the sole or principal reason for his dismissal was the respondent's belief that, on 16 April 2023, the claimant had stolen a brake caliper and a cable from the respondent and this had called into question his trustworthiness and integrity as a colleague. He was summarily dismissed for gross misconduct. That was a reason related to his conduct. That is a potentially fair reason for dismissal.

### **Fairness**

73. Having reached that conclusion, the complaint of unfair dismissal turns on section 98(4) of the ERA. I must apply the law as per the guidelines in *Burchell* and not substitute my opinion for that of the respondent.

74. The essential question is whether the respondent (acting through Mr Gibson and Mr Hunter) acted reasonably in treating the reason for dismissal as a sufficient reason for dismissal in all the circumstances. The respondent is a large employer with a dedicated human resources function, referred to as the People Advice Team.

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

75. It is first necessary to consider who made the decision to dismiss the claimant. I conclude that Mr Gibson made the decision to dismiss the claimant and Mr Hunter made the decision to uphold that dismissal on appeal.

76. It is then necessary to consider what the claimant was dismissed for. This was explored during the Tribunal hearing and I have found that Mr Gibson dismissed the claimant because he believed that, on Sunday 16 April 2023, he had stolen the caliper and a cable. He believed that this called into question the claimant's trustworthiness and integrity and that it was gross misconduct. The same allegations against the claimant were upheld at the time of his appeal. I conclude that Mr Gibson and Mr Hunter did genuinely believe that the claimant had done these things and that amounted to misconduct.

***Did the respondent have in mind reasonable grounds to sustain its belief?***

77. I conclude that it did. The respondent did not have definitive proof of the claimant's guilt – I have found that the allegations against the claimant had only come to the respondent's attention after the date of the alleged incident which meant that the respondent's searches on a subsequent date were of limited value – and the claimant was believed to have secreted the brake caliper and cable on his person while out of view of the CCTV cameras. However, it is sufficient for the respondent to have in mind a genuine and reasonable belief based on reasonable grounds.

78. I have found that the CCTV for 16 April showed the claimant go to the bin behind the bike hut desk at the start of his shift and remove the brake caliper in question from the bin. He was then shown putting it on the bike hut desk next to a coiled up brake or gear cable. He moved them slightly when he went for his break but left them on the desk. Towards the end of his shift, the claimant was shown picking up the caliper and cable from the desk and walking away from the desk area, leaving the shop floor and entering the warehouse still holding both items. The claimant was then seen walking past camera 12 still holding the two items and went off camera for around 12 seconds, after which he could be seen walking back in the opposite direction and onto the shop floor with nothing in his hands. He spent a few minutes on the shop floor appearing distressed and 'slamming' his tools, then got his jacket and left work. The CCTV did not show the claimant stripping the part that day.

79. The claimant's explanation for walking past two bins to use the furthest away bin in the warehouse was simply that he could use any bin and he just used the bin where he was going.

80. The final decision of Mr Gibson to dismiss the claimant was taken principally in reliance on the claimant changing his version of events and his version of events being inconsistent with the CCTV. I have found that Mr Gibson believed that the claimant seemed unable to give any clear explanation as to what he

did with the parts and, after saying that he had stripped the part, appeared to change his version of events to say that he could not remember whether he had stripped the parts. Mr Gibson noted that the claimant said that he had stripped the caliper and then put it in the bin as it was broken, but the CCTV did not show the claimant stripping it and so Mr Gibson concluded that the claimant would not have known whether it was broken as it was not stripped. As part of the disciplinary hearing, Mr Gibson noted that the claimant said that he could recall particular details - that he had kept specific components from the part and where he had put those – and yet he was also saying that he could not remember whether he had stripped it: and the claimant had acknowledged that this was confusing. The claimant accepted that his conduct looked suspicious. Mr Gibson had weighed up the claimant's position but did not believe that the claimant had provided a cogent explanation for what was shown on the CCTV. Accordingly, he reached the conclusion that the claimant had removed the parts from store without payment or permission and that he was guilty of the allegations against him.

81. As to the appeal, Mr Hunter's cogent explanation of his thinking was based on the CCTV, a store visit, the notes of the process, and his interviews with the claimant and those involved in the investigation and disciplinary meetings. Mr Hunter considered that, from the bike hut desk where the caliper had been put after being removed by the claimant from the bin, the claimant had to walk past two bins to reach the warehouse bin. Mr Hunter considered that the claimant had given different versions of events throughout the process which differed from the CCTV. I have accepted Mr Hunter's explanation of his rationale that the claimant was clearly passionate about salvaging parts for re-use and had taken the caliper out of the bin with that in mind. Mr Hunter had noted from the CCTV that the parts (the caliper and a gear or brake cable) had then remained on the desk for most of the claimant's shift and then the claimant had picked them up, walked through the warehouse door and through the warehouse between two high bike storage racks. Mr Hunter noted that the CCTV showed the claimant, with the parts in his hands, going off camera briefly – there is a reference to 12 seconds – and then returning to camera view with nothing in his hands. The warehouse bin was not visible on the CCTV.
82. I have found that Mr Hunter considered the size of the items and was satisfied that the short period when the claimant was not in camera view was sufficient opportunity for the claimant to hide the parts on his person – in an inside pocket, coat or trouser pocket. I have also found that Mr Hunter did not believe that, based on a difficult day, the claimant would have put the parts into the bin given his efforts throughout the day to keep the parts safe for salvaging. He had thoroughly analysed and weighed all of the evidence before reaching his decision.
83. I have also found that the claimant had never indicated either that he had permission to remove them from store or that he had paid for them, and did not dispute that that was what the respondent required before any items of its property were removed from store. Mr Gibson and Mr Hunter were entitled to take this into account in reaching their decision.

***At the stage at which that belief was formed on those grounds, had the respondent carried out as much investigation into the matter as was reasonable in the circumstances?***

84. Mr Tweddell carried out interviews with the claimant, Mr Kennedy and Mr Maxwell. He watched the CCTV of the relevant areas of the Gateshead store for the relevant day. I have also found that he carried out a search of the store (including the internal store bins) to satisfy himself that the parts did not remain in the store but – because the potential allegation came to his attention on a subsequent day – this only took place after Sunday 16 April and there was no merit in searching the claimant or any of his colleagues by that point.
85. Mr Gibson reviewed the investigation notes and watched the CCTV. He also visited the store. He also held a disciplinary hearing with the claimant during which he discussed the evidence with the claimant and gave him an opportunity to explain his version of events. The claimant was reminded to focus on what had happened on Sunday 16 April 2023 in providing his explanation.
86. As part of the appeal, Mr Hunter visited the store, reviewed the CCTV, interviewed Mr Tweddell and Mr Gibson and held an appeal meeting with the claimant.
87. It is necessary to look at the reasonableness of the investigation in the context of (a) the potential allegation against the claimant being made on a day after Sunday 16 April; and (b) the claimant first raised that he had put the items in the warehouse bin during the investigation meeting on 19 April – three days after the alleged thefts took place. The respondent carried out the investigations it reasonably could in the circumstances – interviewing the claimant and colleagues promptly and watching the CCTV. As to conducting searches, I have found that the claimant, his colleagues, the store (and in particular the internal store bins) were not searched on Sunday 16 April. It was unclear whether the bins were searched before or after the investigation meeting with Mr Tweddell. It was reasonable for the respondent to search the bins after the claimant raised this as a possibility on 19 April – and Mr Tweddell did so as part of his investigation. However, the bins could well have been emptied by the time Mr Tweddell did so and so his findings were not definitive.
88. It was never part of the claimant's case that he had paid for the items or that he had permission to remove them from the store. The respondent proceeded on the basis that this was not relevant and it was reasonable that it did not investigate this aspect further.

89. I therefore conclude that the respondent carried a reasonable investigation.

***Did the respondent act reasonably in treating that reason as sufficient for dismissing the Claimant? Did the dismissal lie within the range of reasonable responses?***

90. I conclude that the sanction of dismissal was within the band of reasonable responses. Although the value of both items was relatively low, the respondent is a retailer of goods and, as such, trust in its employees is paramount.

91. Mr Hunter described the items as being, "such valuable parts," notwithstanding that the caliper (and potentially the cable) had been removed from a customer's bike. Further, the claimant's actions in recovering them from the bin with a view to salvaging and re-using the parts demonstrated that he thought the items were valuable.



92. The respondent having found the claimant to have been guilty of theft, I conclude that the sanction of dismissal was within the band of reasonable responses. I am satisfied that the respondent acted reasonably in treating that reason as sufficient for dismissing the claimant.

***Was the dismissal conducted following a fair procedure?***

93. In assessing this aspect of fairness, I consider that procedural issues do not sit “in a vacuum” and should be considered together with the reason for dismissal, in assessing whether, in all the circumstances, the employer acted reasonably in treating the reason as a sufficient reason for dismissal (*Sharkey v Lloyds Bank plc [2015] UKEAT/0005/15*). Whilst an unfair dismissal case will often require a tribunal to consider what are referred to as ‘substantive’ and ‘procedural’ fairness it is important to recognise that the tribunal is not answering whether there has been ‘substantive’ or ‘procedural’ fairness as separate questions.

94. The claimant asked to be told how the investigation came about and was never given clarity on this. The claimant also indicated as part of the process that people wanted rid of him but, as I have found, never gave any further information about this or an explanation as to how he thought it could impact the process. It would have been preferable for the claimant to have been told why the investigation was started. However, in the absence of specific information from the claimant, I conclude that these matters did not affect the fairness of the procedure. Further and more generally, Mr Gibson and Mr Hunter only took into account the evidence before them which was mainly the CCTV and the claimant’s version of events. That could not have been influenced by anyone else. Other individuals were interviewed but, whilst the statements of Mr Kennedy and Mr Maxwell did not support the claimant, they only described what they had seen that day which was consistent with the CCTV. Mr Gibson and Mr Hunter accepted Mr Tweddell’s assurance that he had searched the bins but this too added little as the bins could well have been emptied already. In summary, the other witnesses’ accounts added little, if anything, and it was reasonable not to investigate further as there was no real scope for the decision to be influenced by people ‘wanting rid’ of the claimant.

95. Mr Hunter interviewed Mr Tweddell on 8 June 2023, after the date of the appeal meeting. He did not discuss that interview with the claimant before reaching his decision but he was already aware of the claimant’s position in this regard and in my judgment it was not necessary for him to do so.

96. With those conclusions in mind, I conclude that the respondent followed the provisions of the ACAS Code on disciplinary and grievance procedures. There was an investigation, a disciplinary meeting and an appeal meeting. The three stages were conducted by different Store Managers in an impartial way. The claimant was offered the right to be accompanied to both the disciplinary and the appeal meeting, which he declined. The claimant was sent the evidence to consider in advance other than: two pages of notes (which were satisfactorily resolved by Mr Hunter as part of the appeal) and the information that Mr Tweddell had searched the bins (but the claimant was given that information in the disciplinary hearing and had the opportunity to respond in that hearing and the appeal). The claimant was asked reasonable questions during each stage of the process and given every opportunity to give a cogent explanation for

what had happened, based upon the CCTV. As to the appeal, Mr Hunter conducted the appeal in a careful and thorough manner.

97. I conclude that the procedure followed by the respondent was within the band of reasonable responses. Any flaws were minor in nature or were rectified by the appeal, and were not sufficient to render the procedure outside of the band of reasonable responses.

### **Conclusion**

98. I must consider whether, taking into account the size and administrative resources of the respondent, the decision to dismiss was fair in all the circumstances. On balance and taking my earlier conclusions into account I am satisfied that it was.

99. The respondent dismissed the claimant for a potentially fair reason relating to his conduct. Applying section 98(4), in all the circumstances of the case, the respondent acted reasonably in treating that conduct as a sufficient reason to dismiss the claimant. The claimant was not unfairly dismissed.

*L Robertson*

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Employment Judge L Robertson

*10 January 2024*

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