EMPLOYMENT TRIBUNALS

Claimant: Mr. N. Ihtash
Respondent: Holland & Barrett Limited

Heard at: Watford
On: 22,23 and 24 July 2024
Before: Employment Judge S. Matthews

Representation
Claimant: Mrs. Khylko (the claimant's wife)
Respondent: Ms. Greening (counsel)

JUDGMENT having been sent to the parties on 12 September 2024 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. The claimant brings claims for constructive unfair dismissal and unauthorised deduction of wages. The claimant commenced Acas conciliation on 4 April 2023. Conciliation was completed on 16 May 2023 and the claim was received at the tribunal on 6 June 2023.

2. The respondent denies that it dismissed the claimant and denies unauthorised deduction of wages. The respondent says if it is found to have dismissed the claimant, the reason was conduct and it was a fair dismissal.

Procedure and Evidence

3. There was a tribunal bundle of 1,052 pages. The tribunal heard evidence from the claimant and on behalf of the respondents the tribunal heard evidence from Donna Clelland (Retail Operations Manager) and Mike Ward (Regional manager and line manager to the claimant). All witnesses provided written statements in advance, and the tribunal took time to read them. Each witness was asked questions about the evidence contained in their statements.

4. References to pages in the bundle are given in the form (X). References to

witness statements are in the form [AA:BB] where AA are the initials of the witness and BB is the paragraph reference.

5. I was informed that the claimant has a back condition. I told him he could request a break whenever needed and he was allowed to stand during the hearing when that assisted him.

6. At the beginning of the hearing we discussed the timetable for the hearing. I indicated that I would like to hear evidence on liability first including Polkey and contributory fault (see issues 5 and 6 below). I indicated that we would deal with remedy issues separately on the final day of the hearing if appropriate.

The issues

7. After reading the papers and taking into account the list of issues drawn up by both parties, I determined the issues to be decided by the tribunal and explained them to the parties. A copy was typed up by counsel for the respondent and sent both to the tribunal and the claimant, so we all had the agreed issues in front of us throughout the hearing.

8. The issues are as follows:

CONSTRUCTIVE DISMISSAL

1. Was the claimant dismissed?

1.1. Did the respondent do the following things:

a. Fail to pay overtime.

b. Move location without consultation or reasonable notice.

c. Following the claimant's back injury fail to follow the respondent's wellbeing policy in that it did not carry out a return to work interview and risk assessment.

d. Suspend the claimant with no legitimate reason to do so.

1.2. In relation to 1.1 (a) – (c) above, was this a breach of an express term of the contract?

1.3. In relation to 1.1 (a) – (d) above, did that breach the implied term of trust and confidence? Namely:

a. Did the respondent behave in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent?

b. If the respondent did behave in that way did the respondent have reasonable and proper cause for doing so?

1.4. If a term was breached, was it a fundamental breach, that is a breach so serious that the claimant was entitled to treat the contract as at an end?

1.5. Did the claimant resign in response to the breach? The tribunal will consider if the breach of contract was a reason for the claimant's resignation.

1.6. Did the claimant affirm the contract before resigning? The tribunal will consider if by words or actions of the claimant showed that they chose to keep the contract alive after the breach.

2. If the tribunal find there was a dismissal, the respondent will say the reason was misconduct.

2.1. The tribunal will consider if the respondent had a genuine belief of misconduct.

The tribunal will look at whether there were reasonable grounds for that belief. The tribunal will consider if at the time the belief was formed they carried out a reasonable investigation.

2.2. The tribunal will consider if the respondent acted reasonably or unreasonably in all the circumstances in dismissing the claimant.

The Tribunal will consider R's size and administrative resources.

2.3. Did the respondent act in a procedurally fair manner?

2.4. Was dismissal within the range of reasonable responses open to the respondent?

UNAUTHORISED DEDUCTIONS

3. Did the respondent make unauthorised deductions from the claimant's wages and if so how much was deducted?

4. Was overtime payable and in what amount?

REMEDY ISSUES RELEVANT TO LIABILITY HEARING.

5. Polkey: Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed or for some other reason? If the dismissal was procedurally unfair the tribunal will adjust the compensation award to reflect the chance that the claimant would have been dismissed at a later date.

6. Contributory Conduct: Did the claimant contribute to his dismissal by his conduct?

7. ACAS Code: Did the ACAS code on grievances and disciplinaries apply and did either the claimant or the respondent fail to comply with it? If so, is it just and equitable to increase or decrease any amount of compensation?

Findings of Fact

9. Having considered the issues I then went on to hear the evidence and to make findings of fact. Sometimes there was a conflict about what happened, and, in those situations, I resolve it on a balance of probabilities. The parties will note that not all matters they told the tribunal about are recorded in these findings of fact and that is because I have limited my findings of fact to points that are relevant to the legal issues.

10. The respondent is a large health retailer with stores throughout the UK and Europe. The claimant commenced employment with the respondent on 18 February 2015. He was employed as a Store Manager, initially at the Gerrards Cross store. In summer 2016 he transferred to the Harrow store and in May 2018 to the High Wycombe store. On 10 July 2022 he transferred to the Aylesbury store. He resigned on 10 February 2023. His termination date was 14 February 2023.

11. Mike Ward (MW), Regional Manager, commenced employment with the respondent on 19 October 2020. He started managing the claimant when he transferred to the claimant's region in September 2021. MW manages approximately 26 store managers (MW/2).

12. The claimant and MW differed in their perception of their working relationship. MW said the relationship was 'pleasant and professional' (MW/13). In evidence he said he graded the claimant in his October 2022 appraisal as 'doing a good job'. The claimant, on the other hand, said they 'did not get along easily' and he felt that MW thought he was 'always underperforming' (NI/1.8).

13. The claimant and MW discussed the claimant's ambition to be an area manager at the beginning of their relationship (MW/13).

14. Various issues arose in the last few months of the claimant's employment which the claimant says led to his resignation.

Overtime

15. The claimant, as a store manager, could decide when to schedule his core working hours of 38.75 per week. He could schedule them to start before opening and after closing and could arrange the rota for other staff accordingly (MW/21). For example, he could work from 8.45 am (15 minutes before the shop opened) to 5.45 pm (15 minutes after the shop closed) with a one hour break for lunch (180).

16. The claim for unauthorised deduction of wages relates to overtime work which the claimant says he worked beyond the core hours. His contract stated that overtime will be paid at the basic rate (95).

17. The claimant maintains that overtime was expected when opening and closing the store, for promotion transfers which took place every four weeks (IS/3.3) and for the 'Rejuvenating our Stores' project where staff were told that they would get an extra 20 hours allowance (181). The claimant felt the only way to meet the targets imposed by the respondent was to stay

behind and complete the work. He considers that he did a lot of overtime which he was not paid for it (NI 3.2-3.6).

18. From around March 2020, during the time of the Covid pandemic there was no authorisation process for overtime. The store manager would clock themselves in and out and submit their timecard, which would be passed on to payroll for payment (DC/7). From 6 June 2022 the respondent introduced a new process whereby approval for overtime had to be obtained in advance from the regional manager (DC/7/8/9) (795).

19. The claimant claimed overtime of 1.25 hours in June and July 2022 which was declined (793-794). In evidence MW explained that he would have declined it because the claimant did not seek approval either before or after working the overtime. If he had sought approval, he might have approved it (MW/47). The claimant accepts that he did not apply for approval of the overtime.

20. From September 2022, in a document identified as part of the new My HR system, the respondent referred to a 'new' system to 'bring back the option for lieu days as a way to take time back for extra hours worked' (112). DC explained in evidence that a time in lieu policy had been in place prior to Covid and this was a reversion to the pre-Covid situation.

21. The store manager was responsible for recording their own approved overtime hours and taking the lieu time within the permitted time (DC/12). DC found 6 occasions from September 2022 where the claimant had clocked hours which exceeded his contractual or core hours; only 3 of them were processed for in lieu time (DC/16). Overall, there was a negative balance and no lieu time was due (DC/20). In addition, when subsequently investigating, DC found further irregularities including occasions when the claimant had been paid for core time in full that was not backed up by the clock in records (DC/19). She found occasions where the claimant had recorded more than two days off in a week; normally full-time staff would record two days off in a week as they are contracted to work for five days. By taking more than two days off in a week and not marking it as holiday it would not be accounted for within holiday entitlement. In short, the records which the claimant was responsible for keeping were not reliable (DC/21). He cannot evidence the extra hours he said he worked.

22. The claimant maintained that he was told by MW not to claim overtime when he was required to move to Aylesbury. MW denies he told him that (MW/24). I accept MW's evidence. There is no evidence in the documents before the tribunal that MW said that, and the documents referred to at paragraphs 18 and 20 above set out a procedure for claiming overtime hours. I consider it implausible that the claimant was told on moving to Aylesbury that he could not claim time in lieu for overtime when there was a policy in place which was communicated to staff for authorising overtime, and I take into account that the claimant did not raise a complaint about it at the time.

<u>Relocation.</u>

23. The contract of employment expressly provides that the respondent can change the respondent's place of work upon reasonable notice:

> "Your normal place of work will be at High Wycombe. However, we reserve the right to change this on a permanent basis upon reasonable notice to you. You may be required to work at any of the company's current or future sites." (105)

24. The claimant was instructed to move to the Aylesbury store in July 2022 by MW (NI/2.2). MW thought the Aylesbury store needed 'a fresh pair of eyes' and it is common practice in retail to move managers around to freshen up the approach of stores. He explained to the claimant at the time that he thought it would help his career. A smaller store which was better staffed would give him more time for development training, coaching and mentoring. The claimant felt differently. He suspected that MW was trying to get rid of him, but he did not express that fear at the time.

25. On the day the claimant told him about the relocation MW was prepared to talk to the claimant as long as required (MW/14). Although neither MW nor the claimant can remember the length of the meeting MW thinks it was about one and a half hours and the claimant conceded in cross examination that it was a lengthy conversation. They talked about the reasons for the move including the claimant's career progression. The claimant expressed his concerns regarding travel and domestic arrangements (NI/2.1.4).

26. MW took heed of the claimant's concerns and indicated that he would try to facilitate matters so that the move could happen. They would work through the difficulties together, looking at solutions and discussing how they could resolve any initial challenges (MW/14);

> 'I offered support during the meeting for any adjustments that needed to be made as he transitioned to the new store. The claimant was initially concerned with changes to his hours scheduling and how that might impact his immediate plans. I assured him that we could work together as required on this and if need I could provide support from within the Region to cover any schedule in shortfalls. I do not remember any specifics but the changes needed to operate both stores went smoothly. We also discussed the journey time to Aylesbury and the flexibility of the Aylesbury team and I assured him once again that we could adapt around the store and team needs and any support needed from me would be given to help the settling down process.' (MW/15).

27. The claimant was in shock. He did not want to move to Aylesbury as it was further from home. He maintains that the only reason he went along with it was to keep his job (NI/2.1.6). He did not express those thoughts at the time and MW thought the claimant was agreeable to the move (MW/19). Moreover, the claimant made no complaints subsequently, either formally or informally, and no issues were raised by him on subsequent visits to the store by MW or at his appraisal. The claimant conceded this in cross examination; he said he did not see the point of raising a grievance, 'I just got my head down and carried on working.'

28. The exact amount of notice given regarding the move to Aylesbury is unclear. There is no written note of the meeting and the date is not recorded. MW said he gave notice the week prior to the move (MW/14). The claimant said in evidence he was told to move the following Friday. This suggests it was just over a week.

29. MW said in evidence that once a decision had been made it was better for the manager and for the remaining staff in the store if it happened quickly; inevitably, the manager's work would be impacted, knowing that they were

moving on elsewhere. He also had to coordinate other staff he was moving around, taking into account their rotas and holidays.

30. On the face of it the notice given to the claimant was short. However, I find it was reasonable in this particular situation. The claimant lived in High Wycombe. The Aylesbury store was around 20 miles away. The claimant did not have to move house. MW indicated that he would be flexible to facilitate the move, and he had an understanding of the domestic difficulties that this would cause the claimant. He expressed a willingness to help the claimant and was willing to discuss ways to work around it. The claimant did not ask for specific help. He managed to make the move within the time allocated and he worked there from July 2022 until his resignation in February 2023.

Back Injury

31. The claimant sustained a back injury in November 2022 (177-178). He was unable to work from 8 to 15 November 2022. In a WhatsApp message to MW sent on 8 November 2022 from A&E he said: "I have injured my back yesterday when I was working" The claimant attached a copy of his urgent treatment centre certificate (177).

32. MW replied by WhatsApp later that day saying 'Sorry to hear about that. Fingers crossed with the painkillers it improves. Hoping you will be ok for the conference' (178).

33. The claimant returned to work on 15 November but did not attend a 'return to work' interview in accordance with the respondent's normal policy. The reason that it was not conducted was a combination of the claimant's failure to communicate to MW that he had returned to work and MW overlooking it. As the claimant said under cross examination, "I did not contact him and he did not contact me."

34. The respondent's Wellbeing policy (161-165) refers to objectives including support for employees after a period of absence. It provides that managers have a responsibility to operate this policy effectively. It states that 'it does not form part of your contract of employment' (164).

35. The respondent's health and safety policy states:

> 'All colleagues have a personal responsibility to take reasonable care of themselves and others, as well as following company policies and procedures in line with training, information and supervision provided as well as warning others of potential hazards and unsafe procedures behaviours fulfilling these responsibilities is an employment obligation…" (152).

36. The correct procedure, as the claimant knew, was to report the accident on the respondent's online accident management system, 'ECO'. The claimant was in pain, and he accepts that he did not do this. No risk assessment was carried out. Risk assessment would have been triggered if the claimant had provided information about an unsafe workplace, but he did not do that, and MW had been supplied with only limited information about the claimant's back condition. It is unfortunate that MW forgot to follow up on the claimant's report of a back injury but equally the claimant had a

responsibility (particularly as a manager) to provide further information about the alleged incident.

Suspension

37. The respondent's disciplinary policy states:

> "You may be suspended from duty but still receive normal pay and benefits whilst further investigations take place. This will only be done when necessary, for instance if:
>
> The allegation is potentially an act of Gross Misconduct;
>
> The Manager feels that the investigation would be jeopardised if you were still at work....." (132)

38. The disciplinary policy (127-137) gives examples of gross misconduct (129-130). It is not an exhaustive list as it is not possible to provide such a list. Other serious behaviours could also be deemed misconduct. It refers to an act of misconduct so serious that the respondent no longer has trust or confidence that a working relationship can be maintained, unauthorised absence and deliberately providing false or misleading information to the company including time keeping records , falsifying company records including accounts, expense claims, self-certification forms and any other documentation.

39. On 1 January 2023 MW visited the Aylesbury shop and saw the conversion counter covered by a paper bag. The counter counts people going into the store and the information can be tallied with how many people make a purchase to estimate the purchase rate of customers going into the store. Many people go into the store for reasons that are not related to making a purchase; for example, deliveries, staff walking in and out and online collections. The claimant felt that the target was 'unachievable' (NI/5.13). The respondent views it as an important measure for understanding customer patterns, for example, if there is a promotion, to see how customers respond to it (MW/ 26).

40. Having found that a bag had been put over the counter, which could artificially improve the conversion of footfall into sales (MW/26) MW decided to review the recent CCTV footage. That showed that the counter had been covered at different times on multiple days(MW/26). The claimant was invited to an investigation hearing at which MW was the investigating officer.

41. Investigation hearings took place on 1 and 10 February 2023. Notes were taken (210-226). The claimant was not sent a copy of the notes, and he did not sign the notes. MW says that was because he resigned before that happened. The claimant did not take issue with the record of the meetings in his evidence, and I have found that the notes were accurate as far as I rely on them below.

42. In the first meeting on 1 February 2023 (210-212) the claimant said he covered the counter as a one-off. He was lone working; he closed the shop door when he went to the toilet and covered the counter with a bag. He

forgot to take it off when he returned.

43. MW informed the claimant that they had looked at the CCTV for a random day, 17 December 2022, and found that it was covered between 9.10am and 11.10 am that day. The claimant said in mitigation that he had been instructed in this process by the previous store manager. MW adjourned the meeting to investigate.

44. MW interviewed the previous store manager and the supervisor (224-226). The previous store manager said that she would put the cover on before the store opened at 9am as the staff were arriving and would then take it off for the rest of the day. She denied covering it during opening hours or discussing the counter with the claimant when he took over the store.

45. On 10 February 2023 the investigation meeting with the claimant resumed (213-218). MW went through the CCTV footage going back to November 2022, pointing out several occasions when the bag had been on the counter. At this meeting the claimant admitted that covering the counter was not just a one off or an oversight, he said 'I'm really sorry, I've made a mistake now it gets a bit quiet. I'm scared of the conversion. There is pressure to get a good conversion score. I did this during lunchtime only. I haven't told my team to do this. Since you spoke to me, I haven't been doing this.' (214)

46. In between the two meetings two other issues arose from the CCTV footage. The claimant was suspected of unauthorised sampling of products and taking unauthorised time off on 31 December 2022.

47. When questioned about time off on 31 December 2022 at first the claimant said he could not remember whether he was working that day. When he was told that CCTV had been reviewed, he admitted that he did not work that day even though his timecard had been processed (216). The claimant would have had to instruct another member of staff to clock in for him. It could not be done remotely (MW/46) (DC/21).

48. In respect of unauthorised sampling he said that he was using his own bottle to drink from. That was not resolved and it was not a significant issue in the decision to suspend.

49. MW adjourned the meeting for six minutes and took the decision to suspend the claimant because he suspected him of gross misconduct (130-132) (MW/39). The matter was to go forward to a disciplinary which would be heard by an independent manager. The claimant was told he would be given full details of the allegations against him and a minimum of 48 hours' notice. He would be entitled to be accompanied by a colleague or a trade union representative (217).

50. MW's reason for suspension was not solely that the claimant had covered the counter but the other matters that had come to light, in particular, that the claimant had apparently asked someone else to clock in and out for him. If proven that would clearly be gross misconduct in his view. The respondent has dismissed other managers for timecard fraud (DC/22).

51. MW was aware that the staff who worked under the claimant would be

interviewed as part of the investigation. Confidentiality needed to be maintained, and staff were more likely to feel that they could speak up if the claimant was not working in the store with them at the time (MW/36).

52. I find that MW had a legitimate reason for the suspension. The contract provides that suspension is appropriate where the allegation is potentially an act of gross misconduct, or the manager feels that the investigation will be jeopardised if an employee is still at work. MW reasonably considered both these conditions to be met.

53. I note that the claimant had a clean disciplinary record, but the offences were potentially very serious. Store managers were given a great deal of autonomy and were trusted to keep records accurately. Being able to rely on them and trust them was clearly very important. If the allegations were proved the respondent would have been entitled to assert that it no longer had trust and confidence in the claimant.

Resignation

54. The claimant was informed that the matter would be going forward to a disciplinary at 15.23 on 10 February and he sent an email resigning on 10 February at 19.49 (227). The email said he was resigning, 'immediately as Store Manager for personal reasons from tomorrow'. He said he would miss friends and customers and concluded, 'Thank you for your understanding in this matter'.

55. The HR department asked the claimant if he wished to reconsider, concerned that he may have resigned in haste (232) but the claimant indicated he did not want to reconsider and referred to the 'enormous pressure' he had been put under by MW and the 'disciplinary procedure I have found myself on a middle of is totally unfair, unjust' (231). His resignation was accepted and effective from 14 February 2023.

56. In his statement the claimant said that he did not want to go through more humiliation and wait for the disciplinary hearing as it was an unfair suspension (NI/5.6).

Law

Constructive dismissal

57. Section 95 Employment Rights Act 1996 provides, so far as is relevant to the facts of this case:

> (1)For the purposes of this Part an employee is dismissed by his employer if ...
> (a)the contract under which he is employed is terminated by the employer (whether with or without notice),
> (b).....
> (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

Accordingly, dismissal includes constructive dismissal, which occurs where, owing to the repudiatory conduct of the employer, the employee is entitled to resign and regard himself as dismissed.

58. In Western Excavating (ECC) Ltd v Sharp [1978] IRLR 27 CA Lord Denning set out the basic principles in order to succeed in a claim of constructive dismissal. A claimant must prove: (1) that the employer acted in breach of his contract of employment; (2) that the breach of contract was sufficiently serious to justify resignation or that the breach was the last in a series of events which taken as a whole are sufficiently serious to justify resignation; (3) that he resigned as a direct result of the employer's breach and not for some other reason; and (4) that the Claimant did not waive the breach or affirm the contract; the employee 'must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged'.

59. Terms of an employment contract can be express or implied. Implied terms include a mutual term of trust and confidence. Not every breach of contract entitles the employee to terminate the contract. The breach must be sufficiently serious to amount to a repudiation of the whole contract.

60. A breach of the implied term of trust and confidence will always amount to a repudiatory breach (Morrow v Safeway Stores plc 2002 IRLR 9). Per Malik v Bank of Credit and Commerce International SA 1997 ICR 606, to establish a breach of the implied term it must be found that the respondent's conduct was calculated or likely to destroy or seriously damage trust and confidence and the respondent did not have 'reasonable and proper cause' for the conduct.

61. A course of conduct can cumulatively amount to a fundamental breach of contract entitling an employee to resign and claim constructive dismissal following a 'last straw' incident even though the last straw by itself does not amount to a breach of contract, Lewis v Motorworld Garages Ltd 1986 ICR 157 CA.

Unauthorised Deductions

62. Section 13(1) of the Employment Rights Act 1996 provides that an employer shall not make a deduction from wages unless the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract or the worker has previously signified in writing his agreement or consent to the making of the deduction.

63. Section 13(3) provides that where the total amount of wages paid on any occasion by an employer is less than the total amount of the wages properly payable to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

64. The question of what is properly payable requires interpretation of the relevant terms of the contract and a factual analysis of the claim.

Submissions

65. The respondent provided written closing submissions, and I heard closing oral submissions from both the respondent and the claimant which I took into account before reaching my decision.

Conclusion

66. I considered whether there was a breach of an express term of the employment contract in respect of the failure to pay overtime, the move of location and the conduct of the respondent following the claimant reporting a back injury. If a term was breached, was it a fundamental breach, that is a breach so serious that the claimant was entitled to treat the contract as at an end?

67. In respect of the 3 matters referred to in paragraph 66 above and the additional matter of the claimant's suspension I considered whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent ('the implied term').

68. My conclusions in respect of each term, individually and then cumulatively are set out below. The corollary of my conclusions is that the claimant was not constructively dismissed.

Failure to pay overtime

69. The claimant's contractual entitlement was to be paid overtime for time worked over his core hours. From June 2022 he was required to obtain authorisation for working over his core hours. In September 2022 the respondent implemented a policy of time in lieu which had the effect of cancelling out the need for overtime pay as the employee could take time off in lieu and not exceed their core hours.

70. The claimant did not seek approval for overtime in accordance with the policy in place from June 2022. The records from September 2022 did not demonstrate that he had worked over his core hours and the respondent's calculations indicate his hours were in deficit. Accordingly there was not a breach of the express term to pay overtime.

71. I found the claimant was not paid overtime because he did not request authorisation to work overtime from June 2022 or record sufficient hours to build up time in lieu. I did not accept his evidence that he was told not to claim overtime and I therefore do not find that the respondent acted in a way calculated or likely to destroy or damage trust and confidence.

Move location without consultation or reasonable notice.

72. The terms of the contract did not provide for consultation but did provide for reasonable notice. I found that reasonable notice was given in these particular circumstances and accordingly there was no breach of the express term to give reasonable notice and no breach of the implied term.

73. In any event, as the claimant moved to Aylesbury within the time scale requested and worked there without complaint from July 2022 until his resignation in February 2023, I would have found that even if the express or implied term had been breached the claimant affirmed the breach.

Following the claimant's back injury the respondent failed to follow the respondent's wellbeing policy in that it did not carry out a return to work interview and risk assessment.

74. There was not a breach of an express term in failing to follow the Wellbeing policy. I find that it was a policy rather than a contractual term. A right to a 'return to work' interview is not a term of the contract; it is a way of following up on absence.

75. MW's failure to follow up on the claimant's absence was an oversight caused by a breakdown in communication between him and the claimant. There was fault on both sides, and it was not a breach of the implied term.

76. As far as the risk assessment is concerned, the respondent has a duty of care to the health and safety of staff, but the claimant (particularly as a store manager) also has a responsibility. This is reflected in the respondent's health and safety policy. The claimant did not report the incident in writing or in the correct way. If he had done so that would have triggered a risk assessment. In any event failure to do a risk assessment was not a fundamental breach or conduct that was likely to destroy or seriously damage trust and confidence.

Suspending the claimant with no legitimate reason to do so.

77. I found the decision to suspend, and the procedure followed, was reasonable and fair. I found that there were reasonable grounds for suspicion that gross misconduct had been committed.

78. I accepted the explanation of Mr Ward of the purpose of the suspension. The decision was not to terminate the claimant's employment, it was to suspend. The reason was suspicion of gross misconduct and to enable investigation. As there was a legitimate reason to suspend there was not a breach of the term of trust and confidence.

Cumulative effect

79. Having reached the above conclusions I have stood back and considered the claimant's assertion that being suspended without a legitimate reason was the final straw. I do not find the series of events taken as a whole were sufficiently serious to justify the claimant's resignation. The respondent had reasonable and proper cause for its actions in respect of each event.

80. Having found that there was no breach of contract leading to resignation I have found there was not a dismissal. I do not need to go on to find whether if there had been a dismissal it was a fair dismissal. Making such a finding would be speculative because the investigation was not completed, and the respondent may not have dismissed the claimant. For the same reason I

will not address the issues of Polkey or contributory fault.

Unauthorised deductions

81. The burden of proof is on the claimant to show that the respondent has made an unauthorised deduction from his wages. By his own admission the claimant has not kept records of the overtime he says he worked over and above his core hours. There is no documentary evidence on which he seeks to rely. The records indicate that he did not work over his core hours. Accordingly, I find that the claimant has not established that the total amount of wages paid by the respondent is less than the total amount of the wages properly payable to him.

Summary

82. The claimant's claims for unfair dismissal and unauthorised deductions are not upheld.

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Employment Judge S Matthews

Date: 17 October 2024

Judgment sent to the parties on

25/10/2024

For the Tribunal office

Recording and Transcription
Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here: https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/