EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100340/2025

Held in Glasgow on 28, 29 and 30 May 2025

Employment Judge P O'Donnell

Mr L Jarvie	**Claimant** **Represented by:** **Ms Morgan - Counsel [Instructed by DLG Legal Services]**
Poundstretcher Limited	**Respondent** **Represented by:** **Mr K Gibson - Counsel [Instructed By Bramhalls, Solicitors]**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the claims of unfair dismissal and breach of contract (notice pay) are not well-founded and are hereby dismissed.

REASONS

Introduction

1. The claimant has brought complaints of unfair dismissal and breach of contract (in respect of notice pay). These are resisted by the respondent.

Evidence

2. The Tribunal heard evidence from the following witnesses:

    a. The claimant.

    b. Jennifer Jarvie, the claimant's mother.

c. Gary McNamee (GMcN), an area manager (north and west Scotland) with the respondent, who made the decision to dismiss the claimant.

d. David Richardson (DR), an area manager (south and east Scotland) with the respondent, who dealt with the claimant's appeal.

3. There was an agreed file of productions prepared by the parties running to 351 pages. A reference to a page number below is a reference to a page in that bundle.

4. Parties had helpfully produced a statement of agreed facts relating to the chronology of the events leading to the claimant's dismissal.

5. This was not a case where the relevant facts were fundamentally in dispute especially in respect of the sequence of events that culminated in the claimant's dismissal. The disputes between the parties were about how events should have been interpreted rather than whether particular events occurred or not.

6. Broadly, the Tribunal considered that all witnesses sought to give an accurate account of events as they recalled them. Where there were any issues with the precise recollection of events or the sequence of events by any particular witness then the contemporaneous documents and correspondence were of assistance in clarifying matters. Where the contents of those documents were not in dispute then the Tribunal proceeded on the basis that the documents said what they bore to say and were accurate.

Findings in fact

7. The Tribunal made the following relevant findings in fact.

8. The respondent is a discount retailer selling household items. It has over 300 stores across the UK.

9. The claimant was employed as a sales assistant at the respondent's store in Cardonald, Glasgow. The claimant commenced employment on 1 May 2022 and his contractual hours were 4 hours a week but he would regularly work additional hours.

10. The respondent has a code of conduct for all staff (pp159-165) which, amongst other things prohibits the use of company property for purposes other than the intended purpose and from removing any company property or any individual's property from company premises.

11. The respondent also has a disciplinary process (pp166-176) which contains the following relevant provisions:-

    a. Employees do not have an automatic right to be accompanied to investigatory meetings (p169).

    b. Employees may be suspended during any disciplinary investigation and pending any disciplinary hearing (p169 and 170).

    c. Dismissal without notice may be applied as a sanction for gross misconduct (p173). Theft and unauthorised possession of company goods are listed as examples of gross misconduct (p175).

    d. If an employee fails to attend a disciplinary hearing then a decision may be made in their absence based on the information available (p176).

12. In order to control the loss of stock, the respondent has a number of measures and one of these, relevant to this case, relates to staff purchases (p192). Staff cannot process their own purchases and this must be done by someone else, ideally a member of management. When the purchase is done then a sticker is placed on the item to show that it has been purchased according to the policy especially where the item is being used or consumed in the store. The stickers are kept in the office and not by the tills in the store.

13. At around midday on 23 August 2024, GMcN was contacted by the deputy manager at the Cardonald store, Curtis Wright, to say that he had observed the claimant drinking a bottle of juice from the store for which he had not paid. At that time, only the claimant and Mr Wright were present in the store which is the minimum needed for the store to remain open for health and safety reasons.

14. GMcN advised Mr Wright to wait until another member of staff came into the store before speaking to the claimant about the drink. The delay was to allow the store to remain open whilst Mr Wright spoke to the claimant.

15. Mr Wright phoned GMcN a few hours later to say that he had spoken to the claimant who confirmed that he had not paid for the drink and so Mr Wright had suspended the claimant.

16. A third phone call between GMcN and Mr Wright took place at 16.15 that same day in order that GMcN could make a note of what had happened that day. The note appears at pp49-50 and records the following:

    a. Mr Wright had observed the claimant consuming a can of "raw isotonic orange" at the till. Mr Wright knew that he had not sold this drink to the claimant and they were the only two people on shift at the time.

    b. Towards the end of the claimant's shift, Mr Wright asked the claimant if he had paid for the drink to which the claimant said "no" without any other explanation.

    c. Mr Wright explained the seriousness of theft and suspended the claimant.

17. GMcN spoke to HR about the matter and it was decided to hold an investigation into what happened. Frank Cullen, manager of the respondent's Paisley store, was appointed to hold the investigation meeting. This took place on 6 September 2024 and a note of the meeting appears at pp51-52 which records the following:-

    a. The claimant asked if he was aware of why the investigation was taking place and he replied that he was.

    b. Mr Cullen asks the claimant for an explanation why he consumed the drink without paying for it and he replied that there was no-one at the till at the time and that he was going to pay for it when Curtis came.

    c. The claimant was asked if he had ever consumed food or drink without paying for it before and he replied that he had never done this.

d. Mr Cullen asked the claimant if there was anything else which he wanted to add and he replied that he was surprised at the situation and that people may have the wrong idea. Mr Cullen did not ask the claimant to expand on this comment.

18. It was decided that the matter would proceed to a disciplinary hearing. This was set for 19 September 2024 at the Govan Store and was to be chaired by GMcN. A letter dated 17 September 2024 (p55) was sent to the claimant confirming this. The letter informs the claimant that the allegation was that he had failed to follow company policy for staff purchases and consumed items without paying for them. It goes on to set out his right to be accompanied by a work colleague or trade union official and explained that the allegation may constitute gross misconduct which could result in dismissal.

19. The meeting arranged for 19 September did not proceed as intended. The claimant had not previously perceived how serious the issue was, having never been subject to disciplinary action before. He had not informed his family about what had happened and it was only when he received the invite letter that he discussed this with his mother and she explained what it meant. The claimant suffered a panic attack and was subsequently signed off work sick (pp53 and 54). He did not feel he was prepared to attend the disciplinary hearing and contacted HR about this. It was agreed to postpone the hearing arranged for 19 September.

20. By email dated 18 September 2024 (pp64-65), the claimant contacted the head of HR to thank him for rearranging the hearing and setting out the reasons why he felt he could not attend. He asserts in the email that Mr Wright dislikes him and has been treating him in a way which could amount to bullying. He authorises the respondent to provide information to his mother.

21. By email on the same date (p63), the claimant's mother contacts HR to ask for all witness statements and other documents gathered in the investigation. It is not in dispute that the claimant and his mother made multiple requests for

this information. It is not until an email dated 8 October 2024 (p90) that the claimant is provided with a copy of Mr Cullen's note of the investigation meeting.

22. By letter dated 23 September 2024 (p77), the claimant is invited to a rescheduled disciplinary hearing on 25 September 2024. The letter contains the same information as the first invite at p55.

23. The 25 September meeting did not proceed. By email dated 23 September 2025 at 17.55 (p66), the claimant's mother contacted HR to say that the claimant was unfit to attend after learning from a colleague that Mr Wright had allegedly been discussing the claimant's situation in the workplace.

24. The claimant had emailed HR earlier that day (pp67-75) raising a grievance relating to Mr Wright's alleged conduct (which included the alleged discussion of the claimant's disciplinary situation). In this email, the claimant, for the first time, asserts that taking a drink and paying for it at the end of the shift was something which all staff did and that management was aware it (p69). The claimant's mother had made a similar assertion to HR in an email of 20 September (pp61-62) where she stated that she believed that there was a policy that staff should go to a manager to buy something and get a label but that this was not followed when the store was busy. When GMcN was made aware of this assertion, he checked with the store manager who confirmed that staff were required to pay for items according to company policy.

25. The claimant's grievance did not progress any further. The respondent asked him to complete a grievance form to progress the grievance and it is not in dispute that he did not so. There was a number of emails between the claimant and HR about the grievance but these are not relevant to the issues to be determined in this case.

26. By email dated 24 September 2024 (p83), the respondent's HR department confirmed that they were happy to rearrange the disciplinary hearing. On 2 October 2024, HR emailed the claimant (p83) to say that it would be in everyone's interests to arrange a new date for the hearing and offer to make

adjustments to assist the claim such as arranging the hearing by telephone or permitting him to submit written representations.

27. By letter dated 8 October 2024 (p95), the claimant was invited to attend the disciplinary hearing at the Govan Store on 11 October 2024. The letter is in the same terms as the previous invite letters.

28. GMcN attended the Govan store on 11 October but the claimant did not attend. GMcN decided to proceed to consider the matter in the claimant's absence after taking advice from HR. He recorded his decision in a note at pp80-82. The note is dated 25 September 2024; GMcN had all the dates of the disciplinary hearings and wrote the wrong one on the note. The note sets out what is contained in the earlier notes from the discussions with Mr Wright and the claimant. GMcN felt that the claimant had not given a satisfactory explanation for his actions; he did not consider that intending to pay for the drink later was an adequate explanation given the company policy that goods should be paid for before being consumed. Further, there had been a number of hours in which GMcN felt the claimant could have paid for the drink prior to being challenged by Mr Wright. GMcN concluded that the claimant had acted dishonestly and stolen from the respondent. He decided that dismissal was the appropriate sanction because theft was taken seriously within the company.

29. The claimant had not attended on 11 October 2024 because he had believed that the disciplinary hearing was not going ahead. The reason for this is that his mother had attended the Cardonald store on 9 October to hand in a sick note and reported to the claimant that the store manager had told her that GMcN had said that the hearing would not go ahead. The claimant did not contact HR to query this and confirm that the meeting would not be going ahead.

30. GMcN had had no discussion with the store manager about the disciplinary hearing at all, let alone one in which he had said anything which could have been construed as postponing the hearing.

31. The claimant's dismissal was confirmed in a letter dated 18 October 2024 (p97A); this letter stated that his dismissal was effective from 19 September 2024. The claimant queried this and the head of HR confirmed in an email dated 22 October 2024 (p99) that this was a typographical error and a corrected version of the dismissal letter (p97) was issued with a revised date of 11 October 2024. The Tribunal pauses to note that, as a matter of law, this date is still the wrong date of dismissal; a dismissal is not effective until communicated to the employee and so the claimant was not dismissed until 18 October 2024 when the first letter was received. However, nothing turns on the correct date of dismissal in this case.

32. The letter of dismissal (no matter which version is read) sets out the sequence of events in trying to organise the disciplinary hearing and that this was held in the claimant's absence. It confirmed that the claimant had been summarily dismissed on the grounds of gross misconduct. It also set out the claimant's right of appeal.

33. The claimant appealed by two emails sent on 21 October 2024 (pp101-104). The appeal sets out a number of complaints about Mr Wright and his conduct towards the claimant (repeating what had been said in the earlier email seeking to raise a grievance) but in terms of the disciplinary issue and process the following appeal points are relevant:

    a. The claimant asserts that the company policy is not followed by other staff who have not been disciplined and that staff have never been informed of the policy for staff purchases.

    b. He states that he was told that the 11 October meeting was not going ahead and refers to what he says his mother was told by the store manager on 9 October.

    c. He was unable to put in written representations because he had never been provided with notes about his suspension despite asking for these.

d. He asserted that the incident had been “fabricated” by Mr Wright in order to get the claimant dismissed.

e. He complains about his grievance against Mr Wright not being dealt with.

f. He complains about the length of the investigation meeting with Mr Cullen explaining that he did not know what to say at that meeting.

g. He explained that he offered to pay for the drink on 23 August when challenged by Mr Wright.

34. DR was appointed to hear the appeal and this was originally arranged to take place by telephone on 28 October 2024 (p117) and then rearranged for 1 November 2024 at the claimant’s request (p118). The claimant wanted to have the hearing face-to-face and so it was arranged again for this format to take place on 5 November 2024 (p128).

35. On 4 November 2024, there was a long exchange of emails between the claimant and HR regarding his attendance at the appeal hearing (pp129-134). This was initiated by an email from HR at 10.29 that day asking the claimant to confirm he would be attending the hearing the next day. The substance of the exchange was that the claimant was not comfortable attending on his own but could not get a trade union representative or work colleague to come with him. He asked whether his mother could attend but the respondent was not willing to agree to this. An alternative suggestion made by HR was for the claimant to prepare written submissions. The exchange of emails concluded without the claimant expressly stating that he would not attend; this is implied by the claimant stating that he was going to provide written representations.

36. The claimant sent 4 emails with his written representations on the evening of 4 September 2024 (pp145-151). There were also a number of attachments to the emails mainly comprising of earlier correspondence with the respondent. The emails repeat what the claimant had set out in his earlier correspondence about how staff purchase drinks at the store, his complaints about not receiving the information he had asked for about his suspension,

the quality of the investigation by Mr Cullen and the claimant's version of events when he had been challenged by Mr Wright. The content of the emails was repetitive with the same points being made multiple times and so, although the emails appear to be lengthy, the substance of the claimant's representations was confined to the points summarised above.

37. DR attended the appeal hearing on 5 November 2024. He did so because he had not heard that the hearing was not going ahead and that the claimant would not attend. He prepared a note of his considerations (pp153-155) and his decision was communicated to the claimant by letter dated 14 November 2024 (pp157-158).

38. DR decided not to uphold the appeal for the following reasons:

    a. There was no evidence that the disciplinary hearing on 11 October 2024 had been cancelled. The claimant had been informed on 8 October 2024 that it was going ahead.

    b. DR considered that queries from the claimant had been answered in a timely manner.

    c. In terms of the investigation meeting, DR considered that there was nothing in the fact that this lasted for seven minutes; in his experience these meetings could be 5 minutes or an hour depending on what is being discussed. He noted the lack of reply by the claimant at the meeting.

    d. He considered that the claimant had admitted to taking the drink without paying for it in accordance with company policy and that this constitutes gross misconduct.

    e. DR did not consider that Mr Wright had had any influence over the decision to dismiss.

    f. DR felt that the claimant had been given multiple opportunities to present his case but had not done so.

Submissions

39. Both counsel produced written submissions and supplemented these orally. For the sake of brevity, the Tribunal does not intend to set out the submissions in details. These have been noted and the Tribunal will refer to any point raised that requires to be specifically addressed in its decision below.

Relevant Law

40. The test for unfair dismissal can be found in s98 of the Employment Rights Act 1996 (ERA).

41. The initial burden of proof in such a claim is placed on the respondent under s98(1) to show that there is a potentially fair reason for dismissal. There are 5 reasons listed in s98 and, for the purposes of this claim, the relevant reason is conduct.

42. The test then turns to the requirements of s98(4) for the Tribunal to consider whether dismissal was fair in all the circumstances of the case. There is a neutral burden of proof in relation to this part of the test.

43. The test for whether a dismissal on the grounds of conduct (or misconduct) is fair is set out in the well-known case of *British Home Stores Ltd v Burchell* [1978] IRLR 379. The test effectively comprises 3 elements:-

    a. A genuine belief by the employer in the fact of the misconduct

    b. Reasonable grounds for that belief

    c. A reasonable investigation

44. It is important to note that, due to changes in the burden of proof since *Burchell*, the employer only has the burden of proving the first element as this falls within the scope of s98(1) with the second and third elements falling within the scope of s98(4).

45. It is clear from the *Burchell* test that the Tribunal is not determining whether it believes that a claimant was guilty of any misconduct nor is it re-running the investigation or dismissal process. The Tribunal's role is, rather, to assess

whether the respondent had a genuine and reasonable belief in the claimant's misconduct and whether a fair process was followed in reaching that belief.

46. In order for there to be a reasonable belief, especially where there is a dispute as to whether or not the employee committed the misconduct in question, the employer must have some form of objective evidence on which to base their conclusion.

47. On the question of whether the investigation was reasonable, the case of *Sainsbury's Supermarket v Hitt* [2003] IRLR 30 is authority for the proposition that the band of reasonable responses test applies to conduct of the investigation.

48. If the respondent discharges the burden of showing that there was a potentially fair reason, the test then turns to the requirements of s98(4) for the Tribunal to consider whether dismissal was fair in all the circumstances of the case. There is a neutral burden of proof in relation to this part of the test.

49. In considering s98(4), the Tribunal should take into account all relevant factors such as the size and administrative resources of the employer. There are two matters which have generated considerable case law and which are worth highlighting

50. First, there is the question of whether an employer has followed a fair procedure in dismissing the employee. The well-known case of *Polkey v AE Dayton Services Ltd* [1987] IRLR 503 it was held that a failure to follow a fair procedure was sufficient to render a dismissal unfair in itself (although the compensation to be awarded in such cases may fall to be reduce to reflect the degree to which the employee would have been fairly dismissed if the procedural errors had not been made – the so-called "Polkey" reduction).

51. Procedural fairness includes giving an employee the opportunity to explain their actions or provide some form of mitigation.

52. The Tribunal should have regard to the ACAS Code of Practice on Disciplinary Practices and Procedures in Employment ("ACAS Code") in assessing the

procedural fairness of any dismissal as well as considering whether the employer had complied with their own procedures and policies.

53. On the question of whether the procedure followed by the employer was reasonable, the case of *Sainsbury's Supermarket v Hitt* [2003] IRLR 30 is authority for the proposition that the band of reasonable responses test applies to conduct of the process leading to dismissal.

54. The second broad issue in considering s98(4) is that the Tribunal needs to consider whether the dismissal was a fair sanction applying the "band of reasonable responses" test. The Tribunal must not substitute its own decision as to what sanction it would have applied and, rather, it must assess whether the sanction applied by the employer fell within a reasonable band of options available to the employer.

Decision – unfair dismissal

55. The first question for the Tribunal is whether there is a potentially fair reason for the claimant's dismissal. In the present case, there was no dispute between the parties that the claimant was dismissed because he took a bottle of juice without paying for it. There was no suggestion that the claimant was dismissed for any other reason and it was clear from the evidence heard by the Tribunal that this was the reason for dismissal. This reason clearly falls within the scope of conduct and so is a potentially fair reason for dismissal.

56. The Tribunal is also satisfied that the Mr McNamee, as the person who made the decision to dismiss the claimant, had a genuine belief that the claimant had taken a bottle of drink without paying for it. It is difficult to see how he could not have had a genuine belief when the claimant admitted to doing so (albeit with the explanation that he intended to pay for it later). There was certainly no evidence led before the Tribunal, either expressly or from which the Tribunal could draw an inference, that Mr McNamee did not believe this to be the case nor was there any evidence of some ulterior motive on his part.

57. Similarly, the Tribunal considers that Mr McNamee had a genuine belief that this was in breach of the respondent's policy on staff purchases and that the

claimant was aware of this. Again, there was no evidence that Mr McNamee was using the reason given as a "smokescreen" to dismiss the claimant for some other reason.

58. It would be useful at this point for the Tribunal to comment on the involvement of Curtis Wright in the process leading to the claimant's dismissal. It was quite clear from what was said by the claimant and his mother during the disciplinary process and in evidence at the present hearing that they perceived that Mr Wright had been responsible for the claimant's dismissal as part of a broader course of conduct against the claimant.

59. However, other than reporting the initial incident to Mr McNamee, Mr Wright had absolutely no involvement in the dismissal process whatsoever; he did not conduct any part of the investigation, he had no influence over McNamee's decision and, indeed, had left the business before the dismissal process had concluded. Whilst it is clear that the claimant perceives that Mr Wright had, for some reason, taken against him, the Tribunal considers that this has no bearing on the fairness of the claimant's dismissal.

60. Similarly, the complaint that Mr Wright spoke about the claimant's suspension in public is not something which had any bearing on the fairness of the decision. There was no suggestion that this was done at the instigation of the respondent and the Tribunal simply cannot see any basis on which this would render the dismissal unfair.

61. Turning to the question of the investigation of the claimant's conduct, the Tribunal considers that the investigation by Mr Cullen was limited and did not go far beyond the minimum that would be required. However, there is no question that the claimant was given the opportunity to explain what happened and to the extent that the investigation was about establishing the fact that the claimant took a bottle of drink without paying for it then this was achieved. Once the claimant admitted that he had done so then the fact of the conduct was established.

62. The limited nature of Mr Cullen's discussion with the claimant reflects the limited response given by the claimant. He certainly did not proffer the

detailed explanation that he set out in later correspondence and advanced at the Tribunal and so it was not the case that the claimant was saying anything which would have prompted Mr Cullen to ask for more detail.

63. Whilst Mr Cullen could have asked the claimant more probing questions or pushed him to say more, the Tribunal has to bear in mind that it is assessing the investigation by applying the band of reasonable responses and not substituting its own views as to how it would have conducted the investigation. Once the claimant had admitted to taking the bottle of drink without paying then the fact of the misconduct was established; the claimant was given an opportunity to add anything else and he did not do so.

64. Indeed, the claimant had further opportunity to put his position to the respondent at the disciplinary hearing. At this point, we come to the fundamental problem for the claimant in this case which is that he did not attend any of this hearing and so Mr McNamee did not have the level of detail that has been put before the Tribunal. A number of the criticisms about the investigation and the later disciplinary process are about things which only arise once the detail of the claimant's case emerges. For example, there was a complaint that CCTV was not examined; putting aside the fact that none was available, there was no obvious reason why the respondent would consider this necessary when the claimant did not deny taking the bottle of drink.

65. The same applies to the criticisms that the respondent did not interview other staff about how they made purchases or check till receipts to confirm the claimant had paid for items; there was no apparent need for this given the limited information the claimant gave to the respondent before the decision to dismiss was made. This was not a case where the claimant said that he did not do what he was accused of doing where further investigation might be needed to see if there was anything which confirmed matters one way or the other.

66. Taking all of this into account, the Tribunal considers that a reasonable investigation was carried out and that, when the whole process is considered,

the respondent did give the claimant sufficient opportunity to put his case to them.

67. Turning to the question of reasonable belief, the Tribunal is satisfied that Mr McNamee did have a reasonable belief that the claimant had taken a bottle of drink without paying for it. The claimant admitted as such in the meeting with Mr Cullen and he has never denied doing so.

68. This is clearly a breach of the respondent's policy regarding staff purchases and, at the time of dismissal, there was nothing before Mr McNamee which would indicate to him that the claimant was not aware of this policy. The only thing which Mr McNamee had was the claimant's grievance (which was predominantly about the conduct of Mr Wright) in which the claimant asserted that all staff take drinks and pay for it at the end of the shift (p69). This is not an assertion that the claimant was unaware of the respondent's policy but, rather, that he and other staff did not follow it.

69. It was Mr McNamee's evidence, which the Tribunal accepts because there was nothing to contradict him, that he spoke to the store manager who told him that staff had been informed of the policy.

70. The Tribunal also notes that an email from the claimant's mother to HR on 20 September 2024 (p61) accurately describes the respondent's policy. Although the claimant stated in cross-examination that he had not told his mother about this, it is difficult to see how else the claimant's mother would have become aware of this given that she was not an employee of the respondent and had no other apparent source for this information. The email in question was seen by Mr McNamee at the time it was sent and before he made his decision to dismiss.

71. On the basis of the information available to him, the Tribunal considers that it was reasonable for Mr McNamee to conclude that the claimant had taken a bottle of drink without paying, that this was in breach of the respondent's policy on staff purchases and that the claimant was aware of the policy.

72. Turning to the question of whether dismissal was within the band of reasonable responses, the Tribunal reminds itself that it is not for it to substitute its own decision for that of the respondent. It may well be the case that the Tribunal or any other person may have felt that dismissal was not warranted in the present case but that is not the test to be applied. It is not whether some other sanction could be applied but, rather, whether the sanction which was applied is one which was reasonably open to the respondent.

73. As with the question of reasonable belief, the question of whether dismissal was within the band of reasonable responses has to be assessed on the basis of the information known to the respondent at the time. This is important in this case where the claimant did not attend the disciplinary hearing and so did not present the degree of detail about his case to Mr McNamee that he does now.

74. There is no question that taking an item without paying for it would be considered by most people as theft. In the context of the employment relationship where there needs to be trust and confidence between the employer and employee, anything which destroys or seriously damages that trust goes to the heart of the relationship. The value of the item in question does not weigh heavily in the consideration of loss of trust.

75. The lack of any explanation or mitigation from the claimant is also relevant. The claimant's absence from the disciplinary hearing meant that there was nothing before Mr McNamee (other than a brief assertion in the claimant's grievance) that provided any excuse or mitigation for the claimant's actions. At most, all Mr McNamee had before was an explanation that the claimant was only doing what other staff did; this does not mean that the claimant had not done something wrong but simply others had done wrong as well. It may be that none of them were disciplined but that means nothing more than they had not been reported for such conduct and does not mean that the claimant's conduct had to be excused by the respondent.

76. In these circumstances, whilst it may seem a harsh decision and the Tribunal does have some degree of sympathy for the claimant, the Tribunal does not consider that there is any basis on which it can be said that dismissal was not within the reasonable band of responses.

77. Turning now to the fairness of the process as whole and not just the investigation, this is not a case where no procedure was followed at all. The respondent arranged a disciplinary hearing and the claimant had the opportunity to attend this and put his case to them. Similarly, the claimant was afforded a right of appeal (which he took) and a hearing was arranged at which the claimant had the opportunity to set out why the decision to dismiss was wrong.

78. In these circumstances, the respondent has complied with the requirements of both its own disciplinary procedure and the ACAS Code of Practice.

79. The Tribunal will address some of the specific criticisms made of the procedure by the claimant.

80. First, the claimant complains that the disciplinary hearing went ahead when he was off work sick. An employer is not required to pause a disciplinary process in such circumstances and each case needs to be assessed on its own facts as to whether proceeding with the disciplinary is within the band of reasonable responses.

81. In this case, there was no evidence presented to the respondent at the time that the claimant was unfit to attend the disciplinary hearing on 11 October 2024. The claimant did rely on his health in seeking to postpone the earlier hearings but these were related to specific causes (that is, finding out how serious the situation was and being told that Mr Wright was discussing his case in the store) rather than being unfit to participate in the process at all.

82. The Tribunal notes that the reason why the claimant did not attend the disciplinary hearing was not that he was unfit but that he believed it was not going ahead (a point which the Tribunal will address in more detail below).

83. Further, the cause of the claimant's ill health was the disciplinary process itself and so it was in his interests for this to be progressed and concluded.

84. Second, and connected to the first reason, the claimant criticises the decision to proceed with the disciplinary hearing on 11 October 2024 in his absence. Again, the Tribunal has to assess whether the respondent acted outwith the band of reasonable responses in doing so. From the respondent's perspective, there was no request from the claimant to postpone that hearing and, as far as they were concerned, it was going ahead.

85. It was the claimant's position was that he understood, from what he was told by his mother about something said by the store manager, that the hearing was not going ahead. However, up to that point, all communication about the disciplinary process had been received from the respondent's HR department and the store manager had had no involvement at all. The claimant had received nothing from HR and the Tribunal considers that a reasonable employee would have checked with them to confirm if it was correct that the disciplinary hearing was not going ahead.

86. The Tribunal accepts the evidence from Mr McNamee that he had said nothing to the store manager about the disciplinary hearing not going ahead (nor anything that could have been misinterpreted that it was not going to proceed). This is consistent with the fact that he was in attendance on the day of the hearing and the correspondence between the claimant and HR arranging that hearing.

87. With that being said, the Tribunal does not consider that the claimant or his mother were seeking to mislead the Tribunal in asserting that they understood that the hearing was not going ahead. It is clear that there had been some form of misunderstanding or miscommunication at some point that led the claimant and his mother to believe the hearing was not going ahead but this is not something that can be laid at the feet of the respondent. The clear and unambiguous correspondence from HR was that a disciplinary hearing was going ahead on 11 October and if the claimant had any doubts about this then it was incumbent on him to clarify this rather than simply not turn up.

88. For these reasons, the Tribunal does not consider that it was outwith the band of reasonable responses for the respondent to proceed with the disciplinary hearing in the absence of the claimant and when he was on sick leave.

89. Further, even if there had been any procedural failing in the disciplinary hearing going ahead in the claimant's absence then he had a further opportunity to present his case as part of the appeal but, again, did not attend the hearing. On this occasion, it was not said that he was unfit to attend and it was the fact that he had to attend on his own that led to his absence. It is quite clear that the claimant had been afforded multiple opportunities to put his case and did not take these.

90. Third, the claimant complains about the failure to proceed with his grievance against Mr Wright before, or alongside, dealing with the disciplinary. Putting aside the fact that the respondent did engage with this to a limited degree and asked the claimant to complete their grievance form (which he did not do), there is no requirement for an employer to deal with a grievance before dealing with a disciplinary. The ACAS Code of Practice makes it clear that this is an issue for employers to address on a case-by-case and, again, the Tribunal will assess whether what the respondent did in this case was within the band of reasonable responses.

91. As noted above, other than making the initial report about the claimant, Mr Wright had no involvement in the dismissal process and decision at all. The Tribunal cannot, therefore, see what difference the grievance would have made at all to the disciplinary process; it would have had no bearing on whether the claimant took the drink, whether he breached the respondent's policy on staff purchases in doing so and whether he was aware of the policy.

92. In these circumstances, the Tribunal cannot see any basis on which it could be said that not dealing with the grievance before, or alongside, the disciplinary process was outwith the band of reasonable responses.

93. Fourth, there were a number of date errors in the documents and correspondence; Mr McNamee put the wrong date on the form recording the disciplinary hearing and the wrong date of dismissal was put on the original

dismissal letter (p97A) by HR albeit a corrected version was subsequently produced (p97).

94. The claimant seeks to argue that these errors are evidence of some deliberate effort by the respondent to pre-judge his case or make a decision in his absence whereas the respondent says that these were errors. The Tribunal prefers the respondent's evidence; the simplest explanation is nearly always the true explanation and, although it does not reflect well on the diligence of people within the respondent, error is the far more likely explanation for the wrong dates being given than the respondent engaging in some form of complex plan to get rid of the claimant in a manner that would almost inevitably rebound on them.

95. Fifth, the claimant complains about the lack of information provided to him in advance of the disciplinary hearing. This complaint is based on an assumption that there should have been more information than there was but, as set out above, there was very limited information arising from the investigation process and this was provided to the claimant before the disciplinary hearing proposed for 11 October 2024.

96. It is correct to say that the claimant only received this information before the disciplinary hearing but, given the limited amount of information, the Tribunal considers that there was sufficient time for him to consider it.

97. Sixth, the claimant asserts that the person who accompanied him to the investigation meeting was asked to leave during it. This is not recorded in the note of the meeting which the claimant otherwise accepts as accurate. The Tribunal does bear in mind that there is no right to be accompanied to an investigation hearing (either on a statutory basis or under the respondent's disciplinary policy) as there is for a disciplinary hearing.

98. The claimant does not suggest that anything untoward was said or done by Mr Cullen in his companion's absence and that the note produced was accurate. The Tribunal cannot, therefore, see any basis on which, assuming that it did occur, the claimant's companion being excluded from the meeting rendered the dismissal unfair.

99. Seventh, and finally, the claimant asserts that his immediate suspension was unnecessary and disproportionate. Again, the Tribunal has difficulty in seeing how this rendered the process unfair. Suspension is a neutral act to protect both parties and does not mean that there had been any prejudging of the outcome.

100. Whilst the process followed by the respondent overall may not have been a counsel of perfection and there were errors made (such as those with the dates) which have caused confusion for the claimant, the Tribunal considers that a fair process was followed by the respondent. In particular, the claimant was given every opportunity to present his case, both at a disciplinary hearing and at appeal, and his failure to do so is not the fault of the respondent.

101. In summary, the Tribunal considers that the respondent had a genuine and reasonable belief that the claimant committed the conduct in question, that they followed a fair procedure and that the decision to dismiss was within the band of reasonable responses. The claim of unfair dismissal is, therefore, not well-founded and is hereby dismissed.

Decision- Breach of Contract

102. The claimant's breach of contract claim relates to the fact that he was dismissed without notice.

103. There were no particular submissions made by either party in respect of this claim.

104. If the claimant was dismissed in circumstances where the respondent was entitled to dismiss him summarily then there would be no breach of contract. It is commonly the case that such dismissals are described as "gross misconduct" although the legal principle is that where the claimant has acted in a manner which would amount to a fundamental breach of contract then the respondent is not bound by the contractual requirement to give notice of dismissal.

105. The Tribunal must be satisfied that the respondent has proven, on the balance of probabilities, that there was a repudiatory breach by the claimant and that

this was sufficiently serious so as to justify summary dismissal. This is a different test from that of unfair dismissal and it is not simply a question of the respondent establishing that they had reasonable grounds to believe the claimant was guilty of the misconduct in question.

106. In the Tribunal's view, if the allegation of misconduct in this case is proven then this is certainly one which is serious enough to justify summary dismissal. Any dishonesty goes to the root of the contract and, in particular, the mutual duty of trust and confidence.

107. The question then is whether or not the respondent has proven that the claimant was guilty of a repudiatory breach of contract.

108. There is no dispute in this case that the claimant took a drink without paying for it in accordance with the respondent's policy for staff purchases. Indeed, there is no dispute that the claimant took the drink without paying for it at all. The Tribunal is, therefore, satisfied that event giving rise to the claimant's dismissal is established as a matter of fact.

109. The conduct of the claimant is, on the face of it, a repudiatory breach of the contract; as set out above, this is theft and that it goes to the heart of the trust and confidence between employer and employee.

110. The Tribunal has taken account of the claimant's explanation that he intended to pay for the drink later and that this was a common practice in the store in which he worked. However, other than his assertion to this effect, there was no evidence of this and certainly no evidence that management was content for staff to deviate from the stated policy. The only evidence of the view of management came from Mr McNamee and Mr Richardson that the policy is followed in all stores.

111. In these circumstances, the Tribunal is satisfied that the respondent has established that the claimant committed a repudiatory breach of contract and they were entitled to dismiss him without notice.

Date sent to parties **9 June 2025**