EMPLOYMENT TRIBUNALS

Claimant: Mr M Chowdhury

Respondent: Iceland Foods Limited

Heard at: London Central Employment Tribunal **On:** 8th and 9th March and 23rd – 25th May 2022

Before: Employment Judge Hopton

Appearances (by video):

For the Claimant: Mr S Heitlinger, (Legal Advice Clinic)
For the Respondent: Mr S Hignett (Counsel)

Sylheti interpreters: 9th March: Ms Uddin, 24th May: Mr Hasan

RESERVED JUDGMENT

The judgement of the tribunal is that:

1. The claimant's claims of unfair dismissal and wrongful dismissal fail and are dismissed.

REASONS

1. This is a claim brought by Mr Chowdhury arising out of his employment with the respondent, a supermarket. Mr Chowdhury was dismissed by the respondent for alleged misconduct.

Preliminary matters

Interpreter

2. This hearing was originally due to be heard over two days on 8th and 9th March 2022. Part way through the claimant's evidence it became apparent that it would be helpful to have an interpreter present. Ms Uddin, Sylheti interpreter was available on 9th March and the hearing continued on that date but went part heard.

The hearing resumed on 23rd March 2022. The only day the claimant was present for the final three days of the hearing was the 24th March as he was recalled to give further evidence. Mr Hasan, Sylheti interpreter, was present on that day.

CCTV

3. CCTV was a contentious issue between the parties. The claimant's representatives had requested CCTV footage relatively early on in the proceedings, before the hearing on 8th March. They were told the respondent had undertaken a search for the footage, but it was lost and so unavailable. On the 23rd May, the morning of the first day of the reconvened hearing, some CCTV footage was presented to the tribunal. This had been sent to the claimant's representatives a few days beforehand, despite being discovered by the respondent on 10th March 2022 (albeit in an unviewable format) and converted to a viewable format on 6th April 2022. Mr Hignett explained that the respondent had undertaken a further search for the footage and although there was no footage in the electronic folder for 30th January 2021, it had eventually been discovered in a folder for a different date, due to a vagary of the system whereby the system saves the folder on the date it is saved, not the date it was created. The claimant says that further CCTV footage exists that exonerates him. This was not disclosed by the respondent and the respondent contends that it does not exist.

The law and issues

4. The claimant claims unfair dismissal under section 98 of the Employment Rights Act 1996 and wrongful dismissal.

5. The relevant law is contained in the Employment Rights Act 1996 section 98. Misconduct is a potentially fair reason for dismissal and the Tribunal must decide whether the dismissal was in fact unfair in accordance with section 98(4) which says:

   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 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.

6. In misconduct dismissal the well-established guidance on fairness within section 98(4) are the decisions in ***British Home Stores Ltd v Burchell*** **[1978] IRLR 379,** ***Iceland Frozen Foods Ltd v Jones*** **1983 ICR 17, EAT** and ***Post Office v Foley*** **[2000] IRLR 827:**

   6.1. Did the employer genuinely believe that the claimant was guilty of misconduct?

   6.2. If so, was that belief based on reasonable grounds?

6.3. Had the employer carried out such investigation into the matter as was reasonable?

6.4. Did the employer follow a reasonably fair procedure?

6.5. Was it within the band of reasonable responses to dismiss the claimant rather than impose some other disciplinary sanction?

7. In judging the reasonableness of the employer's conduct a tribunal must not substitute its decision as to what was the right course to adopt for that of the employer.

8. If the dismissal was unfair, the tribunal is asked to consider contributory fault and *Polkey*. the relevant law is section 122 ERA 1996 and the principle *in* ***Polkey v AE Dayton Services Ltd*** **1988 ICR 142, HL**

9. The principle in *Polkey* means that the tribunal may consider whether a reduction should be made to any compensatory award if the tribunal finds that, had a fair procedure been followed, the claimant would still have been dismissed.

10. The tribunal may reduce basic and compensatory awards for culpable conduct as set out in sections 122(2) and 123(6) of the Employment Rights Act 1996:

Section 122 – Basic award: reductions

…

(2) Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.

Section 123 – Compensatory award

…

(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

Procedure, documents and evidence heard

11. I was referred to an agreed bundle of 215 pages, an additional email from the respondent to the claimant, inserted in the bundle as p.85A, and five video clips.

12. For the claimant, I had witness statements from: the claimant, numbering 48 paragraphs, Mr W Cupid, numbering 17 paragraphs and Mr A Kayum, numbering 18 paragraphs. For the respondent, I had witness statements from: Mr E Shahriar, the investigating manager, numbering 38 paragraphs, Mr A Idrees, dismissing manager, numbering 34 paragraphs and Mr P Finnegan, appeal manager,

numbering 29 paragraphs. I also had the benefit of skeleton arguments from both representatives.

13. I heard oral evidence from the claimant, Mr Cupid, Mr Shahriar, Mr Idrees and Mr Finnegan. Mr Kayum was not available to give oral evidence and as his evidence was contested by the respondent I attached little weight to his written statement.

The facts

14. These findings are confined to the facts relevant to the legal issues. There were a large number of disputed facts between the parties.

15. The claimant worked for the respondent supermarket, in its Hoxton store, as a Home Delivery Driver from 12th September 2013 until his dismissal for gross misconduct on 11th March 2021.

16. In February 2021 the respondent discovered CCTV footage that appeared to show the claimant and two others (Halil, another employee of the respondent, and Mr Cupid, a security guard) removing stock from the store without paying for it. The CCTV showed the claimant loading items into plastic bags and removing the bags from the store via the loading bay, near where his van was parked.

17. The respondent operates a 'colleague giveaway' policy which allows employees to take home stock that cannot be sold, for example because it is damaged or out of date. This unsellable stock is known as shrinkage or wastage. In order to qualify for colleague giveaway, stock must first be classified as shrinkage by being scanned on a handheld terminal (HHT) as 'waste' and then further classified as colleague giveaway by being scanned again as 'colleague giveaway'. The respondent's policy states that *"Colleague Giveaway can only commence after close of trade and once all waste has been recorded. Before colleagues can remove products from store, the products must be recorded as "Colleague Giveaway" on the HHT"*.

18. The respondent has no other policy that allows an employee to remove goods from the store without paying for them.

19. The respondent believed the claimant may have been acting against its policies and conducted an investigation.

<u>Investigation meeting</u>

20. The claimant attended an investigation meeting on 18th February 2021 with Evan Shahriar, the Store Manager at Hoxton. Notes were taken by a colleague, Junior. The claimant was given no notice of the meeting. Notice is not required under the ACAS Code.

21. The claimant's and the respondent's account of that meeting differ. The claimant said he reminded Junior in front of Mr Shahriar that Junior had offered him the items of food. The respondent denies this. The claimant says he was not told it was a formal investigation to consider his suspension. The respondent contests this and relies on the 'suspension meeting script' and on the contemporaneous notes

of the meeting which are signed by the claimant on each page. The claimant told me that he had not read the notes before signing.

22. On the whole, I prefer the evidence contained in the meeting notes. This was a contemporaneous document, written at the time, and which bears the claimant's signature. Even though the claimant said he had not read the notes before signing, he had the opportunity to do so and to challenge any inaccuracies at the end of the meeting. It is difficult to conclude that there were significant inaccuracies in the meeting notes when the claimant has signed them on each page and did not challenge the accuracy of the notes at any stage of the disciplinary process. I accept that the suspension meeting script was read to the claimant. There is a note at the bottom of the script page *'I have said everything on the interview'*. These were the claimant's words which Mr Shahriar wrote in the relevant box on the script. I therefore conclude it was more probable than not they were written after Mr Shahriar had read out the script to the claimant.

23. The claimant and respondent agreed that some CCTV was shown to the claimant during the investigation meeting. The claimant says he was shown a few seconds of CCTV but then the respondent stopped the video even though he asked for it to continue to be played. The Respondent says it showed him two videos of about 6 minutes each. Those videos, 'Hoxton 500 handover' and Hoxton 550 loading bay' were shown to the tribunal in evidence. I accept the Respondent's account on this point because the investigation report states the CCTV footage was shown to the claimant and there is nothing in the videos that assists the claimant's case as the videos just show the claimant, Mr Cupid and Halil loading food into bags and removing them from the store. Even if I am wrong on that, I find that it would not have made any difference to the claimant's defence during the disciplinary process to have been shown a few seconds of the video or the whole video because of the content of the video I have described which was not favourable to the claimant.

24. The claimant says that a fourth employee, Mr Kayum can be seen in the Hoxton 550 loading bay video and that the respondent should have noticed this and interviewed Mr Kayum as part of the investigation. The video was very dark. Until it was lightened in the tribunal hearing it was not at all obvious that Mr Kayum was present.

25. At the meeting the claimant admitted taking two slimming world products without paying for them. He said the products were filthy, he had understood they were shrinkage and were going in the bin, and he had the permission of the duty manager, Sadrin, to take them.

26. Mr Shahriar also interviewed Sadrin. Sadrin said no one had asked him if they could take stock home.

27. Mr Shahriar concluded that the claimant had taken two slimming world products without paying for them. He wrote an investigation report recommending disciplinary action. The claimant was invited to a disciplinary hearing by letter and by email. Various attachments were sent with the email and the letter including the investigation notes, the notes from the interview with Sadrin and Mr Shahriar's Investigation Report. The claimant did not receive the posted letter as he had moved house, although it was sent to the only address the respondent had for him.

The parties agree the email to the claimant, containing attachments, was sent. The claimant said he did not receive the attachments and he had not seen them before his disciplinary hearing. Mr Idrees said in his evidence that the claimant had a copy of Sadrin's interview notes in his hand during the disciplinary hearing. The claimant did not say in his witness statement that he had not received the attachments. As the parties agree the email was sent, and the claimant did not mention that he had not received the attachments until his oral evidence before the tribunal, I conclude that the claimant did receive the invitation email and attachments before the disciplinary hearing, and that in any event, the respondent took reasonable steps to ensure he had those documents by sending them to the claimant's active email address.

28. The claimant alleges that it was not made clear to him that the meeting could lead to his suspension, and that Mr Shahriar told him he would not lose his job and to 'go and have a rest for a week'. The claimant refers to a WhatsApp message he sent to Mr Shahriar on 16th March 2021 saying, 'you told me that I'm not going to lose my job'. Mr Shahriar denies that he said that to the claimant. I accept that the claimant believed Mr Shahriar had assured him he would not lose his job. However, he was mistaken in that belief. I have already found that Mr Shahriar read out the suspension meeting script which explains the conditions of suspension in some detail. Mr Shahriar concluded that the claimant had taken the items and should be charged with gross misconduct. It is inconsistent with the script, and with Mr Shahriar's conclusion that the claimant should be charged with gross misconduct, for him to have told the claimant to 'have a rest' and that he would not lose his job. I find that he did not say those things.

29. After the investigation meeting Mr Cupid, the security guard provided a statement giving his account of the incident.

Disciplinary hearing

30. Mr Idrees, Store Manager at the Stepney branch, was the disciplinary manager. At the hearing the claimant confirmed he understood various store policies about buying or taking stock, including the colleague giveaway policy. He said about the evening of 30th January 2021, that colleagues were sweeping frozen stock away from the cold room. He asked where it was going and was told in the bin. He asked if he could take it and Junior and Sadrin said he could take the stock. He got the stock ready to take between 6pm and 7pm. He offered some stock to the security guard, Mr Cupid. He said it was a common practice to take items and that Desrin, his previous manager, had said he could take any items from shrinkage, but despite that he always asked for permission. He said that he always asked if items had been scanned before he took them.

31. During the meeting Mr Idrees asked the claimant about Mr Cupid's statement. Mr Cupid had said in his statement that the claimant approached him and offered him damaged slimming world products and when Mr Cupid had said that he would let the manager know, the claimant had said there was no need to do so. The claimant agreed that was accurate.

32. Mr Idrees showed the claimant the shrinkage report for the 30th January and the claimant agreed that the slimming world items had not been scanned as shrinkage.

He said he had taken other items too. He initially said these had been scanned as colleague giveaway, then that he wasn't sure if they had been scanned or not. He could only remember one of these items, a doner kebab. When Mr Idrees told him a doner kebab had not been scanned as colleague giveaway he said a colleague gave him permission to take it, then when Mr Idrees asked him which colleague the claimant said 'no one'. In his evidence before the tribunal the claimant said that people had asked him so many questions, it was making him tired and he was feeling fed up, which was why he said no one gave him permission to take the kebab.

33. At the end of the meeting Mr Idrees concluded that the claimant would be summarily dismissed for gross misconduct for theft of company property. He took factors into account including that the claimant understood the shrinkage policy, that Sadrin had said he had not given permission, that the claimant had admitted taking other items without paying, and that none of the items taken had been scanned as shrinkage or colleague giveaway. Mr Idrees wrote to the claimant to confirm his decision by letter on 15th March 2021.

34. I considered whether Mr Idrees had decided the outcome before the meeting and closed his mind to the claimant's explanation and defence of permission as the claimant alleges. I conclude that was not the case. I find the notes of the disciplinary meeting more persuasive than the HR note which says Mr Idrees thinks '*it is clear he has taken the items without payment'*. The meeting was a long one, taking around three and a half hours including breaks. Mr Idrees asked questions that gave the claimant the opportunity to tell his side of the story. The claimant was able to give his defence of permission which Mr Idrees explored.

35. Mr Idrees said in his evidence that the claimant's length of service did not make any difference to him, but he said that he considered it. I do not accept that he considered the claimant's length of service as a mitigating factor. He appeared not to understand the concept when it was put to him in cross examination and it is not mentioned in the dismissal letter.

Appeal

36. The claimant appealed the decision to dismiss him. Mr Finnegan, Area Sales Manager was the appeal hearing manager and the hearing took place on 30th March 2021.The claimant brought Mr Kayum to the meeting as a witness, but Mr Finnegan told him Mr Kayum was not able to give a statement at the appeal hearing and that he would contact him after the meeting if the claimant wished Mr Kayum to be a witness. In fact, Mr Finnegan made several attempts to contact Mr Kayum after the meeting, both by telephone and going to the store. He said he felt Mr Kayum was avoiding him. Mr Kayum says in his witness statement that he received no contact from Mr Finnegan. However, as he was not present to give oral evidence, I prefer Mr Finnegan's evidence on this point and accept that Mr Finnegan made a reasonable effort to contact Mr Kayum and that Mr Kayum was aware of those attempts to make contact and chose not to respond.

37. At the appeal hearing, the claimant told Mr Finnegan he believed his dismissal to be unfair because he had permission to take the items. He said he had been given permission from a supervisor colleague called Mary and another colleague, Milton,

as well as Junior and Sadrin. He said both that he thought the items had been scanned out and that he didn't know if they had been scanned or not.

38. After the hearing Mr Finnegan did some further investigations. He interviewed Mary, Milton and Junior. He also interviewed another colleague, Farhana. None of the interviewees confirmed the claimant's side of the story. They all said that they had not given the claimant permission to take items. All except Mary said that they had not seen any frozen stock go to waste that day. Mary couldn't remember. In any event, as duty manager, Sadrin was the only person who had authority to give permission on the evening of 30th January 2021.

39. As part of the appeal the respondent therefore interviewed (or in the case of Mr Kayum, attempted to interview) all the witnesses that were relevant to the allegations who were still working in the business. Mr Finnegan did not re-interview Sadrin, who had left the business and who had been asked specifically about the claimant as part of the investigation stage. He also did not attempt to contact Halil, another colleague, who resigned after being invited to a disciplinary meeting for taking stock without permission.

40. Mr Finnegan felt it was unlikely the witnesses knew that Sadrin and the claimant had been dismissed in connection with these issues. He said they would have known he had left.

41. Mr Finnegan considered whether the sanction of dismissal should stand and took into account the claimant's relatively long service and clean disciplinary record.

HR notes

42. I was referred to some HR notes in evidence. The HR notes refer to a common practice in the Hoxton store of taking items without payment. The notes say this is referred to in the investigation notes and report. This is inaccurate in that the investigation notes and report do not say that. The claimant referred to other people taking items in his disciplinary and investigation meetings, but it appears from his reference to a poster being put up in the pandemic that he is referring to the colleague giveaway policy. Mr Shahriar in his evidence said that he did not tell HR there was a common practice along those lines and that he also did not tell HR the store doesn't follow the correct process dealing with shrinkage. The respondent's poster and policy, Mr Shahriar's evidence and the claimant's evidence were all consistent around the process for dealing with shrinkage, which was that it needed to be scanned out. Given that context, I do not find it credible that Mr Shahriar would have told HR the store was not following the correct procedure. The HR notes are therefore mistaken on that point.

State of the items

43. There was a dispute over the state of the slimming world items the claimant took. The claimant variously said they were filthy, covered in mud and dusty. He said that after he wiped them they were fine. The respondent said they were fine to sell to customers, and at times sought to rely on pixilated CCTV images to demonstrate that. It was not possible to tell from the CCTV whether the items were suitable to sell to customers.

Conclusions

Did the employer genuinely believe that the claimant was guilty of misconduct?

44. The respondent believed the claimant had taken items from the store without paying based on the CCTV footage, which showed him placing items into plastic bags and removing them from the store. Those items had not been scanned as waste or colleague giveaway.

If so, was that belief based on reasonable grounds?

45. The respondent based its belief on the CCTV footage, witness evidence from Sadrin, four colleagues of the claimant, and interviews with the claimant. It did not accept the claimant's argument that he had permission to take the items. This was reasonable. The CCTV footage showed him removing items from the store. During the disciplinary process the claimant confirmed he understood the process for colleague giveaway and other relevant policies. Although he was consistent in his evidence that Sadrin gave him permission, at each stage of the disciplinary process he added more people who had given him permission, several of whom did not have the authority to give permission in any event. All those people said they had not given him permission. The claimant also told the respondent that he had taken a doner kebab without permission. It was reasonable for the respondent to rely on the claimant's own admission in addition to the other evidence when deciding whether or not he had committed misconduct.

46. I considered whether the respondent should have put more weight on the openness of the claimant's actions, in offering goods to Mr Cupid, and whether this gave significant weight to his argument that he had permission to take the items. I concluded that it was reasonable for the respondent to conclude that, because the claimant had told Mr Cupid that he (Mr Cupid) did not need to seek Sadrin's permission, it suggested the claimant was trying to conceal the fact he was taking the items. I considered this in the context of the claimant's interview when he said he took the kebab, and in the context of the internal witnesses saying he did not have permission to take the items.

47. I considered whether it would have been reasonable for the respondent to disregard the internal witness evidence from Mary, Junior, Milton and Farhana, on the basis that they may have been influenced by the fact Sadrin, the claimant and Halil had all left the business, at least partly as a result of these allegations. I concluded it was reasonable for the respondent to rely on the four internal witnesses' evidence because they were the only witnesses, their accounts were all consistent with each other's and with Sadrin's, and because the respondent felt it unlikely the witnesses knew that Sadrin and the claimant had been dismissed for taking stock without paying for it (or in Sadrin's case, allowing it to be taken).

Had the employer carried out such investigation into the matter as was reasonable?

48. Although I found some flaws in the investigation, overall I conclude that it was a reasonable investigation. I have taken into account the fact that Iceland is a large business with significant administrative resources.

49. The respondent invited the claimant to three meetings to discuss the incident – an investigation, disciplinary and appeal. At each of these he was given the opportunity to put his side of the story.

50. Regarding the interviews with colleagues that the respondent undertook, it was reasonable of the respondent not to interview Mr Kayum at the investigation stage. The CCTV was too dark to see that he was there, and the claimant did not mention Mr Kayum had relevant evidence until the appeal stage. The disciplinary process should have been paused to enable Junior to be interviewed. The claimant mentioned at the disciplinary hearing that Junior was a witness and it would have been appropriate for the Respondent to have interviewed him then. However, because Junior and the other witnesses the claimant mentioned were interviewed at the appeal stage, the process was fair taken as a whole. It was frustrating for the claimant that the respondent chose not to interview Desrin, the previous store manager, from whom the claimant said he had standing permission to take items from shrinkage, and another employer might have done so. However, this did not affect the fairness of the process. Mr Heitlinger submitted that the standing permission the claimant had from Desrin was illustrative of the common practice at the store. I do not accept this because the claimant said in the disciplinary process and during the tribunal hearing, that when Mr Shahriar became store manager he always asked for permission to take items. He also said he had not asked for permission to take the doner kebab. Whether or not the claimant, at some point in the past, had standing permission from a manager, was therefore irrelevant to whether or not, under a new manager, on 30th January 2021, he took items without permission and outside of policy.

51. It was reasonable for Mr Finnegan to limit his investigation to those witnesses still in the business and not to interview Halil or reinterview Sarin. Sadrin was an important witness but he had already given a statement on the claimant's case as part of the investigation stage. The other four witnesses, Mary, Junior, Milton and Farhana gave consistent evidence and it was therefore reasonable for Mr Finnegan to rely on it. He also took reasonable steps to contact Mr Kayum. Although another employer might have taken the step of attempting to contact Halil, the further investigation Mr Finnegan did was sufficient by the objective standards of the reasonable employer (*Sainsbury's Supermarkets Ltd v Hitt* [2002] EWCA Civ 1588). It was reasonable for him to rely on the four consistent witness statements from the claimant's colleagues in conjunction with the original statement from Sadrin and to proceed in the absence of evidence from Mr Kayum, and to conclude that the claimant had not had permission to take the items.

52. Regarding the doner kebab, the respondent was entitled to believe what the claimant told Mr Idrees in the disciplinary hearing which was that he had taken the donner kebab without permission.

53. Regarding the cleanliness of the items the claimant took, the state of the items was relatively irrelevant. Whether or not the items were suitable to sell to customers, the claimant had not had permission to take them. Even if the items had been shown to be filthy, he would have breached the respondent's policy by taking them. I have therefore put little weight on the state of the items.

54. The respondent should have made a better search of the CCTV which was covering the store on 30th January 2021. The claimant said consistently that CCTV footage would exonerate him. He believed that CCTV footage existed which showed him with other colleagues looking at the food items, and which showed Sadrin gesturing with his hand to say the claimant could take the items. It would have been reasonable for any of the managers involved in the disciplinary process to have asked for a search of the CCTV to have been made. If Mr Shahriar had done so straight away, the footage would either have been found and made available to the disciplinary process or would have been shown not to exist. I considered carefully whether this failure to search the CCTV more extensively made the investigation and therefore the dismissal unfair. I concluded it did not for two reasons. First because the claimant had admitted to taking the kebab without permission. I reminded myself of why the claimant said he gave that answer – because he was tired and fed up, but conclude it was reasonable for the respondent to rely on what the claimant said in the investigation meeting at face value, given the seriousness of what he was charged with. The claimant knew the store had policies around colleague giveaway and removing items from the store. He knew he needed permission to take items. On the balance of probabilities, I conclude that if Sadrin had given him permission to take the kebab he would have said that. Secondly, I took into account the additional investigation Mr Finnegan did by interviewing four colleagues of the claimant, three of whom the claimant said were witnesses to the incident. This mitigated the failure to undertake a more thorough search for the CCTV.

55. Mr Heitlinger referred me to *Ivey v Genting Casinos* [2017] UKSC 67 on the basis that the respondent should not have considered the claimant to be dishonest. The respondent came to a conclusion that the claimant had been dishonest based on a number of factors: the claimant knew what the procedures were for taking stock out of the store (shrinkage/colleague giveaway) and those procedures had not been complied with; all of the people from whom the claimant said he had permission denied giving him such permission; the claimant said no one had given him permission to take the kebab; the claimant had told the security guard, Mr Cupid, that he did not need to ask for permission to take the items. Although another employer might have interpreted the claimant's discussion with Mr Cupid differently, in the context of the other evidence just mentioned, it was reasonable for the respondent to conclude that the claimant knew what he was doing was dishonest.

56. Mr Heitlinger also submitted that the respondent had investigated insufficiently, based on the principles in *ILEA v Gravett* 1998 IRLR 497 and *A v B* 2003 IRLR 405, EAT. For the reasons given above regarding whether or not the failure to make a better search for the CCTV made the investigation unfair, and the respondent's conclusions on dishonesty, I conclude that the respondent undertook a reasonable level of investigation. This was not a case where serious criminal allegations were brought, or where the result of the disciplinary process would bar the claimant from working in his chosen field.

<u>Did the employer follow a reasonably fair procedure?</u>

57. The claimant points to various aspects of the disciplinary process to say that the process was not in line with the respondent's own procedure or the ACAS Code. I

have considered the process as a whole. The respondent did not comply with various aspects of its own policy such as summarising the issues before adjournments, reading out the charge against the claimant at the beginning of the disciplinary and various other minor procedural issues. However, taking the process as a whole, the procedure was fair. The claimant knew what the charge against him was – this was set out in the invitation letter to disciplinary meeting and the investigation report and made clear in discussions in the meetings; he was shown relevant evidence; and he had ample opportunity to put his side of the story to the respondent and to comment on the evidence provided.

58. The claimant was not shown the video footage at the disciplinary hearing, only stills that had been taken from the video evidence. The claimant says this breaches paragraph 12 of the ACAS Code. I do not agree. The claimant had been shown the video footage in the investigation meeting. Still photographs of the relevant parts of the footage were shown to him during the disciplinary hearing. This was sufficient to comply with the ACAS Code and did not make the process as a whole unfair.

Was it within the band of reasonable responses to dismiss the claimant rather than impose some other disciplinary sanction?

59. Following a reasonable investigation, the respondent concluded that the claimant had stolen items. The respondent is a retail business where employees have access to stock. To preserve its stock it is reasonable for the respondent to treat theft of any stock, however low value, as gross misconduct. Although Mr Idrees did not consider the claimant's length of service and clean disciplinary record as mitigation against dismissal, Mr Finnegan took it into account and still decided dismissal was an appropriate sanction. This meant that the fact Mr Idrees did not take it into account did not make the dismissal unfair. It was within the range of reasonable responses for the respondent to dismiss the claimant for theft despite the mitigating factor of the claimant's long service and clean disciplinary record.

60. The claimant's claims therefore fail and are dismissed.

_____

Employment Judge Hopton

_8th June 2022_____

Date

JUDGMENT & REASONS SENT TO THE PARTIES ON

08/06/2022

.

FOR THE TRIBUNAL OFFICE