EMPLOYMENT TRIBUNALS

Claimant: **MR SELLATHURAI AHILANATHAN**

Respondent: **TESCO STORES LIMITED**

Heard at: **London South by CVP**

On: **19 April 2023**

Before: **EJ Harley**

Representation
Claimant: **Michael Sprack (Counsel)**
Respondent: **Sam Way (Counsel)**

RESERVED JUDGMENT

1. **The claimant was not unfairly dismissed by the respondent. His claim is not well founded and is dismissed.**

2. **The claim for breach of contract was withdrawn at the outset of the hearing and is dismissed.**

REASONS

Claims

1. The claimant brought a claim for Unfair Dismissal, relying on the provisions of section 98 of the Employment Rights Act 1996, together with a claim for Breach of Contract. The Breach of Contract claim was withdrawn at the outset of the hearing.

Issues

2. The issues to be addressed are as follows:

Unfair dismissal

(a) What was the reason for the dismissal? Was it a potentially fair reason?
The respondent says the reason for dismissal was conduct. The claimant says the reasons given for his dismissal were related in whole or in part to capability.

(b) If the reason was conduct, did the respondent hold a reasonable belief that the claimant was guilty of misconduct?

(c) Did the respondent conduct a reasonable investigation?
The claimant contends there was a failure to carry out a proper investigation, that there was a failure to investigate capability issues in accordance with the respondent's disciplinary policy, which he argues required a different approach for capability issues.

(d) Was the dismissal procedurally fair?
The claimant argues that the procedure was deficient in its treatment of the question of, or suggestion of demotion.

(e) Was the dismissal within the range of reasonable responses?
The claimant asserts that demotion was not properly considered, and that the respondent's handling of this issue took their decision outside of the range of reasonable responses.

Owing to time constraints the hearing addressed only the liability issue.

Procedure

3. This was a remote hearing conducted by CVP. All participants appeared remotely. The claimant's Counsel Mr Sprack alerted the Tribunal to the fact that for reasons beyond his control he was having to participate in the proceedings from Belgium. No issue was taken with this by the respondent's Counsel or the Tribunal.

4. As a preliminary issue the claimant's Breach of Contract claim was withdrawn on the claimant's behalf at the start of the hearing.

5. The Tribunal heard evidence in the morning session and early afternoon from witnesses for the Respondent:

Monika Cermakova (a store manager who conducted the initial investigation),
Donato Santangelo (a store manager who conducted the disciplinary interview and made the decision to dismiss), and
Neil Banks (a Tesco area manager who conducted the disciplinary appeal).
Each were cross examined by the claimant's Counsel.

I then heard from the claimant, who was cross examined by Counsel for the respondent. I then accepted submissions for the respondent and claimant respectively.

6. The claimant and respondent's witnesses produced witness statements which were adopted as evidence and supplied in electronic format. The Tribunal was supplied with an electronic bundle comprising 610 pages, with a separate List of Documents. In addition, the respondent provided an opening note addressing the issues including representations on Breach of Contract issue which shared with the claimant's Counsel before the hearing. At the outset the Tribunal asked whether any reasonable adjustments were required and after a request from his Counsel it was left open to the claimant to seek a break after his evidence.

FACTS

7. All findings of fact are made on the balance of probabilities. Where I have reached a finding where there was conflicting evidence, it is because I preferred that party's evidence. I heard evidence concerning a wide range of matters not all of which were relevant to the Issues. Where I have not referred to a matter put before me in this judgment it does not mean that I have not considered it, merely that it was not relevant to my conclusions.

8. The respondent is a major supermarket chain, operating across the UK using different store formats. The claimant was continuously employed by the respondent from 8 May 1990 until his dismissal on 21 June 2022. He commenced employment as a Customer Service assistant, progressing over time to Store Manager level, and served in that capacity in various stores for over 20 years. At the date of his dismissal, he was employed as the Store Manager of the respondent's Clapham Wandsworth Express branch and had been in post there from November 2021.

9. The claimant was employed under a series of standard form company contracts. The most recent version dated from 30 June 2019 and provided for disciplinary and grievance procedures, details of which were available from the Personnel Manager. The tribunal was supplied with a policy document entitled "Disciplinary 2019". For the purposes of this case, I have noted these selected extracts:

> *2. Why could I face disciplinary action?*
> *When your conduct falls below our standards, e.g., you behave unreasonably, unacceptably, against policy, or you don't comply with the Code of Business Conduct, we consider this to be misconduct…*
> *We'll consider whether any issues are misconduct, capability or a mix of both e.g., if a job is not done correctly, is it because you are purposely not performing (misconduct) or is it because you are not capable of performing (incapability).*
> *In this situation, the difference is the level of control that you have over your actions:*
> *- if you could perform better but will not, it would be considered misconduct;*
> *- if you can't perform better no matter how hard you try, it would be considered incapability and we'll work with you on this through our Supporting Your Performance process. …*
>
> *9: What are the possible outcomes of a disciplinary hearing?*
> *The purpose of any disciplinary outcome is to make you aware of unacceptable conduct and how to improve. One of the following outcomes can be given: …*

Final Written Warning
If there is still no improvement in your conduct or the required standard has still not been met you may receive a final written warning. If the offence is more serious you may be issued with a Final Written Warning for a first offence. A final written warning will remain on your record for a period of 52 weeks.

Demotion
As an alternative to your dismissal and if the situation is appropriate (and a suitable vacancy is available) you may be offered a demotion if there is still no improvement in conduct or the required standard has still not been met.

Dismissal
If there is still no improvement in your conduct or the required standard has still not been met, you may be dismissed.
If you have a live disciplinary warning, further conduct offences may be linked together.

10. I was also supplied with a document called "Express Store Manager: My Role", referred to by Ms Cermakova in her statement, which described the various duties and responsibilities of an Express Store Manager. For the purposes of this case, I would summarise the relevant responsibilities as follows:
- managing health and safety in the store for staff and customers,
- managing store security/ 'shrinkage routines'* (*practices to combat theft of stock),
- managing staffing and resource planning,
- responsible for staff training including ensuring company policies are followed regarding pricing and food safety, and
-ensuring compliance with regulations pertaining to the sale of food items,
- leading the team and being a brand ambassador.

These were reflected in assertions made by the respondent's witnesses in their statements and during the hearing. These were not challenged, apart from in the context of staffing. The claimant's duty to manage staffing and organise recruitment was not disputed, but he insisted that the store was understaffed, and that he had repeatedly sought help and support on this issue from his area manager but that this was not forthcoming. I will return to this issue below.

11. Prior to managing the Wandsworth store the Claimant was Store Manager at the respondent's Shirley Express, Croydon. While working there, on 26 June 2021, the claimant was issued with a Final Written Warning for misconduct. This was issued after a disciplinary hearing conducted by an independent Store Manager, Enzo Antinoro. The meeting was witnessed by a note taker, and the claimant was represented at the meeting by a fellow manager, Shariff Imthiyas. The letter outlined his misconduct as "knowingly selling out of code products to customers and colleagues and covering the date with reduction labels." The letter identified the improvement required as being to:
"Follow the correct waste and OOC process, ask for upskilling if required".
The letter confirmed that the warning remained live for 12 months from that date. In the event of further misconduct during the 12-month period, the letter outlined that this would:

"…likely to lead to further disciplinary action and this could ultimately result in your dismissal from the Company. If you feel you have been unfairly treated in this matter, you have the right to appeal against my decision."

The decision was not appealed, and this warning was live at the time of the relevant incidents.

12. On 24 April 2022 a member of the claimant's staff at Wandsworth, Anuja Sivojan, sent a complaint via email to the claimant's line manager, Inthikab Ikram. Ms Sivojan raised concerns over the claimant's communication with her, complained that he did not consult her on her rota, and raised general concerns that he was treating her unfairly. In addition, she outlined concerns about his approach to "Out of Code" items and to price integrity (PI) routines.

The investigation

13. The line manager instigated an investigation into the complaint, approaching an independent Store Manager, Ms Cermakova, to conduct the investigation. He passed her the emailed complaint, together with details of a recent failed store audit where policy breaches were identified (among them the claimant opening the store by himself), an email from the line manager to the claimant raising this specific breach and making reference to this being a re-occurrence of this issue, and an email from the Shrink & Security Partner detailing CCTV evidence showing the claimant opening the store alone on numerous occasions, leaving the store without supervision, and leaving the cash office door open when leaving for the day.

14. Ms Cermakova met with and interviewed Ms Sivojan about her various allegations. Ms Sivojan confirmed her allegations but expanded on them, indicating that the claimant opened the store alone, and that he had left the store without supervision. Ms Cermakova went on to meet and interview four other members of store staff. These staff variously outlined issues of the claimant ignoring policies, of the claimant leaving the store early (and without leaving supervision in place) meaning that there was no manager to deal with complaints, or authorise refunds, requiring customers to return to the store later in the day. Some staff were unaware of the detail of policies which they themselves should have been following. Their training and the oversight of their work was the claimant's responsibility.

15. Ms Cermakova called the claimant to an investigation interview in a letter via email sent 11 June. The meeting was scheduled for 14 June 2022, and the letter confirmed that the meeting would address:

"• Colleague complain (sic) regarding your behaviour and how they are treated at work.
• Not adhering to waste process and not following Alphanumerical date codes.
• Breach of Integrity around PI routines.
• Breach of Store opening process on various occasions.
• Leaving the store and colleagues vulnerable on the 29th April 2022 be (sic) leaving the store early without a trained shift runner."

The letter went on to say:

"This meeting is an investigation and you can be accompanied by either a Tesco colleague or an authorised Trade Union representative"

16. Despite the option to be accompanied the claimant attended the meeting alone, and the meeting was minuted by Lorvin Afonso. Ms Cermakova put various allegations to him. On the separate points I will summarise his responses:

- Communication: The claimant denied the allegations regarding his communications with Ms Sivojan. He criticised her abilities. He suggested that he might raise a grievance against her in response to her complaint.

- Food waste/alphanumeric process: These are the processes by which the respondent manages food waste and ensures food quality by rotating stock by reference to codes associated with the goods. The Tribunal heard that this was regarded as a key process and priority for the respondent, it was the subject of significant internal communication, acknowledged by the claimant. The changes were introduced after the respondent was given a significant fine for selling out of date produce. In this context, during the investigation meeting the claimant gave an example where, by way of illustrating Ms Sivojan's shortcomings, he said she had misinterpreted the waste/alphanumeric code process. He explained to Ms Cermakova how, according to him, Ms Sivojan had got the process wrong, and outlined how she had been corrected. In doing this the claimant misstated the policy during the investigation meeting. Failures in observing this policy had already been identified in the audit visits, but he had not corrected his understanding of them. It subsequently emerged (and this was put to the claimant at the subsequent disciplinary meeting), that he had been trained in this process on 17 October 2021.

- Price Integrity (PI) routines: These are the twice daily processes by which items have their shelf prices changed and updated. The Tribunal heard how failing to observe these processes could lead to overcharging, creating trading standards issues and reputational risks. The claimant misstated the process during the investigation meeting, confirmed that he created his own shortcuts rather than following the process and admitted that even then the process was not followed consistently, to save time. The claimant had been trained in the correct processes on 19 June 2021.

- Opening the Store Alone: The claimant admitted to repeatedly opening the store alone, which was contrary to company policy. He accepted that he had been challenged on this behaviour previously at his performance review, following audits and in a company sanctioned process ("Let's Talk") on 14 April 22 regarding an earlier occurrence. In the note of that session, it was noted any reoccurrence would lead to formal investigation. The claimant admitted to repeating this behaviour on 29 April and 1 May (after the "Let's Talk" warning), after it was put to him that these occurrences were captured on CCTV. These videos were shared with the Tribunal. In response he described this behaviour it as "a bad habit", that he was "silly", and volunteered that he was aware that it was a "risk to me, to Tesco, and risk to everybody". He confirmed he had also been recently trained on the point. The claimant accepted that he was particularly aware of the dangers of this practice, having been attacked and injured in these same circumstances some years previously, and mentioned that even his wife (an ex-Tesco employee) told him not to open the store alone.

The Tribunal was advised by Mr Santangelo that there is no pressure to open the store with only one member of staff – the policy in fact requires the manager to seek assistance rather than open the store alone, and in fact that it may be that the store remained closed until two people were available to open the store. The policy provides that assistance could and should be sought from managers in nearby stores where this situation arises.

- Leaving the store without Supervision/Crisis Trained staff: The claimant accepted that he left the store early on 29 April, leaving the store without the required trained supervision, as per policy. The claimant admitted to not contacting his manager to alert him to his absence, or to seek his approval:

He went on to admit, after being challenged based on staff accounts of his behaviour, to doing the same thing on other days, leaving the store without trained supervisory staff in contravention of policy for "2 - 3 hours". In mitigation the claimant said that he was frequently having to operate "1-to-1" in the mornings, and that the store was understaffed, and leaving the store unsupervised was not a risk: "it is not vulnerable if it is only 2-3 hours".

17. At the end of the meeting, after a recess, Ms Cermakova communicated her conclusion that the allegations (apart from the allegation that the Claimant had behaved badly towards his subordinate) warranted disciplinary action.

Disciplinary Hearing

18. The claimant was invited by letter dated 16 June 2022 to a disciplinary meeting to be conducted by second witness Donato Santangelo, with the meeting scheduled for 21 June 2022. The letter advised that the claimant was required to attend a disciplinary hearing, and confirmed the allegations to be considered as:

> *"• Not adhering to waste process and not following Alphanumerical Date Codes*
> *• Breach of integrity around PI routines*
> *• Breach of store opening process on various occasions*
> *• Leaving the store and colleagues vulnerable on the 29th April 2022 by leaving the store early without a trained shift runner"*

It went on to state:

> *"As this hearing may result in disciplinary action being taken against you, up to and including your dismissal from the Company, you are entitled to be represented at the hearing. This can be either a Tesco colleague or an authorised Trade Union representative. This is a serious matter and you should make every effort to attend."*

19. The meeting was held, the claimant attended unaccompanied, and Mr Santangelo put the various allegations to the claimant.

– Food waste/alphanumeric codes: The claimant was now able to explain the correct waste process/alphanumeric codes but could not offer an explanation as to why the policy was not followed in the store by his staff despite having been trained in the correct process.

- PI process: He accepted that the process was not being consistently followed, it was put to him that it had been picked up on an audit ("shrink") visit – he indicated that he did not have time to follow this process, though he now only admitted to failing to follow the process on one occasion.

- Opening Store Alone: He accepted that he had opened the store alone on several occasions, and it was put to him there were re-occurrences since the 14 April 22 discussion addressed in the investigation which he accepted.

- Leaving Store without Supervision/ Crisis trained staff: He accepted he had left the store without appropriate supervisory cover on 29 April 2022. The claimant sought to mitigate the occurrences on the basis that the store was understaffed, that he was working excessive hours to cover a shortfall in shift leaders and was working on days which should have been his day's off – including 29 April 22.

20. The claimant sought to explain his behaviours on the grounds that he had been on a lifestyle break away from the store owing to a bereavement, he was under pressure from frequently working 1-on-1 (one manager, one staff member) and indicated:

"Like I said before, enough is enough. I can't take full accountabilities of running the store. I would like to go to a large store as a line manager"

21. At the end of the meeting and after a recess Mr Santangelo communicated his decision captured in a rationale document included in the transcript. He recorded that he had considered and rejected the idea that demotion to Team Leader or Shift Leader would be appropriate as they both carried similar responsibilities to those the claimant had failed to fulfil as Store Manager, and that the appropriate sanction was therefore dismissal, outlining the appeal process. The claimant was upset to find himself dismissed. Both claimants and Mr Santangelo's accounts in their witness statements outline that the claimant asked Mr Santangelo to reconsider his decision. The claimant suggests he requested Mr Santangelo consider him for a duty managers job but that he refused, and that this was not recorded in the note. Mr Santangelo indicated that he said he could not reconsider the dismissal or demotion to a lesser role as he'd already made the decision to dismiss him. This is consistent with the claimant's account – that Mr Santangelo would not consider offering the claimant a lesser management role.

22. The claimant says he then requested a Customer Service role as a last resort rather than losing his job completely (so by implication, to be considered by way of a demotion). Mr Santangelo confirms that he said he would enquire into the possibility of him "applying for" a customer service role, but that this would be considered as part of the appeals process, having already announced his decision to dismiss the claimant. I accept this as being an accurate characterisation of what occurred. The claimant suggested in his statement that Mr Santangelo's decision to dismiss was premeditated. I do not accept that. There was no evidence to support that accusation and Mr Santangelo's evidence on his approach was straightforward and consistent with the contemporaneous documents.

23. A letter of dismissal issued dated 21 June, confirming the dismissal on the grounds outlined in the previous letter, and adding a fifth ground that the claimant

was guilty of having shown negligence in his position of accountability as Store Manager and demonstrated a breach of trust. It outlined the right to appeal and the process to follow. The claimant appealed the decision on 5 July 2022 and an appeal hearing was scheduled for 21 July 2022 with the third witness, Neil Banks.

Appeal process

24. At the meeting of 21 July, the claimant was accompanied by colleague and fellow store manager Shariff Imthiyas. Mr Banks was assisted by a note taker, Wayne Barnes. He revisited the areas on which the decision to dismiss was based, and the claimant gave his responses on each point. The claimant indicated that because of work-related stress (the first mention of this) he misstated the OOC policy to a colleague once and asserted that the failure to follow PI processes was down to a lack of staff. The claimant admitted leaving the store without supervision. Mr Banks invited the claimant to offer evidence in mitigation but that he said he would have to ask his solicitor. The written note of the meeting states Mr Banks "explored the possibility of demotion to shift leader which was refused by Ahil *(the claimant)* which was a surprise as this was requested by him at the end of the disciplinary meeting and again requested at the start of appeal". Mr Banks indicated in evidence that he had only considered this because it was raised by the claimant, that demotion was not an appropriate sanction here and that for this to happen, the claimant would have had to have accepted a lesser role. I accept this account. A further meeting was arranged to allow the claimant to assemble his evidence to support suggestion he had contacted his manager to alert him to absences from the store and raising staffing issues.

25. A second meeting was scheduled for 5 August 2022 between Mr Banks and the claimant. The claimant produced evidence and Mr Banks outlined that he would investigate shift leader roles for him if he wished but that he could not make an offer without checking. The claimant was invited to indicate whether he was interested in that lesser role. He indicated he'd have to speak to his solicitor and family. Assessing the email and 'WhatsApp' messages shared, Mr Banks accepted they showed conversations with his manager about staffing, but that they did not reflect the suggestion that he had been "begging" for more staff, and neither did it show him alerting him to issues around opening the store or leaving the store unsupervised.

26. I have reviewed the exchanges with his area manager on staffing that the claimant provided in the bundle.

- The first of these pertained to his time in the Shirley store, so were not directly relevant.
- January: he sought to place a vacancy advert on 13/1 via the Tesco HR resource but did so in error for Shirley rather than Wandsworth. He corrected the error on 16/1.
- February – the claimant requested resource to replace a (pre-planned) departure of staff member. His manager challenged him as to what he, as Store Manager, had done to action an approach agreed two months earlier, to train up an existing member of staff. There is no indication as to his response.

- March: in the context of shift planning, the area manager encouraged the claimant to ask a staff member returning from a career break to assist him with early shifts. The claimant responds by indicating that "I will still manage rather than rushing (X) to come back on early shift", and (in a separate email from the same date) that having spoken with the returnee, he did not have the flexibility to cover early shifts. The area manager confirms within hours that he had spoken with the same returnee that day and that he was happy and available to cover early shifts and gives prescriptive advice around securing his agreement to cover the shifts. The claimant reports back two days later that the returnee could not after all cover the early shifts, but he'd use him in the evenings. The impression from the exchange is that contrary to his suggestion, the claimant was content to maintain the existing morning arrangement, and rather than seeking to capitalise on an available resource he was resistant to accepting the help. He did not advise the manager that 'managing' in this context meant opening the store by himself.
- May: claimant raised general staffing issues and the area manager responding within two hours with a response, with suggestions and arranging a meeting with him to discuss issues three days later.

The exchanges show that there were staffing issues in the store, but do not suggest that the claimant was facing or attempting to deal with critical issues (in other words, issues which would require him to operate contrary to company policy) or that he presented this to his manager. He did not alert his manager to the breaches which occurred (as he would have been expected to do within his role). If those breaches were because of staff shortages that would have given him a powerful argument for further assistance. The exchanges show that he is dealing with short term staffing issues. He is receiving timely responses. The Tribunal heard that working "1-on-1" was not out of the ordinary in these stores (Mr Banks), but elsewhere accepted that if that was a daily occurrence it would be difficult (Mr Santangelo). It was not suggested that this was a daily occurrence. In any event, I do not accept that these exchanges present a picture of a manager struggling to deal with extraordinary staffing issues.

27. There are differing accounts as to what happened next – but the question of demotion or an offer (or acceptance) of a demoted role below Store Manager was not settled at that second appeal meeting. It is the respondent's case that the claimant was told that if he wanted to be considered for demotion, he had to indicate that, otherwise the dismissal would stand. There was a suggestion from the claimant's Counsel that there was confusion as to who was to contact whom regarding the potential offer of a demoted role, and indeed that this request contributed to unfairness in the process. Setting the issue of procedural fairness aside for now, the claimant was aware of the offer of a role in principle and of his need to respond because of what then occurred (see below). I am satisfied that it was made clear to him at the second meeting that if he did not wish to pursue demotion, the dismissal would be confirmed.

28. The final meeting was set for 23 August. The claimant did not attend. In advance of the meeting the claimant's Solicitor advised the respondent's witness Mr Banks that the claimant would not accept anything other than reinstatement to the store manager position as his final position. The dismissal was confirmed in a letter of the same date.

Law

29. Section 98 of the Employment Rights Act 1996 (ERA) provides as follows:

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair it is for the employer to show –
  (a) The reason (or if more than one, the principal reason) for the dismissal, and
  (b) That it is either a reason falling within subsection (20 or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
(2) A reason falls within this subsection if it –
  (a) Relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
  (b) Relates to the conduct of the employee,
  (c) Is that the employee was redundant, or
  (d) Is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.
(3) In subsection (2)(a)
  (a) 'capability' in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental qualify and
  (b) 'qualifications in relation to an employee means any degree, diploma or other academic technical or professional qualification relevant to the position which he held.
(4) In any other case where the employer has fulfilled the requirements of subsection (1) the determination of the question whether the dismiss is fair or unfair (having regard to the reason shown by the employer) –
  (a) Depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonable 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.

30. The respondent's case was that this was dismissal for conduct. That is a potentially fair reason under s 98(2)(b) Employment Rights Act 1996 ('ERA'). In the event that the respondent is correct in that context a determination of the fairness of the dismissal under s98(4) ERA is required. This involves an analysis (the *Burchell* test)[1] of whether the respondent's decision makers had a reasonable and honest belief in the misconduct alleged. Further a tribunal must determine whether there were reasonable grounds for such a belief after such investigation as a reasonable employer would have undertaken. The burden of proof is neutral in relation to the fairness of the dismissal once the respondent has established that the reason is a potentially fair reason for dismissal. The tribunal must also determine whether the sanction falls within the range of reasonable responses to

[1] British Home Stores Limited v Burchell [1978] IRLR 380

the misconduct identified. This test of band of reasonable responses also applies to the belief grounds and investigation referred to.

31. The test as to whether the employer acted reasonably in section 98(4)ERA 1996 is an objective one. I have to decide whether the employer's decision to dismiss the employee fell within the range of reasonable responses that a reasonable employer in those circumstances and in that business might have adopted (*Iceland Frozen Foods Ltd v Jones [1982] IRLR 439*). I have reminded myself of the fact that I must not substitute my view for that of the employer (*Foley v Post Office; Midland Bank plc v Madden [2000] IRLR 82*).

32. I have also reminded myself that this test and the requirement that I not substitute my own view applies to the investigation into any misconduct as well as the decision. (*Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23*. This means that I must decide not whether I would have investigated things differently, but whether the investigation was within the range of investigations that a reasonable employer would have carried out. I know that I must assess the reasonableness of the employer not the potential injustice to the claimant *Chubb Fire Security Ltd v Harper [1983] IRLR 311)*. and only consider facts known to the employer at the time of the investigation and then the decision to dismiss (*W Devis and Sons Ltd v Atkins [1977] IRLR 31.)* There is always an area of discretion within which a respondent may decide on a range of disciplinary sanctions all of which might be considered reasonable. It is not for the Tribunal to ask whether a lesser sanction would have been reasonable but whether the dismissal was reasonable (*Boys & Girls Welfare Society v McDonald [1996] IRLR 129).*

33. The respondent directed me to *Philander v Leonard Cheshire Disability (UKEAT/0275/17/DA)* para 52 on the question of the delineation between conduct and capability. The claimant referred me to para 48 of the same judgment. I have also considered *Whitelock and Storr v Khan (UKEAT/0017/10/RN)*) on the issue of the proper process for considering alternative reasons offered for dismissal to those provided by the employer.

Conclusions

34. Reason for dismissal

The first question to be determined is what was the reason for the dismissal? The reason given for the dismissal was misconduct: the Tribunal accepts that based on the evidence supplied and was known to them at the time that the respondent dismissed the claimant for the reason of his misconduct in failing to follow, failing to implement company policies. The claimant contravened their policies in four distinct areas, in the face of an existing and live Final Warning Letter, and other additional warnings. As is established, dismissal for reasons related to conduct is a potentially fair reason under section 98(2)(b) of the ERA 1996.

35. The next questions to be addressed are captured in the BHS v Burchell criteria:

a. Did the respondent reasonably and honestly believe the claimant committed the misconduct? The tribunal is satisfied based on the evidence presented that the respondent believed the claimant had committed misconduct, and that was expressly accepted by the claimant's Counsel in closing submissions.

b. Were there reasonable grounds to sustain that belief?

There were four free standing areas of alleged misconduct, in which (during the investigation and the disciplinary process) the claimant had either admitted the behaviours or because of investigations the respondent had established the behaviours to the necessary standard.

The claimant's Counsel invited me to consider that these incidents might have been, in whole or in part, capability related. He also criticised the investigation for being deficient in this respect, and I will turn to that below.

The law provides that where a claimant asserts a different reason for the dismissal, the Tribunal should first consider the potentially fair reason advanced by the employer, as they bear the burden of proof, before considering any alternative reasons advanced for the dismissal (Whitelock and Storr v Khan (UKEAT/0017/10/RN)). This is what I will now do.

The claimant admitted to repeatedly opening the store alone contrary to a policy he was familiar with, in the face of repeated warnings. There is no doubt (based on what the Tribunal has seen) that this was a pattern of behaviour, and a deliberately chosen course of conduct. In pursuing the course he did, he exposed himself and others to physical risk, the store to loss and caused the store to fail internal audits. The Tribunal noted the mitigation that he was pressured on mornings when he was working 1-to-1. This confirms that there were other staff available to open the store but that he proceeded to open without waiting for them. If this was a problem he was grappling with, this presented the perfect opportunity to raise this - as we heard that under the relevant policy if there were insufficient staff to open a store it would have to be left closed until the situation could be rectified. He did not raise this issue with his manager and did not raise his capability as a factor. I am satisfied that the respondent had sufficient grounds to believe misconduct occurred here.

The claimant admitted leaving the store without supervision on more than one occasion without warning his supervisor. He did not warn his manager or seek permission to leave the store from his manager. He relied on junior, unqualified staff to cover for him and did not consider their safety, or indeed the supervision of the store and its stock, as a priority. He volunteered his view that this behaviour was "not a risk". The respondent had reasonable grounds to believe misconduct occurred here.

The claimant admitted having breached PI processes and policy, exposing the respondent to reputational and regulatory risk. The claimant accepted that he did not implement or oversee the process consistently, despite having been trained in the process. The Tribunal is satisfied that the respondent believed the claimant did not follow the correct processes and that he did not ensure that his staff were consistently following the process. Claimant's Counsel raised

questions about his training and understanding of that training. It is one thing to argue that someone has failed in their role because they were confused about the detail of a process. That argument cannot help someone who chooses not to run the process at all (and this was a process which had not changed and needed to be run twice a day). On the basis of what it learned, it was reasonable for the respondent to believe that misconduct had occurred here.

On waste/alphanumeric codes: The claimant accepted that he did not implement or oversee the correct waste processes, despite having been trained in the process. The claimant was subject to a Final Written Warning for failing to follow processes in this area. It is evident that choosing not to follow waste or alphanumeric processes properly (i.e., deciding to leave things on the shelf while they appeared to be of 'good quality' as he put it) would also have saved him time and effort. He was aware of what a priority this was for the company.

In this context I recall that the respondent's Counsel referred me to Philander v Leonard Cheshire Disability (UKEAT/0275/17/DA), para 52, which indicates that "the dividing line between conduct and capability can be paper thin and even porous. Some behaviours or acts or omissions which fall within the definition of extreme negligence can be considered as either capability matters or conduct matters and can properly be described as either." He asserted that the facts outlined here in each of the areas could be fairly said to be conduct. The facts were essentially that there were policies he was required to follow, he failed to implement the policies, and he understood the consequences of failing to do so. These were acts or omissions - focusing on what he knew, or his knowledge of the policies, is irrelevant.

The claimant argued that he did not understand the process despite his training. Counsel for the claimant argued that the claimant couldn't, or perhaps shouldn't, be faulted for 'not knowing what he didn't know', and that it was incumbent therefore on the respondent to establish why he didn't know the detail of these policies. I note the claimant (according to his own Counsel) was able to explain the waste/alphanumeric code policy at the disciplinary hearing. There was no evidence that there was a fundamental issue with the training package.
I also note that not running the waste processes would have saved the claimant time.

The claimant was an experienced store manager of 20 years standing. If a manager is unsure of a revised daily process (after having been trained) it was his responsibility to revisit the training himself, to confirm that the process is correct, and to ensure his staff were trained and followed the processes.

In the context of the Final Written Warning, and his admissions, the failure to follow processes here is a continuation of a pattern of behaviour predating the claimant's tenure in the Wandsworth store. The respondent was justified in believing he did not follow or implement the policy and, given his duties as manager, it was fair to characterise this failure as misconduct.

c. Was the investigation reasonable in the circumstances?
The claimant's Counsel asserts that in the circumstances of this case, the investigation was not reasonable, or fair. The respondent does not accept this suggestion.

36. The first issue the claimant's Counsel raises with the investigation is that that the original allegation (that the claimant had effectively mistreated a colleague) was dropped and although other matters were put to the claimant, these were not raised in the context of misconduct. I do not accept that argument. To do so would be to ignore the invitation letter of 11 June which clearly outlined 5 separate topics (including the four distinct areas of misconduct pertaining to policy breaches cited in the ultimate dismissal letter). The claimant's Counsel also asserted that these other issues were not the reason for the misconduct investigation. I do not accept that. The area manager supplied Ms Cermakova with evidence pertaining to various issues - the colleague's complaint, details of a failed audit, shrink reports, and exchanges with the claimant over opening the store alone. Her interviews with colleagues confirmed that each of these issues warranted further attention and suggested that company policies were being broken by the person entrusted by the company to implement, oversee and role model adherence to those policies. All these issues were put to him during the investigatory interview and had been highlighted in the letter of 11 June.

37. His other argument is that a fair or reasonable investigation, in the circumstances of this case, would have considered whether the incidents were in fact capability issues. He points to the respondent's disciplinary guidance

"We will consider the question of whether any issues are misconduct, capability or a mix of both…"

This argument emerged for the first time at the hearing. He put it to both Ms Cermakova and Mr Santangelo in cross examination that the incidents in question, while characterised as conduct issues, could potentially be capability issues depending on circumstances. He also suggested in final submissions that the investigation was deficient because it did not also investigate staffing issues which he suggests his client 'repeatedly raised', and that the claimant should not be punished for not knowing what he did not know (i.e.: that there appeared to be training deficiencies). Ms Cermakova accepted that the incidents could potentially be either and that this was "something you always have to consider" but emphasised that the claimant was a very experienced manager, and that he had made various admissions. Mr Santangelo would not concede capability was a possibility – he determined the behaviours to be choices, within the claimant's control, and made the point that he had the opportunity (with regards to various of the allegations) to seek support from his manager or practical support from other stores, neither of which he did with regards to any of the breaches.

38. The Tribunal notes that the focus of the claimant's Counsel's criticism in this area rested specifically on the investigation, not the disciplinary aspect. The investigating officer was at pains to underline that role was not to reach conclusions, but to act as a fact finder, and to pass her findings to the disciplinary officer. It is not for the investigator to undertake a forensic investigation – she is required to conduct a reasonable investigation [2], and the reasonableness of that investigation is assessed by reference to the way the claimant puts his case during the internal procedure [3].

[2] Srestha v Genesis Housing Association Limited [2015] EWCA Civ 94, [2015] IRLR 399
[3] Stuart v London City Airport UKEAT/0273/12/BA [2013] All ER (D) 33 (Jan)

39. Testing Counsel's general proposition in relation to the investigatory process, I will briefly consider the investigating officer's approach to the alleged individual policy breaches she was presented with and addressed.

- Opening the store alone: there was evidence at the investigation stage that the claimant habitually opened the store alone. The claimant acknowledged that he had done so after repeated challenge, and he knew the policy. He offered no evidence or suggestion that he had sought permission to do so, alerted his manager, sought assistance, or that there was an issue with having a second person to open the store. (In fact, there was no evidence proffered at any point that he did this.) It was a failure of his duties not to alert the manager to his having had to do so. There was no reason for the officer to second guess this issue in the absence of a reason to do so from the claimant.

- Leaving the store unsupervised: the claimant accepted he'd done this. He left the store at 9am and did not alert his manager. He did not suggest that he had done so, or that there was any evidence to suggest that he had done so. There is no basis on which she would have reason to second guess the behaviour in the face of his admissions, the cctv evidence and what she had been told by colleagues.

- PI routines: He admitted to taking shortcuts on PI to save time, and on occasion not running the process at all. He had been trained on the policy. Failures on observation of PI routines had been flagged in audit. He gave staffing levels as an aggravating factor at times but did not say there was a fundamental issue or that he'd raised an issue with his manager. There was nothing to prompt the officer to dig into that as an issue at that stage, or evidence offered to base such a suggestion on.

- Waste/alphanumeric codes: It is the store managers fundamental duty to ensure that he knew and could follow the up-to-date food safety policies so he could oversee their implementation. He was trained and familiar with how important the issue was. He was subject to a Final Written Warning relating to this area. He made no suggestion he'd had any issue following the training. He made no mention to the lifestyle break later mentioned in mitigation to the disciplinary officer, or his bereavement. While he mentioned issues later in the process, these were not put before the investigating officer. Again, she had no reason to look behind what was before her – evidence of a continuing pattern of behaviour.

40. The Tribunal does not accept that the investigator had somehow missed or ignored grounds to further investigate capability here. Taking the evidence in the round, she was entitled to present what she had to the disciplinary officer, on the basis that these incidents appeared to be related to conduct. At the end of Ms Cermakova's investigation was faced with evidence of a manager who contravened at least four policies, two of which related to the security of the store and the safety of staff, and customers, two of which related to regulatory issues – food safety and pricing. Given his admissions, the evidence she had collected, and in the absence of any him raising issues or providing evidence that would point in a different direction. The tribunal concludes that it was not unreasonable or unfair for her to conclude her investigation as she did.

41. In terms of the investigation structure, the tribunal finds that the process was appropriate and complied with ACAS requirements under their "Code of Practice on disciplinary and grievance procedures". The respondent's processes provided for an independent store manager to investigate she interviewed witnesses and gave the claimant notice of a fact-finding interview, during the interview gave him the opportunity to answer the allegations, the meeting was minuted, with a witness present, and the claimant had the opportunity to bring a representative. The findings were passed to a second independent manager who conducted a disciplinary hearing, again arranged with notice, with the opportunity to bring a representative, and again it was witnessed, minuted. An appeal process followed which consisted of three hearings, each held with notice, minuted, with the opportunity for the claimant to be represented. He was represented at the first and failed to attend the third. The claimant was given the opportunity, and indeed was encouraged to produce evidence to support assertions he made regarding understaffing and other issues which he declined to supply until the second of the meetings. The evidence he ultimately supplied did not support the assertions he made in mitigation. I am satisfied that in the circumstances this was a reasonable and fair investigation.

Band of reasonable responses.

42. Did the dismissal fall within the band of reasonable responses? Was it reasonable to dismiss for the misconduct outlined, in the circumstances?
I am satisfied that dismissing the claimant was reasonable in all the circumstances. The disciplinary officer was presented with a series of serious policy breaches. Opening the store alone – this had been flagged in audit, it led to warnings, yet was followed by repetition of the behaviour. Leaving the store unsupervised – this happened repeatedly (and without advising his manager before or after, or seeking assistance from him or other nearby store managers to mitigate risk). Not properly following essential processes in which he has been trained: not implementing them at times at all, ignoring audit findings. Acting contrary to policy on numerous fronts despite a Final Warning.

43. The picture facing the respondent was not of a manager who was confused about his responsibilities but rather of a manager who did not attend to them. He had shown himself consistently unwilling to follow company policies he was aware of (opening, supervision) and failed in his duty to properly implement others. The Final Written Warning provided with the opportunity to address conduct issues, but he continued to behave in the same manner. There was no reason to believe further warnings would have any effect, and therefore the decision here was logical and within reason.

44. The claimant's Counsel also asserts that the respondent went beyond the band of reasonable responses, as a result of its handling of the process of considering demotion. He asserts that by offering him time to consider the option (a suggestion made during the second appeal meeting), it had in fact created an extra hurdle for the claimant to negotiate during what was a stressful time for him. He further asserted that the respondent should have (if it considered demotion to be appropriate) unilaterally determined that demotion was the appropriate step, offer demotion and allow him to accept or reject the proposal, resign and claim unfair dismissal.

45. Firstly, as per the ACAS guidance[4] demotion (which it deems to be a sanction) cannot be imposed unless that is provided as part of the contract of employment (there is no evidence to suggest that the broader contractual arrangements contained such a provision, and it has not been pleaded here that that was the case). The terms of the respondent's disciplinary policy it confirms that as an alternative to dismissal "you may be *offered* a demotion if the situation is appropriate and there is a suitable vacancy" (my italics).

46. The claimant initially requested a demotion after being informed of the decision to dismiss. At the first appeal meeting he then abandoned that request. It was consistently the respondent's case (which I accept) that demotion was not an appropriate sanction in this case and was not instigated or suggested by them. At the second meeting Mr Banks offered to investigate shift leader roles but could not offer without checking, and asked was this something he would consider, if offered. This was not an outright offer but rather part of a discussion about possible options. It came before the claimant made what were damaging comments about his reasons for not alerting his manager for abandoning the store without supervision, and before Mr Banks assessed the disclosed material, which did not support the claimant's earlier assertions. The claimant remained non-committal on the option of demotion by the end of the meeting. Was it therefore reasonable for Mr Banks to ask the claimant to confirm he was seeking a demoted role, before (in accordance with the policy), he assured himself that in all the circumstances it was appropriate and that there was a suitable vacancy? Given that the claimant's position at the end of meeting two had moved only from 'no', to 'I need to think about it', the answer must be yes. This essentially reflects and is consistent with the wording of the policy. It is not unreasonable for an employer to be assured that an employee contemplating a return to a demoted role is in fact motivated to take the role, given the potential sensitivities of doing so. Having to identify a store and a manager capable of accommodating an experienced ex-store manager (now operating at a lower level), within their team would represent a time commitment for any business. This was not an unreasonable question to ask in the circumstances.

47. It was the claimant's right to decide not to pursue the demotion he'd sought. The reduction in status and salary would no doubt have been embarrassing and difficult to accept different status when facing former colleagues. It is to the respondent's credit that they were willing to consider re-engaging the claimant in the circumstances at a reduced level of responsibility. To criticise the respondent for having sought to confirm his request, which ultimately the claimant would not

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[4] https://www.acas.org.uk/sites/default/files/2022-04/discipline-and-grievances-at-work-the-acas-guide.pdf

[4] "Dismissal or other sanction

If the employee has received a final written warning, further misconduct or unsatisfactory performance may warrant dismissal. Alternatively, the contract may allow for a different disciplinary penalty instead. Such a penalty may include disciplinary transfer, disciplinary suspension without pay (although see the considerations on suspension), demotion, loss of seniority or loss of increment. ***These sanctions may only be applied if allowed for in the employee's contract or with the employee's agreement."***

entertain, would be perverse. It cannot be said that this exchange (which by his own account was instigated by the claimant) rendered the dismissal process unfair.

48. The law requires that the Tribunal avoid substituting its own view of the matter for that of the respondent. Taking the investigation, dismissal and appeal process in the round, I find that it was a fair and reasonable process. The decision to dismiss was well founded and within the bounds of reasonable responses. While the claimant had a long work history with the respondent, he was subject to a Final Written Warning which had explicitly made dismissal a possibility for any re-occurrence of misconduct. The Tribunal is satisfied that further misconduct was established in four areas. Setting aside the issues with following price routines, waste and alphanumeric codes, the breaches on store opening and store supervision would on their own, based on the evidence provided, have warranted his dismissal.

49. For the reasons outlined the claim is dismissed. I am grateful to the witnesses for their time and evidence, and to their representatives for their clear and helpful submissions.

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Employment Judge **Harley**

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Date: 26 May 2023