THE INDUSTRIAL TRIBUNALS

CASE REF: 302/14

CLAIMANT: **Graham Davis**

RESPONDENT: **B&M Retail Limited**

DECISION ON AN APPLICATION FOR REVIEW

The decision of the tribunal is that it revokes the decision of the tribunal under Rule 36(3) of the Industrial Tribunal Rules of Procedure 2005 as amended.

Constitution of Tribunal:

Employment Judge: **Employment Judge Crothers**

Member: **Mrs T Cregan**

Appearances:

The claimant was represented by Miss McCrissican, Barrister-at-Law, instructed by Donard King and Company Solicitors.

The respondent was represented by Mr I Steel of Cohen Cramer Solicitors.

1. The majority decision of the tribunal issued on 18 August 2014 was that the claimant was unfairly dismissed and an order was made for his reinstatement in his existing role as a replenishment manager with the respondent on 15 September 2014.

2. The Employment Judge was the minority member. One of the majority members resigned as a tribunal panel member shortly after the decision was issued. The tribunal for the review hearing was therefore comprised of the Employment Judge (who had a casting vote) and one panel member.

3. In correspondence to the tribunal dated 1 September 2014, the respondent's solicitors requested a review of the decision under Rule 34 of the Industrial Tribunal Rules of Procedure 2005 as amended. The tribunal was satisfied that the review had been requested in the interests of justice under Rule 34(3)(e).

4. The tribunal convened on 25 September 2014 to consider the review application. However, on that date, Mr Steel was relying on the same grounds as pleaded in a

Notice of Appeal to the Northern Ireland Court of Appeal. He agreed to redraft the precise basis for the review before the tribunal. Miss McCrissican, for her part, wished to have an opportunity of making written submissions. The parties were made fully aware of the position of the Employment Judge, who had provided the minority decision, and of the panel member who did not have the benefit of her colleague. In the circumstances the tribunal ordered submissions from both sides and the tribunal reconvened on 20 October 2014 to consider the review application.

5. The submissions from both parties which are annexed to this decision, were carefully considered by the tribunal. The promulgation of this decision was delayed at the request of both parties pending discussions with a view to resolving the matter. The tribunal was notified, however, that a resolution had not proved possible.

6. In the circumstances in which it finds itself, the tribunal concludes that it is unable to either confirm of vary the original decision. The only realistic option open to it is to revoke its decision and order the decision to be taken again before a newly constituted tribunal. The parties were made aware that this was a potential outcome. The tribunal is satisfied that such a rehearing is in accordance with its overriding objective and in the interests of justice.

Employment Judge:

Date and place of hearing: 20 October 2014, Belfast.

Date decision recorded in register and issued to parties:

IN THE NORTHERN IRELAND EMPLOYMENT TRIBUNAL

CASE NO: 30214IT

BETWEEN:

GRAHAM DAVIS

Claimant

AND

B&M RETAIL LTD

Defendant

APPLICATION FOR A REVIEW

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1 The Respondent wishes to apply for a review of the judgment made on 18th August 2014 on the grounds that it is in the interests of justice to do so. Whilst it is accepted that it is the duty of the Tribunal to achieve finality in cases, it is submitted that the large number of fundamental errors by the Majority members in this case has resulted in the Respondent being denied a fair trial.

2 Also, the Tribunal's judgment as it stands is likely to have a significant adverse effect on the Respondent, given the facts in this case, namely

2.1 The Claimant has accepted that the disciplinary procedure was procedurally fair and only the substantive element was being questioned (as recorded during the hearing of 2 May 2014),

2.2 The retailer has put in place policies and procedures which the Claimant has accepted in cross examination were there to protect the Respondent and the employee, namely a Staff Shopping Policy (page 60), staff discount cards which record sales and a Staff Search policy (page 63, which the representatives agreed

was a direct quote from the Handbook so it was not necessary to provide another copy of the policy from the Employee Handbook)

2.3 The employee admits that he followed these procedures during the morning of 20th November 2013 when he bought some drinks but did not follow the same procedures for an extension lead later in the day and

2.4 The Claimant admits he made a mistake and in his own words "I was simply walking out with it [the extension lead} (page 81) and

3 If left to stand it potentially means that in principle, no retailer can rely on their agreed policies aimed at protecting the store and their staff which leaves employers at risk of a finding of unfairly dismissing an employee whose primary argument is that despite the policies being in place, they should not count because the employee made a mistake and did not intend to take stock without paying for it.

4 The Industrial Tribunal are asked to consider the large number of errors by the Majority members in this judgment when considering whether or not to overturn the decision. Those errors include

4.1 At paragraph 9(2)(ii) the Tribunal has concluded that the Respondent did not have reasonable suspicion amounting to a belief in the guilt of the employee of the misconduct at the time of that decision on which to sustain its alleged belief in the misconduct of the Claimant.

4.2 However, this conclusion has been reached based on an allegation that was not raised by the Claimant during the disciplinary process , or the ET1, namely that other staff did not follow the Staff Shopping Policy. This allegation was first raised by the Claimant in paragraph 5 of the Claimant's statement and as such it cannot be in the interests of justice to expect a dismissing or appeal officer to consider something that was never raised at the time. Furthermore, whilst it is accepted that the

Claimant repeated this allegation without providing any specific detail or evidence to support the allegation, judge Crothers specifically excluded such evidence. During cross examination, Mr Steel asked the Claimant who was he alleging did not follow the Staff Shopping Policy because he kept repeating the comment. The question was asked because it was becoming difficult to conduct the cross examination when the Claimant was answering specific questions with an unrelated answer. When Mr Steel asked the question judge Crothers stated that legally the Tribunal cannot go down that road and reminded those present of the case law. On that basis Ian Steel did not pursue the matter further.

4.3 In the circumstances, it cannot be in the interests of justice to find against the Respondent for an allegation that was not raised during the disciplinary process, was specifically excluded by the Tribunal and the Respondent did not have the opportunity to cross examine an allegation that was not specific and could have been shown to be baseless. Despite this the majority members have taken this evidence into account in reaching their conclusion.

4.4 Furthermore, the allegation was not put to Michael Nelson, the dismissing officer who worked at the store where the Claimant worked. The allegation was put to John Mailey who does not work at the store where the Claimant worked. At Mr Mailey's store the policy is adhered to and he cannot be expected to know that there may be a deviation from the policy unless the issue is raised with him at the disciplinary hearing.

5. In paragraph 9(2)(i) it is submitted that the Tribunal has incorrectly imposed it's own view to conclude that the Respondent did not have reasonable suspicion amounting to the belief in the guilt of the employee of the misconduct given the facts in this case. It is submitted that it is not in the interests of justice for the Majority

members to deviate from the accepted practice that Tribunals cannot substitute their view of what they would have done in the same circumstances.

6. It is also submitted that it cannot be in the interests of justice to allow the judgment to stand when the Majority Members have made findings on grounds that were not argued,

6.1 Pre set questions

At paragraph 9(2)(i) It was not argued before the Tribunal that the pre-set questions as recorded in the investigatory notes left little scope for the Claimant to expand on his answers. It is submitted that this was not argued before the Tribunal and the opinion is perverse given that the script used entitles the Claimant to add anything else that he wishes to say in relation to the disciplinary process.

6.2 Shopping Policy

At paragraph 9(2)(ii) it was not argued that staff did not follow the staff shopping policy. It was not a point that the Claimant raised in his appeal against his dismissal (page 81-82). It was not a point raised during the investigation (pages 34-38). It was not an issue raised during the Disciplinary Hearing (pages 73-77), or during the Appeal Hearing (pages 85-92). It is only mentioned at page 89 in the Appeal that staff would put something aside. John Mailey was questioned about this and he accepted that on occasion staff would put something aside to buy it later, but it is not accepted that this is the same as this case whereby the Claimant failed to purchase the item and in his own words was in the process of leaving the store.

6.3 At paragraph 9(2)(ii) the Claimant did not argue that his dismissal was unfair because the staff shopping policy (page 60) refers to a requirement that staff were required to make purchases prior to or after the closing of the store. However, even if such an argument was

raised it is unclear what the relevance of the timing of a staff purchase has on the fundamental issue the Tribunal were considering, namely whether the staff shopping policy and the use of a discount card, which the Claimant accepted in evidence was there to protect the Respondent from thefts and to protect staff from suspicion of theft rendered questions asked during the investigation hearing inappropriate.

6.4 During the investigation (pages 66-70) the Claimant was asked why he had no receipt for the purchase of the extension lead which he accepted he was required to do under the Staff Shopping Policy and had done so earlier in the day. At no time during the disciplinary process, or in these proceedings has the Claimant questioned the validity of the staff shopping policy on a technicality which the Tribunal have on their own volition by suggesting that the policy is flawed because purchases are made during the working day whereas the policy states that purchases should be made before or after the store closes. Not only is this point not fully explained, it is a point that was not argued before the Tribunal.

7 The Tribunal have concluded that there was an element of pre judgment a the investigatory stage because the Claimant alleging for the first time at the Tribunal hearing that he had not been shown the CCTV footage..

7.1 It is submitted that it is a perverse conclusion to suggest that by not being shown the CCTV footage that there is any element of prejudgement at the investigatory stage which renders the dismissal unfair. : It is submitted there is very little factual dispute in this case and by the Claimant's own admission, the CCTV footage showed him walking out of the door with the extension lead (page 81).

8 It is also submitted that the majority member's conclusion at 9(2)(iv) that a typographical error in the invitation to the Appeal Hearing dated 23 December 2013, which is repeated in a copy letter of 6 January

2014 (pages 83 and 84) renders the process unfair, is perverse. The decision to dismiss the Claimant is clearly set out in the letter dated 10 December 2013 (pages 79 – 80) . The Claimant was aware he had been dismissed, he had stopped working for the Respondent and the Claimant submitted an appeal dated 16 December 2013 appealing the decision to dismiss (pages 81 – 82) . At no time during the appeal process did the Claimant ever argue that he was not aware that he had not been dismissed or that he was not aware that the purpose of the hearing was not to appeal his dismissal. The point was not raised by the Claimant or his representatives and as such is a new point of law that was not argued before the Tribunal.

9. CCTV Footage

The Tribunal have made a finding that the Claimant had not been shown the CCTV footage which suggested an element of prejudgement. It is submitted that this conclusion lacks explanation for the following reasons.

9.1 Firstly it is in dispute that the Claimant had not seen the CCTV Footage. The only evidence before the Tribunal that the Claimant had not seen the CCTV footage was the Claimant raising an allegation that he had not seen the CCTV footage for the first time in cross-examination. This revelation was made after the Claimant had answered questions in cross examination about the content of the CCTV footage, which the Claimant's representative raised no objections to. The Respondent does not accept that the Claimant had not seen the CCTV footage prior to the disciplinary hearing and it was pointed out to the Tribunal at the hearing on 30th May 2014 that the Investigating Officer could not be contacted to check this new allegation because she was on holiday abroad. This new evidence created difficulty for the Respondent. It is accepted that no application for an adjournment was made based on this new evidence and it is accepted that the Respondent's representative took the view that an adjournment for this point was not proportional. For this reason the

representative simply asked the Tribunal take into account that it was not accepted that the Claimant had not seen the CCTV footage and asked the Tribunal to take into account the fact that the Claimant accepted the Respondent's version of events at page 42 and he refers at page 50 to "*it is clear from the CCTV footage that I made no attempt to conceal this item*" which implied that the Claimant had seen the CCTV footage. However, no reasons have been provided to explain the Tribunal's conclusion that the CCTV footage had not been seen.

10. In paragraph 9(20(i) it is not clear what relevance the Tribunal made of the fact that it was by mutual agreement that the Respondent would resolve the issue the following day. It was accepted that the issue came to light when the store was closing and the Claimant indicated that he had purchased the item but was unable to find his receipt.

11. In the circumstances the Respondent asks the Tribunal to review it's judgment and conclude that the Claimant was fairly dismissed, or in the alternative,

12. Invites the Tribunal to vary the judgment by staying the Claimant's reinstatement pending the outcome of the proposed appeal.

Dated 09 October 2014

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Solicitors for the Respondent

IN THE INDUSTRIAL TRIBUNALS

Industrial Tribunals (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2005

Between:

Graham Davies

Claimant

-and-

B & M Retail Ltd

Respondent

WRITTEN SUBMISSIONS

Pursuant to a direction dated 25th September 2014 by Employment Judge Crothers, the following written submissions are lodged on behalf of the claimant following an application brought by the Respondent seeking a review of the substantive decision of the Tribunal dated 18th August 2014.

Proceedings before the Tribunal:

1. The claimant's claim was for unfair dismissal. The respondent denied this allegation and relied on the claimant's alleged gross misconduct and, in the alternative, some other substantial reason which it claimed related to a loss of trust and confidence as the grounds for the claimant's dismissal.

2. The hearing of this matter proceeded on 15th and 30th May 2014. The majority decision of the Tribunal was issued on 18th August 2014 and stated that the claimant had been unfairly dismissed and ordered his reinstatement in his existing role as a replenishment manager on 15th September 2014. There was no contributory fault attached to him. The majority of the tribunal directed the respondent to pay to the claimant all salaries, allowances, pension

contributions and any financial benefits whatsoever payable to him in the period from the effective date of termination to 15th September 2014 subject to the usual deductions in respect of income tax, national insurance etc. The seniority of the claimant and any consequent pay progression should be restored. Any reckonable service for pension purposed should also be restored as if he had never been dismissed.

Application for a Review:

1. By email dated 1st September 2014, the respondent applied for a Review of the decision of the Tribunal dated 18th August;

2. Under Rule 35(2) of the Industrial Tribunals (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2005 the respondent did not identify which ground they sought to rely upon for the review. This matter was raised in correspondence to the respondent and also to the Tribunal on behalf of the claimant;

3. At the review hearing scheduled on 25th September 2014, Employment Judge Crothers stated that it was implied from correspondence from the respondent that the ground the respondent sought to rely upon was:
'35 (2) (e) the interests of justice require such a review'. This was confirmed by the respondent;

4. Prior to the review on 25th September 2014, the Tribunal had contacted both sets of legal representatives advising that the composition of the Tribunal could not be sustained. Mr Schofield was no longer employed by the Tribunal Service. The options available to the Tribunal were to affirm; vary; or revoke the decision dated 18th August 2014.

5. The respondent had lodged written submissions which were received by the claimant's legal representatives on the evening of 22nd September 2014. Employment Judge Crothers was of the view that the respondent's written submissions were in the same format as the grounds for the notice of appeal

which they intended to lodge with the Court of Appeal of Northern Ireland and matters such as perversity and errs of law are not within the jurisdiction of the Industrial Tribunal conducting a review hearing;

6. The following directions were given:

   - Simultaneous exchange of written submissions by 9th October 2014;
   - Comments on each other's written submissions by 17th October 2014;
   - Review on 20th October 2014.

Grounds for Review:

1. The respondent has sought a review of the decision of 18th August 2014 on the ground that the interests of justice require such a review. The claimant denies that such a review is necessary and that the majority decision of the tribunal that the claimant was unfairly dismissed should be affirmed and the consequential directions applied thereafter in respect of the claimant's reinstatement and financial relief. It is of note that the respondent had indicated an intention to file a Notice of Appeal with the Court of Appeal in Northern Ireland however this has not been progressed with;

2. The composition of the current Tribunal is such that one of the lay members, Mr Schofield who endorsed the majority decision is no longer employed by the Tribunal service. Therefore Mrs Cregan who also endorsed the majority decision and Employment Judge Crothers who was the minority member must make a decision on whether to affirm; vary; or revoke the decision. It is accepted that Employment Judge Crothers will have the casting vote in this instance.

3. The issue before the tribunal is whether its decision dated 18th August 2014 should be reviewed in the interests of justice in accordance with Rule 34(3)(e) of the Industrial Tribunals (Constitution and Rules of Procedure) 2005 as amended.

4. The claimant's application is for the decision to be affirmed. The claimant does not accept that he should be put in the disadvantageous position of a rehearing of this matter which will have cost implications for him when the majority decision was in his favour and this was a balanced and reasonable decision for the majority to arrive at on the basis of the documentary evidence and oral evidence presented at the hearing.

5. On the issue of the staff shopping policy, it was raised during the investigation, disciplinary and appeal hearings with the claimant as to why he had not purchased the extension lead during the working day. The majority decision of the tribunal on this issue is that they "concluded that this was outside the respondent's shopping policy requirement for purchasing items for consumption at home, as the policy states that these must be purchase prior to, or after the closing of the store, using the designated till". This finding by the Tribunal was made on the documentary evidence of the investigation, disciplinary and appeal hearings, the oral evidence of the claimant at the tribunal hearing and the evidence of the respondent's representative under cross examination. On behalf of the claimant it is asserted that the majority of the tribunal were entirely correct if making a finding that "there was no evidence before the tribunal that the respondent sought to assure itself that the staff purchasing policy in the store was being adhered to by all staff". It is submitted on behalf of the claimant that the evidence of the respondent on this issue was not credible and the tribunal were correct to prefer the evidence of the claimant.

6. The majority members were correct to make the findings of fact which they did in relation to the mitigating factors of the claimant. The Tribunal states it "carefully considered the judgement of the disciplinary panel as to the weight given by Michael Nelson relating to the evidence placed before him and the reasoning in his findings leading to the dismissal of the claimant. It applied the same test to the appeal hearing, while viewing the process as a whole". It is submitted that the majority members did consider the reasonableness of the respondent. It is submitted that on the basis of the above cited statement taken

from the decision, the tribunal were alert to the principles as set out in Iceland Frozen Foods v Jones [1983] ICR 17 and in particular would not have allowed themselves to impose their own view of what they would have done rather than consider the reasonableness of the respondent.

7. In applying the principles of Patrick Joseph Rogan v South Eastern Health and Social Care Trust [2009], it is submitted on behalf of the claimant that the majority members have correctly applied the criteria as set out in paragraph 15 of the judgement therein.

8. It was argued before the tribunal on behalf of the claimant that the respondent did not have a reasonable suspicion amounting to the belief in the guilt of the claimant of the misconduct at the time of its decision to dismiss. The majority members correctly concluded, when weighing the evidence at the disciplinary and appeal stages, sufficient account had not been taken of the claimant's explanation or mitigating factors. This is not the majority members straying into making its own determination of the evidence, rather it reverts back to the principle of Rogan that the respondent did not have a reasonable suspicion amounting to the belief in the guilt of the claimant of the misconduct at the time of its decision to dismiss. It was accepted by the respondent that it listened to the claimant at the investigation, disciplinary and appeal stages in respect of mitigating factors raised by the claimant, however given its zero tolerance policy these were in effect not taken into account. Mr Mailey under cross examination admitted, in relation to the mitigating factors "I didn't take that into account". When Judge Crothers specifically asked Mr Mailey whether the fact that Mr Davis said it was a genuine mistake have made any difference, Mr Mailey replied "No". Under re-examination, Mr Mailey accepted that in relation to the mitigating factors – "Off course I took it into account but it is a zero tolerance policy". It is submitted therefore that the majority members were correct in stating that "these were not taken into account in a positive way".

9. It was argued on behalf of the claimant before the tribunal that the respondent's decision to dismiss the claimant was not within the band of

reasonable responses which as an employer they could make in the circumstances. When Mr Mailey was cross examined on the whether or not it was open for him to consider whether the claimant had made a genuine mistake he stated in evidence "his attempt to leave the store without paying for it was what the appeal came down to. I considered everything. I listened to everything. I listened to Graham Davis' side of the story ... once that question is asked that is in effect the appeal decided". When asked whether he took into account that the claimant was a man employed for 3 ½ years with no disciplinary matters he replied "I didn't take it into account". Mr Mailey went on to change his evidence stating that he took everything into account. It is submitted on behalf of the claimant that the majority members rightly came to the conclusion that the dismissal was not fair in the circumstances.

Concluding Remarks:

10. In the circumstances as outlined above, the decision of 18th August 2014 should be affirmed and that it cannot be in the interests of justice for the decision to be either varied or revoked. This is the avenue which should be pursued to appeal the decision of the Tribunal. The claimant relied upon the decision dated 18th August 2014 and spoke to the new manager of the Downpatrick B & M Retail Ltd store and was advised that he would be returning to his position in September 2014. The claimant is being unfairly prejudiced as a result of this review being sought. The interests of justice include justice to the claimant who was successful at the initial hearing. The claimant seeks that if the decision is affirmed that his schedule of losses is amended and ratified accordingly by the Tribunal and that he is awarded his reasonable costs.

Signed:_____

Donard King & Co Solicitors

Dated 9th October 2014

For and on behalf of the Claimant: Graham Davis

To: Office of the Indistrial Tribunal

Case Number: 302/14

IN THE INDUSTRIAL TRIBUNALS

Industrial Tribunals (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2005

Between:

Graham Davies

Claimant

-and-

B & M Retail Ltd

Respondent

RESPONSE TO THE RESPONDENT'S WRITTEN SUBMISSIONS

In response to the Respondent's written submission which were filed with the Tribunal on 10th October 2014 contrary to the direction that all written submissions should be filed on or before 9th October 2014, the following response is made by the claimant on the most salient points.

1. Paragraph 2.3

The claimant believed he had followed the staff shopping policy, believing he had paid for the extension lead and when he realised his genuine mistake that he had not, he brought this to the attention of the respondent;

2. Paragraphs 4.2 – 4.4

This is incorrect. The fact that the staff shopping policy was not followed was expressly stated by the claimant at the initial investigation meeting on 25th November 2014 (page 66 of the bundle) where in response to a question by Susan Barbour, the claimant replies "I usually don't use my staff card". Again during the disciplinary meeting on 30th November 2014 conducted by Michael Nelson (page 75 of the bundle) the claimant again reiterates to the respondent that "Half the time I never use my staff card unless its big sales". Further, at the appeal hearing conducted on 10th

January 2014 by John Mailey (page 88 of the bundle) the claimant once again states in relation to the staff shopping policy "I should be disciplined for not using my staff card and following procedures. Only if it was over £20 I would use it then I don't see it being worth while for a few pence". The assertion that this allegation of the staff shopping policy not being followed not being made known to Mr Mailey is incorrect and remiss of the respondent to allege that Mr Mailey would not have been aware at the time he was making his decision that the claimant was making the case that the staff shopping policy was not being followed. Therefore, Mr Nelson at the disciplinary hearing and Mr Mailey at the Appeal hearing would or indeed should have been aware that the staff shopping policy was not routinely followed within the Downpatrick Store. This was correctly taken into account by the majority members and their conclusion reasonable and proper in the circumstances.

3. Paragraph 6.1

Arguments of perversity are not within the jurisdiction of the Tribunal.

4. Paragraph 6.2

See 2 above

5. Paragraph 7.1

When the claimant was cross examined on the CCTV footage and what it showed he clarified that the letter dated 16th December 2014 was not written by him but his brother in law and in fact he was not walking out of the store with the extension lead but was walking toward the till where the staff search was taking place. Indeed this evidence was corroborated by evidence of the respondent that the claimant at no stage went beyond the designated till with the extension lead;

Donard King & Co Solicitors

16th October 2014

BETWEEN:

his own costs and the review hearing will result in additional costs to the Claimant. In any event, it is submitted that the argument is flawed because it cannot be in the interests of justice for the Tribunal not to overturn a decision it considers to be flawed because the process of doing so costs money.

In any event, it is of course open to the Tribunal not to order a rehearing, the Tribunal could simply overturn the judgment as it stands.

4 Paragraph 5

RESPONDE

Given that the Claimant had purchased drinks from the Respondent during the morning of 20th November 2013 using the procedure set out in the shopping policy, the Respondent's questions during the disciplinary process about why the Claimant had not followed the same procedure in relation to the purchase of an extension lead later that same day seems entirely reasonable.

1 The Respon
dated 9th Oct

Proceedings

2 Paragraph 2

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It is agreed that the Respondent did not investigate whether other staff were using the staff shopping policy. There was no reason to believe that other staff were not following the staff shopping policy. The Claimant never raised the allegation that other staff were not following the staff shopping policy and as such there was no need to satisfy themselves that a policy they consider to be fundamental to the Respondent's business was being followed by all staff. Even if the Respondent did investigate the issue, there is no evidence before the Tribunal that other staff were not following the correct procedure. Even if the Respondent did investigate the matter and found that other staff were not following the policy (which is denied) it does not follow that the Claimant would not have been dismissed. If the allegation had been raised that other staff had not followed the staff shopping policy, and if the Respondent had investigated the matter, and if it was found that other staff were not following the policy, the Respondent may have decided to dismiss everyone who was not following the policy.

Grounds for

3 Paragraph 4

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It is submitted that it is not open to the Claimant to suggest that the evidence of the Respondent that other staff were using the staff shopping policy was not credible when no such evidence was given.

Paragraph 6

It is submitted that the Tribunal is not in a position to know what the majority members did or did not consider when Mr Scholfield is not present to respond to this.

Paragraph 8

It is submitted that the phrase zero tolerance has been taken out of context. It is submitted that any employer who is faced with a situation whereby their employee is about to walk out the door with goods that they have not paid for, they have not followed a policy, but have paid for and followed the correct policy relating to purchases made earlier in the same day is unlikely to be given much tolerance. Even the Claimant accepted that the circumstances were likely to result in him being dismissed. It is also submitted that Mr Mailey's comments that he did not take length of service into account is not unreasonable given that he had concluded that the Claimant was attempting to leave the store with goods that he had not paid for. Mr Mailey clarified this during re-examination.

Dated 17 October 2014

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Solicitors for the Respondent