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EMPLOYMENT TRIBUNALS

Claimant: **Mr J Alagangan**

Respondent: **Superdrug Stores Plc**

Heard at: **East London Hearing Centre** **On: 2 & 3 May 2017**

Before: **Employment Judge Russell**

Members: **Mr P Pendle**
Mr G Tomey

Representation

Claimant: In Person

Respondent: Mr B Gray (Counsel)

JUDGMENT having been sent to the parties on 5 May 2017 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

1. By a Claim Form presented to the Tribunal on 21 September 2016 the Claimant alleged that he had been directly discriminated against on grounds of race when dismissed by the Respondent. The Respondent denied all claims. The matter came before Regional Employment Judge Taylor on 5 December 2016 for a Preliminary Hearing at which the issues were clarified. The Claimant described himself as black African for the purpose of these proceedings and his comparator is Mr Rashid Faizan whom he describes as Asian. The less favourable treatment relied upon was the act of dismissal. The question of whether the Claimant proves primary facts from which we could properly and fairly conclude that the difference in treatment was because of a protected characteristic and if so, the Respondent's explanation. It was made clear that the

Claimant relies upon three matters of background evidence for the purposes of drawing inferences. The first, that he had not been trained properly; the second, that he had been racially abused by Mr Rashid Faizan; and the third, an allegation that a store taker attended an investigation hearing as a note taker but exceeded that capacity. In the event, the final matter was not relied on in the course of submissions. We heard evidence from the Claimant on his own behalf and for the Respondent we heard evidence from Mr J Huddleston and Mr F McMullen.

2. We make the following findings of fact.

3. The Claimant was employed by the Respondent from 30 March 2016 as an assistant manager. The Respondent provides training to its trainee assistant manager ?who? provides a system of training called Star Induction Training and each employee has a training record. The Claimant's training record set out that there would be regular reviews with his sponsor manager and line manager at weeks four, five, eight and 12. Completing a Star Induction workshop with sign-off at the end of what was anticipated to be a 12 week period. The Claimant's sponsor manager was Mr Rashid Faizan, a store manager at Stratford. The Claimant and indeed any employee holds a copy of their own completed file and we were provided with extracts from the Claimant's file. This shows that the Claimant and his area manager, Mrs Robinson, had signed-off the relevant reviews at weeks four, eight and 12, but there had been no sign-off on any of these by Mr Rashid Faizan (the sponsor manager). Additional documents put before us were week two activities dealing with cash and shrinkage. This recorded the completion of training by the Claimant on understanding of the cashing up and balancing procedures including the use of the Tellermate machine and the cash process. The Claimant signed these as being completed on 8 April 2016. This does appear to be signed by the sponsor manager.

Evidence which the employee is required to provide is completing the cashing-up every day of the week ensuring all dual control procedures are followed and completing the safe checks every day of a week using Tellermate and providing copy printouts.

4. The Respondent operates a cash handling policy set out in the bundle in front of us. The Claimant suggests that this document is a forgery created for the purposes of these proceedings as it does not refer to a £50 note. We reject that suggestion as being entirely fanciful and we are satisfied that this was a genuine document in operation in the Respondent's organisation at the time. Indeed, during the course of subsequent internal hearings the Claimant confirmed his understanding of the operation as set out in this document. It makes repeated references to dual control. This means two people must be physically present and count all cash throughout the process. It is made clear that a failure to follow the process will be reviewed as a serious act of gross misconduct which may result in disciplinary action and dismissal. It is made absolutely clear that cash handling and banking must be completed under dual control, being that two people must carry out the check at the same time. The process is undertaken by use of a Tellermate machine. The employee in charge of the process inputs a certain amount of data into the machine manually, for example the date and time of the safe check, a bag number and their operator identities (each employee having their own operator ID). There are then two signature boxes on the machine or on the receipt and we accept the Claimant's evidence that without the details of two employees being entered onto the machine it is not possible to complete the process.

5. After completing his four week initial training at Stratford the Claimant was transferred to the Dalston store. The Claimant's evidence is that this was a poorly managed store and that he ought to have been sent to Beckton instead. We do not

consider either point relevant to the findings of fact that we are required to make in this case.

6. The conduct upon which the Respondent has relied for the Claimant's dismissal took place on 4, 5 and 6 May 2016. On each of these occasions the Claimant undertook a safe check and/or banking procedure using a Tellermate machine at the Dalston branch. The Claimant input the details into the machine including his own operative number (in fact, number one). He also inputted the number of a second operator (number 90) subsequently identified as a member of staff at the store albeit not one whom was present at the time of either safe check exercise. At the end of the receipt there are two signatures required: one is the Claimant's signature while the second is a squiggle, which appears to represent to at least some extent a letter Z. Both of these were entered by the Claimant.

7. The Claimant's evidence was that it was an operational necessity for him to undertake the safe check procedure on his own as he attended at 8am in the morning prior to the store opening at 9am, as such there was no other member of staff with him. For the purposes of these proceedings we have accepted the Claimant's case that the rotas if …?... analysed would show that he was on his own at the appropriate time. We have also taken into account the evidence of Mr Huddleston, a very experienced store manager who disagrees with that approach and says that the safe check can be undertaken during normal trading hours when other members of staff are available, a view we note which was confirmed by Mr Bimane (the store manager at Dalston). The Claimant does not accept that he has carried out a forgery on these documents. He says that the second signature is in fact merely a scribble. With respect to the Claimant that fails to appreciate fully or properly what that scribble is said to represent, which is clearly a

signature showing confirmation of the process. We think it matters little substantively in this case whether it was an attempt of a sophisticated forgery of a signature or a scribble intended to represent the same.

8. The matter came to the attention of Mr Franky Bimane, the store manager at Dalston. It appears, initially at least, …?... the Claimant having raised the matter himself undertaking subsequent Star Induction Training and realising that what he had done previously was incorrect. Mr Bimane conducted the investigation meeting during the course of which the Claimant's position was that he had been told by a previous assistant manager whom he could not name that he was allowed to carry out the checks alone. The Claimant was asked whether he had his training book with him, he had not brought it. He said that he did not know whose the second signature was and his defence to the initial concerns was that he had received insufficient training. Mr Bimane called a brief adjournment during which he investigated the identity of the second employee and as I said it was a gentleman working at the store but who was not present on either occasion. The meeting reconvened and the Claimant again stated that he could not confirm whose signature was shown on the documents. Mr Bimane was unsatisfied or dissatisfied with the Claimant's explanations, particularly with regard to the signatures and referred the matter to a disciplinary hearing. That took place before Mr Huddleston on 5 July 2016.

9. Mr Huddleston had no prior knowledge of the Claimant and had had limited professional contact with Mr Faizan. We do not accept the Claimant's case that Mr Huddleston lied on oath about the extent of his knowledge of Mr Faizan. Rather, we found that Mr Huddleston volunteered and was open and honest …?... the extent of the contact, namely every month or two attending some training upstairs at his store. We are not satisfied that that is significant contact, far less that it is sufficient to impute or infer some

form of improper motive. During the course of the disciplinary hearing notes were taken, a copy of which were produced and shown to the Claimant who at the time signed the notes on each page confirming that the content of the same was accurate. Before us, the Claimant now says that they are not accurate and that further matters were discussed. We do not accept that evidence and find that it is indicative of his approach to this case, namely irrationalising after the event matters which do not support his contentions in order to make them better fit his interpretation of events. Accepting, therefore, that the notes are accurate, we find that Mr Huddleston asked the Claimant to produce his training file. The Claimant had not brought it with him. Mr Huddleston did not request that a copy be produced but he did explore with the Claimant the substance of what that training file would show. He did so by asking the Claimant questions about the training which he had undertaken and his understanding of the dual control process. We find that this was an appropriate way of Mr Huddleston exploring the extent to which the Claimant understood the procedures which were applicable and we note that the Claimant did not raise at that stage any suggestion that the training record would show that Mr Faizan had failed to discharge his obligations, as he has sought to persuade us in the course of this hearing. The Claimant, as we say, confirmed his understanding of the dual control process. Mr Huddleston voluntarily disclosed to the Claimant that he had checked in advance of the hearing the training that the Claimant had undertaken by way of a conversation with Mr Faizan. When this was disclosed the Claimant did not object to the contact nor did he allege race discrimination nor suggest in any way to Mr Huddleston that Mr Faizan was an unreliable witness whose evidence ought not to be relied upon. The Claimant's case at the disciplinary hearing was that he had been told by Mr Bimane that his previous practice of banking alone was wrong, that this had been confirmed at Star training, he had relied upon an instruction by the previous assistant manager that it was permissible to bank alone or check alone under the CCTV but he did not give a name. The Claimant did not

suggest that he had ever been told that it was acceptable to write the signature of an employee who had not been present during the course of such check. Mr Huddleston undertook some additional investigation by contacting Mr Bimane who confirmed that there was no operational requirement for the safe check to be conducted prior to the store opening. This accorded with Mr Huddleston's own knowledge and experience. In particular, we accepted Mr Huddleston's evidence set out at paragraph 25 of his witness statement to this effect.

10. Mr Huddleston carefully considered the matters in front of him and by a letter dated 18 July 2016 informed the Claimant that he was to be summarily dismissed for gross misconduct based upon three allegations, each said to be gross misconduct: failure to follow the cash procedure by completing safe checks and banking by himself (in other words a loan); falsification of company documents by signing and falsifying the other person's signature; and breach of trust by using someone else's ID and signature in the absence of the person. It is clear to us that the banking alone aspect was not the only act of gross misconduct for which the Claimant was dismissed. In particular, we accept Mr Huddleston's evidence as clearly set out in his decision letter that the principal concern was the falsification of the signature, the banking documents and the inclusion of the other member of staff's details. In particular, what rendered this more than a misunderstanding of procedure but instead an offence of dishonesty was this falsification. Also relevant to Mr Huddleston was the Claimant's attitude and reaction to the allegations. We accept Mr Huddleston's evidence as both credible and reliable and we accept that he was in no way motivated by anything that Mr Faizan had improperly said or inferred. In particular, there was no information before Mr Huddleston which could lead him to fear or suspect any discrimination on the part of Mr Faizan.

11. Following the disciplinary hearing the Claimant wrote to the CEO of Superdrug in which he made an allegation of race discrimination. This is a careful and detailed letter in which the Claimant set out what he purported, or what he believed rather, were examples of race discrimination which he had encountered. It is of note that the Claimant did not refer to an incident which is featured large in this hearing, namely an allegation that Mr Faizan had referred to him as a "black monkey" thereby demonstrating racial animus on the Claimant's case. Given the fact that the letter is headed up "a complaint of racism", given that the Claimant sets out in considerable detail the allegations of racism upon which he relies and given that he refers to the possibility of Employment Tribunal proceedings in this letter, we accept Mr Gray's submissions that it is to say the least odd that he would admit to include such an obvious act of discrimination if the same had indeed occurred.

12. In any event, the Claimant attended an appeal hearing before Mr McMullen. Mr McMullen was primarily charged with considering the appeal against dismissal, although we accept to some extent he considered matters raised by the Claimant in his what is said to be a grievance letter insofar as the two procedures overlapped or the allegations overlapped. Notes were produced …?... of this appeal hearing. These were not signed either by the employee or the employer. The Claimant challenges their accuracy. Mr McMullen accepts that they are not verbatim, but his evidence is that they are an accurate summary of what was discussed. We prefer Mr McMullen's evidence on that point. We accept that during the course of the appeal hearing Mr McMullen took care to explore with the Claimant his allegations of race discrimination. There was no reference to the black monkey comment.

13. We had regard to the Claimant's evidence during the course of this hearing and in particular the significant change of position that he adopted from a suggestion at one point that he had not raised the allegation with Mr McMullen in the hearing (that was said in cross-examination to Mr Gray) when an inconsistency was put to him in his witness statement, the Claimant changed tact, described as an about turn …?... face by Mr Gray and said that he had indeed raised it with Mr McMullen, and in response to the Tribunal questions the Claimant set out at length the full version of what he says was told to Mr McMullen. These were significant discrepancies in his evidence. Mr McMullen for his part denied that any of this information was shared with him. We have no hesitation in preferring the evidence of Mr McMullen, who again we found to be credible and reliable.

14. We do not find that the Claimant was deliberately lying to us in the course of his evidence, but rather that he was rationalising after the event to better suit his case. It is clear that he feels genuinely very emotional about the circumstances leading up to his dismissal and what he perceives to be failings on the part of the Respondent. Whilst we consider that this shows a significant lack of insight into his own conduct in an attempt to blame others for what essentially is falsifying a signature, we accept that these are genuine emotions which are driving his evidence to the Tribunal rather than a deliberate lie. In any event, Mr McMullen was not persuaded by the Claimant's arguments on appeal and he set out his decision rejecting the Claimant's appeal in a letter of 8 August 2016, again, a careful letter setting out the allegations of race discrimination relied upon by the Claimant and not mentioning the black monkey comment, we find, because it was not raised before Mr McMullen. Again, we accept Mr McMullen's evidence that in his view the misconduct or gross misconduct in this case was not the banking or carrying out the safe check on his own, rather it was the falsification of company documents in addition to the same. Had it merely been a breach of procedure in carrying out the checks by himself,

the appropriate sanction could have been a final written warning. It was the falsification of documents that made the offence more serious. Furthermore and we accept, Mr McMullen added significant weight to the Claimant's presentation during the course of the internal proceedings, the lack of contrition, the lack of open admissions, particularly at the early investigative stages, all counted heavily against him.

15. Mr Faizan was relied upon in this hearing as a comparator. He was issued with a final written warning following suspension on 20 May 2016 and we have before us a copy of that decision letter. Mr Faizan had been charged with four alleged acts of gross misconduct, which following a disciplinary hearing resulted in three of the same being upheld. These were serious matters of gross misconduct: intentionally falsifying a time and attendance system; abusing a holiday pay process; and falsifying a company expense claim. One of the allegations was not upheld. As I say, each of the allegations upheld did amount to gross misconduct. However, the manager hearing this disciplinary, Mr Mark Stevens, an area manager not involved in the Claimant's own case, accepted Mr Faizan's explanations and mitigation, namely that there had been genuine errors and/or open admissions were wrongdoing had occurred. Accordingly and whilst this was a serious matter, he decided that a final written warning was appropriate. In reaching that decision, Mr Stevens took into account the seven years' continuous employment of Mr Faizan and his approach to the disciplinary allegations.

16. With regard to the law, we are concerned with Section 13 of the Equality Act 2010. We have had regard to the burden of proof provisions and also the case of *CLFIS (UK) Ltd V Reynolds* [2015] EWCA Civ 439 where the Court of Appeal made it clear that the correct approach in a tainted information case is to treat the conduct of the person supplying the information as a separate act from that of the person who acts upon it. It is

important in a discrimination case to consider the reasons and motivation, specifically the reasons, of the decision maker rather than any earlier individual. It is fundamental to the scheme of the legislation that liability can only attach to an employer where an individual employee or agent for whose act is responsible has done an act which satisfies the definition of discrimination. That means that the individual who did the act complained of must himself have been motivated by the protected characteristic. There is no basis on which his act can be said to be discriminatory on the basis of someone else's motivation.

17. The Claimant produced an Australian case, *Monash University* and *Helen Curs & Siggers v Umatuwarikapour*. However, we did not find this to be of any assistance, dealing with entirely separate legislation in Australia it has no binding effect and indeed the Claimant did not take us to any part of that case which was said to be of direct relevance despite being invited to do so.

18. We turn then to our conclusions.

19. We are satisfied that the Claimant was dismissed in this case and that the issue we must decide is whether that was an act of direct discrimination. We take into account the other matters relied upon by way of inferential material or not relied upon as specific detriments and we take care not to confuse the two.

20. We have found as a fact that the Claimant was dismissed following allegations of gross misconduct and we have found as a fact that Mr Faizan was not dismissed following allegations of gross misconduct. We take into account that both were of different racial groups as described to us and we take into account that both were in management positions. Whilst there are some differences between Mr Faizan and the Claimant in their

circumstances, we do not accept that these were so material as to render Mr Faizan not a true statutory comparator. We therefore accept the Claimant's case that Mr Faizan is an appropriate comparator and we are satisfied that he has proven primary facts from which we could conclude that there had been less favourable treatment in circumstances where both had been accused of gross misconduct but the Claimant given a more harsh sanction. We consider therefore that the burden of proof passed to the Respondent to show us that the reason for dismissal was in no sense whatsoever connected to the Claimant's race and we are satisfied that it has done so. We took into account the different decision makers in the Claimant's case and that of Mr Faizan. We took into account the very different circumstances and in particular, the Claimant's conduct during internal hearings, his no comment approach, his denial of knowledge of the signature and that of Mr Faizan who, on the evidence available to us, admitted during the course of the internal proceedings where he had been guilty of wrongdoing. This is a very significant matter, not least in allegations of gross misconduct which raise issues of trust and confidence. If an employee who is found to have committed an act of serious wrongdoing does not admit it, show contrition and accept their own responsibility then the ability of the employer to maintain trust in that individual is by necessity significantly impaired, such that the second chance approach which the Claimant seeks in this case is far less likely to be appropriate. We took into account the different lengths of services between the two individuals and also our findings of fact as to the reasons why both Mr Huddleston and Mr McMullen acted as they did.

21. As for the inferential material, we have had regard to the training file and in particular, the fact that the Claimant's training had not been signed off by Mr Faizan (the sponsor manager). We are not satisfied that that is sufficient information from which we could infer that Mr Faizan was racially motivated against the Claimant, although that is not

the way in which the allegation was put at the Preliminary Hearing we considered it nevertheless, but we note that that was not a matter raised before either Mr Huddleston or Mr McMullen in this case. We find there is in sufficient in that document from which we could draw any proper inference, not least as the Claimant's own signature certified that he believed at least prior to these allegations that he had been properly trained and had the sufficient competency required. In our view, the Claimant attached undue influence to the training record. He had a lack of appreciation of his own conduct. This was not simply a training issue, it may have been had he simply undertaken the safe checks or banking alone through misunderstanding of the policy. Indeed, Mr Huddleston and Mr McMullen accepted that it was possible that that may not have warranted dismissal. But entering manifestly untrue information into the Tellermate system, not only the number of the other operative who was not present but also the scribble intending to represent a signature, in order to complete a process which would not have been otherwise possible goes far beyond a training deficiency and into the realms of honest.

22. As for the alleged comment by Mr Faizan, we note that this was not put before either Mr Huddleston or Mr McMullen by the Claimant, nor indeed were such comments or any statements suggestive of racial animus made by Mr Faizan directly to the decision makers. We have made no finding of fact as to whether or not the specific comment was made. Simply, that as it was not information known to the decision makers, applying *CLFIS* properly, we are satisfied that it would be inappropriate and improper to draw any inference from such a comment – we decline to do so. Finally, the …?... note taker role, as we say this is not a matter pursued to any great extent by the Claimant and there is simply insufficient evidence for us to draw any inference from that point.

23. The Claimant's case put simply in submission was that the Respondent would not have dismissed him on a training deficiency had he been of a different race. We unhesitatingly disagree. No matter what race there were fundamental breaches of procedures important in a retail business and there was evidence of a lack of honesty and transparency with regard to cash handling which rendered dismissal in such circumstances inherently probable no matter what race is the employee. At times the Claimant's evidence and submissions ranged far beyond the confines of the case as identified at the Preliminary Hearing. He made a number of allegations of the Respondent, many of which were very serious, for example fraudulently creating documents for the purposes of these proceedings – an allegation that the Respondent emphatically denies. We have resolved only those factual disputes which we considered necessary to determine the case and we make no finding of fact on the very many allegations which were quite irrelevant, in our view, to the issues before us.

24. For all of those reasons, therefore, the Claimant fails and is dismissed.

25. After judgment was given Mr Gray indicated that no application was made orally today and understands that any application in writing must be made within the appropriate time limit.

Employment Judge Russell

16 August 2017