EMPLOYMENT TRIBUNALS

Claimant: Mr Akeem Akinlade

Respondent: Tesco Stores Limited

Heard at: Manchester **On:** 14 and 15 June 2018

Before: Employment Judge Hill

REPRESENTATION:

Claimant: In person
Respondent: Miss R Thomas, Counsel

JUDGMENT

The judgment of the Tribunal is that the claimant's claim for unfair dismissal fails and is dismissed.

REASONS

1. The Tribunal heard both oral and written evidence. The claimant provided a written witness statement and gave oral evidence. The respondent provided written witness statements for Mr Andrew Schofield, Store Manager/disciplinary officer; Mr William Holdsworth, appeals officer, Mr Jonathan Sayward, Store Manager/dismissing officer, who all also gave oral evidence.

2. The Tribunal was provided with a bundle of documents comprising of 395 pages. CCTV video evidence comprising of ten clips; six being produced by the Claimant and four clips were produced by the respondent. The contents of those clips is summarised below:

3. Respondent's clips of CCTV Footage

   (1) 23 June 2017 shows the claimant and the suspect. The claimant puts his hands on his own head and then the suspected shoplifter does the same. The suspected shoplifter is being walked around the store by the Claimant.

(2) 17 July 2017 refers to the second incident. The claimant is running towards the suspected shoplifter, takes hold of him, there is a scuffle and the claimant pushes the suspect into another aisle.

(3) 17 July 2017 – the claimant can be seen pushing the suspect down the aisle. The suspect pulls out some scissors. The claimant runs away from the suspect.

(4) 17 July 2017 – two female managers holding the claimant back and the suspect walking in front.

4. The claimant's clips of CCTV footage:

(1) 9 September 2017 shows a person walking around the store. The claimant alleges that this is the same suspect.

(2) 23 June 2017 shows the suspect in the store from an earlier part of the day.

(3) 23 June 2017 shows the suspect leaving via a fire exit.

(4) 23 June 2017 shows the suspect walking around the shop.

(5) 8 July – two clips which were both blank.

(6) 7 June 2017 – suspect entering the store.

5. The claimant brought a claim for unfair dismissal by way of an ET1 dated 11 December 2017. The respondent resisted the claim by way of an ET3 dated 12 January 2018. The claimant brought a claim of unfair dismissal based on the following grounds:

(1) That the respondent did not have a fair reason to dismiss;

(2) That the respondent did not –

(a) reasonably and genuinely believe in the allegations against the claimant;

(b) undertake a reasonable investigation into those allegations before forming any such belief;

(c) have reasonable grounds for forming such a belief.

6. The respondent resisted the claim on the basis of –

(1) that it had a fair reason to dismiss, namely conduct;

(2) that it followed a fair procedure;

(3) had a genuine belief in the claimant's guilt based on reasonable grounds.

Main Issues for the Claimant

7. At the Tribunal the main issues put forward by the claimant were:

(a) That the investigation and disciplinary process were engineered and that there was a conspiracy orchestrated by Clara Ashton who had told the claimant in April that she was a manager and she could get him dismissed;

(b) The decision to dismiss him had been made prior to the disciplinary hearing and he believed the respondent had breached confidentiality;

(c) It was unreasonable for the respondent to consider the disciplinary action dated 23 June 2017 in respect of the second incident on 21 July 2017 because the two incidents overlapped;

(d) That he had not been given time to improve between the first incident and the second incident.

Findings of Relevant Facts

The Tribunal has found the following relevant facts:

8. The Claimant was employed as a security officer from 26 August 2008 until his dismissal on 12 September 2017. The claimant was dismissed for gross misconduct for failure to follow store procedures when detaining a suspected shoplifter. These procedures are known as a shorthand “SCONE”.

9. The Claimant had two disciplinary sanctions on his record. The first was a verbal warning in 2016 where he had made a wrongful arrest. The second is referred to below and was in respect of a breach of the SCONE procedures in June 2017.

10. The Tribunal finds that prior to his employment with the respondent and during his employment with the respondent, the claimant had had internal and external training in respect of detaining suspected shoplifters. The claimant was SIA accredited and had undergone his bronze training for security staff with the respondent. The Claimant’s signed training records were set out at pages 66-69 of the bundle, and showed that the last date he had completed his bronze for security training was in November 2015.

11. A copy of the respondent’s training policy is set out at pages 48-54 of the bundle. Page and page 50 sets out specifically the procedure to be followed when stopping a shoplifter, “SCONE”:

S The colleague witnesses the suspected shoplifter select a product

C The colleague is aware that the suspected shoplifter has concealed that product

O The colleague has observed the suspected shoplifter

N The suspected shoplifter has failed to pay for the product (non payment)

E The suspected shoplifter exists the store

12. Further, once the suspected shoplifter is identified a colleague should notify the Duty Manager that a suspected shoplifter is in store, ask for instructions and request backup from other members of the security team before the shoplifter is stopped. The policy states that when stopping a shoplifter the colleague should identity his or herself, explain to them why he or she has been stopped and explain what will happen next.

13. The Tribunal finds that this procedure was the procedure implemented by the Respondent at the time and that the Claimant had received training in this procedure and understood it. The Claimant confirmed during evidence that he was aware of the procedure and that he understood it.

14. On 23 June 2017 the claimant was involved in detaining a suspected shoplifter. This is referred to as the first incident. On this occasion the respondent's store detective had witnessed a customer conceal some cheese. The store detective had notified the claimant and the claimant then witnessed the customer dropping the cheese whilst in the clothing department. The claimant made a decision to approach the customer and detain him and escort him to the respondent's holding room.

15. Available to the respondent and to this Tribunal was CCTV footage of the first incident. The first part of this footage was not available, however, stills from that footage were provided that showed the claimant with the suspect in the holding room. The CCTV stills showed the customer lying on the floor and appears to show the claimant's leg being close to that of the suspect and that there was contact between claimant's foot and the suspect. The stills also appeared to show the Claimant lifting the suspect's arm and then letting it go.

16. The "live" CCTV footage of this incident was shown to the Tribunal and had been viewed by the claimant, at his disciplinary hearing. The footage showed the claimant walking around the store with the suspect. The claimant puts his own hands on his head in a surrender style. The suspect then does the same. The respondent contended that this was at the instruction of the claimant. The claimant denied this but could offer no credible explanation as to why he had put his hands on his head or why the suspect had also put his hands on his head. The claimant then walked the suspect around the store. This incident was witnessed by colleagues and customers, who heard the Claimant telling the suspect that he was banned.

17. A customer, who witness this incident, made a complaint to the store manager concerning the claimant's behaviour and referred to the incident as a "walk of shame". This incident was investigation by Chris Taylor and the claimant was asked to attend a disciplinary meeting with Mr Schofield.

18. This incident was investigated by the Respondent and the Claimant was invited to attend a disciplinary hearing on 20 July 2018. The Claimant was informed of this in writing on 13 July 2017. The Respondent held that the claimant was found to have:

(1) failed to follow the respondent's training;

(2) behaved inappropriately towards a customer; and

(3) that it was an act of gross misconduct.

19. The Respondent considered this to be an act of gross misconduct. However, the disciplinary officer considered that because of the claimant's length of service and his previous record, he gave a sanction short of dismissal. The sanction applied to the Claimant was three days' unpaid suspension, and that it would remain on his file for 52 weeks. This sanction is clearly shown in the disciplinary procedure at page 60 of the bundle alongside dismissal and demotion. The claimant alleged during these proceedings that he had not understood this sanction. However, the Tribunal finds that this is very clearly set out in the respondent's disciplinary policy as an alternative to dismissal.

20. The second incident occurred on 17 July 2017. This incident involved the Claimant attempting to detain a customer, who at the time of the incident had not stolen or concealed any items and again without following the SCONE procedure.

21. The Claimant had spotted the customer and followed him. The Claimant grabbed him from behind in an attempt to move him into the direction of the holding room. During this altercation the customer had pulled out a pair of scissors from his bag. At the same time two female colleagues who heard the commotion had walked into the situation whilst the customer had the scissors. The Tribunal was provided with CCTV of these events and it showed the claimant being held back by the two female colleagues.

22. The Claimant alleged that this particular customer was well known to him and to the store as a shoplifter. He claimed that he had previously spoken to his manager, Chris Taylor, prior to the customer entering the store on 17 July 2017 due to a previous incident, and had been instructed by Mr Taylor to detain this particular customer if he returned to the store, even if he had not stolen or concealed any items. The Respondent disputed this and interviewed Mr Taylor and other security colleagues and found no evidence that this had been the case. The Tribunal accepted that the respondent had fairly and reasonably investigated this allegation and that they were entitled to rely on the evidence they obtained during the investigation to hold that this was not the case and that the Claimant had not been instructed to detain this customer regardless of whether he had stolen goods or not.

23. The claimant was suspended on 17 July 2017 and was invited to an investigatory meeting. The respondent carried out an investigation that included interviewing the claimant, interviewing the two female colleagues who witnessed the events, Mr Taylor and three other witnesses. Mr Taylor disputed that he had given any instructions to the Claimant regarding detaining the individual concerned or to ignore the SCONE procedure. The Respondent also interviewed other colleagues to understand if they had received any such instructions from Mr Taylor and they confirmed they had not. As part of the investigation the Claimant was also provided with an opportunity to view the CCTV. At the end of the investigation the matter was referred to Mr Sayward for disciplinary proceedings to commence.

24. The claimant attended the disciplinary meeting on 12 September 2017 and was represented by his union representative. The Tribunal was provided with copies of the disciplinary hearing notes. The Claimant alleged that the person he had detained was not a customer but a well known shoplifter who had not purchased any items that day and insisted that he had been given instructions from Mr Taylor to detain the customer if he came into the store even if he had not stolen any items or concealed any items. The Claimant alleged that Mr Taylor's denial of this instruction was a lie.

25. The Claimant disputed that he had done anything wrong. The Claimant was given copies of the evidence obtained from Mr Taylor and other security colleagues who all disputed his version of events in relation to the instruction. The Claimant stated that he was the only person given those instructions. The Claimant strongly asserted that the person was not a 'customer' but a known 'shoplifter'.

26. The respondent considered that the claimant's actions amounted not only to a serious breach of their policies but also created a health and safety risk to the customer involved, colleagues, customers and also to the claimant himself. Mr Sayward took the decision to dismiss the claimant and informed him that his behaviour displayed on the CCTV confirmed that he had not followed store procedures 'SCONE' and that he had behaved inappropriately towards a customer. Mr Sayward considered that the claimant's actions amounted to gross misconduct.

27. The claimant appealed the decision to dismiss. His appeal was heard by Mr Holdsworth. Mr Holdsworth conducted a thorough review of the findings and as a consequence of points raised by the claimant in his appeal hearing interviewed again Mr Sayward to check that he had looked at the CCTV footage; Mr Turner another security guard, and Mr Carl Dele-Charley. At the end of this further investigation Mr Holdsworth upheld the decision to dismiss.

28. Further, the claimant confirmed during his evidence to this Tribunal that the manner in which he detained the person was in breach of SCONE.

29. The Claimant alleged that the Respondent had pre judged the issue and other colleagues knew that he was going to be dismissed. The Respondent's evidence was that no such decision was taken prior to the disciplinary hearing and that all evidence was considered. The Respondent had clear notes of evidence and of the meetings and had demonstrated at the previous disciplinary hearing for the first incident that it was prepared to consider all steps before dismissal and the tribunal finds that the Respondent did not prejudged and had not made its decision prior to the disciplinary hearing.

30. The Claimant's view was that the Respondent's people manager, Clara Ashton had told him on 20 April 2017 that she could get him sacked or suspended. The Claimant referred to this in his witness statement as a 'conspiracy' because Clara had discovered that he may have been aware about a relationship she was having with another colleague. The Claimant said that his conversation took place in private and there were no witnesses. The Respondent disputed that this had happened but in any event stated the Ms Ashton had no input into the either the investigation or disciplinary other than note taker and that she did not have the authority to make such decisions.

31. The Respondent further argued that the allegations against the Claimant were real and not made up by Ms Ashton so the Claimant's claims in this respect did not make sense. I agree with the Respondent that there was no evidence presented to them or to this tribunal to suggest that any of the allegations made against the Claimant were false or made up and certainly had not been instigated by Ms Ashton.

32. The Claimant's CCTV footage related mainly to showing that the customer in question had been in the store before. This was not disputed by the Respondent. I find that it is likely that the customer in question had previously been in the store but that this is irrelevant to the issues for me to determine.

The Law

Unfair Dismissal

33. Section 98 of the Employment Rights Act 1996,

a. did the Respondent have a potentially fair reason to dismiss?

b. did the employer act reasonably or unreasonably in dismissing the Claimant for the reason given?

34. Section 98(4) provides that the determination of the question whether the dismissal is fair or unfair (having regard to the reasons 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 reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and

b. shall be determined in accordance with equity and the substantial merits of the case.

35. When determining cases of misconduct the Tribunal has settled case law to assist it in drawing conclusions. In particular in cases of misconduct guidelines have been set out by Arnold J in British Home Stores Ltd v Burchell [1978] IRLR 379. Essentially the Tribunal must determine the following:

a. Did the Respondent reasonably believe that the Claimant was guilty of misconduct at the time of the dismissal?

b. Did the Respondent have in mind reasonable grounds to sustain that belief? And

c. At the stage the Respondent formed that belief had it carried out as much investigation into the matter as was reasonable in the circumstances?

d. Whether the dismissal falls within the 'range of reasonable responses' of a reasonable employer.

36. In conduct cases the 'range of reasonable responses' test applies in conduct cases not only to the decision to dismiss but also to the procedure by which that decision was reached. ***J Sainsbury Plc v Hitt [2003] ICR 111 CA***.

37. In cases where an employer is relying upon previous warnings as a 'totting up' dismissal the Tribunal is assisted by ***Davies v Sandwell Metropolitan Borough Council 2013 ERLR 374*** where the Court of Appeal stated that an employer was able to rely on a final warning where it was given in good faith; that there were prima facie grounds for imposing it and that it was not manifestly inappropriate to impose it. The starting point should always be S.98(4) ERA with the question being whether it was reasonable for the employer to treat the conduct reason taken together with the circumstances of the final written warning as sufficient reason to dismiss the Claimant. It is not for the Tribunal to reopen the final warning and consider whether it was legally valid save in exceptional circumstances.

38. Tribunals do not have the power to decide whether a warning should have been given or not but they can determine whether a warning was given in bad faith, or whether there were prima facie grounds for imposing it or whether it was manifestly inappropriate. Unless a warning was given in bad faith or manifestly inappropriate, it will have been validly issued. Consequently, if the warning was valid, Tribunals should then assess whether it was reasonable for the employer to take it into account when deciding to dismiss.

39. If it is found that a warning is manifestly inappropriate the Tribunal is required to consider the extent to which an employer relied upon it in making the decision to dismiss and must be considered when deciding whether the dismissal was fair or unfair. ***Bandara v BBC UK EAT/0335 15 JOJ***

Conclusions

40. The Tribunal finds that the respondent did have a potentially fair reason to dismiss, and that fair reason was conduct.

41. It is clear that the respondent had clear policies setting out the procedures for dealing with suspected shoplifters and that the claimant did not follow those procedures, and therefore acted in breach of the respondent's policies and put the health and safety of customers, colleagues and himself at risk.

42. The Claimant accepted that he understood the polices and that he had undergone adequate training both internally and externally.

43. The Tribunal finds that the respondent had reasonable grounds after a reasonable investigation to believe that the claimant had not been given instructions to detain the customer without him having stolen or concealed any goods. The tribunal accepts the Respondent's argument that even if the claimant had been told to detain the person as claimed, that the manner in which he did so meant that he still acted in breach of the procedures and policies and that his behaviour would still amount to gross misconduct because his actions were not those that the respondent would expect of one of their security guards. Further that his actions in breach of SCONE meant that he along with colleagues and the customer himself were put in danger.

44. The claimant did not accept that he behaved inappropriately. The claimant referred to the customer as being a trespasser throughout these proceedings and suggested that because of this he was entitled to detain him in the way that he did. The Claimant's argument appeared to be that because the person should be considered a shoplifter that he would in effect a trespasser and should not have been in the store so the fact that he detained him was an attempt to protect the store and its goods. The Claimant did not accept or understand that even he was correct in his analysis, that the manner in which he attempted to detain the customer was in breach of the Respondent's policies and procedures and that those actions amounted to gross misconduct regardless of his motivation.

45. Both the Respondent and the Claimant accept the fact that the customer had not taken anything, was not acting in a threatening way and it was the Claimant who instigated the altercation which resulted in the customer pulling out a pair of scissors and potentially putting the health and safety of himself, colleagues and the Claimant at risk. The Tribunal finds that the respondent was entitled to treat this behaviour as a breach of their policies and as gross misconduct.

46. Turning to the particular issues raised by the Claimant the Tribunal finds no evidence that the respondent pre-judged the decision to dismiss, and Mr Sayward was clear in his evidence that he had not discussed anything regarding the dismissal with other colleagues.

47. In this particular claim the claimant has in effect admitted his guilt. He admitted that he had not followed the procedures. Further, the respondent's investigations did not support the claimant's assertions that he had been instructed to detain the suspect in this way, and therefore the Tribunal finds that the respondent had a genuine belief in the claimant's guilt and that the belief was held on reasonable grounds following a thorough and fair investigation.

48. The investigation, disciplinary and appeal hearings were impartial and were carried out by people that were not influenced by anyone. No evidence was provided to this Tribunal that Clara Ashton was involved in the decision making process. The Tribunal accepted the evidence of the witnesses in that they were at no time influenced by Clara Ashton, and that her position as a People Manager meant that she did not have any influence over whether somebody was dismissed or not.

49. In addition the Tribunal accepts the respondent's argument that in any event the two incidents actually happened. They were not "trumped up charges" brought by Clara Ashton; the Claimant has confirmed they happened. He may not belive he should have been dismissed but he has at no stage ever suggested that the incidents did not occur. It is therefore hard to understand how the Claimant considers that Clara had a 'hand' in orchestrating his dismissal.

50. The respondent behaved reasonably in investigating the incidents and viewed CCTV footage, spoke to those involved and gave the Claimant an opportunity to defend himself.

51. The Tribunal accepts that the claimant believed he was protecting the store and that for some reason he did not see the person as a customer. He may have genuinely believed that the customer was a trespasser but the Claimant had

received specific training, both internally and externally, and he was clear of how the SCONE procedure should operate.

52. The Claimant's belief that the customer had been in the store before and was a risk to the store again may be genuine but is irrelevant for the purposes of his dismissal. The Claimant provided no evidence that this customer due to his previous behaviour had to be detained without using the SCONE procedure and the CCTV produced by him did not assist the tribunal in determining whether the Claimant's conduct amounted to gross misconduct. The CCTV was either from dates other than the date in question or showing only the customer when the Claimant was not present.

53. Although the claimant had a relatively clean employment record, there had been two serious incidents within the space of a couple of months where the claimant had breached the respondent's policy. The Tribunal accepts the respondent's view that the claimant should have been more aware of the policies and procedures given recent events and should have been particularly vigilant after the first incident, but in any event both incidents amounted to gross misconduct on their own. The Claimant was fully aware on the date of the second incident that he was being investigated for breaches to the respondent's policies on the date of the second incident.

54. Although the Claimant argued that he had not had time to 'improve' between the two incidences it is clear that the Claimant did not accept during his dismissal or indeed at this hearing that he had done anything wrong. The Claimant also accepted that he knew and understood the procedures so I cannot see that it would have made any differences in any event but also that the behaviour on the second incident that the Respondent was entitled to treat it in the way that it did.

55. The Tribunal accepts that it was entirely reasonable for the respondent to have considered the first incident when making a decision on the second incident. These events had happened close together and whilst the procedures may have overlapped the Claimant was fully aware that he had breached the SCONE procedures in the first incident and that the Respondent considered this gross misconduct. The Tribunal finds no evidence that the sanction given in the first incident was given in bad faith nor manifestly unfair. There are no grounds for this tribunal to interfere with the sanction awarded at the first disciplinary hearing.

56. The Tribunal accepts the respondent's submissions that they were entitled to take the warning into account and that in any event the claimant did not consider that he had done anything wrong, so the respondent had no confidence that he would not have behaved in the same way again and potentially put himself and others at risk if his employment had continued.

57. The Claimant's evidence and submissions on this point confirm the respondent's view that he did not consider he had done anything wrong and therefore the likelihood of him repeating his actions in similar circumstances was high.

58. It is not the Tribunal's job to determine what it would have done in these circumstances or to substitute its own view, but to look at the evidence before it, find

facts and determine whether the respondent acted within the band of reasonable responses.

59. The decision to dismiss falls within the band of reasonable responses open to an employer and in this case the Respondent had operated an open and fair investigation, determined facts upon which it held a genuine belief in the claimant's guilt.

Employment Judge Hill

Date 09 October 2018

JUDGMENT NAD REASONS SENT TO THE PARTIES ON

11 October 2018

FOR THE TRIBUNAL OFFICE