



EMPLOYMENT TRIBUNALS

Claimant: Mr D Reed

Respondent: Rex Goldsmith Limited

Heard: by CVP

On: 24 January 2022

Before: Employment Judge Codd

Appearances

For the claimant: In person

For the respondent: Mr Harris (Counsel)

JUDGMENT

1. The claimant's claim for unfair dismissal fails and is dismissed.
2. The claimant's claim for breach of contract fails and is dismissed.
3. Permission for the respondent to withdraw its counterclaim (pursuant to Rule 52(a) Employment Tribunal Rules of Procedure 2013) as the respondent seeks to re-issue that claim in another jurisdiction.

REASONS

Introduction

4. The claimant is David Reed. He was employed as a fishmonger by the respondent Rex Goldsmith Limited between 19/02/2013 until 14/09/2021. The claimant is bringing claims for an unfair dismissal and breach of contract in respect of notice pay, following his dismissal for gross misconduct on 14/09/21 for alleged theft of company takings.

5. The claimant brings a counter claim relating to the breach of contract, in order to recover sums it says were stolen by the claimant during the course of his employment. However, an application was made to withdraw that claim, so that it could be re-issued in the county court for the reasons discussed below.

Background

6. The claimant was employed as a fishmonger and held a position of trust and responsibility within the business. To all intents and purposes, he was the right-hand man and deputy to Rex Goldsmith, the owner of the business. The claimant was in charge when Mr Goldsmith was absent. He would ensure stock was replenished (from Billingsgate market) and the smooth running of the operation. On a day-to-day basis, he would also prepare the shop for trading and cash up the till from the previous day's takings.

7. Although the claimant had worked longer hours, he was employed 3 days per week at the time of the incidents referred to in this Judgment. The claimant was flexible and would cover other staff for holidays as required.

8. The claimant was in charge of the shop between 24th August 2021 to the 27th August 2021, whilst Mr Goldsmith was away on holiday. He ran daily trips to Billingsgate Market during that time.
9. Mr Goldsmith returned late on the 27th August 2021. The claimant himself departed for a holiday on the 28th of August and did not return until 11th September 2021. After the claimant had left work on the 27th August 2021, another employee – John Huff, approached Mr Goldsmith and made an allegation that the claimant had been placing cash taken from customers directly into his pocket.
10. The respondent subsequently carried out an investigation, by way of viewing CCTV and a further in-depth discussion with Mr Huff. During that investigation, Mr Huff produced a receipt for £45 for a cash refund which he alleged to have recovered from the bin, and it was said to have been processed by the claimant.
11. The claimant returned from Holiday on 11th September 2021, where he received a letter inviting him to a disciplinary meeting, he later telephoned Mr Goldsmith to discuss the same.
12. A meeting took place between the claimant and the respondent on the 14th September 2021. It was attended by Mr Goldsmith as the chair and Mrs Goldsmith as a note taker. The claimant was accompanied by a fellow employee who also took notes, but did not participate. It is agreed that the meeting lasted around 20 minutes. It was confirmed that it was a disciplinary meeting and CCTV was shown to the claimant for the first time.

13. There is no comprehensive list of the clips seen by the claimant (which corresponds with the clips I have seen), but by common consensus, at least some clips (if not all) viewed, matched the material produced for this hearing.
14. The claimant provided an account with the reasoning why he was placing money in his pocket (piecemeal), namely that he was taking a cash float for the market the following day and that he returned any unused funds and receipts. There remains a dispute as to whether the claimant provided an account relating to dates when he would not visit the market. The claimant avers that on the remaining dates he was replacing change which he had personally put into the till and that on all occasions the till would tally.
15. In any event the claimant was dismissed for gross misconduct by Mr Goldsmith at the conclusion of the meeting. A letter confirming this as well as including the right to appeal was also sent to the claimant. The claimant declined to exercise his right to appeal and instead contacted ACAS on 14th September 2021, immediately after his dismissal and began the early conciliation process. His ET1 claim was issued on 14th October 2022, well within time.

Preliminary matters

16. I was asked by the respondent to permit the withdrawal of their counterclaim, without dismissing it. I agreed with Mr Harris that this matter should be deferred until closing submissions, so that I could hear full argument, without delaying the proceedings. I note in passing that the claim was validly made in the ET3 response dated 6th December 2022. However, I have seen subsequent applications seeking to withdraw the claim. The reason for withdrawal is so that the claim may be re-issued in the county court.

17. Mr Harris agreed that it was proportionate to defer matters to the end of the hearing and he acknowledged that in so doing, should I choose not to exercise my discretion, and dismiss the claim upon withdrawal, that the claim would then fail without having been litigated in these proceedings. In that knowledge Mr Harris agreed with the approach set out above.

18. In respect of an application to admit late / further evidence to the bundle, by the respondent, I allowed the application, on the basis that the material included assisted all parties to define and put their case.

Issues for the Tribunal to decide

19. Having dealt with these preliminary matters, I agreed with the parties that the issues for me to decide related to an whether there had been an unfair dismissal and the subsequently a breach of contract claim. Although the **Polkey** and contributory conduct issues concerned remedy, I agreed with the parties that I would consider them at this stage and invited the parties to deal with them in evidence and submissions.

20. Although Mr Reed has been unrepresented, he has diligently and comprehensively addressed the legal arguments, and he has been in possession of the relevant case law referred to, which has been provided to him by Mr Harris.

Unfair dismissal

21. Section 98 of the Employment Rights Act 1996, deals with the fairness of dismissals. There are two stages within section 98. First, the employer must show that it had a potentially fair reason for the dismissal within section 98(2). The burden of proof rests with the employer to demonstrate the reasons. In this case

the respondent relies upon 'conduct' being the potentially fair reason for dismissal, namely that the respondent was stealing money.

22. Second, if the respondent shows that it had a potentially fair reason for the dismissal, the Tribunal must consider S98(4), without there being any burden of proof on either party, namely whether the respondent acted fairly or unfairly in dismissing for that reason. I must consider the overall merits and circumstances of the case when balancing this issue.

23. A principal limb of the claimant's case was that the procedural aspects of his dismissal were unfair, and that had a fair process been applied, he argues that he would not have been dismissed.

24. In misconduct dismissals, there is well-established guidance for Tribunals on the approach to fairness in section 98(4). The decisions in **BHS V Burchell 1978 IRLR 379 and Post Office v Foley 2000 IRLR 827** should be applied. The Tribunal must decide whether the employer had a genuine belief in the employee's guilt. Then the Tribunal must decide whether the employer held such genuine belief on reasonable grounds and after carrying out a reasonable investigation. In all aspects of the case, (including the investigation, the grounds for belief, the penalty imposed, and the procedure followed), in deciding whether the employer acted reasonably or unreasonably within section 98(4), the Tribunal must decide whether the employer acted within the band or range of reasonable responses open to an employer in the circumstances. It is immaterial how the Tribunal would have handled the events or what decision it would have made, and the Tribunal must not substitute its view for that of the reasonable employer (**Iceland Frozen Foods Limited v Jones 1982 IRLR 439, Sainsbury's Supermarkets Limited v Hitt 2003 IRLR 23, and London Ambulance Service NHS Trust v Small 2009 IRLR 563**).

25. If the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would still have been dismissed had a fair and reasonable procedure been followed, in accordance with the principles in **Polkey v AE Dayton Services Ltd [1987] UKHL 8**; **Software 2000 Ltd v Andrews [2007] ICR 825**; **W Devis & Sons Ltd v Atkins [1977] 3 All ER 40**; and **Crédit Agricole Corporate and Investment Bank v Wardle [2011] IRLR 604**.

26. Finally, I must consider whether it would be just and equitable to reduce the amount of the claimant's award because of any blameworthy or culpable conduct before the dismissal, as set out in section 122(2) & 123(6) of the 1996 Act, and if so to what extent? The respondent said that if I decided that the claimant was unfairly dismissed, the award should be reduced by 100%.

Breach of contract

27. It should be noted that in the circumstances of this case, the claimant had no written statement of employment particulars. He therefore claims notice pay based upon the statutory provisions. I will therefore need to consider whether there has been a breach of contract in dismissing the claimant without paying him his notice pay.

28. I would need to consider if the claimant had committed an act of gross misconduct so as to breach his terms of employment. All parties agreed that even though there was no physical contract, the implied terms of trust and confidence must be read into the conditions of employment.

Findings of fact and analysis of the evidence

29. I have heard evidence from four witnesses. Where necessary I have indicated where I have resolved any dispute of fact. I shall deal first with a summary of the witness evidence I heard.

Mr Huff

30. Mr Huff appeared to be a passionate and forthright witness who was vehement that he felt the claimant had been stealing money consistently over a period of time. Although there were some acknowledged inconsistencies in his written evidence, he conceded these under questioning.

31. He explained his anxiety about informing Mr Goldsmith of his allegations, as he was worried about losing his job. Although he later conceded that Mr Goldsmith was too trusting and it was unlikely he would have lost his job. He explained that the claimant was Mr Goldsmith's right-hand-man and a close friend of Mr Goldsmith, adding to his anxiety about questioning the relationship. The trigger for him was a comment from the claimant that the respondent may struggle to meet the wages and costs in the months after they moved to 12 Cale street at the end of July 2021. He said the CCTV in the old shop was not good. When they moved to the new shop in July 2021 this was better. He said he asked for it to be positioned to cover the till and that no one ever checked the CCTV at either shop. I note that this point was not challenged by the claimant in his questions of the other witnesses.

32. He explained that the claimant was seen by him to issue cash refunds on the till and this was said by him to cover the claimant's tracks. He saved one such receipt recovering it from the bin. That receipt was for £45 and was dated 24/06/21 (which was produced in the bundle). He argued this was to cover the theft, but also that there was a culture of the till not reconciling. Mr Huff rejected the suggestion that

anyone could have processed the refund, indicating that he sought this one out in the days rubbish as he had seen the claimant process it.

33. I found Mr Huff to be a compelling witness, who clearly had a genuine belief that the claimant had been stealing. Although the context of his evidence was subject to extensive challenge by the claimant, the substance of what he gave evidence upon was not. Namely that he had seen money enter the claimant's pocket. This was not disputed by the claimant, although he offers mitigation.

34. It is not necessary for me to determine the specific number of incidents alleged or whether this had occurred over a longer time period. The substance of the evidence before me relates to August 2021. I therefore confine myself to that time period. In that respect I can accept Mr Huff's evidence that he believed the claimant was stealing. I also accept that the refund slip produced was retained by Mr Huff after he witnessed the claimant enter a refund. It seemed in my view entirely reasonable in those circumstances for Mr Huff to raise his suspicion and request for those matters to be investigated. That alone does not prove misconduct, but it does provide the first foundation for a fair and proper process of investigation.

Mrs Goldsmith

35. Mrs Goldsmith is a director of the business along with her husband. It was her task to review the CCTV. She was candid that some CCTV was unclear and so it was not included. Only those matters which showed identifiable occasions of the claimant putting money in his pocket were included.

36. Mrs Goldsmith participated in the meeting on 14th September 2021 and her notes were produced in the additional bundle. Her hand written notes were short and

limited in content. The typed summary, is far more comprehensive. It was argued that the properties of the 'Microsoft word' document showed it had been created around the 24th April 2022. It was suggested that this was for the purpose of this hearing.

37. Mrs Goldsmith was vague about when the typed version was created, although she conceded that it was after the event. She confirmed that she took notes at the time and used these along with her vivid memory of the meeting to produce the typed version. There was no attempt to conceal that these had been completed later, and she argued that there had been no formal request for a note of the meeting. The claimant had access to notes taken by his companion at the meeting.

38. I did not consider there was any attempt by Mrs Goldsmith to present a narrative which favoured the respondent. There are undoubtedly flaws within the written narrative, no doubt created by a tense and heated exchange on 14th September 2021. The central criticism in relation to the notes was that they did not include reference to money being taken when change had been added to the till by the claimant. It was conceded that this may have been said but not included. However, I do not consider that it rendered the process unfair, (as is contended by the claimant) if it was said, it follows that subsequently that explanation was disregarded by the decision maker, just as the other explanations were disbelieved by the respondent. It all flows from the claimant's credibility and plausibility. It was open to any decision maker, to make an adverse finding in that regard, provided they had reasonable evidence to support this.

39. In relation to aspects of the process Mrs Goldsmith made some concessions in respect of the compliance with the ACAS code and that she had not read it all, or, that some aspects strayed from the guidance provided. She felt the overall process was fair. She confirmed that the claimant was informed that it was a disciplinary

meeting. I note that the letter received by the claimant on 11th September 2021 refers specifically to the fact that this was to be a disciplinary meeting.

40. When discussing the process of cash refunds from the till, Mrs Goldsmith was clear that there would never normally be a need to do so. She had only ever done one, and that was due to an error with the scales being incorrectly calibrated, following a customer complaint.

41. It was also clear from her evidence that Mrs Goldsmith had not completed in-depth till reconciliations, beyond looking to see if there were refunds taking place. Those which appear in the additional bundle are sadly too blurred for me to decipher. What was clear and I accept, was that there was a certain slap dash nature to the reconciliations of the cash register, in a manner which demonstrates the trust afforded to the staff. Mrs Goldsmith was clear that on a busy day serving lots of customers, the till may not fully reconcile. Why this was the case does not seem to have been explored or remedied by the respondent. It seemed a certain latitude was permitted for human error within the staff.

42. In relation to reconciliations, Mrs Goldsmith said that she had not observed any money taken for a float at the end of the shift, and she had not observed the CCTV to see if money had been returned when cashing up. Nor was there ever a process undertaken for reconciling stock with what was rung through the till.

Mr Goldsmith

43. Mr Goldsmith was cross examined at length. Much of what was discussed was peripheral to the main substance of the issues.

44. In relation to the issue of Billingsgate fish market, it appeared that he expected the claimant to go every day between 24th – 27th August, and with the exception of 3 suppliers, these would be paid by card or account. It was not disputed that £66 had been spent on potted shrimp and a receipt was enclosed (as well as the window cleaner receipt and some other minor expenses).
45. In terms of the logistics, he said that there was no need to take a float to the market and that the claimant had not done a market run since before the pandemic. He said that in the event the claimant felt a float was needed, that it would not have been unreasonable to take a £200 float, if there was stock to buy or for diesel. I note that when questioning Mr Goldsmith, that the claimant asserted that he had no need to buy diesel that week, so did not take it for that purpose. I raise this as this line of questioning was directly contrary to the claimant's assertions elsewhere.
46. Mr Goldsmith indicated that on the Friday 27th August there would have been no need to take a float as the claimant did not work on a Saturday and was himself going away, and would not be visiting the market the following day. He noted that CCTV for this day also showed the claimant putting customer's money in his pocket.
47. When I asked if workers split change for the till, he advised that this would never normally be necessary and was not common practice as there was always a float and the office always had change if the till was short. In any event he questioned the logic of how that was done. He said if there was a need to split change, a larger note could be taken at the time of the deposit of the change and to do it separately was not logical. He denied that the claimant had ever informed him that he was splitting change for the till.

48. In discussing the CCTV he pointed to days when the claimant was not doing a market run and when he himself was present. When specifically shown one clip featuring himself, he alleged that the claimant purposefully distracted him whilst pocketing the money. He rejected the suggestion that the discussion was about the claimant taking back his change.
49. There was lengthy cross examination regarding the dismissal process and the ACAS code. Mr Goldsmith rejected any allegation of pre-judgment and said the CCTV spoke for itself and that the claimant mumbled and had no explanation for his actions. He said that the claimant left before the conclusion of the meeting as he left his keys and walked out. He denied any allegation that he had used the word 'fired' and stated that he had said that the claimant was dismissed. I am not persuaded (although much was made of it) that the use of the word 'fired' has any relevance here. It is clear that the claimant knew he was dismissed before he left the meeting.
50. The more important point is whether the respondent acted impulsively in dismissing the claimant. Mr Goldsmith argued under cross examination that the CCTV spoke for itself and that in the absence of any reasonable explanation, little more was to be gained. He said it was his decision and his alone. Mr Goldsmith refuted that insufficient evidence and time had been afforded to the claimant to prepare, or that the failure to provide the refund receipt or a statement from Mr Huff, rendered the process unfair.
51. Mr Goldsmith said he relied upon the CCTV, the refund receipt, Mr Huff's account and the absence of a reasonable explanation, in reaching his decision. He was clear that money should always enter the till, even if it is taken back out for a legitimate purpose.

The Claimant

52. The claimant had extensive opportunity to give evidence and answer questions. He provided a largely circular response constructed upon repetitive and well-rehearsed themes.
53. The claimant repeated that he had taken money for the market float and that any excess had gone back in the till the following morning. When asked to justify the piecemeal extraction of funds, he said that was “simply the way I did it.” He said he knew he was going to market the following day and that he would then have that money ready for the float, estimating he would want about £80 with him each day.
54. He argued that he used the money on one occasion for shrimp costing £66 and there is no evidence to suggest he took a separate float. He argued that he had taken the money in full view of everyone and in front of CCTV. He said that if he had been trying to hide it, he would have taken the money out of view to the street before concealing it. He justified the movement of the money from outer pocket to inner pocket to avoid it getting wet from the ice and fish in the shop. He rejected any suggestion that the actions looked suspicious or were done in a way as to conceal his actions.
55. On some of the CCTV images, he justified the lack of ringing up of transactions as being distracted by the next customer and that he would be exonerated if the CCTV were viewed more fully. Although, when I clarified this with him, he conceded that the CCTV would not show what he was doing on the till, and as the till and stock levels are not reconciled, neither would the presence of a subsequent transaction assist in definitively resolving the issues.

56. Finally, upon the subject of the disciplinary process, he contended that the process was unfair and not within the ACAS guidance. He argued the meeting turned into a disciplinary meeting without notice, that there was no official record and he had not got all the information available to the respondent, or had too little time to prepare. He considered that the speed at which matters were conducted was evidence of matters being pre-judged. He argued that if he had the CCTV sent to him, then he could have provided more detailed explanation. What this explanation would have been, I am unclear about. The float argument was well articulated and nothing which I have seen in evidence has fundamentally shifted the explanations provided at the time, or the evidence available. When I pressed the issue, he pointed to page 16 of the bundle which contained his narrative of procedural unfairness and what needed to be remedied to make the process fair.

57. It is fair to say that the claimant's evidence was circular on many of the points. I found that he genuinely believed that he was being misunderstood and that his actions to him seemed to be fully explained by the reasons he has given. There was an element in my view that he felt perplexed as to why his honesty and integrity were being questioned and why other people couldn't see the truth of it. He has in my assessment convinced himself of his own truth, however mismatched that might be with the evidence and reasonable perspective of others.

58. Having listened to the claimant's arguments for two days, I have remained at a loss as to understand how he justified a piecemeal extraction of funds, versus removing what he needed at the end of the day for a float. The very manner in which he took the money is highly suspicious.

CCTV analysis

59. I have carefully reviewed the CCTV provided, and I have seen each clip multiple times. Where there is the potential confusion, I have taken the utmost care to consider what is happening on the CCTV. I record my description analysis and finding in respect of the CCTV as follows.
60. On 04.08.21 the claimant takes £20 from a customer. He rings something into the till, the till drawer opens a couple of inches and then he closes it. The note is not deposited and is put into the claimant's trouser pocket. No other staff member is visible in the shop at the time.
61. On 06.08.21 the claimant took three £10 notes from a customer. Two are taken in his left hand and one in his right. He puts the right hand and note into his pocket and the left-handed notes into the till. He returns to the shop, has a discussion with Mr Goldsmith, then places his hands back in his apron pocket and then is seen checking the shop, pauses, then puts his hand back in his apron pocket again before moving it to his trouser pocket.
62. Again on 06.08.21 at 12.27, the claimant takes two notes from a customer. It is unclear if both are put in the till, or if he puts the note in his apron whilst he has his back to the camera. Later he is seen taking something out of his apron and putting it in his trouser pocket at the moment that a fellow employee steps forward and has his back to the claimant. The timing of the transfer is done at the point he is out of eyeline from the other worker. I find on balance that there was at least one note taken from a customer, which he had not put into the till. I also find that the timing of the move was timed when his colleague was distracted.
63. On 13.08.21 the claimant deposits a note in his pocket when standing behind Mr Goldsmith and engages him in a discussion about an item on a counter. He was

enroute to the till and there was no need to put the money in his pocket. He does not deposit the note into the till. In video 14, he is seen later to be having his hands in his apron pocket and his phone and then moving his hand to his inner pocket. I find on balance that this note was never deposited and he later transferred it to his inner pocket.

64. On 17.08.21 the claimant deposits £20 in his pocket before giving a customer £10 change from the till. He deposits some coins at the same time into the till. Later in video 15 he is seen to move a note from his apron to his trouser pocket.

65. On 24.08.21 the claimant takes £40 from a customer, then puts both notes in his right-hand pocket and then gives change from the till. The notes are not deposited in the till in images seen. I note that this is the same day that a £45 cash refund was witnessed by Mr Huff and is evidenced by the receipt provided.

66. On 25.08.21, the claimant deposits £20 in his pocket before issuing change from the till. Later on the same day the claimant deposits a £50 note in his right pocket followed by a £20 which he put into his left. He then is given a further note (a total of 3 notes) and change by the customer, which went into his right pocket as well. A rather elaborate sorting out ensues at the opposite end of the counter to the cash till, once the customer has left. What is identifiable after careful viewing is that three notes went into two different pockets and two come back out. The note put in the left pocket is not removed on the video I have seen. I find that this was never deposited in the till. The putting of any money into his pockets was unnecessary and I find that the elaborate sorting out later was deliberately designed to mislead and confuse any other people watching.

67. On 26.08.21 (a 10.39) the claimant serves a customer with smoked salmon (pre-packaged) he takes £20 approaches the till and then deposits it in his pocket. He then presses something on the till. He packs the carrier bag returns to the till and removes a note of change which he gives to the customer. At no point does the money enter the till. Immediately after the customer leaves, he returns to the till and enters something further and then removes and screws up the printed receipts from his own and another till, before placing them in a bin.

68. On 27.08.21 the claimant sells smoked salmon to a customer who hands him a single note. The customer leaves and he deposits the note in his left-hand apron pocket. He approaches the till and appears to use it but does not deposit the money. When he walks away from the till he is clearly seen continuing to handle the money in his pocket. His right hand moves to his inner pocket.

Analysis

69. Turning then to the context of this, it is clear from these extensive videos that the claimant had a well-practiced procedure for placing funds in his pocket, when there was absolutely no need to do so. The evidence is clear and overwhelming that this was at the opposite end of the spectrum from an open and visible process. The claimant's actions are covert, subversive and well-practiced.

70. The claimant looks around to assess who else is in the shop before taking money. On each occasion the deposit is done in a manner to conceal it. Where colleagues are present the deposit or transfer is done when they are distracted, or indeed the distraction is orchestrated by the claimant. From an objective standpoint, it is difficult to see these incidents as anything other than appearing to be blatant theft.

71. It is of significant note that between the 24th – 27th August, when the claimant says that he needed a float of around £80, that at no point is he seen to take anywhere

near this sum of money. If he did amass £80 in this way then there must have been further incidents not picked up or visible in the CCTV. Given that the till carried a £200 float each day, there was simply no need for him to do this piecemeal.

72. In relation to the £45 refund, I prefer the evidence of Mr Huff. I agree that this refund was most likely issued by the claimant to cover the indiscretion and avoid difficulties with the till reconciliation being too far out. If there was a need for a refund the receipt should also have gone into the till.

73. I simply cannot believe the claimant's contention that there was an honest and obvious purpose to taking the money. There is simply no logic to it. If money was required it should have been taken at the end of the day, or if change was being broken in the till, a larger note taken at the time. I agree with Mr Goldsmith that if money was required for a legitimate purpose, it should still have gone into the till first.

74. The manner in which the claimant took the money was, in and of itself, so suspicious, that even if no money was found to be missing, the suspicious activity alone would be enough for any reasonable employer to believe that the implied term of trust and confidence had been breached by the claimant.

Burchell test

75. I turn now to consider the application of the Burchell test to the dismissal process.

76. Firstly, I must consider whether the employer had a reasonable belief in the misconduct having occurred. It seems to me that it is overwhelmingly the case that the respondent did. The evidence of Mr Huff and the refund receipt was enough to reasonably start an investigation. Then once the CCTV was viewed, the

behaviour is (as I have already found) suspicious of theft, and would require any employee behaving in this way to have to explain their actions in a misconduct investigation.

77. Turning to consider whether the belief was reasonable on the basis of the investigation, process and sanction, there is much to consider here. Firstly, there was, as I have said above, obvious and compelling evidence of misconduct. It was not unreasonable in my view to expect the claimant to explain his actions.

78. The claimant was notified in writing that there was to be a meeting at which it would be considered whether he would be dismissed or not. That meeting was convened and attended by Mrs Goldsmith as a note taker with Mr Goldsmith in the chair. The claimant was accompanied by a fellow employee. The claimant spoke with Mr Goldsmith on 11th September 2021 about the process. It seems to me that he was in no doubt that this was a disciplinary meeting.

79. I bear in mind that, whilst the business has a reasonable turnover, they are a small employer, with significant overheads. It was in my view not unreasonable for Mr Goldsmith to chair the meeting. There was in essence no one else to do it.

80. I do not consider the absence of an investigatory meeting to be unfair. This was a small organisation. The same people would have been present at any investigatory meeting. There were no other witnesses to call. The CCTV was in effect the main witness.

81. I do need to consider whether the claimant should have had access to the evidence available before that meeting. In terms of Mr Huff, I accept that at the time of

dismissal he wished to remain anonymous. I agree that the refund receipt was not raised or provided to the claimant. Nor does it seem to me that this was evidence that tipped the balance of the dismissal decision.

82. Mr Goldsmith indicated in evidence that he considered Mr Huffs account, the wider evidence and the CCTV, in reaching his decision. He raised this in direct response to a challenge of being over-reliant upon the CCTV and in effect viewing it out of context. However, it seems to me that the respondent was entirely justified in being reliant upon the CCTV. That was in my view the main evidence that needed to be considered. Once the CCTV was obtained, the evidence of Mr Huff became of less significance.

83. At the time of the disciplinary meeting, no formal statement was available from Mr Huff. It was in my view not necessary for the claimant to know who had accused him. He did not deny putting money in his pocket. Nor do I think the absence of the refund receipt was a material deficit in the process. It seems to me that reliance on that document, has become more prominent during the litigation rather than the original dismissal process.

84. The question as to whether the CCTV should have been provided in advance is a more complex matter. I have born in mind the size and resources of the respondent. The complexities of providing CCTV electronically in advance are not without their difficulties (as we have experienced in this hearing). Even if an opportunity to view them, had been afforded, it is likely that the respondent would have to have been present to facilitate viewing them. I do not think it was practical or reasonable in the circumstances to provide them in advance.

85. However, more than this, I do not think it would have made a material difference. The claimant does not deny putting money in his pocket. He provided an account which he has maintained throughout these proceedings. I cannot see how that would have changed by having the CCTV earlier.
86. It seems to me and I find that the claimant's real complaint here, was that he did not have the time to think of a better excuse for his actions. It also follows that when the claimant complains that the respondent did not adequately factor in his justification for putting funds into his pocket, what he is really complaining about was that the respondent didn't believe him. It is in my view not a deficit in the process, it was reasonable for the respondent to take a view as to whether the claimant was telling the truth or not. The fact that they disagreed with him, is not a flaw in the process.
87. The claimant has made much during this hearing, that the till rolls were not considered at the disciplinary meeting and, had they been, then these would have shown that the till reconciled. I do not find that this would have assisted the process. The till roll investigation in this hearing has not assisted me. It is clear that these could be easily manipulated by processing refunds, and that if no transaction is rung up, then it would not appear. There was a lax and trusting approach to human error and the till not balancing. It would not have resolved or influenced matters in my view.
88. The claimant has made much of the presence of a £66 receipt for Brown Shrimp, which he purchased from the market. No one has been able to account where he got the funds from to purchase these. At no point does the CCTV show a sum anywhere near this being taken on the preceding day. What is clear is that the claimant was not out of pocket. It may well be that on the day in question the claimant acted appropriately and the till balanced. It does not follow that just

because someone steals one day that they will steal the following day as well. Just as a person who lies about one matter cannot be said to be lying about everything.

89. However, even if I take the claimant's case at its highest on this particular point, and even if I accept that he accounted properly for the shrimp, the behaviour and totality of his conduct remains an issue on this and the other dates. It seems to me that the respondent, in reaching a decision that there was a misconduct taking place was acting reasonably in forming that view.

90. As I have said above, even if the claimant had not stolen any money (and for the avoidance of doubt, I find that he did), the manner alone in which he removed the money was enough for any employer to reasonably determine that the claimant should be dismissed for a breach of trust and confidence.

91. The fact that Mr Goldsmith concluded after a short meeting (with no adjournment) that the claimant was dismissed may, on the face of matters, appear problematic. However, I bear in mind that all parties agree that the meeting was heated. I also bear in mind that the claimant had offered a justification and there was in all likelihood nothing to be gained from elongating it. The conduct of the meeting may well have lacked the finesse and finery of a better resourced employer, but it does not in my view render it unfair or unreasonable.

92. In terms of the appeal process and procedure there is little to be said about this. The claimant was (albeit with some delay) offered a right of appeal within the written dismissal letter. The fact that there was no appeal hearing does not render the process unfair. It is not for me to speculate as to what would have happened or who would have heard it. It matters very little as the claimant had already chosen

to absent himself from the process and initiate matters with ACAS on the 14th of September 2021.

93. In terms of ACAS, the claimant argued that the failure to follow (in full) the ACAS code rendered the process unfair. For all the reasons articulated above, I disagree with that contention. It seemed to me that the process was fair and reasonable.

94. It seems to me that the decision arrived at by the respondent was entirely within the band of reasonable responses. In the circumstances the decision to affect an immediate dismissal was entirely reasonable, and would have been the decision of any reasonable employer faced with the same evidence. For a retailer such as the respondent, trust is at the heart of the enterprise, when it comes to processing cash transaction. I cannot see how any other lesser sanction could be imposed in the circumstances.

95. I reject the contention that the claimant was unfairly dismissed for reasons of procedural unfairness.

Polkey and contributory conduct

96. Whilst it is not strictly necessary for me to go on to consider the remedy provisions, of Polkey and contributory or blameworthy conduct, I do so to assist the claimant. I am mindful that central to his case has been the fairness of the process and the fact that his justification for putting money in his pocket was not given (in his view) adequate weight by the respondent.

97. I heard the evidence and submissions in respect of these matters. I want to make it plain what I would have determined had I been dissatisfied with the disciplinary process and found that there had been a procedurally unfair dismissal.

98. It seems to me that had it been necessary to do so, I would have gone on to award 100% reductions for Polkey and contributory conduct. I have found as a fact that the claimant was stealing money from the respondent. The evidence was clear and overwhelming. Therefore, any substituted disciplinary process (for **Polkey** purposes) would inevitably have reached the same conclusion, namely that the claimant should be dismissed for gross misconduct. It also follows that I would have considered it entirely just and equitable to reduce the award to zero on contributory conduct grounds as well.

99. The claimant seeks an award for the absence of written particulars of employment. I make no award for this, as the claimant's claim has failed, and I have no jurisdiction to do so.

100. I therefore dismiss the claims for unfair dismissal and breach of contract brought by the claimant.

Counterclaim withdrawal

101. I am invited by the respondent to permit the withdrawal of the counter claim (without dismissing it), upon the basis that the value exceeds the statutory cap within these proceedings. The claimant argues that the claim should be dismissed upon withdrawal. He says that the limit was well known to the claimant when they brought the claim and that it would be unfair to permit it to be re-litigated (upon the basis of alternative evidence) within the county court.

102. I have been referred to various authorities, in particular **Verdin (appellant) v. Harrods Ltd (respondents) [2006] IRLR 339** and **Fraser (appellant) v. Hlmad Ltd (respondents) [2006] IRLR 687**.
103. It seems to me that the factors I need to consider is whether the withdrawal sought (as suggested by Para 52 of the Employment tribunal Rules of Procedure 2013), would be an abuse of process, or whether the principle of 'merger' espoused in **Fraser V Hlmad** should apply to the counter claim. If the answer to either of those questions is 'yes,' then I should dismiss the claim rather than permit its withdrawal.
104. As a starting point, I note that the value of the counter claim sought, has always exceeded the statutory cap. I am not at all clear why it was made in these proceedings upon that basis. I suspect it has its origins in litigation tactics.
105. Rule 52 permits the withdrawal of a claim if it is to be issued within another jurisdiction. At no point have I been asked to determine the counter claim and all parties were clear that whilst my decision would be made at the conclusion of these proceedings on the issue, that should I decide to dismiss the counterclaim, then the opportunity to litigate it would be lost.
106. Carefully balancing the issues in this case, it seems to me that although the respondent may have been misguided in entering a counter claim in excess of the statutory cap, they have subsequently taken appropriate steps to withdraw it. The withdrawal application was made in writing to the tribunal, well in advance of this final hearing. There has been nothing within the papers before me that has touched

upon the issue and no argument has been raised. I therefore consider that the 'merger' trap espoused in **Fraser V Hlmad** has been appropriately avoided.

107. I also consider that it is entirely appropriate that respondent may seek to pursue the claim in another jurisdiction. There is no abuse of process in the manner in which that claim is sought to be withdrawn. There is a legitimate argument behind the counterclaim, and I do not consider that it is vexatious or abusive to have the matter properly determined elsewhere.

108. I have not strayed into the value of any claims. The findings I have made are limited to factual matters regarding conduct and are limited to the investigatory and dismissal period. I have not seen evidence of how the respondent seeks to evidence the substantial losses claimed. I have deliberately avoided (with the consent of the parties) all such matters.

109. I therefore consider that it is an appropriate exercise of my jurisdiction to permit the withdrawal of the claim, without dismissing it. This will preserve the ability for it to be issued elsewhere, if so advised. I therefore grant permission to withdraw the counter claim.

110. That is my judgment.

Employment Judge **Codd**

25 May 2022

Sent to the parties on: 25/05/2022

For the Tribunal:

Written reasons will not be provided unless a written request is presented by either party within 14 days of the sending of this written record of the decision.

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