



Case Number: 2301903/2016

EMPLOYMENT TRIBUNALS

SITTING AT: LONDON SOUTH

BEFORE: EMPLOYMENT JUDGE H WILLIAMS QC (SITTING ALONE)

BETWEEN:

Mr Saeed Akhtar

Claimant

AND

Tesco Stores Limited

Respondent

ON: 27 February 2017

APPEARANCES:

For the Claimant: Mr J Davis, Counsel

For the Respondent: Ms P Campbell, Solicitor

JUDGMENT

The judgment of the Tribunal is that:-

1. (By consent), the name of the Respondent is corrected to Tesco Stores Limited.
2. The Claimant's application to amend the Claim Form to add a claim for failure to provide written particulars of employment pursuant to section 38, Employment Act 2002 is refused.
3. The Claimant's dismissal was fair and reasonable and therefore the claim for unfair dismissal is dismissed.

REASONS

Issues

1. This is a claim for unfair dismissal only. At the time of his dismissal the Claimant was employed by the Respondent as the Store Manager at its Woolwich Express Store. He was summarily dismissed with effect from 1 July 2016 for a conduct reason concerning his recruitment of two individuals to work at the Store in deliberate breach of prescribed procedures. The Claimant accepts that he was dismissed for a conduct reason, but contends that the decision to do so was unfair in all the circumstances.
2. Although the Respondent's Grounds of Resistance contended in the alternative that the dismissal was for "some other substantial reason", it was sensibly accepted by Ms Campbell at the outset of the hearing that this added nothing to her client's reliance on the conduct ground for dismissal.
3. The primary remedy sought by the Claimant is reinstatement / re-engagement. The parties agreed at the outset of the hearing before me that this should be dealt with at a subsequent hearing, if the liability issues were decided in the Claimant's favour, as the parties would want to consider those findings and make representations as to their impact on the remedies sought.
4. It was therefore confirmed with the parties at the outset of the hearing that the issues for me to determine were as follows:
 - 4.1 Was the dismissal fair or unfair as provided for by the terms of the Employment Rights Act 1996, section 98(4) and in particular:
 - (i) Was the Respondent's belief in the conduct relied on to dismiss the Claimant based on reasonable grounds?
 - (ii) Did the Respondent carry out a reasonable investigation before reaching that conclusion?
 - (iii) Was the procedure conducted in a fair way?
 - (iv) Was dismissal within the band of reasonable responses? (The Claimant contending that it was an unreasonably harsh sanction in light of his long, unblemished work record with the Respondent and other features.)
 - 4.2 If the dismissal was is found to have been unfair, should any award made by the Tribunal be reduced for the Claimant's contributory fault and if so by what percentage should it be reduced?
 - 4.3 If the dismissal is found to have been unfair on procedural grounds, should any award made by the Tribunal be reduced in light of the fact

that such flaws would not have made any difference to the outcome as the Claimant would have been dismissed in any event?

Application to amend the claim

5. Before the agreed issues were finalised, an application was made by Mr Davis on behalf of the Claimant seeking permission to amend the Claim Form to add a claim for failure to provide written particulars of employment pursuant to section 38, Employment Act 2002. The application was opposed by the Respondent.
6. Having heard both parties' submissions, I declined to permit the amendment. I gave summary reasons at the time, indicating that they would be set out more fully in my written judgment and reasons.
7. In making my decision I bore in mind that the claim in question only arose if liability for unfair dismissal was established and that the sums involved were usually relatively small, the standard award being two weeks wages. However, these features were essentially neutral: whilst it meant that the hardship the Claimant would suffer if amendment was not permitted was less than in a situation involving a more substantial proposed claim, it also meant that the degree of prejudice the Respondent would suffer if the application was granted was likely to be relatively modest.
8. More pertinently, the amendment involved the substantive addition of an entirely new claim, which had not been flagged at all in the Claim Form, either in terms of the claim itself or by inclusion of the relevant factual allegations. Accordingly, the proposed amendment was at the other end of the spectrum from a simple relabeling. Furthermore, as was accepted by Mr Davis, the proposed claim was being raised well outside the prescribed three months limitation period and in circumstances where it could not realistically be said that it "was not reasonably practicable" to bring it an earlier stage, even allowing for the fact that Mr Akhtar did not have legal representation until more recently. The factual material underpinning the potential claim was first raised in the Claimant's witness statement, which was served in mid-January. However, even then there had been no correspondence or other indication to the Respondent of an intention to apply to add this claim prior to the hearing date itself.
9. Thus, in all the circumstances and in the exercise of my discretion I concluded that the balance came down in favour of refusing the application to amend.

Evidence

10. There was an agreed bundle of documents before me, comprising some 400 pages. Pagination cross-references given in these reasons are to the pages in that bundle of documents. Once the issues had been clarified, I read the witness statements and the relevant material in this bundle.

11. In terms of oral evidence, I heard evidence from the Claimant and from two witnesses called by the Respondent, namely:
 - 11.1 Mr Bernard Osei-Tutu, the Store Manager at the Respondent's Canary Wharf Store, who was the manager who made the decision to dismiss the Claimant; and
 - 11.2 Mr Richard Frear, the Area Manager for the Group 909 Stores, who heard the Claimant's appeal and upheld the decision to dismiss.

Findings of Fact

12. The Respondent is a large, well-known retailer. The Claimant was employed by the Respondent from 12 May 2001, initially as a Customer Service Assistant. He worked his way up to a Store Manager position (a promotion he achieved in January 2013). I have already referred to the fact that at the time of his dismissal he was the manager of the Woolwich Express Store ("the Store"). Until the matters that I go on to detail arose, the Claimant had an exemplary conduct record.

The Respondent's Disciplinary Policy

13. Extracts from two versions of the Respondent's Disciplinary Policy ("DP") are included in the agreed bundle of documents. The first in time is dated December 2015 [98 – 100] and the second in time is dated April 2016 [95 – 97]. Mr Osei-Tutu told me that he was operating under the earlier policy. Mr Frear indicated he was working under the later DP.
14. Both policies contained a non-exhaustive list of gross misconduct examples, which included the following:
 - *"Deliberate disregard / abuse of Tesco procedures e.g. – Misuse of the Privilege card Policy*
 - *A serious and deliberate breach of Health & Safety*
 - *Any other action which, on a common sense basis, is considered a serious breach of acceptable behaviour."*
15. The December 2015 DP indicated that Store Managers could be subject to stage 4 disciplinary processes (dismissal) heard by a Store Operations Manager. Appeals could be heard by a Store Director or a People Manager Group employee [100]. The April 2016 gave the same indication in relation to dismissals and stated that appeals could be heard by Selected Lead Store Managers, in addition to the two roles listed in the December 2015 version [97].
16. Both DPs addressed a number of circumstances in which an employee could be suspended during an investigation / disciplinary process, including where they had committed gross misconduct [95A & 98A].

The Respondent's Recruitment Procedure and Right to Work policies

17. The bundle of documents contains the Respondent's "Recruitment Workbook for Managers" [33 – 76]; a "Right to Work in the UK" manual for line managers [77 – 92]; and a section from the Respondent's Recruitment Selection manual entitled "Immigration and the Right to Work Policy [101 – 110].
18. In the circumstances, it is unnecessary for me to refer to the contents in detail because it was clear from the evidence I heard that the Claimant accepted he failed to adhere to the following requirements of the Respondent's procedures:
 - 18.1 Obtaining authorisation to embark on recruitment for a particular vacancy;
 - 18.2 Advertising the vacancy through the Respondent's online website, with candidates then completing on-line application forms;
 - 18.3 Completion of a Customer Service Assessment Health Questionnaire and Customer Service Assessment before an applicant is recruited;
 - 18.4 Establishing via prescribed documentation that must be produced and checked, that the individual in question is eligible to work in the UK before they are recruited. For UK and EU citizens this entails production of a passport or equivalent documentation which is then checked initially by the Store Manager / Personnel Manager and then forwarded to the Respondent's Central Employment Compliance Team ("the Compliance Team") for fuller checks to be undertaken;
 - 18.5 Before starting work, each employee must receive an induction, which includes relevant health and safety training.

The unauthorised recruitment

19. On 2 February 2016, the Claimant recruited Cezary Czyruk to work at the Store. He was given a 7.5 hours contract to work one night a week. It was accepted by the Claimant after the matter came to light that he had neither sought nor obtained authority to recruit him to a specific vacancy and nor had the position been advertised or applied for on-line. The new recruit had come to the Claimant's attention as a result of an informal approach; Mr Cezary's mother already worked at the store. Mr Cezary was an EU national and in fact did have the right to work in the UK. However, although he produced his passport, the Claimant did not forward it on to the Compliance Team for checking as he should have done.
20. The following day, 3 February 2016, the Claimant recruited Sebeshan Nadesan to work a weekly night shift in the Store. Again this was done informally without the prescribed authorisation being sought and without advertising any vacancy. Apparently, Mr Nadesan had simply come into the Store to inquire about positions. Mr Nadesan was a British passport

holder and so had the right to work. In his case, Mr Akhtar did send his passport to the Compliance Team.

21. In relation to both these new members of staff, the Claimant failed to arrange for them to undergo an induction until several weeks after their employment had commenced.
22. On 6 February 2016 Joanne Hoare, the Group People Manager carried out a routine audit of employee personnel files at the Store. She was concerned when she discovered the recruitment of Mr Czyruk and Mr Nadesan as she was not aware of any relevant vacancies having been authorised or advertised. Ms Hoare questioned the Claimant who said that Mr Czyruk was a career break returner and that Mr Nadesan had transferred from the Respondent's Marsh Wall store. This explanation did not allay Ms Hoare's concerns as both men had been processed by the Claimant as new starters on the Respondent's systems.
23. The same day, Ms Hoare met with Mr Nadesan. After some initial prevarication, Mr Nadesan confirmed he had never worked at the Marsh Wall Store. Moreover, he said that the Claimant had told him he should say he was a transferee from that store, if he was asked.
24. As a result of her concerns, on 7 February 2016 Ms Hoare emailed Mr Frear (who I have already referred to at paragraph 11 above). She set out a detailed account of her concerns and the relevant events of the previous day [151 – 153]. In his appeal hearing (referred to below) the Claimant accepted that the contents of her email were a "100% true" [252]. Of particular note, Ms Hoare stressed how the Claimant had put Mr Nadesan in a very awkward position whereby he had been asked to lie to cover up Mr Akhtar's breaches of procedure. Ms Hoare said that she believed Mr Akhtar was very clear about the correct processes for recruitment, which she felt he had deliberately disregarded. She expressed her personal view that he should be suspended pending investigation.

The investigation

25. Mark Bailey, Operations Manager was appointed to conduct an investigation into these matters. Mr Bailey decided not to suspend the Claimant whilst the investigation proceeded. There does not appear to be a document setting out the details of his rationale in this respect. Mr Bailey has since left his position with the Respondent, who did not call him as a witness.
26. As a result of the decision not to suspend him, the Claimant remained working in his post as manager of the Store throughout the period from 6 February 2016 to his summary dismissal on 1 July 2016. It is right to record that no further incidents or concerns arose during this period.
27. Mr Bailey's first investigation meeting with the Claimant was held on 15 February 2016 [158 – 163]. The Claimant accepted "*I did bypass recruitment process*". He said this was because the process was a

lengthy one and he wanted to recruit quickly in the face of concerns that the Store was not delivering sufficiently on service and customer concerns [159]. He said his understanding of someone who was on a career break was that they remained on the payroll [161]. He reiterated, as he had told Ms Hoare, that he thought Mr Czyruk was returning from a career break and this was why he had not undertaken the full checks on his passport.

28. There was then a second investigation meeting held by Mr Bailey with the Claimant on 22 February 2016 [173 – 178]. The Claimant described his decision to recruit without following prescribed procedures as “*rash*” [174]. He accepted that he had got Mr Nadesan to lie about the fact he had come from another of the Respondent’s stores, but described this as a “*white lie – didn’t harm anyone*” [174 & 176]. When Mr Bailey inquired why he had not sought authorisation to recruit, he said “*I should have given respect to my bosses, on this occasion I failed to do*” [176]. He accepted that he should have asked for permission to recruit and that he should not have done what he did [178].
29. There was a lapse of time before the third investigatory meeting, which was held on 4 May 2016 [187 – 188]. From what I was told at the hearing by the Respondent’s witnesses it appears that the delay was due to internal re-structuring and the potential disappearance of Mr Bailey’s role. I need not explore this further, as Mr Davis accepted that, whilst undesirable, the delay did not in itself impact on the fairness of the process.
30. At the third investigatory meeting, the Claimant acknowledged again that he should have sought permission from his manager before recruiting [187]. Mr Bailey made the decision to escalate the matter to a disciplinary process.

The disciplinary hearing and decision to dismiss

31. Mr Osei-Tutu (referred to at paragraph 11 above) was appointed to conduct the disciplinary stage. He was a level 3 manager. The Claimant was a lower level, level 2 manager. I will return to the significance of this when I set out my conclusions below.
32. There does not appear to be a letter inviting the Claimant to the first disciplinary hearing, or at least not one that has been retained. It was held on 10 June 2016 [196 – 198]. The Claimant confirmed at the outset of the hearing that he did not wish to have a representative.
33. At this hearing, as at the investigation meetings, the Claimant accepted he was aware of relevant procedures and that he had not followed them. He said that at the time the store was struggling and needed more staff quickly. The Claimant accepted it was his responsibility to ensure that the Right to Work checks were undertaken.

34. Mr Akhtar also accepted that the inductions were held “3 to 4 weeks after starting” and that they should have been done before the new employees had started work [197].
35. Mr Osei-Tutu inquired whether Mr Akhtar had asked his colleagues to lie. The Claimant accepted he had told Mr Nadesan to say he had worked at the Marsh Wall store, when he had not in fact done so [196 – 197]. At one point Mr Osei-Tutu commented: “*You are in a position of trust. Tesco cannot have a Store Manager where the integrity is in question. You blatantly lied*” [197]. When asked why he had not picked up the phone and asked a manager if he was having difficulties at the Store, the Claimant said: “*I am guilty and I shouldn’t have done what I did. I tried to protect staff and deliver for the customer, but I did wrong*” [198].
36. Mr Osei-Tutu indicated that he was going to adjourn the meeting to enable further investigations to be undertaken before he made a decision [198].
37. On 21 June 2016 Mr Czyruk was interviewed by Kate Marsden [207 – 210]. He said he had walked into the Store and asked Mr Akhtar if he had any vacancies. He said he had done this on several occasions and then the Claimant had offered him a job. He said he had never been on a career break with Tesco’s; that he had left the Company four years previously and he had not told Mr Akhtar that he was on a career break. He confirmed he had not applied on-line.
38. Mr Nadesan was interviewed by Ms Marsden on 25 June 2016 [211 – 212]. He said that he had never worked in Tesco’s before and that he had gone into the Store and asked about vacancies. He confirmed he had not applied on-line.
39. The Claimant was asked to attend the re-convened disciplinary hearing via an undated hand-delivered letter [213]. The allegation he faced was described as: “*Knowingly allowing two colleagues to work in your store without following the correct recruitment process and failing to ensure they had the correct right to work in the UK*”. The letter continued: “*As this hearing may result in disciplinary action being taken against you, up to and including your dismissal from the Company, you are entitled to be represented at the hearing...*”. The letter also said: “*This is a serious matter and you should make every effort to attend*”.
39. The resumed hearing took place on 1 July 2017 [198 – 201]. The Claimant again said that he did not want representation. The Claimant said he had let himself down, but that he had now re-trained on recruitment and had the right number of people working in the Store [199]. Mr Akhtar said he had not been told by Mr Czyruk that he had earlier resigned from the company; he had been informed he was on a career break. He accepted that he had not checked the files to see if this was the case [200]. The Claimant pointed out that both the men he recruited had now passed all relevant checks [199]. He accepted that he could have gone to his Area Manager for help in terms of store recruitment, but had

not done so [200]. Mr Akhtar again accepted that he knew the process for recruitment and had not followed it [201].

40. Mr Osei-Tutu observed: *"I feel that throughout you knew what you were doing. The recruitment process isn't complex and you knew how to do it. You are in a position of trust and you breached it. You lied about a colleague working for the company, who didn't, so you chose to put the company in a vulnerable position and could have been prosecuted. You have had opportunities to ask for support from your group or other superstores near you or from other managers about your manager. But you didn't. Your whole judgment had been marred..."* [201].
41. Shortly after this, at the conclusion of the hearing Mr Osei-Tutu observed: *"I feel that I cannot trust you. To lie about something and then protect your back and putting the company in a vulnerable position; I have taken the decision to dismiss you from the company"* [201].
42. Mr Osei-Tutu then competed and read the record of summary dismissal [221 – 223]. Under the heading "What are the facts?", Mr Osei-Tutu summarised that both individuals had been recruited without the correct recruitment process being followed and one without the correct right to work checks being completed first. He noted that the Claimant had accepted that what he had done was wrong. Then under the heading: "Evidence of mitigating circumstances", he wrote *"no mitigating circumstances"*. The document described the dismissal decision as being for *"knowingly allowing two colleagues to work in your store without following the correct recruitment process and failing to ensure that they had the correct right to work in UK documentation"* [222].
43. Under the next heading "Rationale", in terms of points additional to those I have already covered, Mr Osei-Tutu said that the Claimant had *"allowed two colleagues to work illegally in his store"*. The Respondent accepts that this aspect was not correct, as both new recruits in fact had the right to work in the UK at the time (and indeed remain employed by the Respondent). The decision maker then referred to the Claimant's actions having put the company in a vulnerable position and exposed it to potential legal action. It is accepted that this is a reference to the substantial fines of up to £20,000 that could be incurred if the Respondent were found to be employing a member of staff illegally. He also expressed the view that: *"There has been a serious breach of trust on the part of Saeed as a Store Manager, which cannot be tolerated"* and that *"It would be further significant risk to the company to allow Saeed to be employed by Tesco"* [223].

The Claimant's appeal

44. The Claimant appealed against the decision to dismiss him. His grounds were that the outcome was too harsh and insufficient regard had been paid to his mitigation; the decision was inconsistent with action taken in previous, similar cases; the investigation was not complete; there was

fresh evidence available; and he was not given a fair hearing at the disciplinary meeting [225 – 226].

45. Mr Richard Frear (who I have earlier referred to), was assigned to hear the appeal. He considered all the relevant documents.
46. The first appeal hearing took place on 29 July 2016 [235 – 243]. Mr Akhtar was represented by Raymond Hocking, a BCSA Union representative. As a non-USDAW representative (the recognised union), Mr Frear indicated that Mr Hocking was not able to address him, as opposed to assisting the Claimant [239].
47. A point was raised as to whether Mr Frear had sufficient seniority to hear the appeal under the DP. Mr Frear responded that he could as he had been a Lead Store Manager and since then had been promoted [236]. Mr Frear mentioned that he was a work level 3 manager and it was then queried whether he could hear the appeal as he appeared to be the same level of seniority as Mr Osei-Tutu. An issue was also raised as to whether Mr Osei-Tutu was sufficiently senior to have conducted the disciplinary hearing under the prescribed procedure [237]. Mr Frear indicated that in his view they were authorised to hear the disciplinary and appeal respectively, but adjourned briefly to check this with Human Resources. On re-commencement he indicated that in the new structure he was one of the nominated representatives who could hear appeals [238].
48. An adjournment was requested on the basis that Mr Akhtar and his representative had not had sufficient opportunity to go through the documents. Mr Frear was unwilling to adjourn to another day, but was prepared to allow additional preparation time that morning [240 - 241]. However, in the event, the meeting was adjourned shortly after this on the basis that the Claimant was not well enough to continue [244].
49. The appeal hearing was resumed on 26 August 2016 [250 – 276]. On this occasion, Mr Akhtar was represented by Nigel Scully, the USDAW Area Organiser.
50. It was alleged that the investigation had not been properly carried out as Rushsayanathan Indradas, the Claimant's team leader (who was present at the time of the February audit) and Joanne Hoare had not been interviewed [251 – 252]. Some concerns were raised about the length of time the process had taken [255]. I need not go into that in any detail, given the concession rightly made by Mr Davis (see paragraph 29 above). Mr Akhtar emphasised that he had worked with honesty and pride for the company for 15 years [257]. There was then a discussion about the funding of the Store, with Mr Frear pointing out that an additional £1,500 had been allocated to manage operations in addition to the usual payroll budget [259 - 260]. The Claimant complained that he had felt unsupported by his managers [260]. He also said that he felt Mr Osei-Tutu had conducted the disciplinary hearing unprofessionally [264].

51. Mr Akhtar produced a short email sent from the email address of Mr Czyruk's girlfriend. The email said that when he was recruited by the Claimant, Mr Czyruk had referred to having had a break and coming back to the company [265]. The Claimant reiterated that he believed Mr Czyruk was on a career break when he took him on [266 – 267].
52. There was then further discussion about whether Mr Osei-Tutu was sufficiently senior to conduct the disciplinary process. Mr Frear said he had checked and a level 3 manager did have authority to dismiss, albeit the DP had not been updated in this respect to reflect re-structuring of roles within the organisation [268 – 269]. Mr Akhtar emphasised the impact dismissal had had on his personal life and that he had not breached procedures for personal gain [272]. Mr Scully made some closing representations, emphasising that a lesser sanction could have been applied [274]. He accepted that they had no direct evidence of inconsistency with other cases [275].
53. At the conclusion of the hearing Mr Frear indicated that he had decided to uphold the decision to dismiss [275]. He read out his rationale in support of this decision [277]. The central points he covered were that procedures had not been followed in the recruitment of Mr Czyruk and Mr Nadesan and that the Claimant was aware of the correct procedures; that Mr Akhtar had provided false information in terms of saying that Mr Nadesan had transferred from another store and had asked him to lie about it, if asked; that Mr Osei-Tutu had sufficient authority to deal with the dismissal and a reasonable process had been followed given the re-structuring and the fact that policies were being updated; and there was a financial risk to Tesco going forwards in terms of fines if right to work procedures were not complied with.

Relevant Law

54. Where an employee is dismissed and claims unfair dismissal it is incumbent upon a Respondent to establish a potentially fair reason for the dismissal from the exhaustive statutory list set out in section 98(1) and (2) of the Employment Rights Act 1996 ("ERA"). Conduct is one the reasons there listed.
55. If the Respondent establishes a potentially fair reason for the dismissal, the Tribunal must assess whether the decision to dismiss was fair or unfair, in light of the conduct reason identified. This 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: see section 98(4) ERA. This entails the Tribunal applying the well-known band of reasonable responses test.
56. In applying this test, the Tribunal must not substitute its own view for that of the employer, but must consider whether the employer's decision to

dismiss fell outside the range of reasonable responses open to it in the circumstances, as well as considering the reasonableness of the sanction of dismissal, if the Tribunal accepts the Respondent has shown it genuinely believed the Claimant was guilty of misconduct. In addition, the Tribunal must consider whether: the employer had in mind reasonable grounds upon which to sustain that belief; and at the stage when the belief on those grounds was formed, whether as much investigation into the matter as was reasonable had been carried out.

57. These principles were set out in the well known case of **British Home Stores Limited and Burchell [1980] ICR 303** and have been applied on many subsequent occasions. It is also well-established that the Tribunal must apply the band of reasonable responses test to any alleged failings in the scope of the employer's investigation and procedures as well as to the decision to dismiss the **Sainsbury's Supermarket Limited and Hitt [2003] ICR 111**.
58. Where an appeal hearing takes place it is for the Tribunal to consider whether the appeal hearing is sufficiently fair and comprehensive to be capable of remedying any earlier defects in the disciplinary process. If the Tribunal finds that earlier stages of the process were defective and unfair they will want to examine the subsequent appeal proceedings with particular care in order to determine whether the process taken as a whole was fair, see **Taylor v OCS Group Limited [2006] ILR 613**.
59. In **Tayeh v Barchester Healthcare Limited [2013] EWCA Civ 29** (to which Mr Davis very properly drew my attention), the Court of Appeal indicated that the sheer fact that the claimant employee had not been suspended upon discovery of the conduct in question, did not preclude the employer from treating the matter as gross misconduct and dismissing her. The Court concluded that the Tribunal had erred in a number of respects, including in finding that a failure to suspend was necessarily inconsistent with the subsequent dismissal. The Court of Appeal said that the failure to suspend was a material consideration for the Tribunal, but in the instant case the employer had been entitled to regard the employee's behaviour as serious enough to warrant dismissal in any event.

Conclusions

60. For the avoidance of doubt, I record that Mr Davis made clear he did not pursue some of the allegations contained in Mr Akhtar's witness statement, specifically those concerning an alleged conspiracy, a cover up in relation to documents and the delay point which I have already referred to. He also accepted that there was no evidence of inconsistent treatment with other instances (and, as I indicated at the hearing, even if evidence of other instances had been produced, it is very likely that each would have turned on its own fact specific circumstances).

61. Whilst I have grouped my consideration of the points pursued on behalf of Mr Akhtar under the sub-headings that appear below for ease of analysis, I accept, as Mr Davis suggested to me, that it is also necessary to consider the overall, global effect of these points in determining whether the decision to dismiss fell outside the band of reasonable responses open to the Respondent and I have duly done so.

The reasonableness of the investigation

62. The central criticism advanced in respect of the investigation was that neither Ms Hoare nor Mr Rushsayanathan was interviewed. This point was not raised at the disciplinary hearing, but was put forward at the time of the appeal. However, since Mr Akhtar indicated at the appeal hearing that he agreed with the account set out in Ms Hoare's email of 7 February 2016 (see paragraph 24 above) and given he admitted deliberately breaching the relevant procedures, I consider that it was perfectly reasonable for the Respondent to view this as unnecessary.
63. At the hearing before me it was also contended that Mr Czyruk should have been re-interviewed if the Respondent was minded to believe that he had not told the Claimant he was on a career break (so that the implication was that Mr Akhtar had not been truthful in putting forward this explanation for failing to following the processes). However, as Mr Czyruk had already been interviewed on 21 June 2016 when he had clearly told Ms Marsden that he had not said this to the Claimant (see paragraph 37 above); and given that Mr Czyruk had been processed as a new joiner (paragraph 22); I consider the Respondent was entitled to regard the brief email first produced at the appeal hearing (paragraph 51 above) as not requiring a further interview. In any event, this point was secondary to the Claimant's own admission that he had lied about the circumstances in which Mr Nadesan had commenced work at the Store.
64. Overall, I am satisfied that a reasonable investigation was undertaken.

The reasonableness of the Respondent's belief

65. I have set out at some length above the admissions made by the Claimant in his various interviews as to his knowing breaches of procedure (see for example paragraphs 27, 28, 30, 33, 34, 35 and 39 above).
66. Further, in so far as the Claimant explained that he had so acted because of pressures he felt under in relation to his Store, the Respondent's decision makers were justified in considering, as they did, that there were other options open to the Claimant which he had not attempted to utilise; in particular he accepted that he had not spoken to his managers about recruiting to these particular positions. On the evidence available, the decision makers were entitled to conclude, as I find they did, that the Claimant simply decided to cut corners for no justifiable reason.
67. Furthermore the decision makers were fully entitled to approach matters on the basis that the Claimant had lied about the circumstances in which

Mr Nadesan had been recruited when these matters came to light on 6 February 2016 and had asked Mr Nadesan to lie in order to try and cover over his breaches of procedures (see the Claimant's admissions in these respects, for example at paragraphs 24, 28 and 35 above).

68. For the reasons I have set out in paragraph 63 above, the decision makers were also entitled to approach matters on the basis that Mr Akhtar was not telling the truth when he explained that Mr Czyruk had told him he was on a career break.
69. It is accepted by the Respondent that Mr Osei-Tutu did not have a basis for concluding that the two recruits were working illegally (see paragraph 43 above). However, having heard his evidence, I am satisfied that this point did not form a substantial part of Mr Osei-Tutu's reasoning. Furthermore, Mr Frear upheld the dismissal on the basis of the legitimate points I have already discussed, whilst recognising that this particular point was inaccurate.
70. In all the circumstances I consider that there were reasonable grounds for the Respondent's decision makers to form the views that they did regarding the Claimant's misconduct.

The procedure followed

71. The main procedural contention advanced concerned the allegation that under the Respondent's DP, Mr Osei-Tutu should not have heard the disciplinary proceedings and Mr Frear should not have heard the appeal. (The relevant parts of the DPs are identified in paragraph 15 above.)
72. Mr Osei-Tutu accepted in his evidence to me that he was not a Store Operations Manager and thus in terms of the wording of DP current at the time, he was not of a sufficient level of seniority to hear cases involving dismissals. He told me that in practice he had heard a number of such cases, so that he had appropriate experience and he was also more senior than the Claimant as a level 3 manager. I accept that although the letter of the DP was not complied with, for these reasons (experience and seniority) Mr Osei-Tutu was in practice an appropriate person to conduct the disciplinary process. Mr Davis accepted that a conclusion of unfair dismissal would not follow from a technical breach of the written procedure and that I must consider whether any such breach meant that the procedure fell outside the band of reasonable responses by an employer in this situation and/or that substantive unfairness was occasioned. For the reasons I have already identified I consider that a reasonable and fair procedure was followed in the circumstances.
73. As regards Mr Frear and the question of who could conduct the appeal, he was in a more senior role than that of a Lead Store Manager. He indicated in his evidence, and I accept, that by the relevant time he had been selected as an Area Manager capable of hearing appeals and had been trained to perform the role. The issue only arose at all because at that stage the DP had not been updated to refer to Area Managers

conducting appeals against dismissals. Further, as an Area Manager he was more senior than the Claimant and more senior than Mr Osei-Tutu, who reported to an Area Manager, who was a counterpart of Mr Frear's. In all the circumstances, including his seniority, training and experience, I find that it was reasonable for Mr Frear to hear the appeal and that no unfairness was occasioned to the Claimant by this.

74. A secondary point raised on behalf of the Claimant was the lack of notification that he was at risk of dismissal before the initial disciplinary hearing. However, as I have described above, the bulk, if not the entirety of the substantive part of the process occurred at the adjourned hearing on 1 July 2016. The Claimant had received an appropriate letter, advising him of this prospect in advance of that hearing (see paragraph 39 above). Further, he attended both hearings with a union representative to assist him.
75. Accordingly, I am satisfied that a fair procedure was followed.

The reasonableness of the sanction

76. Lastly I turn to consider whether the Claimant's dismissal was within the bounds of reasonable responses available to the Respondent in terms of penalty. This was the aspect upon which most emphasis was placed by Mr Davis at the hearing.
77. Before looking at this question more broadly, I need to deal with a specific contention raised, namely that Mr Osei-Tutu did not base his decision to dismiss on any dishonesty on the part of the Claimant. This submission was made following Mr Osei-Tutu agreeing during his evidence that he did not refer to dishonesty or the Claimant lying in his "Record of Summary Dismissal" document [221 – 223]. Whether or not the reference in this document to a serious breach of trust on the part of the Claimant [223] was in fact intended to refer to that aspect, it is clear from the notes of the disciplinary hearing that Mr Osei-Tutu was very troubled by the fact that the Claimant had been untruthful about how Mr Nadesan had come to work at the Store and had done so in an effort to avoid detection (see paragraphs 35, 40 and 41 above). This was also a matter that troubled Mr Frear greatly (see paragraph 53 above).
78. Accordingly, I approach the question of whether the sanction of dismissal was within the band of reasonable responses on the basis that the Respondent's decision makers had justifiably concluded not only that the Claimant had deliberately circumnavigated procedures, but had subsequently lied in an effort to avoid detection and had induced a junior member of his staff to lie too for these purposes.
79. I acknowledge that there were a substantial number of features that could be (and were) advanced on the Claimant's behalf, in particular:
- 79.1 He was a long serving employee who had risen through the ranks and had an unblemished conduct record;

79.2 He had admitted his wrongdoing during the investigative and disciplinary processes. He had given assurances that it would not happen again and had undergone some re-training;

79.3 He was left in post for the period of almost five months between the matters coming to light and his dismissal and there was no reoccurrence of these issues or other problems during that time;

79.4 He did not act as he did for personal gain.

80. Mr Davis placed a lot of emphasis upon the fact that Mr Akhtar was not suspended, as showing that after the discovery of these matters he in fact remained a trusted employee. He also drew attention to the fact that the Respondent's standard form "Misconduct Checklist" envisaged suspension in an instance of potential gross misconduct [166 – 171]. Thus, he suggested, the failure to suspend here was indicative of the fact that the circumstances were not viewed as capable of amounting to gross misconduct.
81. In my view this submission accords too much weight to one aspect of what is self-evidently no more than a checklist. Furthermore, the decision not to suspend was made by Mr Bailey, for reasons that are not entirely clear. In any event, it did not constrain Mr Osei-Tutu's or Mr Frear's consideration of the appropriate penalty. As the Court of Appeal made clear in **Tayeh v Barchester Healthcare Limited**, a failure to suspend does not in itself preclude an employer from regarding the behaviour in question as gross misconduct or from dismissing the employee (see paragraph 59 above). In this instance the Respondent's DP did not mandate suspension, as opposed to contemplate it as a potential outcome (see paragraph 16 above).
82. In short, if the conduct in question was otherwise capable of leading to dismissal, the fact Mr Akhtar was not suspended is simply one of a number of factors to be taken into account in considering whether the penalty imposed was outside the band of reasonable responses. In terms of the Respondent's own DP, I also note that the conduct in this instance plainly came within the "*deliberate disregard*" of Tesco procedures example of gross misconduct (see paragraph 14 above). The lying to Ms Hoare and encouragement of Mr Nadesan to lie was clearly capable of constituting other action which was "*a serious breach of acceptable behaviour*". (I do not attach weight to the other DP example of gross misconduct highlighted by Ms Campbell, given that Mr Frear accepted in his evidence that the risk going forward, as he saw it, was financial, rather than a risk to health and safety).
83. Even taking into account each of the features I have identified in paragraph 79 and all other relevant circumstances, I consider that the Respondent's decision-makers were entitled to take the view that the Claimant was guilty of gross misconduct and that dismissal was the appropriate penalty, given the deliberate and multiple breaches of procedures involved and the Claimant's initial attempts to cover this up,

which involved him lying to his managers and trying to get a junior employee to lie for him. I accept that not every manager would have dismissed in this situation, given the Claimant's previous good record, the admissions he made and the lack of subsequent problems. However, I am quite clear that I cannot say this decision fell outside the band of reasonable responses available to the Respondent's decision makers.

84. In so far as the Claimant suggested that Mr Osei-Tutu's reference to there being no mitigating circumstances (see paragraph 42 above) showed he had not appreciated or taken into account the matters I have listed at paragraph 79 above, I do not read his document in that way. I accept, as he told me in evidence, he did bear these factors in mind, but he concluded that in light of the nature of the Claimant's conduct they did not avail him as mitigation. Based on the evidence I heard, I am satisfied that both Mr Osei-Tutu and Mr Frear did bear in mind the circumstances that potentially pointed in the Claimant's favour, along with other relevant circumstances.
85. Accordingly, the decision to summarily dismiss the Claimant was one which was open to the Respondent's decision makers.
86. It therefore follows that the claim for unfair dismissal is not successful. It also follows that the last two issues I identified in paragraph 4 above do not in fact arise for my consideration.

Employment Judge Williams QC
Date: 6 March 2017