EMPLOYMENT TRIBUNALS

Claimant: **Mr J Singh**

Respondent: **CDS (Superstores International) Limited**

Heard at: **Southampton** **On: 15th and 16th May 2019**

Before: **Employment Judge Dawson**

Representation
Claimant: Mr Fitzpatrick
Respondent: Mrs Hornblower

JUDGMENT having been sent to the parties and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided

REASONS FOR JUDGMENT

1. This is a claim for unfair dismissal

2. At the outset of the hearing I amended the respondent's name to CDS (Superstores International) Ltd with the consent of the parties.

3. I heard from the claimant and, for the respondent, Mr Ford, the respondent's loss prevention manager who conducted the original investigation in the case, Mr Walker, a store manager for the respondent who conducted a further part of the investigation and Mr Dyehouse, the respondent's regional support manager who heard the appeal.

4. The respondent asserts that it dismissed the claimant for misconduct, the misconduct being twofold, firstly breach of company systems in failing to check required documentation prior to allowing stock to leave the store, secondly, theft, in that the claimant conspired with a customer (Mr Johnson) to remove the said stock, being a bed and mattress.

5. Although there was an agreed list of issues, with the agreement of the parties I recast those issues at the outset of the hearing as set out below:

a. whether the person who made the decision to dismiss had a genuine belief in the misconduct alleged,

b. whether that belief was based on reasonable grounds and

c. whether it followed a reasonable investigation. The investigation does not need to be perfect but must be within a range of reasonable investigations.

d. Having regard to the size and administrative resources of the respondent, whether the decision to dismiss was within the range of reasonable responses.

e. The respondent relies upon the decision in Polkey v Dayton Services [1987] 1 WLR 1147, asserting that even if I were to find the dismissal was procedurally unfair I should reduce the compensatory award to reflect the fact that a fair procedure would have been likely to result in the same outcome.

f. Further the respondent argues that if I were to find that the dismissal was unfair, I should also reduce compensation on the basis that the claimant contributed to his dismissal by his conduct or that it would be otherwise just and equitable to do so.

6. In respect of the issue of whether the dismissing officer had a genuine belief in the misconduct alleged, the claimant, at the hearing, sought to suggest that the reason for the dismissal may have been a conviction and suspended prison sentence which he had received. I do not believe that assertion had been made before. The respondent was not able to call the dismissing officer since he no longer worked for the respondent and, I am told by counsel, could not be contacted.

7. In respect of the question of whether belief was based on reasonable grounds the respondent relies upon the following grounds as set out by counsel for the respondent in her closing submissions;

a. the bed in question was not paid for,

b. the claimant was seen to be speaking to the customer who took the bed, on the morning that it was taken,

c. when the bed was collected by the customer that evening, he appeared to know exactly where to take his vehicle and almost as soon as he arrived the claimant appeared with the bed on a forklift truck to load it into the customer's car,

d. the claimant did not check any paperwork which the customer should have had, to show that he was entitled to take the bed away,

e. to a lesser extent, there was evidence from anonymous employees that the customer had been seen with with the claimant on 17 February 2018, four days before the bed was taken.

Findings of fact

8. The claimant worked for the respondent in its warehouse. He had done so since 2009 and so was a long serving employee. He had no relevant disciplinary record. There was no previous suggestion that he had been dishonest.

9. On 22 February 2018, staff at the respondent's Southampton store discovered that a bed and mattress were unaccounted for when a potential customer enquired about the size of the box which that product came in. A member of staff, believing that the product was in stock, went to get measurements and realised that the stock had gone.

10. Mr Ford was asked to investigate.

11. Mr Ford attended at the Southampton store on 6 March 2018. He spoke to staff who wished to remain anonymous. He has written a report at page 44 of the bundle.

12. On 17 February 2018 a furniture order was placed by one Storm Grant for the bed and mattress in issue with the total retail value of £309.98.

13. Storm Grant customer paid a deposit of £62. The customer was accompanied by someone else known by staff as Peter Johnson.

14. On 21 February 2018, Mr Johnson (who I now refer to as the customer) returned to the store. Prior to going into the store he spoke to the claimant as seen on CCTV. The length of the conversation was short, being only seconds in length. (The claimant explained in his evidence that conversation was when he was asked to look at the customer's paperwork to assist him in advising on whether the bed would fit into a car. The respondent does not accept that explanation).

15. Thereafter the customer went into the store telling staff that he was going to pay for the bed, however when he got to the till he changed his mind and left the store without further payment.

16. Later the same day, Mr Johnson drove his BMW to the rear of the store. He drove down what I would describe as a service road which led to the entrance to a yard. From that yard stock from the store would be provided to customers who were using vehicles to pick up purchases.

17. The yard is different to the Respondent's warehouse.

18. Without stopping for any period time, the customer turned his vehicle around and drove back up the service road to some parking bays on the left-hand side, having passed various empty parking bays.

19. Very shortly thereafter, less than two minutes after the BMW first arrived in the service road, the claimant drove a forklift truck loaded with the bed in question, through the yard and along the road to the BMW and alighted from the truck. He then attempted to assist Mr Johnson with putting the bed in his car but the same would not fit. He therefore left the bed by the side of the road and drove his forklift back.

20. A van arrived thereafter to take the bed away.

21. When the next customer who wanted the bed made enquiries on 22 February, staff looked for the documentation which would have been created by the purchase. It was not in the filing cabinet where it would normally be. It has never been found.

22. The bed was not paid for, if it had been it would have shown up on the Respondent's system, which was checked by Mr Ford.

23. The normal procedure when a customer has paid for furniture which he or she wishes to pick up from the warehouse part of the store is for the paperwork, or at least the top copy of it to be marked "PIF" or payment in full by the member of staff dealing with the customer. The place for payment by customers is not on the ground floor and therefore the staff go to mezzanine area and shout down to staff in the warehouse that there is a collection to organise. They then throw the paperwork down to the warehouse operative who picks the product, if necessary puts it on a forklift, and drives it to the customer, who has by then gone to the warehouse.

24. Thereafter, the store's general policy (and the respondent disavowed reliance on any written policy in its closing submissions) is that the warehouse operative should check paperwork which the customer will have been given and, if it relates to the stock the operative has picked, hand it over.

25. The claimant told me, and in circumstances where there is no evidence to the contrary I am inclined to accept, that collection of stock by customers was not particularly busy. If only one item was being picked at the relevant time then staff would simply assume that the customer who had arrived at the warehouse was there to pick up that item and paperwork would not be rechecked at that point.

26. Counsel for the respondent stated that the respondent was not saying that the claimant did or did not receive paperwork inside the store in respect of the bed in question and the respondent could not say what happened inside the store since it simply did not know.

27. During his visit to the store Mr Ford wrote a report but was not able to interview the claimant because he was not at work. Because he had travelled a distance (from Newcastle) and needed to return he left matters for somebody else to deal with.

28. A letter, therefore, was sent to the claimant dated 6 March 2018 requiring him to attend what was, wrongly, described as a disciplinary meeting on 9 March 2018. In fact what he was being invited to was an investigatory meeting and that meeting took place on 12 March 2018.

29. The letter made reference to the suspected theft of stock and the alleged conspiracy between the claimant and the customer and set out the allegations in some detail. It stated "you were then seen on CCTV at about 1900 the same day to remove the above stock from the store secure service area and leave it with this male at the rear of the store. There is no

evidence to suggest you had any contact from anyone in store to inform you of the impending customer collection although you had the stock ready to go. CCTV shows that you did not make any attempt to check any paperwork to clarify full payment had been made… A subsequent search for the products and paperwork in store revealed the stock and paperwork were missing…"

30. The same letter also made reference to breach of the company systems in failing to check the required documents from the customer

31. The claimant told me that he thought he was attending the meeting on 12 March 2018 about his sickness absence. He says he did not receive the letter of 6 March 2018.

32. Having looked at the minutes of the 12th of March 2018 I have difficulty accepting that version of events. At the outset of the meeting Mr Walker, who conducted the investigation at this stage, asked the claimant if he knew why they were there today. The claimant replied "I do indeed". The claimant was asked if he required representation and he said "no". Mr Morgan said "we are here today to do a formal hearing regarding the taking of stock without payment…"

33. I find that had Mr Singh genuinely thought he was attending that meeting in relation to his absence he would have said so at that stage.

34. In the course of that investigation Mr Singh [being asked about the first discussion on the 21st of February] stated "I knew the guy or recognised the guy from the estate and he asked about the bed ". He was then asked about the time when the customer picked up the bed and was asked "did you check the customer paperwork?" He replied "no I assumed that he had paid for it."

35. Later in the same meeting the claimant said "I don't have anything to do with this apart from a mistake and negligence". He made reference to mental health issues from which he was suffering. Again, later in the same meeting he said "all I can say is that I am sorry and apologise I have made a mistake but I wouldn't make the same mistake twice"

36. On 16 March 2018 a further letter was sent to the claimant inviting him to a disciplinary meeting. In this letter the allegation was not of conspiracy and theft but simply a breach of the company systems which, it was said, led to a loss of trust and confidence.

37. That meeting was conducted by Mr Mullaney. It is apparent from the evidence before me and, indeed, from what I was told by Mr Dyehouse, that Mr Mullaney took the view that the investigation by Mr Walker had been inadequate in the sense that he felt the charges should include conspiracy and theft. Many of Mr Mullaney's questions in the meeting were directed to the that issue. For instance he asked about the meeting between the claimant and the customer earlier on the 21st February, which would not be necessary if all that was being investigated was the failure to check the paperwork. He put to the claimant that it was suggested that he knew the customer. He asked the claimant about the payment of the deposit.

38. In that meeting the claimant stated that there was “PIF” on the paperwork that led to him picking the bed and delivering it on the forklift and stated that he wanted to see that paperwork.

39. Mr Mullaney concluded the meeting stating that he wanted to look at further matters (although the precise wording is not clear in the minutes which I have been given, he clearly said “I can’t make a decision)”.

40. On the same day Mr Mullaney spoke to Abdul Elkindy, a deputy manager at the store. There was an exchange between the two in which Mr Mullaney asked the question “explain why warehouse goods out is not being done? I am a customer I purchase, drive round and get the goods. Management should be called and countersigned with reg plate. Why is this not being done? You, Luke or other management were here. Potentially it may not have happened”. (Page 61)

41. Mr Elkindy replied “to be fair. I’m not sure. I don’t know when this stopped. [Illegible]”. I note that although the claimant put weight on this exchange to suggest that management knew that the checking of paperwork by warehouse operatives was not taking place, it does not go that far. It only states that management were not counter signing documents. Nevertheless it is evidence that the store staff, generally, were not following proper procedures.

42. Thereafter on 16 April 2018 Mr Mullaney took statements of three witnesses who wished to remain anonymous. He did not ask them to sign their statements but he did reduce their statements to writing and they largely corroborated each other.

43. On 19 April 2018, the claimant received a further letter inviting him to attend a further disciplinary meeting on 23 April 2018 and, in this letter, the charge in respect of the theft of stock and conspiracy had been reinstated. It was in largely, if not exactly, the same terms as the letter of 6 March 2018.

44. With that letter Mr Mullaney sent a CD with CCTV footage, a witness statement from Mr Ford and the three anonymous witness statements he had taken. He did not enclose the minutes of the interview with Mr Elkindy which the Claimant did not see until these tribunal proceedings.

45. At the resumed disciplinary hearing Mr Mullaney asked about the arrival of the car to pick up the bed.

46. I interpose these findings of fact to record that one of the statements made by Mr Ford in his evidence as to why the behaviour of the BMW was suspicious was “the car drove down, no one got or spoke to anyone, it turned round, it goes beyond all the spaces it could have parked in, out of range of the CCTV, then the forklift drives out. How do they know who is here? Or what they want to collect? Drive straight to the car ,leave the bed out when it doesn’t fit, no attempt to look at the paperwork.”

47. That is a compelling narrative but was not really put to the claimant in those terms in the resumed disciplinary hearing. The nearest the interview comes is at page 93 of the bundle. Mr Mullaney states “Jamie if cast mind back. At

this point, what happens. No one out of car." The claimant replied "he shouts out window". He went on "I said park at top". Mr Mullaney said "how do you know pickup". The claimant replied "paperwork came down from furniture". Later Mr Mullaney clarified "someone gave you paperwork to say customer getting bed." The claimant replied yes. Mr Mullaney said "this is site security" and the claimant's representative stated "I assume you have a full copy of tape – internal." Mr Mullaney replied that he was "not sure" the representative stated "you need to find out".

48. Later on the same page the claimants representative stated that the claimant was aware there were warehouse cameras and therefore he would not be dishonest in the warehouse.

49. After the meeting Mr Mullaney did not carry out any further investigation and on 3 May 2018 he dismissed the claimant both for breach of company systems and theft of stock and stated that either would be sufficient to warrant dismissal.

50. There was, thereafter, an appeal by Mr Dyehouse. That appeal was limited to a review of the points made by the claimant in his letter of 9 May 2018. Mr Dyehouse could not remember whether he had seen statement of Mr Elkindy or not.

51. When it was put to the claimant in cross examination that the time lapse between the claimant's car arriving and him driving the forklift truck into the road was so close that there must have been collusion between him and the customer, Mr Singh explained that once the customer has paid for the furniture he would have to go down the escalators, out of the store, get into his car, drive around two mini roundabouts and then drive down the road. That would be plenty of time for him to be called from the mezzanine floor, pick the stock and drive it out. In answer to this question as to how the car knew where to park, Mr Singh stated that at the point where the car turned around (in front of the yard gates) he was off-camera in his forklift truck and gesticulated as to where to . He stated that warehouse cameras (which were not checked by the respondent) would show that.

52. In cross examination, when asked why the car parked so far away, when there were spare parking bays, he stated that parking bays which were closer were not ones in which customers of the store could park because they belonged to other businesses. That was not disputed by the respondent.

The Law

53. Section 98 Employment Rights Act 1996 provides that it is for the Respondent to show the reason for dismissal and that it is a potentially fair reason.

54. Section 98(4) states that "The determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)- 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 shall be determined in accordance with equity and the substantial merits of the case".

55. In considering a dismissal for misconduct the tribunal must have regard to the test in *BHS v Burchell* that "First, there must be established by the employer the fact of that belief; that the employer did believe it. Second, it must be shown that the employer had in his mind reasonable grounds upon which to sustain that belief. And, third, the employer at the stage at which he formed that belief on those grounds, must have carried out as much investigation into the matter as was reasonable in all the circumstances of the case"

56. In Linfood Cash and Carry v Thomson [1989] ICR 518, the EAT gave the following guidance in respect of anonymous informants

> Every case must depend upon its own facts, and circumstances may vary widely — indeed with further experience other aspects may demonstrate themselves — but we hope that the following comments may prove to be of assistance:
>
> 1. The information given by the informant should be reduced into writing in one or more statements. Initially these statements should be taken without regard to the fact that in those cases where anonymity is to be preserved, it may subsequently prove to be necessary to omit or erase certain parts of the statements before submission to others in order to prevent identification.
>
> 2. In taking statements the following seem important: (a) Date, time and place of each or any observation or incident. (b) The opportunity and ability to observe clearly and with accuracy. (c) The circumstantial evidence such as knowledge of a system or arrangement, or the reason [1989] ICR 518 at 523for the presence of the informer and why certain small details are memorable. (d) Whether the informant has suffered at the hands of the accused or has any other reason to fabricate, whether from personal grudge or any other reason or principle.
>
> 3. Further investigation can then take place either to confirm or undermine the information given. Corroboration is clearly desirable.
>
> 4. Tactful inquiries may well be thought suitable and advisable into the character and background of the informant or any other information which may tend to add to or detract from the value of the information.
>
> 5. If the informant is prepared to attend a disciplinary hearing, no problem will arise, but if, as in the present case, the employer is satisfied that the fear is genuine, then a decision will need to be made whether or not to continue with the disciplinary process.

> 6. If it is to continue, then it seems to us desirable that at each stage of those procedures the member of management responsible for that hearing should himself interview the informant and satisfy himself what weight is to be given to the information.
>
> 7. The written statement of the informant — if necessary with omissions to avoid identification — should be made available to the employee and his representatives.
>
> 8. If the employee or his representative raises any particular and relevant issue which should be put to the informant, then it may be desirable to adjourn for the chairman to make further inquiries of that informant.
>
> 9. Although it is always desirable for notes to be taken during disciplinary procedures, it seems to us to be particularly important that full and careful notes should be taken in these cases.
>
> 10. Although not peculiar to cases where informants have been the cause for the initiation of an investigation, it seems to us important that if evidence from an investigating officer is to be taken at a hearing it should, where possible, be prepared in a written form.

57. In circumstances where it is found that a decision to dismiss was unfair the tribunal must consider how much compensation to award in accordance with sections 122 and 123 Employment Rights Act 1996.

58. In respect of the basic award, section 122 (2) ERA 1996 provides

> "Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly"

59. In respect of the compensatory award, s123 ERA 1996 provides

> (1) Subject to the provisions of this section and sections … , the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.
>
> ...
>
> (6)Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall

reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

Conclusions

60. I give my conclusions by reference to the list of issues.

61. I deal firstly with the allegation in respect of theft.

62. Although I have not heard from Mr Mullaney, given the extensive disciplinary interviews that he conducted over two occasions, the additional investigations that he carried out (without commenting at this stage on whether he was right to or not) and the letter of dismissal, I am satisfied on the balance of probabilities that the reason for the dismissal was his belief in the claimant's misconduct. Beyond a bald assertion made at the outset of this hearing, the claimant has adduced no evidence to suggest that another reason was operating on his mind.

63. In respect of the next question, whether there were reasonable grounds for that belief, I accept that factually the grounds asserted by the respondent (which I have set out above) existed. I have reservations about whether they are, sufficient to make a finding of dishonesty, the evidence is somewhat thin, but I remind myself that in a case of unfair dismissal I must be careful not to substitute my decision for that of the employer. Whilst that is particularly the case in relation to the decision to dismiss, it seems to me it is also the case when considering whether there are sufficient grounds to conclude that an employee has been guilty of misconduct. I have come to the conclusion that there were reasonable grounds for Mr Mullaney's decision.

64. However I do not accept that Mr Mullaney had carried out a sufficient investigation. The company procedures (as well as the ACAS code) requires a different person to carry out the investigation and the disciplinary process whenever possible. Between the first and second disciplinary hearings in this case Mr Mullaney very clearly carried out an investigation. Whether that, on its own, would have been sufficient to render the investigation unfair is debatable. I have borne in mind that there is a range of reasonable investigations which may be carried out.

65. However the interposition of a new investigating officer between the first and second disciplinary hearings would, in my judgment, have put in place some safeguards which would have been likely to prevent the errors occurring which, I find did occur.

66. Firstly, given the gravity of the charge, namely theft (which would be likely to stay with the claimant in his career for some time), it is my judgment that the interview with Mr Elkindy should have been sent to the claimant. It supported the Claimant's assertion that staff at the store were not following proper procedures and management were complicit in that. The claimant may have wanted to make use of that document and it should, at least, have been available for him to use at the appeal stage

67. Secondly, the fact that it was not sent to the claimant gives rise to a suspicion that was because it did not support the route down which Mr Mullaney had chosen to travel.

68. Thirdly, Mr Mullaney did not properly follow the guidance provided by the EAT in Linfood. Whilst I accept that the EAT was not laying down a test which always had to be followed and the touchstone remains section 98(4) Employment Rights Act 1996, he did not clarify properly what opportunity the anonymous informants had had to observe matters, he did not clarify whether they would have any reason to villify the claimant and he did not obtain signatures on the statements which, in my judgment, is a flaw where witnesses are giving evidence anonymously. Although, of course, the signatures will be redacted, the signature of witness is an additional level of protection in ascertaining what they are saying is true.

69. Part of the reason for the respondent concluding that the claimant was in a conspiracy with the customer, as explained Mr Ford and recounted above, was never properly put to the claimant for his comment, in particular the allegation that the customer had driven beyond available parking spaces which would have been in view of the CCTV. Had it been the respondent would have been provided with the answer which it got in cross examination which it could then investigate.

70. Additional to that point, when it was put to Mr Mullaney in the reconvened disciplinary hearing that there was further CCTV to be investigated (which may have shown the claimant calling to the customer and telling him where to park), he neither did so nor explained why he was not doing so.

71. In my judgment given the gravity of the allegation of theft, those matters were sufficiently serious to render the process, in this respect, unfair. They were not corrected by the appeal which was limited to consideration of the points advanced by the claimant in his letter.

72. In respect of the charge of failure to properly follow the respondent's systems, having regard to the apology given by the claimant I am of the view that, again, Mr Mullaney had a genuine belief based on reasonable grounds in that misconduct. However, in circumstances where the respondent does not even have policy which is written, and where it was dealing with a long serving employee, and where the respondent knew from the witness statement of Mr Elkindy that there were issues of following procedure within the store, in respect of this part alone, in my judgment any dismissal would outside the bounds of reasonable responses.

73. Thus, I have concluded that the dismissal was unfair.

74. It is difficult to assess what difference a fair procedure would have made. I do not know what investigations of the warehouse CCTV would have revealed, or even if such CCTV would have been available. If it simply showed the claimant gesticulating to the BMW driver where to park, it is unlikely that would have made any difference to the respondent's decision. It is difficult to say what the respondents response to the fuller version of events which I have been given by the claimant would have been. Despite the forceful submissions of Mr Fitzpatrick for the claimant, I consider that

there was evidence that the bed in question have not been paid for and the speed with which the bed was delivered upon the arrival of the BMW does, at least, give rise to questions. I consider that there is a 65% chance that the claimant would have been dismissed even if a fair procedure been carried out. Thus the compensatory award will be reduced by 65%.

75. I am not satisfied that the claimant contributed to his dismissal. I am not satisfied on the balance of probabilities from the evidence which I have, that the claimant was guilty of collusion with the customer. The explanation which the claimant gave me in his evidence as to both why he was speaking to the customer on the morning of 21st of February and the speed at which he was able to deliver the bed was sufficiently compelling that I am not willing to find that he was guilty of working with the customer to steal the bed.

76. Thus the decision that I have reached is that the claimant was unfairly dismissed but the compensatory award will be reduced by 65%.

77. The calculation of compensation was agreed by all of the parties, the only dispute which I was required to adjudicate upon was the appropriate uplift to be applied having regard to the failure to comply with the relevant ACAS code. I determined that the appropriate uplift was 10%. The failure to comply with the ACAS code was relatively minor but not wholly insignificant.

78. The agreed figures were as follows

2466.16	Basic award
1664.66	Compensatory award
175.00	Loss of statutory rights
183.97	10% Acas uplift of compensatory award
4489.79	Total

Employment Judge Dawson

Date: 10 June 2019

Sent to Parties: 25 June 2019

For the Tribunal Office