



EMPLOYMENT TRIBUNALS

Claimant: Mr Rahmon Tesilimi-Layeni

Respondent: Lidl Great Britain Limited

Heard at: East London Hearing Centre (by Cloud Video Platform)

On: 15 & 16 June 2022
12 August 2022 (in chambers)

Before: Employment Judge Barrett

Members: Mrs M Long
Mr S Woodhouse

Representation

Claimant: Represented himself

Respondent: Mrs Gill Williams, solicitor

JUDGMENT

The judgment of the Tribunal is that: -

1. The Claimant's claim for unfair dismissal is not well-founded and is dismissed.
2. The Claimant's claim for victimisation is not well-founded and is dismissed.

REASONS

This has been a remote hearing, which has not been objected to by the parties. The form of remote hearing was by CVP. A face-to-face hearing was not held, because it was not practicable, and all issues could be determined in a remote hearing.

Introduction

1. The Respondent is part of the British-based operation of a discount supermarket operator which originated in Germany. The Claimant was employed by the

Respondent as a Deputy Store Manager from 4 December 2012 until 5 October 2020.

2. The Claimant presented his ET1 claim form on 13 November 2020, after an ACAS period between 6 October and 6 November 2020. There was a preliminary hearing for case management on 13 May 2021.

The hearing

3. The Claimant gave evidence. Miss Kubra Dankofa, Customer Service Assistant, also gave evidence for the Claimant.
4. The following witnesses gave evidence on behalf of the Respondent:
 - 4.1. Mr Akbab Miah, Store Manager, who conducted the disciplinary investigation at an early stage.
 - 4.2. Mr Beau Thompson, Area Manager, who completed the disciplinary investigation.
 - 4.3. Mr Jonathan Wise, Area Manager, disciplinary manager who took the decision to dismiss.
 - 4.4. Miss Lauren Axtmann, Regional Manager, who heard the Claimant's appeal.
5. The Tribunal was provided with a 179-page bundle of evidential documents and played a 45-second CCTV clip. The Respondent provided a further 40 pages of evidence on the morning of the second day of the hearing, which the Tribunal agreed to admit and added to the bundle.
6. At the close of the evidence, Mrs Williams and the Claimant made helpful closing submissions.
7. The parties agreed the issues for determination were:

Unfair dismissal

- 7.1. Was the Claimant dismissed for a potentially fair reason within Section 98 Employment Rights Act 1996 ('ERA')? The Respondent relies on conduct:
 - a. Breach of company cashing up procedure;
 - b. Allowed a colleague to retain two discount vouchers and used one for himself, in breach of the voucher procedure;
 - c. Had been grossly negligent in the performance of his duties.
- 7.2. Applying the Burchell test:
 - 7.2.1. Did the Respondent have a genuine belief in the Claimant's guilt?
 - 7.2.2. Were there reasonable grounds on which to base that belief?
 - 7.2.3. Had the Respondent carried out as much investigation as was reasonable in the circumstances?
- 7.3. If so, was the dismissal within the range of reasonable responses available to the Respondent?

- 7.4. If the dismissal was unfair, should compensation be reduced following *Polkey v AE Dayton Services Limited* and, if so, by how much?
- 7.5. If the dismissal was unfair, should the basic and compensatory awards be reduced to reflect any culpable or blameworthy conduct by the Claimant which contributed to his dismissal?

Victimisation

- 7.6. Did the Claimant do a protected act within the definition of s.27(2) Equality Act 2010 ('EqA')? The Claimant says that on 7 July 2020 he spoke to Miss Axtmann, in connection with a disciplinary investigation into another colleague, and told her that the allegation to this colleague was racially motivated and that Black staff members were being mistreated by managers.
- 7.7. Did the Respondent subject the Claimant to detrimental treatment? The Claimant alleges the following detriment: that he was dismissed because he raised allegations of racial discrimination against other employees.
- 7.8. Was the Claimant subject to the alleged detriment by the Respondent because he did a protected act or because the Respondent believed that he did, or may do, a protected act?

Findings of fact

The Claimant's role

8. The Claimant was most recently Deputy Store Manager of the Respondent's Stag Island, Barking store. He had previously worked for the Respondent in a number of other locations. His Store Manager at the Stag Island store was Mr Akbab Miah. The Claimant's role included taking responsibility for the store when Mr Miah was absent. Mr Miah's manager was Mr Imran Aslam, Area Manager, who covered a number of stores including the Stag Island branch.

Policy and practice regarding cashing up and vouchers

9. The Respondent has a 'Till and Safe' policy which sets out how cash and is kept secure on site. It includes the 'four-eyes' principle, which requires two members of staff to be present when certain tasks are undertaken:

'The four-eyes principle is used to confirm certain tasks such as collecting a till drawer cashing up and confirming safecodes... Four-eyes means that 2 Employees must be present for the task, one Employee performs the required task with the second Employee present to understand and confirm.'

10. The Respondent operates several voucher schemes. The 'Till and Safe' policy states that:

'All customer service vouchers / magazine vouchers should be checked for authenticity. The terms and conditions on the voucher should always be followed. Customer service vouchers / magazine vouchers must only be scanned once, under no circumstances should the same voucher be scanned twice.'

Note: All vouchers should be kept inside the till drawer until the cashier is cashed up. Upon cash up the cashier should pass all vouchers to the safeholder.'

11. In practice, at least at the Stag Island store, this policy was not uniformly followed in respect of all types of vouchers. 'Healthy Start' vouchers, customer service vouchers and specific promotional vouchers, which were issued in connection with campaigns or one-off events from time to time, were usually (but not invariably) retained and filed in accordance with the policy. Coupons from magazines and newspapers were usually scrunched up or defaced then disposed of in the bin after receipt, rather than being passed to the safe holder at the end of the shift. Magazine and newspaper coupons were received more frequently than the other types of vouchers.
12. If not defaced and disposed of or safely retained, then there was a risk that the same voucher could be used multiple times. This is because vouchers within the same batch have the same voucher code and are identical; the Respondent's scanners cannot identify whether the same voucher has been processed before.
13. Cashing up a till takes place at the end of a cashier's shift. The till drawer is removed and taken to the office. Cashing up is usually done by a shift manager or deputy manager. The process falls under the 'four-eyes' principle, and so the cashier is required to accompany the manager and observe the process until the money and vouchers have been secured in the safe.
14. In the Stag Island store, there were occasions when the 'four-eyes' principle was not followed during the cashing up process. This would happen when a cashier had to leave early, and the manager cashed up alone. The Claimant, as Deputy Manager, was responsible for the practice in the store, together with other managerial staff.

Conversation with Miss Axtmann on 7 July 2020

15. On 7 July 2020, Miss Lauren Axtmann, Regional Manager, spoke to the Claimant by telephone regarding an appeal into a disciplinary matter which she was conducting at that time. He was one of a number of managers she spoke to at around this time. We find that during this meeting, the Claimant did not allege that the disciplinary matter had been affected by racial bias or that Black staff were treated badly by managers in the store. Our reasons for this finding are set out in the 'conclusions' section below.

Mr Miah's investigation

16. The Stag Island store conducts weekly cash audits. Following a cash audit in early August 2020, Mr Miah realised that there was a discrepancy. Three of a specific promotional voucher had been processed through the tills on 6 August 2020. The voucher was recorded on the till receipt as "*BOMMO London get5off25*". This meant it was a promotional voucher which had been distributed at an event called "Big On London" and entitled a shopper to £5 off when spending £25 in store. The voucher code was PLU 2455. Had the Till and Safe policy been complied with, three of these vouchers ought to have been retained in the safe, matching the number processed through the till. They were missing.
17. Mr Miah spoke to his manager Mr Aslam and was told to investigate what had happened to the three missing vouchers. Mr Miah started his investigation by identifying the cashier who had undertaken the transaction receiving the vouchers; the cashier number is identifiable on the transaction receipt. That cashier has been referred to throughout these proceedings as 'Cashier 15'. Mr

Miah also identified the person who had cashed up that cashier's till at the end of the day, who was the Claimant.

18. Mr Miah checked the till records to see whether any vouchers with code PLU 2455 had been used in store after 6 August 2020. He found that on 8 August 2020, a shopper with an employee discount used a voucher with code PLU 2455 to save £5. That voucher was retained in accordance with the Respondent's policy. The Tribunal was shown a greyscale photocopy of it, together with the shopping receipt recording an employee discount and a "*BOMMO London get5off25*" reduction. The photocopied voucher had "£5" written on it in large white font.
19. Mr Miah met with Cashier 15 on 13 August 2020, to ask about the missing vouchers. Cashier 15 said he remembered the transaction on 6 August 2020 when a customer had used three vouchers on his till. He said that he had had a conversation with the Claimant and taken two of these vouchers with the Claimant's permission. He had not in fact gone on to use them and he had torn them up. He left the third voucher in the till for the Claimant when cashing up.
20. Mr Miah then met with the Claimant on 22 August 2020. At that meeting, the Claimant said he could not remember cashing up on 6 August 2022 or the three vouchers, but if such vouchers had been present, he would have thrown them in the bin. He explained that was his normal practice for all vouchers other than Healthy Start vouchers and customer service vouchers. He said that he had not witnessed any staff members taking vouchers from the office and that he had never told any staff member that they could use customer vouchers.
21. Mr Miah showed the Claimant the transaction on 8 August 2020 with the employee discount. The Claimant identified this transaction as being his own shopping. He said he could not remember where the £5 off voucher had come from but he was always looking for vouchers in magazines and leaflets.
22. Mr Miah accepted the Claimant's assurances and closed his investigation on 22 August 2020, signing off an investigation report recording no concerns.

CCTV

23. Mr Aslam told Mr Miah that this did not make sense, that vouchers cannot just disappear, and that he would get CCTV. On 26 August 2020, Mr Aslam submitted a request for CCTV footage of the office from 13.30 to 14.00 on 6 August 2020 stating:

'On 06/08/20 store scanned voucher 2455 three times. This was all on same cashier. During cash up no voucher were found. Cashier claims during investigation that all 3 voucher were present and placed on table during cash up.

Investigating the DSM who cashed up that cashier, he claim he can't remember and even if vouchers were there he would shred them.

Only 08/08/20 the same DSM used one voucher 2455 on his personal shopping. He admits he used this voucher but claim he got for magazine.

He can't remember when or where he got voucher. This voucher was there when cashing up the cashier on 08/08/20.

Can CCTV be viewed for 06/08/20 between 13:30 to 14:00 when the cashier was being cashed up to determine if the 3 voucher were there and if potentially one was taken by DSM.'

24. We find that Mr Aslam submitted this request, despite Mr Miah having closed the initial investigation, because he was concerned that no adequate explanation had been provided for the missing vouchers and because he was concerned by the Claimant having used the same type of voucher to buy his own shopping.
25. The Respondent's practice where CCTV is needed for an investigation is as follows. An Area Manager such as Mr Aslam sends request to the Regional Data Protection Officer. The Regional Data Protection Officer reviews the request to check whether provision of the CCTV footage is necessary and justified. If it is, the request is forwarded to the national Data Protection team based at the Respondent's head office. A member of that team will then view the CCTV footage for the period specified in the request. The team member decides what if any part of the footage is relevant to the request. Only that selected part of the footage is burned to a file. The file is sent to the Regional Data Protection Officer, who transfers it to a USB stick that is compatible for use only with designated 'CCTV' laptops. Only certain managers are authorised to use CCTV laptops.
26. Therefore, following Mr Aslam's request, the decision as to what footage should be made available for the investigation into the missing vouchers was taken by a Data Protection team member at head office.
27. The footage which was selected and provided shows a view of the office. Cashier 15 is sitting down at a desk with the Claimant standing next to him to his right. They are both looking at a till drawer placed on the desk. Cashier 15 takes a number of vouchers from the back of the drawer. They are blue and have "£5" written on them in large white font. He shows the vouchers to the Claimant, who takes one and looks at it. They have a discussion while looking at the vouchers. Cashier 15 then puts a voucher or vouchers into his jacket pocket. Meanwhile, the Claimant leans over the desk to replace the voucher he had been looking at back in the till drawer. This means the Claimant's back is towards Cashier 15 as Cashier 15 places the voucher or vouchers into his jacket pocket. However, it is clear from the footage that Claimant saw Cashier 15 holding a voucher or vouchers and did not see him returning them to the drawer. Cashier 15 then stands up and exits the office. The Claimant sits down and continues cashing up by himself.

Mr Thompson's investigation

28. At the point when the CCTV footage was provided, the investigation was taken over by Mr Beau Thompson. He explained in evidence this was because as an Area Manager he was able to view the footage on the CCTV laptop, which Mr Miah as a Store Manager did not have access to.
29. On 5 September 2020, Mr Thompson interviewed Cashier 15 and then the Claimant.
30. Cashier 15 told Mr Thompson that he had taken two vouchers and left one with the Claimant. He had shredded the two vouchers he took and thrown them in the bin outside the office or in the canteen. The notes of the meeting record Cashier 15 saying:

'I ask Rahmon can we use the vouchers he said we can because we as company ge[t] money. I took the vouchers but did not use them.'

31. In his interview with Mr Thompson, the Claimant said the voucher he used for his shopping on 8 August 2022 was a voucher he had taken from a magazine, and he had had it with him for a while. He said that he could not remember whether he had ever cashed up on his own in the office but that might happen in an emergency. Asked whether he had allowed Cashier 15 to leave with two vouchers, leaving him to cash up alone, the Claimant replied:

'I didn't allow him to leave. I'm not sure if he left to do an emergency... I didn't let the cashier take it he must of taken it without my knowledge. The voucher on my shopping [was] my own voucher I brought from home.'

32. Mr Thompson told the Claimant that the voucher he used on 8 August 2020 was from a one-off event and asked if he had attended that event. The Claimant said he was not sure, but the voucher might have come from friends or family. Mr Thompson played the CCTV footage for the Claimant to watch more than once. The Claimant maintained that he had not seen Cashier 15 leave with the vouchers.

33. Mr Thompson completed his investigation report later that day. He noted two concerns. The first was letting a Customer Assistant leave before cashing up, not following the 'four-eye' principle. The second concern was regarding voucher misuse. He wrote that:

'CCTV shows CA & DSM discussing the £5 off voucher and DSM letting the CA take 2 x voucher out the office. DSM states he was not aware.'

34. Mr Thompson recommended that a disciplinary hearing should be held. He also took the decision to suspend the Claimant and Cashier 15 pending the outcome of their respective disciplinary processes.

Disciplinary stage

35. Mr Aslam initially took on the role of disciplinary manager. However, the initial invitation letters to the Claimant and Cashier 15 went astray, meaning that their disciplinary hearings needed to be rescheduled to a time when Mr Aslam was on leave. Mr Jonathan Wise, who was the 'buddy' Area Manager from the neighbouring area, took over the case.

36. Mr Wise sent the Claimant a disciplinary invitation letter on 17 September 2020, which stated that he was facing three allegations of potential gross misconduct, namely:

'Breach of cashing up procedure, when on 06/08/20 you allowed a customer assistant to leave the office whilst the till was still being cashed up, you continued cashing up the till without anyone else present breaching the 4 eye company principle...

Breach of voucher procedure which could potentially lead to fraudulent voucher activity, whilst cashing up a customer assistant on 06/08/20, Three vouchers were found. You allowed the customer assistant to leave the office with Two vouchers which he placed in his pocket during your presence, the third voucher was also never found during weekly protocol checks. On 08/08/20 you used a similar voucher on your own shopping...

Gross negligence in the performance of your duties. On 06/08/20 whilst cashing up the above-mentioned customer assistant you breached multiple procedures. As the Manager in charge of the safe and cash on that day at that particular time you are fully responsible and accountable to ensure procedures are fully adhered to, however on this occasion you allowed breaches in the cashing up and voucher procedure.'

37. The letter went on to warn the Claimant that the outcome could be disciplinary action up to dismissal and inform him of his right to be accompanied.
38. Mr Wise conducted Cashier 15's disciplinary hearing on the morning of 21 September 2020. Insofar as the discussion was relevant to the Claimant, Cashier 15 said that he asked if he could take the vouchers and was told by the Claimant that he could. He intended to use the vouchers because the Claimant had told him that it would benefit the business. However, later that day or the next day he shredded them and threw them into the bin.
39. The Claimant's disciplinary meeting took place in the afternoon of 21 September 2020. At the meeting, the Claimant said that the four-eye principle could not be followed on 6 August 2020 because Cashier 15 had had an emergency. When asked about the nature of the emergency, the Claimant said he had no details, Cashier 15 had just said that he needed to leave. He maintained he was not aware that Cashier 15 had taken the vouchers as he had his back turned to Cashier 15 at the relevant time. Mr Wise said that the CCTV showed the Claimant next to Cashier 15. They viewed the footage again together and each maintained their own view of what it showed. When Mr Wise put to him that, "*you were both checking vouchers at the same time*", the Claimant said, "*I thought it was receipt voids*". As noted above, the CCTV showed "£5" written on the face of the vouchers; the Claimant's assertion that it showed receipt voids was implausible. When asked to account for why no vouchers were found at the store manager's cash audit, he said it was normal practice for magazine vouchers to be disposed of. When asked why he used the same type of voucher for his shopping on 8 August 2020, he said it was not the same voucher and he had nothing else to add. He emphasised that it was normal practice that the area manager was aware of for managers to cash up alone when a staff member needed to leave.
40. The Claimant brought a written statement which he handed to Mr Wise towards the end of the meeting. The statement said that Cashier 15 left due to a "*family emergency*", that the Store Manager was aware and gave the go ahead, and that this was normal practice in the store. In relation to the vouchers, it stated that it was normal practice for magazine vouchers to be defaced and disposed of rather than accounted for. Further, the four-eye principle was not followed to the letter in the store. The Claimant was following instructions and normal store culture, so it would be unfair to treat it as gross negligence in his case. The statement went on to say:

'I have not challenged the Store Manager or Area Manager as I wanted to avoid bullying and discrimination against my person and am not in the position of challenging their capabilities.

I believe I am being victimized against with these allegations of gross misconduct as I have previously raised a discrimination issue that occurred at the store and I find this treatment unfair.'

41. On being handed the statement, Mr Wise responded by asking the Claimant to explain why he felt unable to raise concerns, given that he said he was aware of the issues and continued not to follow company procedures. The Claimant replied that he did not want to be bullied. Mr Wise asked him to give any examples. We accept Mr Wise's evidence that while the notes record this question related to bullying, he was referring more broadly to the allegations of bullying and discrimination contained in the Claimant's statement, which he had just read. His evidence is supported by the disciplinary outcome letter which says, *"you state[d] that you felt you could not raise your concerns regarding this breach of Company procedure due to being discriminated and bullied against... I asked if there were any circumstances that you could tell me that would make you feel that would happen."* The Claimant replied, *"not right now"*. Mr Wise checked that the Claimant felt he had been able to explain his concerns during the meeting and the Claimant said that he had.
42. Following the disciplinary hearing, Mr Wise conducted further investigation by meeting with store workers the following day. One Deputy Store Manager confirmed that there were occasions when cashiers wanted to leave quickly and would be allowed to go without cashing up, explaining that *"we may write their initials on the cash sheet and let the cashier know if their till was ok or not"*. The remaining witnesses, who were all customer assistants, said that the correct process was followed. The Claimant was not shown the notes of these interviews, or the investigation or disciplinary notes relating to Cashier 15.

Dismissal

43. Mr Wise decided to dismiss the Claimant. His findings as set out in his dismissal letter dated 2 October 2020 were:
 - 43.1. In relation to the alleged breach of the cashing up procedure:

'I agree cash processes are not being fully adhered to by the whole store team, however, you are a manager and were aware of this breach. I feel as a manager, knowing this was happening, you had a responsibility of enforcing this procedure and you could not give any evidence that there would be consequences towards you for doing so.'
 - 43.2. In relation to the alleged breach of the voucher procedure:

'I believe that you knew vouchers were not to be used more than once and, on this occasion, you allowed a member of staff to have two of the vouchers with the intention of using them both. You then took the third voucher for yourself and used it on the 08/08/20 with your shopping. You stated that the cashier was behind you and that you did not see him take the vouchers but on viewing the footage, I disagree with this statement as it is clear that the cashier took the vouchers in clear view of yourself. It is my belief that you were fully aware that he took the vouchers, and therefore allowed the cashier to take two vouchers that had already been used with a potential loss to the Company of ten points. The PLU code on these vouchers is 2455, which is the same code that is on the voucher you used, so I believe the third voucher that was unaccounted for on 06/08/20 was used by yourself on 08/08/20 for your own shopping. This is fraudulent use of a voucher and a monetary loss of 5 pounds for the Company. These vouchers are uncommon and only given at a certain event which you could not confirm that you attended.'
 - 43.3. In relation to alleged gross negligence in allowing multiple procedural breaches:

'I disagree with your statement that because other members of the management team allegedly don't follow processes and procedures, you don't either, even when you are fully aware of the process that should be followed. As a manager within the store, you have a responsibility to protect both the business and colleagues by adhering to procedures and processes in place. To state you are just doing the same as someone else but acknowledge that it is not the correct process not acceptable.

You could not provide any examples where you feel that if you had raised concerns about these breaches, you would be discriminated against and I do not agree with this statement. There are also other ways of raising concerns, such as the whistleblowing hotline, which is anonymous.'

44. The letter went on to say that the disciplinary sanction for the first allegation would be a first written warning, but that the second and third allegations warranted dismissal. The Claimant said he received that letter two or three days later. The 2 October 2020 was a Friday. We find on the balance of probabilities that the date of his dismissal was 5 October 2020.

Appeal stage

45. The Claimant submitted an appeal against dismissal to Miss Axtmann on 7 October 2020. In his appeal letter he said Mr Wise had been biased and unfair in concluding that he took the third voucher himself, in the absence of direct evidence. He said the voucher he used for his shopping had been given to him by a family member. In relation to the alleged breach of the cashing up procedure, he said that there had been exceptional circumstances in that Cashier 15 had an emergency, and he had sought the Store Manager's approval. He further submitted that:

'I did not raise concerns because information are not been [sic] kept private and confidential at Lidl Barking and I feared that if I would have whistle blow on my line manager, anonymously would not have been kept and information would have seek [sic] through to my line manager.

...

I believe that this investigation and disciplinary has also been discriminative as Cashier 15 who took the vouchers without my knowledge ... is still employed ... whereas I have been dismissed. Cashier 15 investigation has led to my own investigation. I believe it was planned to get rid of me as there have been racial discrimination in Lidl Barking and I previously raised concern about it with you Lauren.'

46. Miss Axtmann met with the Claimant on 19 October 2020. At the appeal meeting, Miss Axtmann asked why the Claimant thought that Mr Wise had been biased and unfair. The Claimant said that he had been victimised and over the year he had raised lots of concerns regarding racial harassment at work and he was a victim of this. She asked him to elaborate, and the minutes show he said:

'There's been lots of racial harassment in the store which I've spoken about, the way certain individuals have been treated, even the way the rota has been structured. Also, up to recruitment in this store – I felt the store was more like a family business and I have been isolated from discussions in the store, like grievances [examples given] because of all this racial harassment, I find this comes on me now, to find a way to get rid of me. Also this investigation was open up from Cashier 15, because of vouchers, when the cashier is still working tin the store and I'm being given a capital punishment.'

47. Miss Axtmann then asked:

'At the topic of racial harassment, who did you raise your concerns to who you feel would now influence the outcome of this disciplinary process?'

48. The Claimant replied:

'With Akbab, last time in August, in the case of [names provided], which I was isolated from I felt that I was kept out of the agenda, and it was kept in secret from me.'

49. The Claimant said he had also raised concerns with Mr Miah in December 2019. They went on to discuss in further detail the matters the Claimant said amounted to racial harassment of colleagues. He emphasised that he thought he had been targeted because he had stood up against unfair situations in the store. He thought the disciplinary investigation had been a "set up", and that Mr Wise had been "strongly influenced" by Mr Aslam. He did not refer back to any previous conversation with Miss Axtmann herself or allege that she had provided information to Mr Aslam. The Claimant also reiterated that he had told Mr Miah that Cashier 15 had to leave due to an emergency, "and he was okay with it". He asked her to look at an inventory audit conducted in December 2019 which would support his contention that it was normal practice in the store not to process vouchers in accordance with the Till and Safe policy.

50. Miss Axtmann followed up by interviewing Mr Miah on 19 October 2020. During their meeting, Mr Miah stated that he had not been told that Cashier 15 would be leaving early and was not aware that Cashier 15 had any emergency on that day. Miss Axtmann asked him whether the Claimant had raised any concerns with him about racial harassment in the store. Mr Miah replied that the Claimant had not done so.

51. Miss Axtmann turned down the Claimant's appeal in a detailed 5-page letter dated 26 October 2020. She stated that she had found no indication that Mr Aslam had been involved in or influenced the outcome of the Claimant's disciplinary hearing. She found that Mr Miah had not been aware of the Claimant's concerns about racial harassment in the store, and therefore had not been influenced by these concerns when conducting his initial investigation into the voucher discrepancy. She had obtained the December 2019 inventory audit as requested by the Claimant and confirmed that it did show Healthy Start vouchers had been processed incorrectly; however, she did not accept this affected the disciplinary outcome. She had checked that Cashier 15 had received a disciplinary sanction (albeit, not dismissal), and was satisfied that the different outcomes were appropriate on the facts of the two cases. She had found no evidence of a conspiracy to remove the Claimant and considered that the conduct of the investigation following receipt of the CCTV evidence accorded with normal procedure. She had not found evidence to corroborate that Cashier 15 had left due to a family emergency or that the Claimant had sought permission from Mr Miah. In relation to the issue of whether the Claimant had taken a voucher, her findings were:

'I have found that on 6th August 2020, Cashier 15 processed 3 transactions of voucher PLU 2455. As shown on CCTV footage, these 3 vouchers were in cashier 15's till drawer when you cashed him up at the end of shift. Cashier 15 is captured on CCTV footage taking two PLU 2455 vouchers from his till drawer whilst being cashed up. Having investigated further, I have found that Cashier 15 says that he

was given permission by you to take two PLU 2455 vouchers. CCTV shows that the third PLU 2455 voucher is placed back in the till drawer. Three missing PLU 2455 vouchers were then identified during the weekly cash audit and Cashier 15 was investigated in relation to this, as Cashier 15 had processed the transactions with these 3 vouchers. From this investigation, 2 of the 3 missing PLU 2455 vouchers are traced back to Cashier 15; leaving 1 PLU 2455 voucher unaccounted for. I have conducted further investigation into the total number of PLU 2455 vouchers redeemed in week 32 in #599 Barking, and there were 4 PLU 2455 vouchers used in total. I therefore find it reasonable to believe that the final unaccounted-for PLU 2455 voucher was taken and redeemed by you on 8th August 2020, two days after you cashed up Cashier 15. This accounts for all 4 redemptions of PLU 2455 voucher in #599 Barking in this week (3 redeemed by customer transactions on Cashier 15's till on 6th August 2020, and 1 which I believe was redeemed by you on 8th August 2020).'

52. Miss Axtmann concluded that the Claimant's misconduct was so severe that it could not be negated by his length of service or clean disciplinary record. She upheld the decision to dismiss.

Submissions

53. In relation to the unfair dismissal claim, Mrs Williams submitted on behalf of the Respondent that there were reasonable grounds on which to form a belief in the Claimant's misconduct; namely, the CCTV evidence, inconsistency of explanation from the Claimant, and the Claimant's use of a voucher with the same PLU code as the missing voucher for his own shopping. Further, there was a reasonable investigation, including reasonable reliance on the selection of CCTV footage by head office. Mrs Williams acknowledged that the Claimant was not provided with the notes of the investigation and disciplinary meetings with Cashier 15 but submitted that the Claimant was told verbally that Cashier 15 alleged he had been given permission by the Claimant to take two vouchers. The dismissal decision was submitted to be within the range of reasonable responses, given that the Claimant was a manager with an obligation to set an example in following procedures. Taking a voucher for his own use was fraudulent and amounted to gross misconduct. Meting out a heavier sanction to the Claimant than Cashier 15 was reasonable because Cashier 15 had not used the vouchers, was in a junior position, and the Respondent believed the Claimant had told him that he could take the vouchers. In relation to the victimisation claim, Mrs Williams invited us to find that the Claimant had not done the alleged protected act. Miss Axtmann had no recollection that he raised an issue of race discrimination with her in July 2019. When she asked him in the appeal meeting, he did not say he had spoken to her about the issue previously. She investigated by speaking to Mr Miah, whose evidence to her and to the Tribunal was that the Claimant had never raised any concerns of race harassment or discrimination with him. Further, there was no evidence of a causal link to the dismissal. The Claimant felt that Mr Aslam was responsible but there was no evidence that anyone had told Mr Aslam that the Claimant had done a protected act, or that Mr Aslam had lent on Mr Wise to reach a decision to dismiss. To the contrary, the reason for dismissal was the clear evidence of misconduct and there was nothing to suggest that there had been any ulterior motive. In the alternative Mrs Williams argued there should be a substantial deduction in respect of the *Polkey* principle and contributory fault.
54. The Claimant submitted that the alleged breach of the cashing up procedure should not have been treated as misconduct because the correct procedure was not being implemented in the store at the time. This was acknowledged by the

Deputy Store Manager interviewed by Mr Wise. He had not allowed Cashier 15 to take two vouchers. Cashiers were allowed to rip up vouchers and put them in the bin, this was not something managers got involved in. At the time Cashier 15 took the vouchers he was not aware of it, because he did not consider the vouchers to be important and was focussed on the cash in the till drawer which he set out to count. It was an untidy till, with vouchers and receipts mixed up with notes, so it was common to take up a stack to sort by hand. The vouchers would be ripped up and thrown in the bin, which is what Cashier 15 in fact said that he had done with them. At no point did the CCTV show the Claimant personally taking a voucher. He agreed it showed Cashier 15 taking 2 vouchers and the Claimant with a voucher in his hand which he put back in the till. Had the full CCTV footage been provided, it would have shown him leaving the office without taking a voucher. There were no reasonable grounds on which to found a belief in misconduct. The CCTV showed Cashier 15 leaving the office, not the conversation between them. At the time when Cashier 15 put the vouchers in his pocket, the Claimant had his back turned. He presumed he would put the vouchers in the bin. The Respondent had failed to carry out a reasonable investigation. The full CCTV footage ought to have been obtained to show whether the Claimant took the last voucher or left it there. The Respondent's belief in misconduct was based on an assumption about what happened not proof. The target had been to dismiss him. He had been picked on as a scapegoat. His personnel record showed there had been no previous disciplinary issues over the previous 8 years. In relation to victimisation, Ms Dankofa agreed there had been harassment in the store. There was no point in him raising harassment and discrimination because it would be swept under the carpet. He was only being investigated and was dismissed because of his protected act. Miss Axtmann had given the information to Mr Aslam. There was no proper reason for Mr Aslam to start an investigation (i.e., by requesting the CCTV). There had been a plan to get rid of him which was why the CCTV footage was cut short and they had looked up his personal shopping.

The law

Unfair dismissal

55. Section 94 ERA provides that an employee with sufficient qualifying service has the right not to be unfairly dismissed by her employer.

56. Section 98 ERA provides so far as relevant:

In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

A reason falls within this subsection if it—

...

(b) relates to the conduct of the employee

(4) ... where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

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

57. The starting-point in misconduct cases is the well-known guidance in *Burchell v British Home Stores* [1980] ICR 303 at 304:

‘What the tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case’.

58. In *Turner v East Midlands Trains Ltd* [2013] ICR 525, Elias LJ (at paras 16–17) held:

‘... the band of reasonable responses test does not simply apply to the question whether the sanction of dismissal was permissible; it bears upon all aspects of the dismissal process. This includes whether the procedures adopted by the employer were adequate: see *Whitbread plc (trading as Whitbread Medway Inns) v Hall* [2001] ICR 699; and whether the pre-dismissal investigation was fair and appropriate: see *J Sainsbury plc v Hitt* [2003] ICR 111.’

59. It is not for the Tribunal to make its own assessment of the credibility of witnesses on the basis of evidence given before it (*Linfood Cash and Carry Ltd v Thomson* [1989] ICR 518). The relevant question is whether an employer, acting reasonably and fairly in the circumstances, could properly have accepted the facts and opinions which he did. The Tribunal must have logical and substantial grounds for concluding that no reasonable employer could have assessed the credibility of the witnesses in the way in which the employer did.

60. In looking at whether dismissal was an appropriate sanction, the question is not whether some lesser sanction would, in the Tribunal's view, have been appropriate, but rather whether dismissal was within the band of reasonable responses. The fact that other employers might reasonably have been more lenient is irrelevant (*British Leyland (UK) Ltd v Swift* [1981] IRLR 91).

61. A Tribunal should only find that a dismissal is unfair for inconsistency if the two cases in question were ‘truly similar’ (*Hadjioannou v Coral Casinos Ltd* [1981] IRLR 352 at para 25). The EAT in that case enjoined Tribunals ‘to scrutinize arguments based upon disparity with particular care’.

62. In cases where there is a procedural defect, the question that remains to be answered is whether the employer's procedure constituted a fair process. A

dismissal will be held unfair either where there was a defect of such seriousness that the procedure itself was unfair or where the results of the defect taken overall were unfair (*Fuller v Lloyds Bank plc* [1991] IRLR 336; see also *Slater v Leicestershire Health Authority* [1989] IRLR 16).

63. Procedural defects in the initial disciplinary hearing may be remedied on appeal provided that in all the circumstances the later stages of a procedure are sufficient to cure any earlier unfairness, according to the decision of the Court of Appeal in *Taylor v OCS Group Ltd* [2006] IRLR 613.

Victimisation

64. Section 27 EqA provides:

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

65. If the Claimant shows on the balance of probabilities that there are facts from which the Tribunal could decide that:

65.1. the Claimant did one or more protected acts (or the Respondent thought he may do in future);

65.2. the Respondent subjected the Claimant to detrimental treatment; and

65.3. the reason for the treatment was either a previous protected act, or a fear that the Claimant would do another protected act (such as making an allegation of discrimination) in the future;

then under s.136 EqA, the burden of proof passes to the Respondent to show that it did not victimise the Claimant.

66. A “detriment” exists if a reasonable employee would or might take the view that the treatment was in all the circumstances to his or her disadvantage: *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11; [2003] ICR 337 at [34].

67. The test of causation in a victimisation complaint is whether the relevant decision was materially influenced by the doing of a protected act. This is not a ‘but for’ test, it is a subjective test. The focus is on the ‘reason why’ the alleged

discriminator acted as he did (*West Yorkshire Police v Khan* [2001] IRLR 830). It is sufficient for the protected act to be a “significant influence” on the outcome (i.e., the same causal test as in direct discrimination): *Nagarajan v London Regional Transport* [2000] 1 AC 501, 513 HL. If the burden of proof shifts, the Respondent must show that the impugned treatment was not influenced (other than minimally or trivially) by the protected act(s).

68. The Court of Appeal emphasised the importance of focusing on motivation, rather than ‘but for’ causation in *Dunn v Secretary of State for Justice* [2019] IRLR 298 at [44], per Underhill LJ:

‘In the context of direct discrimination, if a Claimant cannot show a discriminatory motivation on the part of a relevant decision-maker he or she can only satisfy the ‘because of’ requirement if the treatment in question is inherently discriminatory, typically as the result of the application of a criterion which necessarily treats (say) men and women differently. [...] There is an analogy with the not uncommon case where an employee who raises a grievance about (say) sex discrimination which is then, for reasons unrelated to his or her gender, mishandled: the mishandling is not discriminatory simply because the grievance concerned discrimination.’

Conclusions

Unfair dismissal

69. The first issue to consider is whether the Claimant was dismissed for a potentially fair reason within Section 98 ERA 1996. As noted above, the Respondent relies on conduct, which is a potentially fair reason. The Respondent says it believed the Claimant had committed the following misconduct: a. a breach of company cashing up procedure, by cashing up alone; b. he had allowed a colleague to retain two discount vouchers and used one for himself, in breach of the voucher procedure; and c. he had been grossly negligent in the performance of his duties. The latter allegation is a reframing of the first two.
70. On application of the *Burchell* test, we reach the following conclusions.
71. The Respondent had a genuine belief in the Claimant's guilt. We accept the evidence of Mr Wise that he believed the Claimant had breached the 4-eye procedure when cashing up Cashier 15's till on 6 August 2020, allowed Cashier 15 to take two vouchers, and taken a third voucher himself and used it to purchase personal shopping. These were the matters in his mind which caused him to dismiss the Claimant. The reason for dismissal was therefore the Claimant's conduct.
72. The Respondent had reasonable grounds on which to base a belief in misconduct, comprising the CCTV footage, Cashier 15's account, the Claimant's own account, and the Claimant's shopping receipt.
- 72.1. The CCTV footage showed the Claimant and Cashier 15 looking at the vouchers together while having a conversation, and Cashier 15 retaining a voucher or vouchers while the Claimant replaced one in the till. Had the Claimant intended all the vouchers to be torn up and disposed of, there would have been no need to divide them up between them in this manner. It was reasonable for the Respondent's managers to conclude from viewing this footage, that the Claimant was aware Cashier 15 had taken vouchers.

- 72.2. The Respondent was also entitled to take into account Cashier 15's account at the investigation and disciplinary stages and had reasonable grounds to prefer his account to the Claimant's. The CCTV footage corroborated Cashier 15's evidence that he took two vouchers with the Claimant's knowledge and left one for the Claimant. The footage was also consistent with although not probative of Cashier 15's claim that the Claimant had given him permission to take two vouchers.
- 72.3. The Claimant's account shifted between the investigation and disciplinary stages. He initially said to Mr Miah that he could not remember cashing up on 6 August 2020, and then said to Mr Thompson that Cashier 15 might have left early due to an emergency. He told Mr Thompson that the voucher he used on his shopping on 8 August 2020 came from a magazine. However, when told that the voucher was a one-off event voucher, he said it may have come from family or friends. At the disciplinary stage, he said to Mr Wise that Cashier 15 left due to an emergency, the details of which he did not know. In the letter handed to Mr Wise, he said it was a family emergency. He also said at the disciplinary stage for the first time that Mr Miah was aware of and had authorised Cashier 15's absence. Mr Miah disputed this.
- 72.4. The Claimant himself accepted that the receipt of 8 August 2020 showed his own shopping and his use of a voucher. It was the same type of voucher as the missing voucher and used just two days after the voucher went missing. It was not a common type of voucher and had originally been distributed at a one-off event. Although there was no conclusive proof that the Claimant took the third voucher, this was strong circumstantial evidence pointing towards that conclusion.
73. The Respondent had carried out as much investigation as was reasonable in the circumstances. There were aspects of the investigation which could have been improved. The 45-second CCTV clip does not give the full context or show what the Claimant did after Cashier 15 left. It is unfortunate that the entire half hour requested was not provided to the investigation, as this would have given the Claimant the opportunity to identify if there was anything helpful to him in the longer clip. However, the shorter clip that was available provided the Respondent with a proper basis for conducting a further disciplinary investigation. We also considered that the Respondent's investigation into whether policies and procedures were being followed in the Stag Island store could have been more thorough; the interview with the other Deputy Store Manager and the December 2019 audit tended to corroborate the Claimant's contention that policies were being flouted, which was contextually relevant to aspects of his conduct. However, the standard to which the Respondent is held is one of reasonableness and not perfection. The Claimant was interviewed on four occasions. Matters which the Claimant raised in his defence were investigated, including by Mr Wise interviewing other store colleagues regarding policies and by Miss Axtmann interviewing Mr Miah regarding his knowledge of Cashier 15 leaving early, and whether the Claimant had previously raised concerns about racial harassment in the store. Overall, the investigation fell within the reasonable range.
74. There was also an aspect of the procedure followed that could have been improved, in that it would have been better for the Claimant to have seen and had

the opportunity to comment on the interview notes with Cashier 15, given that they were relied on by the decision-makers in his own disciplinary process. However, we accept Mrs Williams' submission that the Claimant had been informed of the gist of Cashier 15's account and had the opportunity to respond. Overall, we do not consider that this procedural defect was serious enough to render the process unfair to the Claimant.

75. We further conclude that the decision to dismiss was within the range of reasonable responses. The Claimant's conduct in cashing up alone, in breach of the four-eyes principle, was influenced by the practice in the store, which did not adhere strictly to the Till and Safe policy. However, the Claimant as Deputy Store Manager was in part responsible for the store's practice, and the Respondent was entitled to expect that he would set a good example. That conduct alone would have resulted in a warning and not dismissal. The allegation that the Claimant had allowed Cashier 15 to take two vouchers, and used one himself, was viewed more seriously. The fact that the practice in store was to deface and dispose of magazine vouchers, could not justify the Claimant's decision (as found by the Respondent) to allow vouchers to be reused and to use one for his own shopping. The Respondent as a retailer is entitled to take a zero-tolerance approach to fraud and dishonesty offences.
76. We have considered whether Cashier 15's case was truly similar, such that the difference in outcome made the Claimant's dismissal unfair (*Hadjioannou v Coral Casinos Ltd*). We conclude that it was not. Cashier 15 did not use the vouchers he retained for personal gain, and he was in a junior position to the Claimant.
77. We conclude that the Claimant was fairly dismissed.
78. Moving on to the claim for victimisation, it is accepted that the Respondent subjected the Claimant to a detriment by dismissing him. However, it is disputed whether the Claimant did a protected act, and further or alternatively it is disputed that there was any causal link between the protected act and the detriment.
79. The Claimant says that on 7 July 2020 he spoke to Miss Axtmann, in connection with a disciplinary investigation into another colleague, and told her that the allegation to this colleague was racially motivated and that Black staff members were being mistreated by managers. We have found that although the Claimant did speak to Miss Axtmann on 7 July 2020 regarding the disciplinary investigation into another colleague, on the balance of probabilities he did not during that conversation raise a concern that the allegation was racially motivated or that Black staff members were being mistreated by managers. Our reasons for making this finding are:
 - 79.1. The Claimant said in his appeal letter to Miss Axtmann, "... *there have been racial discrimination in Lidl Barking and I previously raised concern about it with you Lauren.*" However, when she specifically asked him during the appeal meeting who he had raised his concerns with, the Claimant did not reply that it was with her; rather, he said that he had raised them with Mr Miah. If the Claimant had made a disclosure to Miss Axtmann, the natural and obvious response during the appeal meeting would have been to say so, and if necessary to remind her of the conversation.

- 79.2. Miss Axtmann's evidence was that while she no longer had a clear memory of the conversation on 7 July 2020, she believed there was no mention of racial discrimination because if there had been, she would have taken it seriously and investigated it further. We accept that evidence because when the Claimant raised an allegation of discrimination in his appeal, Miss Axtmann did take it seriously and investigated it by interviewing Mr Miah. We consider that that if the Claimant had made an allegation of discrimination on 7 July 2020, it is likely that Miss Axtmann would have noted this and followed up on it.
- 79.3. The Claimant's own account has been inconsistent both in relation to the person he said he made a disclosure to (Mr Miah or Miss Axtmann) and in relation to his ability to challenge poor conduct in the store. During his disciplinary and appeal stages, he said that he was unable to challenge store culture because he was afraid of being bullied or discriminated against. However, he also told Miss Axtmann that he stood up against unfair situations in the store. He said in evidence that he was the focus point for minorities in the store as the manager who stood up for them.
80. Having found there was no protected act, it follows that the victimisation claim fails. However, for completeness we have gone on to consider whether, if we were wrong about the protected act, there was evidence from which we could infer that the Claimant was victimised as a result. The Claimant's case is that he made a protected act by a disclosure to Miss Axtmann, and she informed Mr Aslam of this, who in turn engineered the Claimant's dismissal, including by requesting CCTV footage after Mr Miah had closed his investigation.
81. We conclude there is not sufficient evidence from which we could infer victimisation. Miss Axtmann denied having told Mr Aslam that the Claimant had made an allegation of racial discrimination and emphasised that she was unaware of such an allegation until the Claimant put in his appeal. There is no contrary evidence that she did tell him. There is no basis for inferring that Mr Aslam had an ulterior motive for requesting the CCTV evidence; as we have found, the unexplained missing vouchers and the Claimant's use of a voucher for his own shopping, were the cause of Mr Aslam's concern. Mr Aslam was not a decision-maker in the Claimant's case. Mr Thompson, Mr Wise and Miss Axtmann conducted separate stages of the process. Mr Wise denied having discussed the outcome of the Claimant's disciplinary hearing with Mr Aslam. There is no reason to suspect that Mr Wise's decision-making was improperly influenced, because he had reasonable grounds for concluding that the Claimant had committed misconduct.

Employment Judge Barrett
Dated: 31 August 2022