EMPLOYMENT TRIBUNALS

Claimant: Mrs G Hegg

Respondent: Co-op Group Limited

HELD AT: Manchester **ON:** 17-18 January 2017

BEFORE: Employment Judge Slater
(sitting alone)

REPRESENTATION:

Claimant: Mr P Norman, counsel
Respondent: Mr J Boyd, counsel

JUDGMENT having been sent to the parties on 23 January 2017 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

Claims and issues

1. The claimant claimed unfair dismissal. The issues were agreed by the parties to be as follows:

Liability

1. Has the Respondent demonstrated that there was a fair reason for the Claimant's dismissal under either Section 98(1) or 98(2) ERA 1996?

2. Did the Respondent act reasonably in treating that reason as a sufficient reason for dismissal (Section 98(4) ERA 1996)? i.e. was the dismissal procedurally and substantively fair? If the dismissal was for gross misconduct: -

(i) Has the Respondent demonstrated that it genuinely believed the Claimant to be guilty of the misconduct alleged?
(ii) Were there reasonable grounds for such a belief?
(iii) Did the Respondent carry out a reasonable investigation?
(iv) Did the decision to dismiss fall within the band of reasonable responses?

Remedy

3. If the tribunal finds that the Claimant was unfairly dismissed, what, if any, is the appropriate amount of compensation for financial loss in all the circumstances, taking into account the Claimant's duty to mitigate her loss?

4. Did the Respondent fail to adhere to the ACAS Code of Practice on Disciplinary and Grievance Procedures?

5. If so, was that failure reasonable?

6. If so, would it be just and equitable to make an uplift in any compensatory award for the unreasonable failure to adhere to the ACAS Code of Practice?

7. If so, what percentage uplift should be made?

8. Does any act or omission by the Claimant after her dismissal give rise to a just and equitable reduction in her compensation? If so, by how much should compensation be reduced?

9. If the Tribunal find that a fair procedure was not followed, should any compensatory award be reduced to reflect the fact that following a fair procedure would have made no difference to the decision to dismiss?

10. Is it just and equitable to reduce any award because the Claimant's conduct caused or contributed to her dismissal?

The Facts

2. The claimant took over running of the Unsworth store where the claimant was already employed as a store assistant in 2007. The claimant had been employed there since 1983. In around March 2016 Julie Parker took over as manager of the Unsworth store.

3. On 9 June 2016, there was an incident which led to the claimant's dismissal. It is common ground that the claimant took a Twirl chocolate bar from the display, ate at least part of it behind the till and did not pay for it. The claimant says it was damaged produce which would have been wasted and she intended to pay for it later when paying for goods at the end of her shift, and that she put the wrapper behind the till to remind her to pay for it. The claimant bought goods of the value of around £20 at the end of her shift. The goods were put through, in accordance with procedure, by another employee. The wrapper for the Twirl bar was not rung through

so the claimant did not pay for it. The claimant says she did not remember she needed to pay for the bar and forgot all about it until she was required to attend an investigatory meeting on her next shift.

4. It appears, from a log compiled by the respondent's Human Resources of a call made by Julie Parker to them, that another employee found the wrapper behind the kiosk and that Julie Parker then viewed CCTV. Julie Parker did not give evidence in these proceedings.

5. The claimant's next shift at work was 11 June 2016. When she arrived for work, she was called into a meeting with Julie Parker. The claimant thought the meeting would be about a holiday request she had made but she was informed that it was an investigatory meeting into an allegation of gross misconduct surrounding theft of Co-op Group stock. Ms Parker asked the claimant the question, "Do you know it's against policy to eat and drink at the till and if you haven't paid for it?". The claimant replied, "Yes, Hilary had put up notice. I'd forgotten before and come back and paid for it". The claimant volunteered, therefore, that she had eaten something before and forgotten to pay for it and come back to pay when she remembered, and had referred to Hilary, who was a previous manager, putting up a notice. The claimant said she had only eaten items before paying on a previous occasion when it was an open packet at the till which had been damaged. Ms Parker put to her that this item was not open and the claimant went to the fixture, took the item, ate it and threw the wrapper away. The claimant did not respond with an immediate denial but replied that she must have been out of her mind. The claimant accepted in the investigatory meeting that she knew it was against policy to eat items before paying for them. The claimant said she remembered now eating something but did not remember what it was. Ms Parker told her that it was a Twirl.

6. At the end of the meeting, Ms Parker informed the claimant that she was suspended because she had admitted eating a chocolate bar and not paying for it. The claimant said to Ms Parker that she may have put the wrapper in the bin with receipts by mistake. She said she usually put it with her shopping; she had done it once before and paid for it the day after when she remembered. The claimant signed the notes of the meeting to indicate that they were agreed to be a true record.

7. There is no reference in the investigation notes to the claimant being offered a chance to view the CCTV. The employee relations log records that Ms Parker said that she had offered this and the claimant declined. We heard no evidence from Ms Parker. The claimant's evidence was that she was never given an opportunity to view the CCTV. I accept the claimant's evidence that this was her understanding. The claimant was not shown the CCTV footage at any time during the internal proceedings and the CCTV footage has not been disclosed in these proceedings. Mr Halliwell has told me in evidence that he appears to have lost the DVDs and that the relevant footage is no longer on the hard drive since this had been overwritten. The claimant has never, therefore, seen the CCTV. We have only Mr Holt's evidence in his witness statement on what he saw and presumably his witness statement was written some time after he had viewed the CCTV. Mr Holt said, at paragraph 9 of his witness statement, about this footage that it showed the claimant leaving her till and going to clear the baskets at the front of the store. From there, the claimant went to the confectionary section and picked what appeared to be a chocolate bar from the shelf. She then returned to clearing the baskets before going back to her till. The footage then showed the claimant eating the chocolate bar at the till until a customer

approached the till at which point the claimant put the chocolate bar down. Mr Holt does not, therefore, record that he saw anything on the CCTV which looked like the claimant throwing the wrapper in the bin. The appeal officer, Mr Halliwell, did not view the CCTV.

8. On 11 June 2016, Ms Parker gave the claimant a letter confirming the claimant's suspension. The allegation was stated to be theft of Co-op Group stock.

9. At some time after that investigation meeting, Julie Parker contacted the Employee Relations Call Centre for advice. The advice given was recorded as being that, although the evidence was strong on CCTV, the claimant was not admitting to theft and was stating that she forgot to pay. The advisers suggested further investigation, including Ms Parker exploring whether there was a culture of the claimant bringing empty wrappers to pay with her shopping to reinforce her claims that the claimant pays for anything consumed on shift. They also suggested that Ms Parker view CCTV of previous shifts to see if there was any further evidence of the claimant taking stock and consuming through shift. A later log of 13 June indicated Ms Parker told them that she had looked through some CCTV but found nothing and that colleagues were not willing to make statements.

10. Also around 11 June, Julie Parker contacted Keith Halliwell, the Area Manager, and told him that she had suspended the claimant and believed there was sufficient evidence to proceed to a disciplinary hearing. Mr Halliwell suggested that Chris Holt, Store Manager of the Holcombe Brook store, would be an appropriate person to chair the disciplinary hearing as he was relatively new to the area. Ms Parker contacted Mr Holt also around that time and Mr Holt agreed to chair the disciplinary hearing.

11. On 13 June 2016, Julie Parker wrote to the claimant requiring her to attend a disciplinary hearing with Mr Holt on 16 June. The allegation was again expressed as being theft of Co-op Group stock. Ms Parker advised in the letter that dismissal could be an outcome and advised her of her right to be accompanied at the meeting.

12. The disciplinary hearing took place on 16 June 2016. When Mr Holt arrived at the store he was given a pack of documents which comprised the notes of the investigation meeting, the till receipt, the suspension letter and the invitation to the disciplinary hearing. Mr Holt did not see, until these Tribunal proceedings, the Employee Relations log.

13. Mr Holt had a discussion with Ms Parker. There are no notes of Mr Holt's discussion with Ms Parker and whatever Ms Parker told Mr Holt was not put by Mr Holt to the claimant in the disciplinary hearing. Mr Holt says that Ms Parker told him that, when she took over the store, she had issued all staff with the respondent's purchasing policy and had got signed copies back, but she did not have a signed copy from the claimant. Ms Parker did not tell Mr Holt specifically that she had given the claimant a copy. Mr Holt says that Ms Parker told him that she had offered the claimant the chance to view the CCTV but the claimant had declined the offer. Neither Ms Parker nor Mr Holt, nor anyone else from the respondent, took any statements from the colleagues at the store as to practices there and the claimant's previous conduct. As previously noted, the Employee Relations log records Ms Parker as saying that colleagues were not willing to make statements.

14. At the start of the disciplinary hearing on 16 June, the claimant gave Mr Holt a letter from her. This referred to her long service at the store, both before and after the Co-op took it over. The letter also included the following:

> "May I say that I am truly sorry for not saving the offending crushed wrapper after removing it from the shelf and pay for it later with my shopping, which I'm sure if you ask my colleagues they will, I am certain, confirm this. I would be grateful if you would accept my apology and I assure that in the future I will keep to the rule and once the item is wasted throw it away in the appropriate box/basket."

15. Notes were taken at the disciplinary hearing and these were signed by the claimant as a true and accurate record of the meeting. One addition was made to the notes after the claimant's signature by Mr Holt, who put a note to the effect that this was what had been done (page 57 in the bundle). The CCTV was not viewed in the disciplinary hearing and Mr Holt did not offer the claimant an opportunity to see this.

16. The claimant said in the disciplinary hearing that she was embarrassed about the situation. She said the bar was crushed; she had meant to pay for it later. She suggested that Mr Holt could ask any of her colleagues that she always pays later. Mr Holt did not explore further with the claimant what she thought her colleagues could give information about. Mr Holt's exploration of the claimant's understanding of company policies was limited to asking the claimant whether she had been to a Co-op induction when they took over, without asking the claimant what that covered, and asking "you are aware of company policy regarding goods" to which the claimant replied "yes". Mr Holt did not show the claimant the written policy or ask her about her understanding of what was in that policy. Mr Holt's exploration of the claimant's intent was limited to saying "as far as you're concerned you forgot". The claimant replied "yes" and that she had done it before and paid for it the day after. Mr Holt asked no further questions about this previous incident.

17. Mr Holt then adjourned and consulted with Employee Relations. Their log records that Mr Holt wanted to dismiss the claimant. Mr Holt is recorded as saying, in connection with the outcome letter, that he was not sure if the claimant was admitting to theft or not. The adviser suggested some questions which may have gone some way to exploring whether the claimant had a dishonest intent. Mr Holt did not ask the claimant these questions.

18. After the adjournment, Mr Holt did not ask any further questions about the claimant's intention or the claimant's understanding of policies. Mr Holt recapped that the claimant took a chocolate bar and ate it without paying. He asked the claimant whether she was aware that was classed as theft. The claimant said "no". She had never done it before, other than when she paid for it the day after. Mr Holt likened the situation to shoplifting. It is common ground that the claimant got upset at this point. These points are not reflected in the notes. Mr Holt's addition to the notes after the claimant had signed them was "when discussing issue of theft Glenda sees it will be classed as theft". I accept the claimant's evidence that she went along with what Mr Holt was telling her; that it would be classed as theft, although she did not think it was. The claimant was clear throughout the disciplinary hearing that she always intended to pay for the chocolate bar but forgot.

19. Mr Holt took another adjournment. It was suggested that Mr Holt consulted again with Employee Relations at this point. However, it appears more likely to me from the timings of the meeting notes and the log, and the content of the log which records that Mr Holt had told the claimant she was dismissed for admitted theft of Co-op stock, that the adjournment was for Mr Holt to consider his decision and that he called Employee Relations again after he had dismissed the claimant.

20. After the adjournment, Mr Holt noted that the claimant had expressed remorse but said, "We still have taking products without paying". The claimant stated again that she did not do it intentionally. Mr Holt did not say that he had concluded that she had not intended to pay. Mr Holt told her that she was dismissed on the ground of gross misconduct for the theft of company products. He advised her of the right of appeal. He handed her the dismissal letter and read her the contents. The letter dated 16 June 2016 confirmed the claimant's dismissal for gross misconduct "due to admission of theft of group stock". The letter advised the claimant of her right of appeal.

21. I have considered whether Mr Holt formed the view at the time of dismissal that the claimant had a dishonest intent. I found his evidence very unclear and inconsistent on this point. His witness statement summarises at paragraph 44 the reason for dismissal in terms of a breach of policy. However, he informed the claimant in the meeting and in the outcome letter that she was dismissed for theft, and Mr Holt confirmed in evidence that this was the case. When asked why he wrote paragraph 44 as he did, if he concluded that the claimant was guilty of theft, he said to him it was the same thing, taking without payment. Mr Holt did not make any reference at that point to dishonest intention. Mr Holt did not appear to appreciate that dishonest intent was a requirement for theft to be established. At paragraph 14 of his witness statement he wrote:

> "Taking stock without paying for it first is regarded as theft and is a gross misconduct offence regardless of the value of the stock in question."

22. Mr Holt made no reference at this point to a requirement for dishonest intent for theft to be established. In an initial answer to a question from me as to what he understood by theft he said, "taking items without paying or intending to pay". The issue of the claimant's intent was not explored in the disciplinary hearing to any meaningful degree. Mr Holt was not explicit in his witness statement as to whether he had formed a view that the claimant had a dishonest intent and if so, why. In answer to a question from me as to what he based his conclusion on that the claimant did not intend to pay, he said she had selected the bar and consumed it without making payment. When questioned further he said he did not believe you could forget to pay for something. Mr Holt in his witness statement described the claimant as having been "caught" on a previous occasion. This was an entirely inaccurate way of describing what the claimant had said to him. The claimant had volunteered information that she had forgotten to pay, then returned to pay when she remembered. There was no suggestion that her return to the store to pay for the goods was prompted by anybody knowing about her having failed to pay.

23. I find that Mr Holt did not reach a conclusion that the claimant had thrown the wrapper away. He said in evidence that this was his assumption from viewing the CCTV but this was inconsistent with what he wrote in his witness statement about seeing her put the bar down.

24. I find on a balance of probabilities that Mr Holt did not reach a conclusion as to whether the claimant intended to pay for the chocolate bar or not. He did not appreciate that dishonest intent was an important element in deciding whether the charge of theft was proven. He conflated taking stock without paying for it first, which is a breach of the respondent's policy regardless of intent, with theft. Mr Holt did not take account of the claimant's long service and clean disciplinary record in assessing the likelihood of the truth of the claimant's assertion that she intended to pay but forgot, because Mr Holt did not understand intent to be relevant to his conclusion that the claimant was guilty of theft. Mr Holt accepted that the claimant was genuinely sorry for what she had done.

25. On the basis of Mr Holt's answers in cross examination, I find that Mr Holt took the view that, once he found gross misconduct, he should dismiss. I find, on a balance of probabilities, that he gave no real consideration to a lesser sanction, having regard to the claimant's length of service and clean disciplinary record.

26. The claimant appealed against her dismissal by a letter dated 17 June 2016. She set out a number of grounds of appeal in the letter. The fifth ground of appeal was stated as follows:

> "In the definition of theft I did not dishonestly appropriate the product as it was always my intention to pay for it."

27. Keith Halliwell was charged with dealing with the appeal. He was given a pack of information. This did not include the Employee Relations log. He did not review the CCTV footage since he understood that the content was not in dispute. He thought he had sent the DVDs of the footage to the respondent's solicitors during the course of these Tribunal proceedings, but it appears that he was wrong in this belief and that, on his evidence, he has mislaid them.

28. The appeal hearing took place on 24 June 2016. At this hearing, Mr Halliwell did not explore the issue of whether the claimant intended to pay for the item. He understood from the pack that she was saying she intended to pay. He did not investigate her assertion that she had done it before and paid when she remembered. Mr Halliwell asked the claimant what the Co-op policy was. The claimant replied that there was a sign up stating not eat on the tills and that there were open sweets behind the till. The claimant said others ate them. Mr Halliwell asked whether the claimant knew that the bar was not hers. The claimant said she did and she just forgot to buy it. Mr Halliwell did not explore further the claimant's understanding of the policy. Mr Halliwell asked the claimant what she thought should happen, and she said maybe a caution, slapped wrist or a letter.

29. On 5 July 2016, Mr Halliwell contacted Employee Relations. The log of that call records his description of the grounds of appeal without mentioning the ground relating to dishonest intent.

30. By a letter dated 5 July 2016, Mr Halliwell wrote to the claimant, informing her that he was not allowing her appeal against dismissal. He wrote that he could find no reason to change the earlier decision which still stands, and said he took into account the following reasons and considerations in reaching his decision:

> "You admitted that you took the stock without paying for it. You did not present any new evidence that would have altered the original decision. You did not present any mitigating factors that would have altered the original decision."

31. Mr Halliwell's answers to questions in cross examination suggest that, if he did reach a conclusion at the time as to dishonest intent, he did so purely on the basis that the claimant took the product and did not pay for it. For example, it was put to Mr Halliwell that he did not go into whether she intended to pay, and his reply was that he did not believe it was in dispute that stock was taken and not paid for. When asked about the evidence that the claimant did not intend to pay, Mr Halliwell referred only to the fact that she did not pay. I did not find Mr Halliwell's evidence that he reached a conclusion that the claimant did not intend to pay for the goods to be credible. If he had regarded this as something on which he needed to reach a conclusion, I consider it would have been recorded in the Employee Relations log. I find, on a balance of probabilities, that Mr Halliwell did not form a view at the time as to whether the claimant had an intention to pay for the goods but forgot to do so.

32. I deal now with some further evidence which is relevant to the *Polkey* and contribution issues rather than the fairness or otherwise of the dismissal.

33. The claimant's contract of employment and letter issued to her on the Co-op taking over the store at which she was employed make no reference to the respondent's purchasing policy. The respondent has a purchasing policy but I have no evidence on the date of its introduction. The policy includes the following point, which is stated to be of paramount importance, any breach of which would be regarded as gross misconduct and potentially resulting in dismissal:

> "Colleagues must make payment and obtain a signed receipt prior to consuming goods or removing them from the premises. Any consumption or use of goods before payment has been made will be viewed as misappropriation of the items and regarded as a gross misconduct offence."

There is also a provision stating that:

> "Damaged stock cannot be purchased or consumed by colleagues under any circumstances and should be dealt with through the usual wastage procedures."

Also that:

> "It is strictly forbidden for colleagues to take items from waste regardless of whether the stock has been scanned out as waste or not. The stock remains the property of the group at all times and any removal of waste will be regarded as a gross misconduct offence and could result in dismissal."

34. I find, based on the evidence of the claimant, that a previous manager of the store, Hilary, put up a handwritten note behind the tills that there was to be no eating or drinking behind the tills. I am not satisfied on the evidence before me that the claimant was ever given or shown a copy of the respondent's purchasing policy. The claimant says that she was not, and the respondent has produced no credible evidence that she was. The claimant only worked ten hours per week. It is possible

that, if Ms Parker did re-issue the policy, as Mr Holt said she told him that she had done, that the claimant missed out on seeing this by not being there at the time and being overlooked. The fact that Ms Parker did not have a signed copy from the claimant supports this possibility. I accept the claimant's evidence that she was not sent a copy of the employee handbook containing a copy of the policy. The respondent has produced no credible evidence to the contrary.

35. It is common ground that the claimant ate an item of stock i.e. the twirl chocolate bar, without paying for it first and did not pay for it subsequently. The claimant understood that she should not consume stock before paying for it. However, I accept that the claimant was not aware that this was regarded so seriously by the respondent that it was a matter for which she could be dismissed. I am not satisfied on the evidence that the claimant threw the wrapper in the bin. I note that the Employee Relations log records Ms Parker as saying that the wrapper had been found by another staff member behind the kiosk. I also note that Mr Holt's description of the CCTV footage does not support a finding that the claimant was seen on that footage throwing the wrapper in the bin.

36. I am not satisfied on the evidence before me that the claimant did not intend to pay for the item rather than, as she explained, she intended to pay for it but forgot to do so. I accept the claimant's evidence that there was a previous occasion on which she had consumed an item intending to pay for it later, had forgotten about it on the day and returned of her own volition on a day when she would not otherwise have been working, volunteering that she needed to pay for the item and then paying for it.

The Law

37. The law that I have to apply in relation to unfair dismissal is contained in the Employment Rights Act 1996. The burden is on the respondent to show a potentially fair reason for dismissal. Conduct is a potentially fair reason for dismissal. Once a potentially fair reason has been shown, section 98(4) provides 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 dismissal. This is to be determined in accordance with equity and the substantial merits of the case. The Tribunal must consider whether the procedure followed and the penalty of dismissal were within the band of reasonable responses.

38. In relation to a conduct dismissal, I am to be guided by the authority in *British Home Stores v Burchell [1979] IRLR 379*. I must consider whether the respondent had a genuine belief in the claimant's guilt and whether the belief was based on reasonable grounds and formed after a reasonable investigation.

39. Compensation for unfair dismissal is a basic award, and a compensatory award of such amount is just and equitable. In accordance with the principles set out by the House of Lords in *Polkey v A E Dayton Services [1988] ICR 142*, a Tribunal may reduce a compensatory award for unfair dismissal by up to 100% if there is evidence to suggest the claimant might have been fairly dismissed, either at the time she was dismissed or at some later date.

40. In section 122(2) of the Employment Rights Act 1996 there is provision for reducing the amount of the basic award to any extent where it would be just and equitable to do so because of conduct of the claimant before the dismissal.

41. In section 123(6) of the Employment Rights Act it states that where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the claimant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

42. To make a reduction in compensation because of conduct of the claimant, the authorities guide me that there must be culpable and blameworthy conduct on the part of the claimant.

Conclusions

43. I conclude that the respondent has shown that the dismissal was by reason of misconduct. The respondent dismissed the claimant because she had eaten a chocolate bar from stock without first paying for it. It was common ground that the claimant had done this. The respondent had, therefore, a genuine belief in these elements of the offence.

44. I have found that the respondent did not reach a conclusion at the time of dismissal as to whether the claimant had dishonest intent; the dismissing officer did not understand that this was a requirement for a finding of theft. I consider that the fact that the respondent miscategorised the conduct as theft goes to the fairness of the dismissal under section 98(4) of the Employment Rights Act 1996, rather than meaning that the respondent has not shown a potentially fair reason for dismissal.

45. I conclude, for these reasons, that the respondent has shown a potentially fair reason for dismissal, that reason being misconduct. However, for the reasons which follow, I conclude that the respondent did not act reasonably in dismissing the claimant for this misconduct.

46. The respondent charged the claimant with theft and described the reason for dismissal in these terms. A finding of theft required a finding that the claimant did not intend to pay for the item. It is distinct from a breach of a policy that stock must not be consumed before it has been paid for. I have found that Mr Holt did not appreciate that dishonest intent was an important element in deciding whether the charge of theft was proven. He conflated taking stock without paying for it first, which is a breach of the respondent's policy regardless of intent, with theft. Mr Holt did not explore the issue of intent to any meaningful degree in the disciplinary hearing and I have found that he did not reach a conclusion that the claimant had dishonest intent.

47. The claimant was consistent in saying that she had intended to pay for the item but forgot. The respondent did not genuinely believe the claimant to be guilty of theft, if theft is given its proper meaning, since Mr Holt did not address his mind to the crucial issue of dishonesty. The respondent did not have reasonable grounds for a belief that the claimant was guilty of theft since it had no belief that the claimant had a dishonest intent. The respondent did not carry out a reasonable investigation into whether the claimant was guilty of theft since Mr Holt did not explore the issue of intent to any meaningful degree. The appeal did not correct these defects. I found, on a balance of probabilities, that Mr Halliwell did not form a view at the time as to

the claimant's intent. It is particularly serious that the respondent attached the label of theft to the claimant's conduct because of the taint of dishonesty which accompanies that label.

48. The reason for which I have concluded the respondent dismissed the claimant was that she ate a chocolate bar without first paying for it. It is unclear to me whether, at the start of the investigation, the respondent suspected dishonest intent. From what was said at the investigatory hearing onwards, it appears that the investigating officer, the dismissing officer and the appeals officer did not understand that dishonest intent was required for theft to be established. If the respondent did not suspect dishonest intent, or came to realise that there was likely to be insufficient evidence to establish dishonest intent, the appropriate charge should have been breach of the respondent's policy, in particular, the part that prohibited consumption of goods without first paying for them and obtaining a signed receipt. This charge was not put to the claimant.

49. Whilst it was common ground that the claimant had eaten the chocolate bar without first paying for it, Mr Holt and then Mr Halliwell did not engage sufficiently with the issue of the claimant's knowledge, not only that this conduct was wrong but that it was a very serious matter which could lead to dismissal. The claimant admitted in the internal proceedings that she knew she should not have eaten the chocolate bar without first paying for it. She did not admit that she knew at the time it was a very serious matter. Mr Holt acted largely on the basis of assumptions rather than evidence, assuming that the claimant must have been well aware of the respondent's policy classifying such a breach as a matter of gross misconduct.

50. I conclude that the respondent could not be acting within the band of reasonable responses in dismissing the claimant without having established, on the basis of evidence rather than assumption, the culpability of the claimant. In these circumstances, I conclude that the respondent did not act reasonably in dismissing the claimant for misconduct. The complaint of unfair dismissal is, therefore, well-founded.

51. As agreed, I then went on to consider the *Polkey* and contributory conduct issues. In considering the *Polkey* issue, I have considered what the evidence is that the claimant would have been fairly dismissed if the defects in approach had not been present. On the basis of the evidence that was available to the respondent, I consider that they would have charged the claimant with breach of the staff purchase policy rather than theft, in particular the part of the policy prohibiting consumption of goods without first paying for them.

52. It is common ground that the claimant ate the chocolate bar without first paying for it. If the respondent concluded, on reasonable grounds, that the claimant was, or should reasonably have been, fully aware of the policy and, therefore, the seriousness with which this was regarded at the time of the offence, I consider that dismissal would be within the band of reasonable responses, despite the claimant's long service and previous clean disciplinary record. However, I do not consider that dismissal would be within the band of reasonable responses if the respondent concluded that the claimant was not aware at the time of the offence of the seriousness of this conduct. A warning would be appropriate in those circumstances.

53. On the basis of the evidence available to me, I consider this to be a case where it is too speculative for me to make a percentage assessment of the chances that the claimant would have been fairly dismissed for breach of the policy had the respondent conducted a proper investigation into the claimant's knowledge of the respondent's policy. There is no reliable evidence from the respondent that the claimant was ever given or shown a copy of the policy. Whilst she was aware that she should not eat stock before paying for it, which is a matter of common sense, I do not consider there to be any reliable evidence that the claimant was, or should have been, aware of the seriousness of this rule and the likely consequences if it was breached. I do not, therefore, consider it just and equitable to make any reduction in the compensatory award on the basis of a chance that the claimant would have been fairly dismissed if the respondent had approached matters correctly.

54. In relation to contributory conduct, I consider that the claimant was guilty of culpable and blameworthy conduct in eating the chocolate bar without first paying for it. She knew this was wrong at the time she did it. However, I am not satisfied that she appreciated that this was a very serious matter for which she could be dismissed. There is a causal link with her dismissal since this led directly to her dismissal. I consider it just and equitable that there should be some reduction in both the basic award and compensatory award because of this conduct. However, since I am not satisfied that the respondent had made the claimant aware of the potential seriousness of such an offence, I consider it just and equitable that the reduction should be towards the lower end of the scale. I consider a reduction of 25% in both the basic and compensatory awards to be appropriate.

55. After giving my oral judgment on liability and the *Polkey* and contribution issues, the parties agreed the amount of compensation to be paid to the claimant.

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Employment Judge Slater

17 February 2017

REASONS SENT TO THE PARTIES ON

23 February 2017

FOR THE TRIBUNAL OFFICE