



3. The issues the Tribunal had to determine were:
  - a. Was the claimant dismissed because of his conduct?
  - b. Was his dismissal fair in all the circumstances in terms of Section 98(4) of the Employment Rights Act 1996 (the ERA)?
  - 5 c. Was his dismissal procedurally fair?
  - d. What if any remedy should be awarded?
4. The parties prepared a single set of productions. Scott Menzies, Group Service Manager gave evidence for the respondent. The claimant gave evidence on his own account.
- 10 5. In relation to the issues that had to determined the Tribunal made the following material findings in fact.

### **Findings in Fact**

6. The respondent is a company engaged in motor retail, repair and maintenance. It employed the claimant from 8 March 2010. At the time of his dismissal on 2 August 2016 the claimant was employed as a Warranty Administrator in the Service Department at Hamilton. He reported to Brian Shirlaw, Service Manager.  
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7. In early July 2016, as part of routine credit control the Finance Department became aware that it had not received a total of £1,613.06 customer cash payments that had ostensibly been paid by the customers to service advisers in the Service Department.  
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8. Scott Menzies, Group Service Adviser was aware that David McBennett, Head of Business at Hamilton thought there was an administrative error and along with Mr Shirlaw had started an investigation. This involved speaking to the service advisers and checking that the customers had made the cash payments. Mr Menzies was not involved in the investigation.  
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9. Mr McBennett ascertained that on the following dates the customers had made cash payment to the service advisers but the Finance Department had not received the payments:

	Customer McL	14 May 2016	£39.95
	Customer G	14 May 2016	£78.11
	Customer W	14 May 2016	£534.35
	Customer C	7 June 2016	£323.50
5	Customer CG	10 June 2016	£280.42
	Customer C	10 June 2016	£100.80
	Customer P	23 June 2016	£39.95
	Customer D	28 June 2016	£176.03
	Customer J	7 July 2016	£39.95

10 10. The Service Department procedure for processing cash payments was as follows:

i. The customer gave the cash payment to the service adviser. The customer was given possession of their car. The service adviser would go to the claimant's office and deposit the cash in a cash box.  
15 The service adviser would record the cash payment on a cash summary sheet for that date.

ii. At the start of the day if there was a cash summary sheet for the previous day the claimant would:

a. obtain the key for the cash box from a drawer in Mr Shirlaw's office (there being no other reason to be in Mr Shirlaw's office at  
20 that time of day otherwise). If Mr Shirlaw was on holiday the claimant would take the key from the cash box from either his own or Nicola Carson's (Service Adviser) desk drawer.

b. The claimant would take the cash out of the cash box in the sum that was recorded on the cash summary sheet, occasionally taking change from the security guard if there was  
25 insufficient change in the float in the cash box to make up the exact amount shown on the cash summary sheet.

c. The claimant would get an envelope and place the cash summary sheet and the cash in it. He would then place that  
30 envelope in his desk drawer.

iii. When Callum Kennedy, Administration Officer, delivered/collected internal mail, the claimant would give the envelope containing the

cash summary sheet and the cash, which was in his desk drawer to Mr Kennedy.

5                   iv.   Mr Kennedy would check the contents of the envelope, check the amount of cash in the envelope corresponded with the sum shown on the cash summary sheet, take a copy of the cash summary sheet and give a copy of the cash summary sheet to the claimant for retention in the Service Department and put the other copy back in the envelope with the cash and then place the envelope in the safe for the Finance Department staff to collect and process with all the other cash payments from the other parts of the business on that day.

10                   v.   When the cash payments for the Service Department were received and processed by the Finance Department this generated an entry for "Service" on the daily cash received sheet for that day together with a note of the amount of the payment received and the date on which it was received. This allowed for a paper trail to ascertain the breakdown of customers and amounts paid by them by referring to the relevant cash summary sheets so that it could be ascertained which customers had paid and which had apparently not.

15                   vi.   Occasionally there may be more than one cash summary sheet processed for a particular day and for a payment to be processed by the Finance Department more than a day after it was received from the customer. Eventually all cash payments which were received and for which the cash summary sheets were generated and retained in the Service Department were eventually processed, paid into the respondent's bank account and shown on the daily cash received sheets.

20                   11.   The claimant was primarily responsible for processing cash payments in the Service Department. Occasionally Ms Carson undertook these duties. During the period in which cash payments were missing there were no occasions when the claimant was not responsible for the process in the Service Department.

25                   12.   Having established that in respect of the missing cash payments each of the customers said that they had made the payment and were in possession of

their cars, Mr McBennett checked that all the service advisers who received the missing payments had followed the procedure at paragraph 10i above. He then checked and found that in respect of each of the payments there was no cash summary sheet relating to that payment either in the Service Department or the Finance Department. Mr McBennett also viewed CCTV footage.

13. On 16 July 2016 Mr McBennett had a meeting with the claimant at which Mr Shirlaw took notes (the 16 July Meeting) (production 170). The claimant confirmed:

- i. The procedure for processing cash payments in the Service Department.
- ii. He would only retrieve the cash box key from Mr Shirlaw's office if there was a cash summary sheet.
- iii. Normally there was only one cash summary sheet per day but occasionally there may be multiple transactions on different cash summary sheets.
- iv. The cash summary sheets were kept on a shelf at the printer and that cash box was kept in a cupboard under the printer.
- v. He always gave the envelope containing the cash and cash summary sheet to Mr Kennedy and was not aware of ever having forgotten to do so.
- vi. He did not know anything about missing cash payments.
- vii. A lot of people had access to the cash box.

14. Mr McBennett said that he had viewed CCTV footage, which was inconsistent with what the claimant had said. Accordingly, the claimant was being suspended on full pay to allow the investigation to continue. The claimant said that he was being made a scapegoat.

15. Around this time Mr McBennett informed Mr Menzies that the investigation had taken a turn and there was a bigger problem than expected. Mr Menzies was provided with no further information at this stage.

16. Mr McBennett met the claimant on 19 July 2016 (the 19 July Meeting). Mr Shirlaw again took notes (production 175). The claimant was shown CCTV footage from 30 June 2016 (the 30 June Footage). The claimant confirmed that the 30 June Footage showed him following the procedure.
- 5 17. Next the claimant was then shown CCTV footage from 8 July 2016 (the 8 July Footage). The claimant confirmed that it showed him getting an envelope from a drawer. The claimant said that he assumed that he was doing the banking but could not say for sure. When Mr Kennedy entered the claimant's office the claimant did not give him the envelope. The claimant was informed that the cash for that day had not been banked albeit that the customer had paid. The claimant said that he could have forgotten and did not know what day he would have handed it in.
- 10 18. The claimant was then shown CCTV footage from 29 June 2016 (the 29 June Footage). The claimant accepted that it showed that he had cash in his hand and appeared to be getting an envelope. The claimant assumed that he was doing the banking. There was a discussion about the claimant holding a large bundle of cash. The claimant said that he did not know anything about missing money. It was pointed out that the claimant appeared to have put the envelope in his desk drawer. The claimant was then asked to look at footage from the end of the day. It showed the claimant putting his bag on the floor. He was asked what he was putting into his bag. The claimant said it could be juice, a lunchbox or anything. Mr McBennet confirmed that he had spoken to other members of staff but no one else had been suspended.
- 15 20 19. Mr McBennett spoke to Andrew McKnight, Driver on 20 July 2016 about the Customer W cash payment (production 180). Mr McKnight confirmed that he and another driver delivered the car to Customer W on 14 May 2016. Customer W gave Mr McKnight cash to pay the service bill, which was in an envelope. The drivers counted the cash then returned to Hamilton and gave the envelope containing the cash to Ms Carson who also counted the cash in front of them. During the meeting Mr McKnight volunteered that he had lent money to the claimant the previous year, which had been repaid. A
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further loan had been given to the claimant on 29 April 2016. Mr McKnight had also lent the claimant various small amounts of cash.

20. Mr McBennett then spoke to Ms Carson on 20 July 2016 (production 181). Ms Carson confirmed that Mr McKnight and the other driver gave her the money paid by Customer W, which she counted with the drivers and “*would have put the money into the tin*”. She said that the next time someone would have handled this cash would have been Monday 16 May 2016 when banking was done for the weekend transactions. Ms Carson confirmed that the service advisers knew where the cash box was located but that the claimant did the banking. Ms Carson said that when cash is taken there would be a cash summary sheet. It was not a normal regular occurrence for the cash summary sheets to be missing. She could offer no explanation why the cash from Customer W was missing, nor could she provide an explanation as to why money banked on 16 May 2016 related to payments made to service advisers on 4 and 9 May 2016.
21. Mr McBennett again met the claimant on 21 July 2016 (the 21 July Meeting). Mr Shirlaw took notes (production 182). The claimant was shown a close-up recording of the 8 July Footage. It was explained that Mr Kennedy had visited the claimant’s office on a second occasion that day. Mr Kennedy was not handed an envelope on that occasion either. It was suggested that the 8 July Footage showed the envelope being put into the claimant’s bag. The claimant was asked what was he putting into his bag. The claimant reiterated that it might be cereal bars or a lunch box.
22. The claimant was then asked about the 29 June Footage. It could be seen that the claimant had a bundle of cash in his hand. The claimant accepted this but did not say that it was £176.03 that was missing from 28 June 2016. Mr McBennett said that no envelope was passed to Mr Kennedy on 29 June 2016. Mr McBennett said that he was believed from the 29 June Footage that the claimant had taken the cash from this day.
23. The claimant was also asked about the daily cash received sheet for 16 May 2016 (production 66). This showed that cash received on 4 and 9 May 2016 had not been banked by the Finance Department until 16 May 2016.

The claimant said that he did not look at the dates on the cash summary sheets.

24. When asked about the Customer W cash payment the claimant said that Ms Carson had been worried about this payment and had not been sure where she had put the money from this customer.
25. The claimant was asked whether he had any money or personal issues of which Mr McBennett should be aware. The claimant referred to money that he had borrowed from Mr McKnight. The claimant confirmed that he borrowed money from his colleague before.
26. Mr McBennett said that from looking at the CCTV footage and the process, which the claimant confirmed he followed when banking, Mr McBennett believed that the customer cash payments were put in an envelope and this envelope was then put into the claimant's bag. The claimant said it could not be said 100 percent that it was an envelope he was putting into the bag. The claimant was advised that the matter would be referred to the Police. The claimant acknowledged that he understood why this was necessary.
27. Mr McBennett spoke to Richard Scott, Security Guard on 21 July 2016 (production 186). Mr Scott was shown the 29 June Footage and asked if he recalled giving change to the claimant. Mr Scott confirmed that there had been three or four occasions over the last few months when the claimant had asked him for change. He did not know the reason why the claimant required change.
28. On 21 July 2016 Mr McBennett spoke to Tom King, Valet and asked if he recalled any times when the claimant had asked for change from Mr Scott, (production 185). Mr King could not recall having seen that or he was never asked for any change.
29. On 25 July 2016 Mr McBennett met Mr Kennedy. Mr Shirlaw took notes (production 187). Mr Kennedy explained that when collecting cash payments from the Service Department he would take a copy of the cash summary sheet and leave one copy with the Service Department. The other



copy was given to Administration along with the cash. Mr Kennedy said he did not really check the dates on the cash summary sheets. He confirmed that the cash always matched the amount on the cash summary sheets and he usually dealt with the claimant.

- 5 30. In terms of the respondent's disciplinary policy an example of gross misconduct is theft from the company, fellow employees, visitors or customers (production 37). The procedure provides that following investigation if an investigating manager determines that there is a case to answer the employee will attend a disciplinary hearing. At the disciplinary hearing, the employee has a right to be accompanied by a work colleague. The employee's departmental manager or appropriate manager will conduct the disciplinary hearing. If the disciplinary case against the employee is established the disciplining manager can decide what disciplinary action if any is to be taken. The level of the action depends on the nature of the misconduct and can range from a verbal warning up to summary dismissal. The procedure also includes the right of appeal.
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31. On 25 July 2016 Mr McBennett met Mr Menzies and provided Mr Menzies with the investigation notes, the cash summary sheets and the daily cash received sheets. Mr Menzies also had an opportunity to view the CCTV footage. Mr Menzies decided that the claimant should be invited to a disciplinary hearing.
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32. Mr Menzies wrote to the claimant on 26 July 2016 inviting him to attend a disciplinary hearing on 29 July 2016 (the Invitation Letter) (production 189). The Invitation Letter said that it was alleged that the claimant was responsible for missing cash payments from the Service Department amounting to £1,613.06. The claimant was provided with the individual transaction dates and amounts making up the total. The claimant was informed that at the time of writing the letter all but two customers had been contacted and had confirmed that they had made these payments in cash.
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- 30 The claimant was informed that Mr Ferguson, HR Manager would accompany Mr Menzies and that the claimant was entitled to be accompanied by a work colleague of his choice. The claimant was informed

that the respondent considered the allegations as gross misconduct and that a possible outcome could be summary dismissal.

- 5 33. On 27 July 2016, the claimant sent an email to Mr Ferguson requesting a copy of a witness statements and a copy of the CCTV footage, which were referred to in the Invitation Letter. Mr Ferguson emailed the witness statements to the claimant on 28 July 2016. He also confirmed that as the claimant requested, Mr McKnight and Mr Kennedy would be available to attend the disciplinary hearing to answer any questions the claimant may have (production 204).
- 10 34. At the disciplinary hearing on 29 July 2016 the claimant was accompanied by Mark Brown (production 193). The claimant prepared an opening statement, which he read aloud. The claimant believed that he had been singled out as a scapegoat for the offence and that Mr Menzies had decided that the claimant was guilty before a full investigation was carried out. The claimant said that although he had been suspended on full pay his wages had not been transferred to his bank account and this was unlawful. He felt that the suspension was not a punishment but a procedure. He also believed that a fair investigation had not been carried out. Not every employee had been interviewed and some of these employees had an opportunity to take the money. He felt that all these factors indicated that he had already been singled out as the culprit without a full investigation to collate all evidence.
- 15 35. It was noted that the claimant said that Ms Carson told him that she had once left £1,300 out over the weekend but there was no mention of that in her witness statement.
- 20 36. Mr Kennedy joined the disciplinary hearing. Mr Kennedy confirmed that about 30 percent of the time the claimant would bring the banking envelope to him. Mr Kennedy agreed that the cash in the envelope had to be the same as the amount marked on the summary sheet. Mr Kennedy also agreed that there were occasions where more than one cash summary sheet would be banked in one day. Mr Kennedy said that he had never noticed the dates on the cash summary sheets.
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37. The claimant said that Mr Kennedy's evidence supported that he had forgotten to give Mr Kennedy the envelope and had taken it along to him at a later stage. Although there was footage of the claimant having money in his hand there was no evidence that this was the £176.03 that was missing from 28 June 2016. None of the evidence showed beyond doubt that he had taken the money. It was up to the company to prove that he had taken the money and not up to him to prove that he had not. Mr Ferguson advised that Mr Menzies would form a reasonable belief based on the balance of probabilities in making his decision.
38. The claimant then referred to money that he had borrowed from Mr McKnight and asked if Mr McKnight could attend to verify that a payment plan was in place. It was confirmed that if that was the only point that the claimant wished to make Mr Menzies was happy to accept that without verification from Mr McKnight.
39. The claimant said that insufficient attention had been paid to Mr Kennedy's comments that he did not pay attention to the dates. The claimant had asked Mr Scott for change because as Mr Kennedy had confirmed the exact amount of money had to be in the envelope. The claimant said he could have given the banking money to Mr Kennedy another time or taken it along to Mr Kennedy himself.
40. As regards positioning of the bag in the office the claimant said that he would choose to bring his bag down lower to the ground to put something in it other than put his bag upon a shelf. He did not consider that the CCTV footage showed clearly what he was putting in or taking out of his bag. It could have been cereal bars, his telephone or a wallet. The claimant produced an envelope and said that his P60 in the envelope which he had had in his drawer for weeks and had to keep moving it when he was going into his drawer for something. He put this in his bag so that it could have the envelope he was putting in his bag rather than the envelope with money. The claimant said he did not gauge where he put his bag. It was easier to put it down beside the desk rather than carry it to put something in his bag in the cupboard.

41. The claimant read out a summary as follows:

*"To summarise what you have, in my belief is:*

1. *Incomplete investigation.*
2. *An unfair investigation.*
- 5 3. *Unlawful holding of wages.*
4. *Singling out one employee without a full investigation.*
5. *CCTV footage that is unclear on what you say the allegations I am guilty of (putting cash in bag).*
6. *CCTV footage (carrying out the cashing up procedure but no*  
10 *concrete evidence that the sheets and cash in question are in actual fact the sheets and cash in the footage).*
7. *Admission of a Senior Service Adviser verbally to me that in actual fact the cash tin on occasion has been left out over the weekend, whilst I was on holiday with large amounts of money in it, which*  
15 *shows a lack of level security adhered to.*
8. *Inaccurate information in the sheets.*
9. *Missing information that is crucial from the statements.*
10. *Questions asked of me by Mr McBennett about other people's statements that in viewing the statements were actually not true.*
- 20 11. *Flawed and incomplete investigation. All employees should have been interviewed."*

42. In relation to the non-payment of the claimant's wages Mr Ferguson said that he believed that the decision to withhold the claimant's wages was likely to have been a precautionary measure and should it be decided that  
25 he was not responsible for the missing money he would have his wages paid in full into his bank account.

43. Mr Menzies asked the claimant if the cash was missing and it was not the claimant who had taken it what did he believe had happened. The claimant said that somebody else must have taken it. Mr Menzies asked who the  
30 claimant thought had taken it. The claimant said other people had access to the cash but he would not like to say who had taken it. When Mr Menzies

asked the claimant to say whom he thought had taken it the claimant said he did not know and added that someone had to be doing it.

44. The disciplinary hearing was adjourned to allow Mr Menzies to consider the matter. Mr Menzies had asked Mr McBennett to clarify Ms Carson's position in relation to the Customer W cash payment. Ms Carson denied that she had told the claimant that she could not remember putting the cash in the cash box. She confirmed that she had put it in the cash box.
45. Mr Menzies reviewed the 29 June Footage. He believed that:
- i. It showed the claimant carrying out the procedure for cash payments, which the claimant did not deny.
  - ii. It showed the claimant getting change from Mr Scott, which the claimant did not deny.
  - iii. If the Customer D cash payment had not been recorded on the cash summary sheet and put in the cash box on 28 June 2016 there would have been no reason for the claimant to have carried out the procedure for cash payments on the morning of 29 June 2016. The claimant had accepted that unless there was a cash summary sheet there was no reason for him to open the cash box and handle cash the cash.
  - iv. Although the claimant did not admit that he was processing the Customer D cash payment he did not in Mr Menzies' view offer a plausible explanation as to what it could be.
  - v. The claimant was carrying out the cash procedure for the Customer D cash payment of £176.03, which had been paid by Customer D on 29 June 2016.
  - vi. When Mr Kennedy was in the claimant's office the claimant had not passed the envelope obtaining the cash payment and the cash summary sheet that he had placed in his drawer to Mr Kennedy. The claimant said that he might have taken the envelope to Mr Kennedy later. Having reviewed the all the 29 June Footage there was nothing to suggest that the claimant had left his office with an envelope.

- vii. It showed the claimant taking an item from his desk drawer and placing it in his bag. The claimant did not deny that he could be seen taking an item from his drawer and putting it into his bag but denied that it was the Customer D cash payment.
- 5 viii. The way in which the claimant took the item from the drawer and put it in his bag showed that he was attempting to conceal what it was that came from his drawer that he was placing in his bag.
- ix. The only explanation offered by the claimant was that it could be a lunchbox, cereal bars, a juice carton, wallet or an envelope containing his P60.
- 10 x. The claimant was unable to offer any plausible explanation as to what happened to the Customer D cash payment.
- xi. The claimant had stolen the Customer D cash payment of £176.03 received on 28 June 2016 with the corresponding cash summary sheet recording that payment.
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46. Mr Menzies then reviewed the 8 July Footage. He believed that:

- i. It showed the claimant carrying out the procedure for cash payments, which the claimant did not deny.
- ii. If the Customer J cash payment had not been recorded on the cash summary sheet and put in the cash box on 7 July 2016 there would have been no reason for the claimant to have carried out the procedure for cash payments on the morning of 8 July 2016. The claimant had accepted that unless there was a cash summary sheet there was no reason for him to open the cash box and handle cash the cash.
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- 25 iii. Although the claimant did not admit that he was processing the Customer J cash payment he did not in Mr Menzies' view offer a plausible explanation as to what it could be.
- iv. The claimant was carrying out the cash procedure for the Customer J cash payment of £39.95, which had been paid by Customer J on 7 July 2016.
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- v. When Mr Kennedy was in the claimant's office the claimant had not passed the envelope obtaining the cash payment and the cash

summary sheet that he had placed in his drawer to Mr Kennedy. The claimant said that he might have taken the envelope to Mr Kennedy later. Having reviewed the all the 8 July Footage there was nothing to suggest that the claimant had left his office with an envelope.

- 5 vi. The claimant took an item from his desk and placed it into his bag after he is seen carrying out the banking process. The claimant did not deny he could be seen taking an item from his drawer and putting it into his bag. He denied that it was the Customer J cash payment.
- vii. The way in which the claimant took the item from the drawer and put  
10 it in his bag showed that he was attempting to conceal what it was that came from his drawer that he was placing in his bag.
- viii. The only explanation offered by the claimant was that it could be a lunchbox, cereal bars, a juice carton, wallet or an envelope containing his P60.
- 15 ix. The claimant was unable to offer any plausible explanation as to what happened to the Customer J cash payment.
- x. The claimant had stolen the Customer J cash payment of £39.95 received on 7 July 2016 with the corresponding cash summary sheet recording that payment.

20 47. Mr Menzies was satisfied that the same service adviser did not receive the other missing cash payments. In carrying out the cash payment procedure, the claimant was the only person to have control of all the cash payments. Mr Menzies believed it was more likely that one person rather than a combination of different service advisers was responsible for all the other  
25 missing payments. The only evidence offered by the claimant was that other people had access to the cash box as well as himself.

48. Mr Menzies believed that all the service advisers who received the missing payments knew nothing about the payments going missing and that they had followed the procedure for processing cash payments.

30 49. Having reached the conclusion that he did in relation to the claimant's responsibility for the theft of the Customer D cash payment and Customer J cash payment and believing that it was the claimant who was in control of

the other cash payments in carrying out the cash payment process, Mr Menzies believed that it was the claimant who had taken the other cash payments.

50. Mr Menzies considered whether to dismiss the claimant in the  
5 circumstances. Had Mr Menzies not seen the 29 June Footage and the 8  
July Footage he would not, on the evidence available to him, have  
dismissed the claimant. He also placed little weight on the fact that the  
claimant borrowed money from Mr McKnight and was repaying him. Mr  
Menzies was aware that the claimant had previous misconduct regarding  
10 misappropriation of the respondent's money. The only bearing that this had  
on Mr Menzies' decision was that having been through the process the  
claimant was aware of the disciplinary procedure. Nonetheless Mr Menzies  
considered that in relation to the cash payments for Customer D and  
Customer J the claimant did take this money and given his position of trust  
15 Mr Menzies felt that he had no alternative but to dismiss the claimant  
summarily. Mr Menzies had not been involved in any decision to withhold  
any of the claimant's wages.

51. Mr Menzies wrote to the claimant by letter dated 1 August 2016 advising  
him of the decision and the reasons for it (the Outcome Letter) (production  
20 199). The claimant was advised of his right to appeal to Willie Cumming,  
Group After Sales Director within five working days of receipt of the  
Outcome Letter. The claimant did not exercise his right of appeal.

52. At the date of termination of employment, the claimant was 40 years of age.  
The respondent had continuously employed the claimant for six years. The  
25 claimant's gross weekly basic pay was £512.69. His normal weekly take  
home pay was £411.45. The respondent's annual pension contributions  
were £211.68. The claimant was in receipt of Jobseekers' Allowance. He  
found alternative employment on 12 September 2016. The claimant's net  
weekly pay in his new employment is £362.60. Since finding alternative  
30 employment in September 2016 the claimant had not looked for any other  
alternative employment.



*Observations on Witnesses and Conflict of Evidence*

53. The Tribunal found Mr Menzies to be a reliable and credible witness. He had no animosity to towards the claimant. Mr Menzies was candid; he readily acknowledged that the banking process was not always adhered to and that there were several irregularities for example more than one cash summary sheet for each day and payments not being passed to the Finance Department on the next banking day.
54. The claimant believed that he was made a scapegoat because he did not take the cash. The claimant accepted that the cash was missing. The Tribunal was not convinced that the respondent was making the claimant a scapegoat. The issue of the missing cash came to light through routine credit control (the debtors list). At first Mr McBennett and Mr Shirlaw assumed it was an administrative error. There was no evidence to suggest that Mr Shirlaw or Mr McBennett initially thought that there was any misconduct by the claimant or any other employee. The claimant had a good working relationship with them. Mr Shirlaw's involvement in the investigation was restricted to taking notes. None of the other employees who were interviewed alleged that the claimant was involved in taking the missing money. Mr McKnight volunteered that he lent money to the claimant but did not suggest that the claimant had not or was unable to repay the debt. Ms Carson said that she put the Customer W cash payment into the cash box. She said that the service advisers had access to the cash box and claimant did the "banking" for the Service Department. She did not allege or infer that the claimant had taken any of the cash payments.
55. The conflicting evidence was about what could be seen on the CCTV footage. The Tribunal accepted Mr Menzies' evidence that Mr McBennett and Mr Shirlaw had reviewed the CCTV for the whole days. The Tribunal had the benefit of viewing the CCTV footage that was shown to the claimant during the disciplinary process and had the following observations:

### 29 June Footage

This showed the claimant carrying out the Service Department banking process. The claimant got change from the security guard. The claimant put an envelope into his drawer. Mr Kennedy entered the claimant's office. The claimant did not hand the envelope to Mr Kennedy while he was in the office.

When no one else was in the claimant's room he removed his bag from the cupboard and put it on the floor next to his seat. He opened the lower drawer then an upper drawer. The claimant removed an item from the drawer and placed it in his bag. The claimant then returned the bag to the cupboard.

### 8 July Footage

This showed the claimant carrying out the Service Department banking process. The claimant put an envelope into his drawer. Mr Kennedy entered the claimant's office. The claimant did not hand the envelope to Mr Kennedy while he was in the office.

When no one else was in the claimant's room he removed his bag from the cupboard and put it on the floor next to his seat. He opened the lower drawer then an upper drawer. The claimant removed an item from the drawer and placed it in his bag. The claimant then returned the bag to the cupboard.

56. In neither piece of CCTV footage did it show clearly the item the claimant was removing from his drawer and place in his bag.

## **Submissions**

25 *The Respondent*

57. The respondent provided the Tribunal and the claimant with outline written submissions. The following is a summary.

58. The respondent invited the Tribunal to prefer Mr Menzies' evidence over that of the claimant which it said was more credible, reliable and consistent than that of the claimant.
59. The respondent said that the reason for the claimant's dismissal was that his actions, stealing cash payments made to the Service Department by customers, amounted to gross misconduct. The respondent submitted that in accordance with Mr Menzies' evidence the actual reason for dismissal, was the theft of the Customer D cash payment of £176.03 received on 28 June 2016 and the theft of the Customer J cash payment of £39.95 received on 7 July 2016 in relation to which the Respondent had CCTV evidence. While the respondent also believed that the claimant was responsible for the theft of the other missing payments, this did not form a part of the actual reason for dismissal. The claimant did not suggest that this was not the true reason for dismissal.
60. If the Tribunal found that the theft of the other missing payments did form a part of the reason for dismissal, which was denied, the respondent submitted that they did not form a part of the principal reason for dismissal and merely lent emphasis to what had already been decided (see *Ms D Robinson v Combat Stress* UKEAT/0310/14/JOJ).
61. Once an employer has shown a potentially fair reason for dismissal, the Tribunal must decide whether that employer acted reasonably or unreasonably in dismissing for that reason. The Tribunal was referred to section 98(4) of the ERA and the guidelines set out in *British Home Stores Ltd v Burchell* [1978] IRLR 380 was confirmed in *Post Office v Foley* [2000] IRLR 827 and *Whitbread v Hall* [2001] ICR 699.
62. The Tribunal must not substitute its decision as to what was the right course to adopt for that of the respondent. It must ask itself whether what occurred fell within the range of reasonable responses of a reasonable employer in the circumstances (see *Iceland Frozen Foods Ltd v Jones* [1982] IRLR 43).

63. The respondent submitted that the claimant was dismissed because the respondent genuinely believed that the claimant had committed the acts complained about. It is not for the Tribunal to substitute its own opinion as to whether it would have believed in the claimant's guilt. The question was whether the employer believed that the employee was guilty and was entitled so to believe, having regard to the investigation carried out (see *Scottish Midland Co-operative Society Ltd v Cullion* [1991] IRLR 261).
64. As regards the investigation the Tribunal was reminded that the range of reasonable responses test applies as much to the question of whether the investigation into the suspected misconduct was reasonable in the circumstances as it does to the reasonableness of the decision to dismiss (see *Sainsburys Supermarkets Ltd v Hitt* [2003] IRLR 23).
65. The respondent submitted that it carried out as much investigation into the claimant's conduct as was reasonable. It collated and considered the debtor sheets, all daily cash received sheets and cash summary sheets for a three month period, spoke to all customers whose payments were missing, spoke to all relevant staff concerned including all service advisers who had taken the payments and conducted nine other formal investigatory meetings (three of which were with the claimant), and viewed all CCTV footage available at the time it was viewed of the days subsequent to missing payments being made as well as CCTV footage of an example of the process being followed on 30 June 2016 and showed this to the claimant. The respondent held a disciplinary meeting with the claimant on 29 July 2016, in advance of which the allegations against the claimant were set out in detail in writing to him and the claimant was given all documentation he requested. At the disciplinary hearing, the claimant was given the opportunity to be accompanied and to call any witnesses he wanted to call and he was also given an opportunity to view the CCTV footage again and respond to all the allegations against him. Other than in relation to the Customer W payment, the claimant did not point to any further specific enquiries or investigations the respondent could carry out. The claimant's only complaint in relation to the extent and reasonableness of the investigation carried out by the respondent is that it reached the wrong

conclusion: that it was him who was responsible for the missing payments, and that not every person employed by the respondent at the claimant's place of work was interviewed as part of the investigation.

- 5 66. In relation to the reasonableness of the sanction to dismiss. The respondent submitted that the question for the Tribunal was whether the dismissal was within the range of reasonable responses open to employers (see *Boys & Girls Welfare Society v McDonald [1996] IRLR 129*).
- 10 67. The key question in a gross dismissal case is the nature of the conduct committed in the context of the respondent's business and the employment relationship. The claimant knew the seriousness and the potential consequences of his actions. The respondent is a well-known motor retail, repair and maintenance organisation in which the honesty and integrity of each of its members of staff is paramount. The claimant was in an important position as a warranty clerk with responsibility for processing cash payments and as such, was in a position of responsibility and trust. The disciplinary policy defines what the respondent considers gross misconduct. This includes theft.
- 15 68. The respondent submitted that the claimant stole the missing payments and accordingly was guilty of theft. As part of his decision-making process Mr Menzies considered whether a lesser sanction would have been appropriate but there were no mitigating factors present which would have merited a lesser sanction than dismissal in the circumstances of the gravity of the misconduct the claimant was guilty of. The claimant stated in his evidence that that if it were reasonable for the respondent to conclude that he was guilty of theft then the reasonable sanction would be dismissal. The respondent submitted that in the circumstances the decision to dismiss the claimant fell within the band of reasonable responses which a reasonable employer might have adopted.
- 20 25
69. As regards remedy, the respondent argued that any award

- i. should be reduced on the basis that the claimant has failed to mitigate his loss under section 123(4) ERA.
  - ii. That it is just and equitable to make a Polkey deduction and reduce the amount of compensation payable to the Claimant under section 123(1) ERA.
  - iii. That it is just and equitable to reduce the amount of compensation payable to the claimant under section 207A(3) of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA).
  - iv. That any award should be reduced on the basis that the claimant has contributed to the dismissal under section 123(6) ERA.
70. The respondent submitted that if the Tribunal found that the dismissal was unfair the amount of the basis award should be reduced because it is just and equitable to do so under section 122(2) if the ERA.

*The Claimant*

71. The claimant read a statement. A handwritten copy was provided to the Tribunal and the respondent. The following is a summary.
72. The claimant narrated that he was told of the missing payments by Ms Carson around 14/15 July 2016. The service advisers were telephoning customers and checking daily cash sheets in the archived folders. The claimant described the situation as frantic.
73. At the 16 July Meeting the claimant said that he was shown a sheet that he had not seen before. The claimant said that sometimes there was more than one daily cash sheet. The claimant said that Mr McBennett had an accusatory tone. When the claimant was suspended he was irate as he was suspected of doing something that he had not done.
74. The claimant felt that he could not trust anyone and contacted ACAS who recommended that any requests made of the claimant should be in writing.
75. At the 19 July Meeting the claimant on the advice of ACAS asked if Mr McBennett had spoken to anyone else and if there was signage for the CCTV. The claimant reiterated his evidence about the 21 July Meeting.

76. The claimant said that on 25 July 2016 he discovered that he had not been paid. Mr McBennett said that the wages had been withheld until the conclusion of the investigation when either the claimant would be paid in full or less the amount of missing cash if it was believed that the claimant took it. The claimant took advice and was told that this was an illegal act.
77. The Invitation Letter was inaccurate as it referred to the claimant waited until the admin team presented themselves but the claimant had already said that he would sometimes take the cash to admin. Also, the claimant had not been asked about any occasion when there was a cash sheet and no cash.
78. At the disciplinary hearing, the claimant read a statement to allow Mr Menzies to reassess the amount of investigation. The claimant was singled out. He was more severely questioned than other employees. Some advisers were not questioned. Mr Ferguson continuously interrupted; the claimant felt that this was to unsettle him.
79. If Ms Carson had not told the claimant had not spoken to the claimant why would he know about the payment. There was lack of attention paid to the cash tin and cash sheet. Anyone could have accessed it. Mr Kennedy agreed that the claimant sometimes took the envelope to him. The Tribunal only had Mr Menzies word that the CCTV footage did not show the claimant taking the envelope to admin and by the time he was putting something in his bag the envelope was not in the drawer.
80. What Mr Menzies said about the cupboard being locked was untrue. Anyone could open the cupboard.
81. The police did not charge the claimant. He assumes they were shown the CCTV footage.
82. Despite what Mr Menzies said the claimant believed that Mr Menzies did consider Mr McKnight lending the claimant money and the claimant's historic written warning in 2014 as otherwise they would not have been

mentioned. This validates the claimant's argument that he was being singled out.

83. The claimant felt that he was singled out; the respondent did not explore any other options that someone else could be or was the real culprit. This was emphasised by withholding the claimant's wages. The claimant was not solely responsible for cashing up. The claimant was not treated the same as others. The investigation was flawed and incomplete before the decision was made.

84. The claimant had six years' service. Apart for the written warning in 2014 he had an exemplary record. He was never off sick, late or unwilling to work late or early to meet deadlines. He enjoyed his job. He had no reason to steal money. He was not in financial difficulty. His wife was in a good well-paid job. They live a comfortable life. The claimant would not have jeopardised this position.

15

### **Deliberations**

85. The Tribunal referred to Section 98(1) of the Employment Rights Act 1996 (the ERA). It provides that the respondent must show the reason for the dismissal and that it was for one of the potentially fair reasons set out in Section 98(2).

86. At this stage, the Tribunal was not considering the question of reasonableness. It asked whether the respondent had shown the reason for the claimant's dismissal.

87. The respondent admitted that the reason for dismissal was the claimant's misconduct – a potentially fair reason under Section 98(2)(b). The claimant accepted that conduct had been a reason for his dismissal.

88. The Tribunal then referred to the case of *British Homes Stores v Burchell* (above) where the Employment Appeal Tribunal held that in cases of alleged misconduct an employer must show that (i) he believed the employee was guilty of misconduct; (ii) he had in his mind reasonable grounds to sustain that belief and (iii) at the stage he formed that belief on



those grounds he had carried out as much investigation was reasonable in all the circumstances of the case. The *Burchell* test was approved by the Court of Appeal in the case *Foley v Post Office [2000] IRLR 827*.

- 5 89. Mr Menzies confirmed his belief that the claimant had taken the missing Customer D and Customer J cash payments on 29 June 2016 and 8 July 2016. He formed this belief based on viewing the CCTV footage, reading the witness statements and cash summary sheets, daily cash received sheets and from what the claimant said at the disciplinary hearing. Mr Menzies said that he would not have dismissed the claimant for taking the missing cash had it not been for the CCTV footage. The claimant's misconduct was the reason why he dismissed the claimant. The Tribunal was satisfied that the respondent had shown the reason for the dismissal was misconduct. The Tribunal therefore concluded that the respondent was successful in establishing that the dismissal was for a potentially fair reason.
- 10
- 15 90. Next, the Tribunal referred to Section 98(4) of the ERA. The Tribunal had to determine whether the dismissal was fair or unfair, having regard to the reasons shown by the employer, and the answer to that question depends upon whether, in the circumstances (including the size and administrative resources of the employers' undertaking) the employer acted reasonably in treating the reason as a sufficient reason for dismissing the employee; and this should be determined in accordance with equity and the substantial merits of the case
- 20
91. The Tribunal considered the reasonableness of the respondent's conduct. It was mindful that it must not substitute its own decision as to what the right course to adopt for that with the respondent.
- 25
92. Applying the range of reasonable responses approach, the Tribunal considered whether the respondent had carried out a reasonable investigation and had reasonable grounds for its belief that the claimant had taken the missing cash.
- 30 93. Due to a routine credit control query Mr McBennett carried out an investigation. There was no suggestion that Mr McBennett had any issue

with the claimant. Mr McBennett clarified that the customers had paid cash. He considered the relevant cash summary sheets, daily cash received sheets. He then reviewed CCTV footage. Mr McBennett interviewed the claimant on 16 July 2016. Based on the responses the claimant was suspended because the responses contradicted what Mr McBennett saw on the CCTV footage. The claimant was subsequently shown the CCTV footage and invited to comment. Mr McBennett interviewed Mr McKnight and Ms Carson. The claimant was then shown close-up 8 July Footage and asked to comment. Mr McBennett then interviewed Messrs King, Scott and Kennedy.

94. Mr Menzies also reviewed the CCTV footage. He considered the paperwork and witness statements. The investigation continued interviewed throughout the disciplinary hearing with Mr Menzies.

95. The Tribunal turned to consider the investigation undertaken by Mr Menzies. During the disciplinary hearing, the claimant raised an issue about the accuracy of Ms Carson's interview notes as she had not been asked about what happened to the Customer W cash payment only the process. The claimant said that Ms Carson had once left £1,300 out over the weekend. Mr Menzies agreed to consider that. Mr Menzies was present when the claimant asked questions of Mr Kennedy. The claimant addressed issues about his loan from Mr McKnight which Mr Menzies accepted. The claimant explained that the Finance Department wanted the cash to exactly reflect the amount on the cash summary sheet which was why Mr Scott had been asked for change. Mr Menzies accepted that explanation. The claimant said that it was natural for him to put his bag on the floor. He reiterated what he might have been putting in his bag. In addition to the items that he mentioned to Mr McBennett the claimant produced a brown envelope which he said contained his P60 and had been in his drawer and he could have been putting that in his bag rather than the envelope containing the money. Mr Menzies ask the claimant if he did not take the cash what did he think had happened. The claimant said that someone other than him must have taken it but did not make any specific allegation.

96. The disciplinary hearing was adjourned. Mr Menzies asked for Ms Carson's position to be clarified. She denied making a statement to the claimant that she had left £1,300 out over the weekend. Mr Menzies accepted what Mr Kennedy said. Mr Menzies checked the CCTV footage but it did not show the claimant leaving his office with an envelope. Mr Menzies thought that the claimant's explanation about what he was putting in his bag was very vague and evasive.
97. The Tribunal considered that Mr Menzies took a pragmatic view of how the cash procedure operated. He accepted that there might have been occasions when there was more than one cash summary sheet and that the claimant might take the envelope to Mr Kennedy. Mr Menzies checked the that the CCTV footage did not show the claimant leaving his office with an envelope in his hand. That had not happened. Against this background Mr Menzies' reservations about the claimant's explanation of what he was putting in his bag was in the Tribunal's view reasonable.
98. The Tribunal was satisfied that before the disciplinary hearing the claimant was aware of the case against him. He had viewed the CCTV footage which Mr Menzies was considering and was given an opportunity to respond. Mr Menzies reviewed the CCTV footage considering what the claimant had said at the disciplinary hearing. The Tribunal felt that Mr Menzies had not predetermined the matter and the claimant was not being made a scapegoat. Mr Menzies considered the points raised by the claimant and made further enquiries.
99. It was agreed that the cash was missing. The claimant acknowledged that unless there was a cash summary sheet to be processed he would not get the key for the cash box. The claimant did not deny that he was carrying out the banking process in relation to a cash payment on 29 June 2016 and 8 July 2016. There was CCTV footage for 29 June 2016 and 8 July 2016. It was accepted that the claimant was seen putting cash in an envelope and placing it in his drawer. The Tribunal considered that it was reasonable for Mr Menzies to conclude that the banking processes being carried out were for Customer D and Customer J cash payment respectively.

100. There was no footage of the claimant giving the envelope to Mr Kennedy or leaving the office with the envelope in his hand. The footage showed that the claimant opening his drawer and putting something in his bag. Mr Menzies concluded that the claimant was putting an envelope in his bag.  
5 The Tribunal considered that there was reasonable for Mr Menzies to for that belief given that the cash payments were missing and the claimant's explanation about what he said he was putting in his bag was vague.
101. As regards the other missing cash payments Mr Menzies' belief was formed on the basis that they were not received by the same service adviser and the claimant was the only person to have control of all the payments as he  
10 carried out the cash process on the days following receipt of the payments. Mr Menzies concluded that it was more likely that one person, the claimant rather than a combination of different service advisers were responsible for the missing payments. This conclusion was not in the Tribunal's view  
15 unreasonable.
102. The Tribunal appreciated that Mr Menzies could have spoken to other employees. However, when asked at the disciplinary hearing the claimant did not suggest any other lines of enquiry that could be investigated. The Tribunal acknowledged that while other employers may have acted  
20 differently it could not conclude that the investigation carried out by the respondent up to and including the disciplinary hearing did not fall within a reasonable band of responses to the situation.
103. The Tribunal then applied the range of reasonable responses test to the decision to dismiss and the procedure by which that decision had been  
25 reached.
104. As regards the investigation and the conduct of the disciplinary hearing for the reasons previously indicated the Tribunal was satisfied that there had been a reasonable investigation.
105. The claimant was aware of the case against him and at the disciplinary  
30 hearing he was given an opportunity to explain his position or any mitigation circumstances. The claimant was accompanied at the disciplinary hearing.

The Tribunal observed that Mr Menzies considered the debtors sheet, cash summary sheets and daily cash received sheets. These documents were available during the investigation meetings and the disciplinary hearing. The claimant was not provided nor did he ask for copies. Given that the claimant  
5 was provided with all the copies of all the information he requested before the disciplinary hearing the Tribunal had no reason to believe that this documentation was being withheld from him or would not have been provided if he had asked. In any event the claimant did not dispute that the cash payments had been received in the Service Department but not  
10 processed and banked.

106. Mr Menzies believed that the claimant had taken cash payments made to the Service Department by customers. This was an act of misconduct. The Tribunal observed that the letter inviting the claimant to the disciplinary hearing referred to gross misconduct. The disciplinary policy also defines  
15 gross misconduct which includes theft. The claimant did not take issue with it at the time. Also in evidence, he accepted that if it was reasonable for the respondent to conclude that he was guilty of theft then dismissal would be a reasonable sanction.

107. The Tribunal considered what the reaction of a reasonable employer would  
20 have been in the circumstances.

108. The Tribunal did not consider that Mr Menzies' decision to dismiss the claimant was predetermined or an automatic conclusion. Until the claimant informed him Mr Menzies was unaware of the deductions made from the claimant's salary. The claimant denied that he took any of the missing cash.  
25 The claimant said that a full investigation had not been carried out. Mr Menzies did not agree and continued to explore issues raised by the claimant at the disciplinary hearing. The claimant did not suggest that the respondent follow a line of enquiry; he just said that he did not do it.

109. The claimant said that Mr Menzies took into consideration the claimant's  
30 previous written warning and his arrangement with Mr McKnight. Contrary to the Dismissal Letter Mr Menzies said that the previous disciplinary record was considered only in relation to the claimant's awareness of the

procedure and little weight was placed on the claimant's arrangement with Mr Menzies. The Tribunal felt that it was not unreasonable for this background information to be a factor to be considered. There was no evidence that it was being given undue weighting especially as Mr Menzies said that had he not seen the 29 June Footage and the 8 July Footage he would not have dismissed the claimant.

110. The Tribunal concluded that Mr Menzies' decision to dismiss the claimant fell within the band of reasonable responses which a reasonable employer might have adopted.

111. The Tribunal noted that a failure to carry out a reasonable and proper procedure at each stage of the dismissal process, including the appeal stage is relevant to reasonableness of the whole dismissal process. The claimant was offered a right of appeal but did not exercise it. He said that this was based on advice from ACAS which the Tribunal found unconvincing.

112. The Tribunal was satisfied that the respondent had carried out a reasonable and proper procedure at each stage of the dismissal process, including the appeal stage.

113. The Tribunal concluded that the dismissal was fair. Having reached this conclusion, the Tribunal did not consider it necessary to go onto determine the question of remedy.

114. The Tribunal therefore dismissed the claimant's claim for unfair dismissal.

Employment Judge: Shona MacLean  
Date of Judgment: 19 October 2017  
Entered in Register: 23 October 2017  
and Copied to Parties