RM

EMPLOYMENT TRIBUNALS

Claimant: **Ms M Griffith**

Respondent: **Primark Stores Limited**

Heard at: **East London Hearing Centre**

On: **3, 4, 5, 9 and 10 January 2018**

Before: **Employment Judge Russell**
Members: **Ms M Long**
Mrs P Alford

Representation
Claimant: **Ms N Thomas (McKenzie Friend)**
Respondent: **Ms L Bell (Counsel)**

JUDGMENT having been sent to the parties on 26 January 2018 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

1 By a claim form presented on 30 May 2017, the Claimant brought claims of unfair dismissal, wrongful dismissal and race discrimination. The Respondent resisted all claims. The issues were identified at a Preliminary Hearing on 7 August 2017 and they are set out at page 24 of the bundle.

2 The Claimant gave evidence and Mr Dim gave evidence on her behalf. She produced a witness statement for Ms Dawn Dickson who did not attend and we attached little if any weight to that statement in the circumstances. For the Respondent we heard from Ms Karen Dykes (Department Manager), Ms Gemma Billet (Assistant Store Manager) and Mr Colum McCarron (Store Manager). There was an agreed bundle and we read those pages to which we were taken in evidence. We watched a CCTV extract about whose authenticity there was a dispute to which we shall return. We have resolved only those disputes of fact necessary to decide the issues before us.

3 At the outset of the hearing the Claimant made an application to strike out the Response as an abuse of process, relying on allegations of procedural impropriety in respect of the CCTV which is said to have been altered and/or telephony records which were improperly withheld. We rejected that application as we were not satisfied that a fair

trial was not possible. It seemed to us these were matters to be considered in cross-examination not least as the Respondent strongly contested the allegations of wrongdoing. The Claimant, through Ms Thomas, applied for an Unless Order for the disclosure of telephone records and CCTV footage for the full day in question. We did not make such an order because we were not satisfied that the documents were in the Respondent's possession or control.

4 The first day of the hearing was essentially taken as a reading day, largely because Ms Thomas did not have her bundle in order. There were some 30 or so additional pages of documents which had been provided electronically which she had failed to paginate and insert. Furthermore the computer equipment required to watch the CCTV footage was not present. A full day would not have been required for reading and it was rather unfortunate that hearing time was lost.

5 At the outset of the hearing the representatives agreed a timetable including an estimate for cross-examination. The Tribunal indicated that whilst it would not strictly guillotine cross-examination so long as the questions were not repetitive or irrelevant but were focused on the issues. Ms Bell adhered to her time estimate, Ms Thomas did not. Despite being warned about repetitive questioning, Ms Thomas continued to revisit several areas as a result the Tribunal did impose a time limit and required her to conclude by 4.30pm on Friday. In the event the Tribunal sat until 4.50pm to enable Ms Thomas to put some final questions.

6 On Friday 5 January 2018, a timetable was agreed for exchange of submissions prior to attendance at the Tribunal at 12noon on 9 January 2018. At 8.16am that morning, Ms Thomas emailed to say that she had been unwell and asked for an extension of time for exchange of submissions and to delay the start of the hearing. The Tribunal agreed that the time for provision of submissions would be extended but not to the later start time as we were concerned that there would be insufficient time for the Tribunal to deliberate and give judgment orally on 10 January 2018. The Respondent provided their submissions on time in any event. Having been told that the hearing would start at 12noon, Ms Thomas replied that she would be here at 12.30pm. To prevent the Claimant being prejudiced, we waited for Ms Thomas to attend and the hearing started at 12.50pm.

7 Ms Bell's oral submissions lasted for approximately 20 minutes. As Ms Thomas' written submissions were not complete, we permitted her additional time for oral submissions. After 55 minutes, Ms Thomas had still not concluded and asked for a further 30 minutes. As the Tribunal considered that many of her submissions were ill-structured and repetitive, she was granted a further 10 minutes and told to focus on matters not yet addressed. We refused Ms Thomas' request for leave to present further written submissions as we were satisfied that she had had ample time over the weekend to prepare her submissions, had been afforded additional time for written submissions and for oral submissions and the Tribunal required time to deliberate, give Judgment and deal with remedy if appropriate. At 10.03am on 10 January 2018, Ms Thomas purported to submit further written submissions. We did not consider these as the Tribunal had already reached its Judgment and the Respondent had not had sufficient opportunity to reply.

Findings of Fact

8 The Respondent is a retail operation with stores throughout the UK. The Claimant was employed as a retail operative working at its Romford branch from 16 September

2004. She had a good working history. Ms Karen Dykes and Ms Gemma Billet were retail operatives prior to their promotion to management. In or around 2015, Mr McCarron was appointed store manager at Romford and Ms Billet and Ms Dykes returned to the store as assistant manager and department manager respectively. We find on balance that by and large the working relationships were and remained professional between the Claimant, Ms Dykes and Ms Billet although it was a more formal relationship once they became managers. The Claimant also had a good working relationship with Mr McCarron who she stated would greet her and speak to her despite her initially pleaded case asserting to the contrary. On balance, we do not find that the Claimant was ignored or treated in an unfriendly manner as alleged in paragraphs 5.1.1 and 5.1.2 of the agreed Issues. Nor has the Claimant adduced evidence from which we could find that other retail operatives were treated in a more friendly manner.

9 The Respondent has an employee handbook which includes a loss of property procedure which states (in its entirety):

> **"A lost property book is kept in the Store. Items found must be handed to the person responsible who will enter details into the lost property book."**

After her induction at the start of her employment, the Claimant received no further training or updates on the operation of the loss of property procedure. There was no warning that failure to follow the procedure would or could be considered an act of gross misconduct.

10 The policy does not distinguish between perishable and non-perishable or low and high value items but requires that all items handed in be entered into the lost property book. Until about a year or two ago, the practice at Romford was that after a period of time, some unclaimed property would be put into the canteen for the staff. The Respondent's case is that this policy was changed. The staff were not expressly told of the policy change rather, as Mr McCarron accepted in evidence, items were no longer put into the canteen.

11 The lost property book is kept in the cash office. It was common ground that in practice some low value or perishable items would be taken to customer services rather than to the cash office, despite the written procedure making no such distinction. Whether in customer services or the cash office, a supervisor would decide whether or not the property should be entered into the book, again despite the written procedure appearing to relate to all property. Over a four period, only one perishable item was entered into the book: two cakes handed in by the Claimant. Mr Dim gave evidence which we found to be credible and spontaneous about the handling of lost property in practice at Romford. He clearly understood that a retail operative had a degree of discretion as to what should be kept behind the till, for how long and what required logging. Further that some items would be taken to the canteen to be enjoyed by the staff (for example chocolate) but would not be taken home. To some extent the Respondent did not dispute that there was some discretion, for example if a half eaten sandwich were left at the till, the operative would simply bin it. Whilst it was obvious that items such as the sandwich could be binned and items such as mobile telephones and money must be handed in, we find that the procedure was not clear in practical operation when it came to low value, perishable items such as chocolate, flowers and other foodstuffs.

12 On 2 February 2017, the Claimant was working on the accessories and jewellery

till. It is not in dispute between the parties that a customer left a bunch of flowers at the till operated by Ms Mary Finley. The Claimant and the other retail operatives, Ms Finley and Mr Razaq, became aware of them, commented on which of them should take the flowers and joked about what Mr Razaq's wife may say if he took them. In the end, the Claimant took the flowers and put them by her till. At the end of her shift at lunchtime, she picked up the flowers and took them to the changing room, making no attempt to hide what she was doing. Ms Dykes came in to the changing room a short time afterwards and asked if the Claimant had the flowers as the customer had called to collect them. The Claimant said she had the flowers and gave them back. There is a dispute about some of the details and timings of these matters.

13 Ms Dykes produced a statement on the 2 February 2017 setting out her account of what had happened, including the timing of the customer's telephone call and that the flowers were returned to the customer. Ms Dykes stated: "**I told her that the roses were lost property and they should have been placed in lost property in the cash office or at customer services. Marcia said "yes I know". I repeated myself and said "it's not your property to take home. I know they are perishable but you just don't do it.**" Ms Dykes confirmed that that was a comment she had made to the Claimant on 2 February 2017. On balance, we find that reference to perishable items consistent with the evidence of the Claimant and Mr Dim that there was a distinction in practice if not in the written procedure.

14 The Claimant was suspended pending an investigation into potential misconduct. In the investigation interview on 3 February 2017, Ms Harris read out the contents of the statement provided by Ms Dykes. The Claimant's explanation was that the flowers had been left by a customer, she did not know how long they had been there but instead of throwing them away she had put them to one side and taken them home. She said that she had discussed this with Ms Finley and Mr Razaq who also wanted them. The Claimant accepted that she was aware of the lost property procedure, that they should be taken to the cash office, but she regarded the flowers as "**nothing**" and different from usual lost property because they were dying or wilting. We find this to be a clear reference by the Claimant to their perishable nature. The Claimant acknowledged that she had made a stupid mistake. She stated that the mangers had been good to her and accepted that she normally she would have asked a supervisor and not just taken something. The Claimant signed the notes of the interview as accurate.

15 Mr Razaq and Ms Finley were also interviewed. Mr Razaq confirmed that there was a discussion about the flowers and whether he would take them if the customer did not come back but that throwing them in the bin otherwise was not mentioned. Ms Finley's confirmed the joke about Ms Razaq not taking them home and that the Claimant took them. Ms Finley told Ms Harris that lost property stayed at the till for a while and would then go upstairs. She said that she had taken food to the fridge before. We find that this is consistent with the evidence of the Claimant and Mr Dim of a degree of discretion and that perishable items were treated differently, being taken to the canteen. Whilst there are some differences between the accounts given by the Claimant, Ms Finley and Mr Razaq, we do not consider these significant. The exchanges happened at the tills whilst they were all busy serving customers, in the circumstances we consider that minor differences in recollection are to be expected and not matters from which we can draw any inference as to credibility or reliability. Neither was subjected to disciplinary proceedings.

16 On 13 February 2017, the Claimant attended a disciplinary hearing chaired by Ms Billet and again notes were taken which the Claimant signed as accurate. The Claimant

initially told Ms Billet that the flowers had been taken by her at the beginning of the shift, having been left earlier that day. She said that Ms Finley had asked who wanted them to which both the Claimant and Mr Razaq said that they did. The Claimant said that the flowers were wilting and would have been binned anyway and Ms Finley handed her the flowers. The Claimant describes this as the full conversation. On the Claimant's own contemporaneous account it is clear that the discussion took a matter of seconds and not five minutes as she suggested at this Tribunal hearing.

17 The Claimant told Ms Billet that she took the flowers at the end of her shift. Whilst at the time she did not believe that she had done anything wrong, she now accepted that she had made a mistake which she really regretted and for she apologised. The Claimant's case at disciplinary was that she believed that the flowers would otherwise have been thrown in the bin. The Claimant accepted more than once in the course of the disciplinary hearing that the customer had returned for the flowers. The Claimant now disputes that the customer did return and says that she did not think to challenge it at the time. Whether or not that is so, Ms Billet reasonably believed that there was no issue as to the customer's return for the flowers in circumstances where the Claimant knew from as early as the investigation hearing that this was Ms Dykes' assertion.

18 There was a break in the disciplinary hearing for 55 minutes during which time CCTV was viewed by the Claimant and Ms Billet together. The Respondent's case is that the CCTV footage showed in that break was the same as that shown to the Tribunal. It shows that the flowers were left at 11.15am, Ms Finley was made aware and put them on her chair at 11.21am and that the Claimant picked them up at 11.31am. The CCTV shows no lengthy conversation between the three till operators, simply a few comments over about 20 seconds or so when Ms Finley, Mr Razaq and the Claimant can be seen looking at each other as the Claimant get the flowers. The CCTV footage does not show that the flowers were offered to the Claimant by Ms Finley, instead that she went over and took them. The short conversation shown on the CCTV is consistent with the likely length of the conversation described by the Claimant earlier in the disciplinary hearing. The Claimant's case is that this CCTV footage, shown to the Tribunal, was not what was viewed in the break of the disciplinary hearing and that it has been doctored to support the Respondent's case.

19 The disciplinary hearing reconvened. The notes refer to having "reviewed CCTV footage of the customer leaving flowers with Marcia". We find that this is a grammatical infelicity; it should read "we reviewed with Marcia CCTV footage of the customer leaving the flowers". It is not, was not and never has been the Respondent's case that the flowers were ever left with the Claimant. It has always been common ground that they were left with Ms Finley.

20 When the hearing reconvened, the notes record that the Claimant accepted that the flowers had been left with Ms Finley and taken at 11.30am, not at the beginning of the shift. The notes do not record any challenge by the Claimant to the veracity of the CCTV footage or any request to see CCTV footage from the beginning or end of the shift. On balance, we prefer the evidence of Ms Billet and accept that no such request was made because the Claimant accepted the timing as shown by the CCTV footage taken between 11.15 and 11.31 am. The Claimant has adduced no evidence to support her serious allegation that the Respondent as tampered with the CCTV footage beyond her own assertion. We rejected Ms Thomas' submission that her own experience as the proprietor of an IT shop added expert weight to the Claimant's case of manipulation of the evidence.

The activity logs record the occasions on which the CCTV footage was watched, played, stopped or fast forwarded. There was nothing in the logs to cast doubt on the veracity of the CCTV footage. The allegation of significant manipulation advanced by the Claimant and by Ms Thomas on her behalf in this hearing is in stark contrast to her case at the disciplinary hearing and subsequent appeal. It is, we find, baseless and fanciful. We find that the CCTV footage shown to the Tribunal is the same as that shown in its entirety to the Claimant at the disciplinary hearing, discussed in the disciplinary hearing and later referred to in the dismissal letter.

21 The CCTV footage revealed the presence of another employee, Ms Exton, during the relevant period. The Claimant's disciplinary hearing was adjourned so that she could be interviewed. Ms Exton did not add detail but confirmed the conversation broadly consistent with the accounts given by Ms Finley and Mr Razaq. Insofar as there was any inconsistency and/or areas of uncertainty, we find that these were not significant and were caused by the frailty of human memory particularly of shop workers in a busy retail setting.

22 The Claimant's disciplinary hearing reconvened. The Claimant again accepted that she had made a mistake and had been wrong to take the flowers without checking with her manager. She maintained that the flowers would have been binned anyway and were "nothing". We do not accept Ms Bell's submission that the distinction between perishable and non-perishable was not relied upon during the internal disciplinary process.

23 Following the conclusion of the hearing, Ms Billet began to deliberate. She considered that there had been an act of misconduct sufficient to warrant dismissal, the Claimant's conduct amounted to theft and she was concerned about what she regarded as differences in the accounts given by the Claimant and her colleagues principally in relation to whether or not Ms Finley had offered the flowers to the Claimant. Ms Billet sought HR advice. That advice given by email on 17 February 2017 read:

> "**Hi Gemma,**
>
> **Whilst it is absolutely your decision should you wish to dismiss; I do need to make you aware that there are some risks from a possible unfair dismissal stance**
>
> - **due to length of service;**
> - **no previous conduct warnings**
> - **and fellow colleagues not expressing any concerns as to Marcia's intent or actions**
>
> **It could be seen that the staff were complicit as not one member of staff expressed any concern over Marcia taking the flowers even when she was seen with them in her possession. Marcia states in her DH that Mary hands the flowers. Do you have any CCTV footage of the incident?**
> **And Amar states that he would have taken them- may have been joking but this is hardly the time to be joking.**
>
> **Please send me the sanction letter on whatever outcome you decide upon."**

24 This email was disclosed by the Respondent in these proceedings despite it being potentially adverse to their case. This is not consistent with the Claimant's allegations at Tribunal that the Respondent has tampered with and concealed relevant evidence.

25 Ms Billet produced a series of draft dismissal letters, culminating in a final version

dated 11 March 2017. Ms Billet summarised the evidence given by the Claimant, Ms Finley, Mr Razaq, Ms Dykes and Ms Exton. She referred to what was shown on the CCTV footage identifying specifically 11.15am and 11.28am (the leaving and the taking of the flowers). Relying upon this evidence, Ms Billet concluded that she did not accept that Ms Finley had offered the flowers to the Claimant or that there was any conversation about them being put in the bin. Ms Billet concluded that Ms Finley and Mr Razaq had engaged in banter when talking about taking the flowers and that it should have been apparent to the Claimant that this was simply a joke. The Claimant was aware of the loss of property procedure yet nevertheless took possession of the flowers without following it. Ms Billet accepted that the Claimant did not sneak the flowers out of the building but had taken them knowing that they did not belong to her and that she would have taken them home had the customer not returned. Ms Billet considered that parts of the Claimant's account suggested that she had not been entirely truthful and she had implicated her colleagues. After careful consideration, Ms Billet concluded that the Claimant should be summarily dismissed for gross misconduct, specifically for breaching company policies and procedures namely the loss of property procedure, theft, fraud or collusion with a third party and a breach of trust to refer to the appropriate entries in the staff handbook. Ms Billet regarded the Claimant's long service as an aggravating rather than mitigating feature, accepting in evidence that if the Claimant had been new, she may not have been dismissed. The Claimant was advised of her right to appeal.

26 In her letter of appeal dated 13 March 2017, the Claimant asserted that there had been a misunderstanding and she challenged the severity of the sanction. The appeal conducted by Mr McCarron on 20 March 2017 was short. The Claimant did not challenge the veracity of the CCTV footage and what she had been shown during the disciplinary hearing. Nor did she dispute that the customer had returned for the flowers. Her appeal might properly be described as a plea in mitigation with regard to sanction. Mr McCarron did not uphold the appeal. He regarded the Claimant's conduct as being very serious and was not persuaded that her length of service should be regarded as mitigating.

27 We referred at the outset to there being disputes of fact between the parties as to the detail of the incident leading to the Claimant's dismissal. At Tribunal, the Claimant's case was that she had taken the flowers at the beginning of the shift and that she had still been at her till when the customer was said to have returned to collect them at 1.15pm. It is for this reason that the Claimant sought disclosure of the CCTV footage for the whole day. As the request was not made until some months after the incident, it no longer exists. We have had regard to the Respondent's records of the Claimant's clock-in and clock-out times for that day. The record shows that she clocked off the shop floor at 1.08pm, meaning that she would have left the till some minutes earlier as is shown in the transaction records of her till. At Tribunal, the Claimant asserts that both the clocking records and transaction records have been tampered with to undermine her case. We reject that assertion. The clocking system is operated by a scan of the employee's palm and automatically recorded. In her disciplinary hearing, the Claimant volunteered that she had left the shop floor at 1.08pm. We find that the allegation of tampering is made because the recorded times disagree with the Claimant's recollection of events now. The Claimant was similarly mistaken as to when the flowers were left and now alleges tampering with the CCTV to fit her recollection. We find that the Claimant is genuine in her evidence in the sense that she really believes her recollection of the times to be true, so strong is her belief that the only explanation for the discrepancy must be that the records are wrong in her mind. On balance, we find that the Claimant's recollection is unreliable and accept the clocking records and transaction records as accurate.

28 The Respondent produced a list showing the race of employees leaving (dismissed or resigned) and those recruited during the period of Mr McCarron's management of Romford. Of the dismissals there were two black employees, two white employees and one Asian employee. Looked at statistically, the ratio is approximately one black member of staff leaving (dismissed or resigned) for every six white members of staff and approximately one black member of staff recruited for every five white members of staff. This evidence is inconsistent with the Claimant's case that the management team under Mr McCarron, with Ms Billet and Ms Dykes actively involved, was seeking to remove black members of staff.

29 Both the Claimant and Mr Dim had received written warnings following customer complaints during the time that Mr McCarron, Ms Billet and Ms Dykes were managing Romford. In Mr Dim's case, the conduct was particularly serious in circumstances where he raised his voice in an argument with a customer. The fact that neither was dismissed is not consistent with the Claimant's case that very minor acts of misconduct by black members of staff were used as a pretext for dismissal.

Law

Unfair Dismissal

30 The employer must show a potentially fair reason for dismissal within section 98 of the Employment Rights Act 1996. The Respondent relies upon conduct within section 98(2)(b). The legal issues in a conduct unfair dismissal case are well established in the case of **BHS –v- Burchell** [1978] IRLR 379, namely:

(1) did the employer genuinely believe that the employee had committed the act of misconduct?
(2) was such a belief held on reasonable grounds? And
(3) at the stage at which it formed the belief on those grounds, had the employer carried as much investigation as was reasonable in all the circumstances of the case?

31 Section 98(4) of the Employment Rights Act 1996 requires the Tribunal to determine whether the Respondent acted reasonably or unreasonably in treating any such misconduct as sufficient reason for dismissal in accordance with the equity and substantial merits of the case. This will include consideration of whether or not a fair procedure has been adopted as well as questions of sanction.

32 In an unfair dismissal case it is not for the tribunal to decide whether or not the claimant is guilty or innocent of the alleged misconduct. Even if another employer, or indeed the tribunal, may well have concluded that there had been no misconduct or that it would have imposed a different sanction, the dismissal will be fair as long as the **Burchell** test is satisfied, a fair procedure is followed and dismissal falls within the range of reasonable responses (although these should not be regarded as 'hurdles' to be passed or failed).

33 The range of reasonable responses test or, to put it another way, the need to apply the objective standards of a reasonable employer, applies as much to the adequacy of an investigation as it does to other procedural and substantive aspects of the decision

to dismiss, see **Sainsbury's Supermarkets Limited v Hitt** [2002] IRLR 23, CA. As confirmed in **A v B** [2003] IRLR 405, EAT and **Salford NHS Trust v Roldan** [2010] ICR 1457, CA, in determining whether an employer carried out such investigation as was reasonable in all the circumstances, relevant circumstances include the gravity of the charges and their potential effects upon the employee.

34 The gravity of the misconduct is not determinative in assessing the extent of investigation reasonably required. This will also depend, amongst other things, upon the extent to which the employee disputes the factual basis of the allegations concerned and the nature of the defence advanced by the employee, **Stuart v London City Airport** [2013] EWCA 973.

35 The test for the range of reasonable responses is not one of perversity but is to be assessed by the objective standards of the reasonable employer rather than by reference to the tribunal's own subjective views, **Post Office –v- Foley, HSBC Bank Plc –v- Madden** [2000] IRLR 827, CA. There is often a range of disciplinary sanctions available to a reasonable employer. As long as dismissal falls within this range, the Tribunal must not substitute its own views for that of the employer, **London Ambulance Service NHS Trust v Small** [2009] IRLR 563. However, the range of reasonable responses test is not a test of irrationality; nor is it infinitely wide. It is important not to overlook s.98(4)(b) the provisions of which indicate that Parliament did not intend the Tribunal's consideration of a conduct case to be a matter of procedural box ticking and it is entitled to find that dismissal was outside of the band of reasonable responses without being accused of placing itself in the position of the employer, **Newbound –v- Thames Water Utilities Ltd** [2015] IRLR 734, CA.

36 Relevant factors in the overall assessment of reasonableness under s.98(4) include, amongst other matters going to the equity of the case overall:

36.1 the conduct of the employee in the disciplinary process (whether they are contrite or go on the offensive);

36.2 disparity where an employer has (i) led an employee to believe that certain categories of conduct will either be overlooked or at least not be dealt with by the sanction of dismissal; (ii) where evidence about decisions made in relation to other cases supports an inference that the purported reason for dismissal is not the real or genuine reason; and/or (iii) decisions made by an employer in truly parallel circumstances may be sufficient to support an argument in a particular case that it was not reasonable to adopt the penalty of dismissal that some lesser penalty would have been appropriate in the circumstances, **Hadjioannou v Coral Casinos Ltd** [1981] IRLR 352.

36.3 A finding of gross misconduct does not automatically justify a finding that dismissal was within the range of reasonable responses, **Brito-Babapulle v Ealing Hospital NHS Trust** [2013] IRLR 854.

36.4 Mitigating factors. These include length of service and disciplinary record but neither will necessarily save an employee from dismissal in cases of serious misconduct. Another mitigating factor may be whether the employee believed or had reason to believe that what they did was permitted and, therefore, whether they were doing something wrong.

37 The fairness of dismissal must be judged by what the decision-maker knew or ought reasonably to have known at the time of dismissal. The knowledge of others within the employment organisation is not imputed to him merely because he is employed by the same employer, **Orr v Milton Keynes Council** [2011] ICR 704. It may however be relevant to whether or not the employer has carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

38 In deciding whether the dismissal was fair or unfair, the tribunal must consider the whole of the disciplinary process. If it finds that an early stage of the process was defective, the tribunal should consider the appeal and whether the overall procedure adopted was fair, see **Taylor –v- OCS Group Limited** [2006] IRLR 613, CA per Smith LJ at paragraph 47.

39 The Tribunal must have regard to the ACAS Code of Practice which sets out basic principles of fairness to be adopted in disciplinary situations, promoting fairness and transparency for example in use of clear rules and procedures. This includes the requirement that employers carry out necessary investigations to establish the facts of the case.

40 If a dismissal is unfair due to procedural failings but the appropriate steps, if taken, would not have affected the outcome, this may be reflected in the compensatory award, **Polkey v A E Dayton Services Ltd** [1987] IRLR 503, HL. This may be done either by limiting the period for which a compensatory award is made or by applying a percentage reduction to reflect the possibility of a fair dismissal in any event.

41 A basic and/or compensatory award may be reduced pursuant to s.122(2) and s.123(6) ERA respectively. In **Steen v ASP Packaging Ltd** [2014] ICR 65, the EAT advised Tribunals to address (i) the relevant conduct; (ii) whether it was blameworthy; (iii) whether it caused or contributed to the dismissal (for the compensatory award) and (iv) to what extent should any award be reduced.

Breach of Contract

42 The Claimant's claim for notice pay is brought under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, article 3. It is, in general, for the Respondent to show on the balance of probabilities that the Claimant was in fact guilty of the misconduct alleged to amount to a repudiatory breach of contract entitling it to dismissal without notice or pay in lieu. To be sufficient, the conduct must so undermine the trust and confidence inherent in that particular contract of employment that the employer should no longer be required to retain the employee, **Neary v Dean of Westminster** [1999] IRLR 288. Relevant to this determination will be the nature of the employer, the role of the employee and the degree of trust required.

43 Non-deliberate breaches of duty are qualitatively different from deliberate breach, **Chhabra v West London Mental Health NHS Trust** [2014] ICR 194, Supreme Court.

Race Discrimination

44 Section 13 Equality Act 2010 provides that a person discriminates against another if, because of a protected characteristic, he treats that other less favourably than he treats

or would treat others. Sex is a protected characteristic. Conscious motivation is not a requirement for direct discrimination, it being enough that sex had a significant influence on the outcome. The crucial question is why the complainant was treated in the way in which they were, particularly in cases where there are no actual comparators identified, **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] IRLR 285.

45 In considering the burden of proof, we referred to s.136 Equality Act 2010 and the guidance set out in the case of **Igen Ltd v Wong** [2005] IRLR 258, CA as approved in **Madarassy v Nomura International Plc** [2007] IRLR 246, CA. This guidance reminds us that it is for the Claimant to prove facts from which the Tribunal could conclude, in the absence of adequate explanation, that the employer has committed an act of unlawful discrimination. The outcome at this stage of the analysis will usually depend upon what inferences it is proper to draw from the primary facts found by the Tribunal. Where the Claimant has proved such facts, the burden of proof moves and it is necessary for the employer to prove on the balance of probabilities that the treatment was in no sense whatsoever on the prohibited ground. If the Respondent cannot provide such an explanation, the Tribunal must infer discrimination.

46 The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination; they are not, without more, sufficient material from which we could conclude that there had been discrimination, **Madarassy** at paragraphs 54-57. The protected characteristic must be an effective cause of any less favourable treatment. We must take care to distinguish between unfair or unreasonable treatment and discriminatory treatment as the two are not the same.

47 Where a discrimination claim is based upon multiple allegations, it is necessary for the Tribunal to consider each allegation individually and also to adopt a holistic approach to consider the explanations given by the Respondent. We should avoid a fragmented approach which risks diminishing the eloquence of the cumulative effect of primary facts and the inferences which may be drawn, for example see **X v Y** [2013] UKEAT/0322/12. We must consider the totality of the evidence and decide the reason why the Claimant received any less favourable treatment.

Conclusions

Unfair Dismissal

48 Based upon our findings of fact, we have accepted that Ms Billet had a genuine belief that the Claimant had committed an act of misconduct. The Claimant herself admitted as much and Ms Billet genuinely believed that the Claimant had taken flowers without a manager's authority and that she should not have done so. The Claimant did not dispute this at the time but sought to explain why she made what she regarded as a mistake. We do not accept that Ms Billet used this as a pretext to dismiss, rather she was genuinely concerned about the Claimant's admitted conduct.

49 Even though the belief was genuine, it must also have been reasonable and based upon a reasonable investigation. Based upon the case advanced by the Claimant in the disciplinary process, we are satisfied that Ms Billet's belief satisfied both requirements. We have found that the CCTV footage was genuine primary evidence of the Claimant taking the flowers upon which it was reasonable for Ms Billet to rely; it was consistent with the evidence of the other employees and the Claimant's admissions. This

was all information before Ms Billet and upon which she relied in reaching her decision. We have found that the Claimant did not ask to see further CCTV footage. Even if she had, it would not have been outside the range of reasonable responses for Ms Billet to have failed further to have investigated CCTV from the start or end of the shift given that during the internal process the Claimant accepted the chronology of events shown on the CCTV extract which was shown. There was no need for further investigation given the extent to which the Claimant accepted the core facts of the alleged misconduct.

50 In considering section 98(4), we are aware that a Tribunal should not substitute its own view for that of the employer and we must be careful in a situation where both parties have come to the hearing with further arguments not presented at the time of the internal process. The Claimant has put her case in this Tribunal in a manner very different to that advanced at the disciplinary and appeal hearings. Before the Tribunal, the Claimant has gone on the offensive, denying all wrongdoing, challenging the evidence of her colleagues and on the CCTV, denying that there was a customer returning to collect the flowers and alleging bad faith by the Respondent and her colleagues. At the disciplinary hearing, the Claimant accepted what had happened and expressed genuine regret and contrition. The Respondent has advanced further criticisms of the Claimant's conduct at this hearing which were not levelled during the disciplinary hearing which, again we note, proceeded largely on the basis of a core of non-disputed fact. There is additional evidence before the Tribunal which was not before Ms Billet, namely that of Mr Dim and the lost property books. The Tribunal has been asked to watch the CCTV footage to determine what is shown. For the purposes of the unfair dismissal claim, however, we remind ourselves that it is the reasonableness of Ms Billet's belief and the fairness of the dismissal based upon the evidence which was (or ought reasonably to have been) available at the time.

51 Having set out these caveats with regard to substitution, we remind ourselves however that unfair dismissal is not a check box exercise and the test is not one of irrationality or perversity. Overall, we are satisfied that there was sufficient evidence before Ms Billet to cause doubt as to the certainty and clarity of the lost property procedure. Ms Dykes' reference to perishable property, offered spontaneously at the time when the Claimant was challenged, the Claimant's explanations to Ms Billet that the flowers were "nothing" and destined for the bin, and indeed the reaction of the Claimant's colleagues who themselves discussed taking the property even if joking, are all consistent with the conclusion that the position was not as clear cut as Respondent now seeks to suggest. There was a degree of discretion placed in the retail operative and not all property was taken to the cash office to be entered into the lost property book. The previous practice had been to take perishable or low value items to the canteen; the termination of this practice was not communicated to the staff. Whilst the lost property book was not considered at the internal hearings, given her experience as a retail operative and then as a manager for many years at Romford, it would be reasonable to expect Ms Billet to be aware that matters were not as clear as cut as stated in the very brief lost property procedure set out in the handbook.

52 The lost property procedure did not state that breach would be regarded as an act of gross misconduct leading to potential dismissal. Nor do we accept that it is reasonable for an employer to regard long service with a good disciplinary record as an aggravating feature. The Respondent failed to take into account adequately or at all the fact that the Claimant had made no effort to hide what she was doing. The points of concern raised by the Respondent's HR representative are valid and matters which a reasonable employer would have to take into account. It is significant that the Claimant's colleagues did not

express any concern as to the Claimant's open actions on the day in question. Whilst there is not a **Hadjiannou** disparity point in the sense of other employees acting in a similar manner, with the managers' knowledge but not being dismissed, we consider that the conduct of colleagues supports the Claimant's case that she did not believe that she was committing an act of gross misconduct. An employer is entitled to have strict policies and is entitled to apply its rules strictly, but these should be clearly communicated and employees made clearly aware of the consequences of breach.

53 For all of these reasons, we are satisfied that in the facts and circumstances of this case and applying the test in Section 98(4), the dismissal fell outside of the range of reasonable responses. For that reason the unfair dismissal claim succeeds.

Wrongful Dismissal

54 On this claim, the Tribunal is required to decide whether or not it considers that the Claimant committed a repudiatory breach of contract. In order to reach our conclusion, we took into account the additional evidence of Mr Dim and the lost property book which we considered supported that the Claimant's case that there were grey areas and matters of discretion which resided in the retail operatives as well as in managers. Whilst Mr Dim's evidence was that he himself would not take things home, in the absence of a clear written policy and given the absence of any attempt at subterfuge by the Claimant, we are not satisfied that the Respondent has demonstrated a repudiatory breach. We think that this is more a non-deliberate failure of duty rather than an act of dishonesty. The Claimant took the flowers believing that they were abandoned and that they would otherwise be binned. It was unwise to take the flowers, particularly after so short a time, but it was not an act of dishonesty or theft. The Claimant's wrongful dismissal claim succeeds.

Race Discrimination

55 The Claimant made a number of generalised allegations that her managers did not treat her as they did other employees in terms of greetings, general behaviour and friendliness. The Claimant's case is that Ms Billet in particular, and Ms Dykes and Mr McCarron by implication by essentially "turning a blind eye", wanted to procure the departure of black members of staff. The Claimant submitted that her dismissal was so unfair that it should be regarded as an attempt to remove her due to her race. In other words, she asked us to draw an inference from the unfairness of her dismissal to find race discrimination.

56 As set out in our analysis of the law, unfair or unreasonable treatment is not necessarily the same as discriminatory treatment and we considered whether or not the Claimant had proved primary facts which would entitled us to conclude that there had been an act of discrimination. The Claimant gave no particulars of occasions when Ms Billet or Ms Dykes ignored her but talked to non-black colleagues or when they had been harsh, confrontational or unfriendly to her. In her oral evidence, the Claimant confirmed that she raised no such complaint about Mr McCarron. Her allegations are inconsistent with her position in the disciplinary hearing that her managers were good to her. At that stage, the Claimant did not draw any distinction between current managers and previous managers as she does now. We have found as a fact that the Claimant had a good working relationship with all three managers named in the issues and that she was not treated in the way alleged in paragraphs 5.1.1 and 5.1.2 of the agreed Issues.

57 Ms Finley and Mr Razaq were not subjected to disciplinary action. We consider that their circumstances were not the same or not materially different to those of the Claimant. Neither Ms Finley nor Mr Razaq in fact took the flowers, the Claimant by her own admission did. Talking about whether they would take them, whether seriously or in jest, is materially different from actually doing so.

58 The Claimant has made a general allegation that Ms Billet and Ms Dykes lied during the disciplinary hearings to protect Ms Finley and Mr Razaq. This appeared to be a challenge to the credibility of both witnesses in respect of parts of the evidence with which the Claimant disagreed. Notes were taken of the investigation and disciplinary hearings which the Claimant signed as accurate. She did not identify any "lies" on appeal to Mr McCarron. The Claimant has not adduced sufficient primary evidence from which we could find that there had been any such lies, far less that an employee in similar circumstances would have been treated more favourably. Nor have we found that at the disciplinary hearing the Claimant asked to look at CCTV footage beyond that shown.

59 We have found that the statistics produced by the Respondent showing the ethnicity of employees leaving (dismissed or resigned) and joining is inconsistent with the Claimant's case the Respondent was looking to remove black employees.

60 The Claimant's dismissal was unfair for the reasons we have given, however, we have found that Ms Billet genuinely believed that the Claimant had committed a serious act of misconduct. Her belief and subsequent decision may have been unduly harsh (and outside of the range of reasonable responses) but it was held for reasons which were entirely unrelated to race. The Claimant says that a trivial matter was used as a pretext to dismiss her because she is black. This is inconsistent with the failure of the Respondent, under the same Romford management, to dismiss either the Claimant on the earlier allegation of misconduct or Mr Dim who had shouted at a customer in an argument.

61 For all of these reasons, whether looked at as individual allegations or holistically overall, we are not satisfied that the Claimant has proven the necessary primary facts and we reject the claim of race discrimination.

Remedy

62 After giving Judgment on liability, the Tribunal considered remedy. The Claimant expressed a desire to be reinstated and/or to be re-engaged. The Respondent opposed the application, not on grounds that suitable employment would not be available but solely on grounds of the practicability of such an order in the circumstances of this case. In the alternative we were asked to consider compensation and to consider whether and to what extent there should be a deduction for contributory fault or **Polkey**.

63 The relevant legal principles to be considered when deciding whether to make an order for reinstatement or re-engagement are summarised at paragraphs 21 to 27 of the judgment in **United Lincolnshire Hospitals NHS Foundation Trust v Farren** [2017] ICR 513 as follows:

> **21. The ET's powers to make reinstatement and re-engagement orders are set out at sections 112 to 116 of the Employment Rights Act 1996 ("ERA"). Section 113 provides that orders may be made for reinstatement or re-engagement. Section 114**

specifically defines reinstatement and section 115 re-engagement. By section 116 it is provided as follows:

> **"116. *Choice of order and its terms***
> **(1) In exercising its discretion under section 113 the tribunal shall first consider whether to make an order for reinstatement ...**
> **(2) If the tribunal decides not to make an order for reinstatement it shall then consider whether to make an order for re-engagement and, if so, on what terms.**
> **(3) In so doing the tribunal shall take into account -**
> **(a) any wish expressed by the complainant as to the nature of the order to be made,**
> **(b) whether it is practicable for the employer (or a successor or an associated employer) to comply with an order for re-engagement, and**
> **(c) where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order his re-engagement and (if so) on what terms.**
> **(4) Except in a case where the tribunal takes into account contributory fault under subsection (3)(c) it shall, if it orders re-engagement, do so on terms which are, so far as is reasonably practicable, as favourable as an order for reinstatement."**

22. It is common ground before us that an ET is to determine the question of reasonable practicability as at the date it is considering making a re-employment order; at which stage, it has to form a preliminary or provisional view of practicability (per Baroness Hale at paragraph 37, McBride v Scottish Police Authority [2016] IRLR 633 SC). The Respondent has a further opportunity (section 117(4)) to show why a re-engagement order is not practicable if it does not comply with the original order and seeks to defend itself against an award of compensation and/or additional award that might otherwise then be made under section 117(3).

23. More generally, Mr Ohringer has helpfully summarised the principles relevant to an ET's approach to a re-engagement order at paragraphs 16 to 23 of his skeleton argument:

> **"16. Under s.112 of the Employment Rights Act 1996 … a tribunal must enquire whether an unfairly dismissed claimant seeks orders for reinstatement or reengagement in preference to compensation.**
>
> **17. In ss. 113 and 116 of the ERA 1996, the tribunal is given a broad discretion as to whether to order reinstatement, reengagement or neither and directed to take into account various factors. In relation to reengagement, those factors are:**
> **(a) any wish expressed by the complaint [sic] as to the nature of the order to be made,**
> **(b) whether it is practicable for the employer … to comply with the order for reengagement, and**
> **(c) where the complainant caused or contributed to some extent to the dismissal, whether to make an order for re-engagement, and if so on what terms.**
>
> **18. Reinstatement and reengagement are the 'primary remedies' for unfair dismissal (*Rao v Civil Aviation Authority* [1992] ICR 503, unsuccessfully appealed to the Court of Appeal on other grounds [1994] ICR 495 and *Central & North West London NHS Foundation Trust v Abimbola* (UKEAT/0542/08), para. 14).**
>
> **19. A Tribunal has a wide discretion in determining whether to order reinstatement or reengagement. (… *Valencia* … para. 7)**
>
> **20. If the employer maintains a genuine (even if unreasonable) belief that the employee has committed serious misconduct, then re-engagement will rarely be practicable. (paras. 10-11 citing *Wood Group Heavy Industrial Turbines Ltd v Crossan* [1998] IRLR 680).**
>
> **21. However as stated in *Timex Corporation v* [*Thomson*] [1981] IRLR 522, cited with approval by the Supreme Court in *McBride* … the Tribunal need only have 'regard to' whether reengagement is practicable and that is to be considered on a provisional basis only.**
>
> **22. Simler J stated that contributory conduct is relevant to whether it is just to make an order. She emphasised that contributory fault, even to a high degree, does not necessarily mean it**

> **would be impracticable or unjust to reinstate. (*Valencia,* para. 12, citing *United Distillers & Vintners Ltd v Brown* (UKEAT/1471/99), para 14).**
>
> **23. Although the Tribunal is entitled to take into account contributory conduct in deciding whether to order reinstatement or reengagement, the question of whether the Claimant's employment would have been fairly dismissed in any event (applying the *Polkey* [*v A E Dayton Services Ltd* [1987] IRLR 503] principle) is irrelevant. This was the conclusion of the EAT in *The Manchester College v Hazel & Huggins* (UKEAT/0136/12, para. 40) which was upheld by the Court of Appeal [2014] ICR 989, para. 43).***"***

24. In this case, the ET's approach to the question of trust and confidence and how this might impact on its discretion to order re-engagement has been key. This has put the focus on the test that an ET is to apply in determining practicability, which was addressed by the EAT when overturning an order for re-engagement in Wood Group v Crossan [1998] IRLR 680:

> **"10. … we are persuaded in this case that it is not practical to order re-engagement against the background of the finding that the employer genuinely believed in the substance of the allegations. It may seem somewhat incongruous that where a tribunal goes on to categorise the investigations into the belief as unfair or unreasonable, nevertheless, the original belief can found a decision as to remedy and the practicality of re-engagement, but it is inevitable to our way of thinking that when allegations of this sort are made and are investigated against a genuine belief held by the employer, it is difficult to see how the essential bond of trust and confidence that must exist between an employer and employee, inevitably broken by such investigations and allegations can be satisfactorily repaired by re-engagement or upon re-engagement. We consider that the remedy of re-engagement has very limited scope and will only be practical in the rarest cases where there is a breakdown in confidence as between the employer and the employee. Even if the way the matter is handled results in a finding of unfair dismissal, the remedy, in that context, invariably to our minds will be compensation."**

25. Before us, the parties have approached the test of practicability at the first stage as one in respect of which there is a neutral burden of proof. They see the burden shifting to the employer if and when it seeks to avoid the making of an additional award of compensation under section 117 ERA. That said, where an employer is relying on a breakdown in trust and confidence as making it impracticable for an order for re-engagement to be made, the ET will need to be satisfied not only that the employer genuinely has a belief that trust and confidence has broken down in fact but also that its belief in that respect is not irrational (see paragraph 14 United Distillers v Brown UKEAT/1471/99).

26. In the case of Valencia Simler J revisited the question as to how an ET was to undertake its task on the making of a re-engagement order, giving the following guidance:

> **"7. It is accordingly clear that tribunals have a wide discretion in determining whether or not to order reinstatement or re-engagement. It is a question of fact for them. However, whereas an order for reinstatement is an order that the employer *shall* treat the complainant in all respects as if he had not been dismissed, an order for re-engagement is more flexible and may be made on such terms as the tribunal may decide.**
>
> **8. The statute requires consideration of reinstatement first. Only if a decision not to make a reinstatement order is made, does the question of re-engagement arise. In making a reinstatement order the tribunal must take into account three factors under s.116(1) ERA: the complainant's wish to be reinstated; whether it is practicable for the employer to comply; and where the complainant caused or contributed to his dismissal whether it would be just to order his reinstatement.**
>
> **9. Practicable in this context means more than merely possible but 'capable of being carried into effect with success': *Coleman v Magnet Joinery Ltd* [1974] IRLR 343 at 346 (Stephenson LJ).**

> **10. Loss of the necessary mutual trust and confidence between employer and employee may render re-employment impracticable. For example, where there is a breakdown in trust between the parties and a genuine belief of misconduct by the employee on the part of the employer, reinstatement or re-engagement will rarely be practicable: see *Wood Group Heavy Industrial Turbines Ltd v Crossan* [1998] IRLR 680 at [10] (Lord Johnston) in the context of misconduct involving drugs and clocking offences:**
>
> **'in this case it is not practical to order re-engagement against the background of the finding that the employer genuinely believed in the substance of the allegations … when allegations of this sort are made and are investigated against a genuine belief held by the employer, it is difficult to see how the essential bond of trust and confidence that must exist … can be satisfactorily repaired by re-engagement or upon re-engagement. We consider that the remedy of re-engagement has very limited scope and will only be practical in the rarest cases where there is a breakdown in confidence as between the employer and the employee.'**
>
> **11. Similarly in *ILEA v Gravett* [1988] IRLR 497 (albeit on very different facts) the EAT accepted that a genuine belief in the guilt of an employee of misconduct, even if there were no reasonable grounds for it, was a factor that had to be weighed properly in deciding whether to order re-engagement:**
>
> > **'21. The tribunal ordered re-engagement and are criticised by the appellant employer for what they submit is a wholly perverse decision upon all the facts of this case. It is a possible view of that decision, but we do not seek nor do we need to go that far. An essential finding in the present case was that the authority had a genuine belief in the guilt of the applicant. It is said with accuracy that this is the largest education authority in the country and that it has a vast area to cover and a vast variety of posts into which the applicant could be fitted. It is, however, a common factor in any of those posts that the applicant would have the care and handling of young children of both sexes. Bearing in mind the duty of care imposed upon the authority and the very real risks should they depart from the highest standard of care, we take the view that this tribunal failed adequately to give weight to those factors in the balancing exercise carried out in order to reach their decision on re-engagement.'**
>
> **12. So far as contributory conduct is concerned, this is relevant to whether it is just to make either order and in the case of a re-engagement order, on what terms. In cases where the contribution assessment is high, it may be necessary to consider whether the level of contribution is consistent with the employer being able genuinely to trust the employee again: *United Distillers & Vintners Ltd v Brown* UKEAT/1471/99, unreported, 27 April 2000 at paragraph14."**

27. Although we have just cited passages from two cases in which different divisions of the EAT overturned ET orders for re-engagement, more generally we note as follows: (1) questions of practicability under section 116 are primarily for the ET and are likely to be difficult to challenge on appeal (see Clancy v Cannock Chase Technical College [2001] IRLR 331 EAT); and (2) ETs have a wide discretion in determining whether or not to order reinstatement or re-engagement; it is essentially a question of fact (see Central & North West London NHS Foundation Trust v Abimbola UKEAT/0542/08, at paragraph 15)."

64 In this case, the Claimant has expressed the wish to be reinstated, in the alternative re-engaged. We were satisfied that that wish was genuine and made for good reason, arising as it did from her difficulty in finding alternative employment due to the dismissal for dishonesty and her previous happiness in her job with the Respondent.

65 The next stage is to consider whether it is practicable for the employer to comply with such an order and where the complainant has caused or contributed to some extent the dismissal whether it would be just to order re-engagement. We had regard to the guidance given in **Farren** as summarised above, in particular that cited from **Valencia** and **Crossen**, if the employer maintains a genuine even if unreasonable belief that the employee has committed serious misconduct then re-engagement will rarely be practicable and will be ordered in only the rarest of cases. Even though the employer's belief is unreasonable, where there has been a breakdown in confidence, the remedy

invariably will be compensation.

66 The Respondent relies upon the belief of Ms Billet that the Claimant had committed an act of gross misconduct, namely theft. We have found that belief genuine, albeit unreasonable. That caused Ms Billet to lose trust and confidence in the Claimant. Also relevant to the practicability of reinstatement or re-engagement, is the effect of the Claimant's conduct in these proceedings upon trust and confidence. It is important that if reinstatement or re-engagement were to be ordered, that the working relationship is capable of being carried into effect with success. It not enough that it is possible, we must consider realistically the capability of re-establishing trust and confidence between the parties as this is an essential element of an employment relationship.

67 If the Claimant had advanced her case in this Tribunal as she had done in the internal disciplinary process, we would have concluded that this was one of those rare cases where reinstatement was appropriate and reasonably practicable despite Ms Billet's genuine belief that there had been theft. We would have concluded that such view was not apparently shared by HR and was so unreasonable on our findings that our provisional view would have been that the working relationship with the Respondent was capable of being carried into effect. However, any possible relationship of trust and confidence has been fatally damaged by the way in which the Claimant has chosen to prosecute her claim in this Tribunal. This is not simply the tactics of an unwise or inexperienced representative. The Claimant was given an opportunity to speak directly to the Tribunal after the liability judgment was given and state whether or not she maintained her allegations that: (i) Ms Billet was acting in bad faith, (ii) there had been discrimination on grounds of race and (iii) her broader, wide-ranging allegations of tampering with the evidence. The Claimant maintained her belief in each of those matters. We conclude that her distrust goes beyond doubts about one manager at one branch (namely Ms Billet at Romford) but is evidence of a serious and deep rooted distrust by the Claimant of the Respondent's entire organisation and the manner in which she believes it is prepared to conduct itself in order to defend her claim. Whilst the Claimant expressed a desire to put matters behind her and to move forward, we must also consider the effect that her unsubstantiated allegations of in essence an attempt to pervert the course of justice has affected the Respondent's ability to have trust and confidence in her.

68 Overall, we conclude that the way in which the case has been advanced in this Tribunal has been such as to render reinstatement and the alternative re-engagement not reasonably practicable and that the appropriate remedy is compensation. In reaching this conclusion, we were very concerned about the difficult position in which the Claimant finds herself when looking for alternative employment if required to give the reason for leaving the Respondent, where the latter has not proved repudiatory breach and the Claimant was wrongfully dismissed. The Respondent confirmed to the Tribunal that its references include dates of employment, job title and duties only. In other words, that it would not disclose that the Claimant had been dismissed for gross misconduct. It may be that the Respondent is asked for more details orally. The Respondent would not wish to give a reference which is materially misleading, even if factually accurate, by stating that employment was summarily terminated for gross misconduct. We hope that it can find a form of words which will reflect the fact that no allegation of theft has been proven to the satisfaction of an external objective review by this Tribunal.

69 The parties agree that the basic award is £2,592. This is 12 years' continuous employment, the Claimant being over the age of 41 for all of those and a gross weekly pay

for basic award purposes of £144.

70 As for compensatory award, it was agreed that the Claimant had weekly net basic pay of £135 per week and also that she undertook additional weekly overtime. The only dispute was whether or not when calculated net, the weekly pay including overtime was £177.24 (calculated using the HMRC web page) or £168.75 (calculated by Ms Bell working out the proportion of tax and national insurance deducted from basic pay and applying it pro rata to overtime). We prefer the HMRC calculations and find that the Claimant's weekly net loss, including overtime, is £177.24.

71 The Tribunal has a discretion as to the order in which we calculate monetary awards where there are concurrent claims of wrongful dismissal and unfair dismissal. We may choose whether to start at the expiry of the notice period or calculate the total sum due by way of loss of earnings from dismissal and give credit for any sums due for notice pay. In exercising our discretion, we took into account that compensation under s.123 Employment Rights Act will be reduced for compensatory award whereas damages for breach of contract will not. We have found that the Claimant ought not to have been summarily dismissed. In such circumstances, it would be unjust and irrational to penalise her in damages and award an unjust windfall to the Respondent if we calculate all of her loss under s.123. The Claimant is entitled to 12 weeks' full pay in respect of notice, from 12 March 2017 until 4 May 2017, giving a sum of £1,620.

72 Prior to any deductions, the total compensatory award under Section 123 is £10,837.30, for the following reasons:

72.1 To the date of this hearing, the Claimant has not secured alternative employment. There was no suggesting that she has failed to mitigate her loss. Her problems have arisen in large part due to the extremely prejudicial effect of a dishonesty dismissal upon her prospects of work in the retail sector. We consider it just and equitable that the Claimant be compensated for loss of earnings from 5 May 2017 to date, a period of 31 ½ weeks at £177.24, giving a sum of £5,583.06.

72.2 We considered the period of future loss of earnings and we are satisfied in principle that six months is appropriate given the stigma caused to the Claimant and the difficulties caused in finding alternative retail employment in light of her dismissal. Whilst we have expressed hope that the Respondent will be able to assist in the wording of a reference, we cannot compel it to do so and therefore we cannot assume that any reference will be such as to reduce the Claimant's future losses. 26 weeks at £177.24 gives a future loss of £4,608.24.

72.3 The Claimant is entitled to loss of statutory rights in the sum of £500 and expenses incurred in job seeking in the sum of £146.

73 Dealing first with **Polkey,** the dismissal was substantively unfair under s.98(4) as it fell outside of the range of reasonable responses but we did not find any procedure unfairness. There will be no deduction.

74 As for any reduction of the basic or compensatory awards, and applying **Steen**, the Tribunal did not consider that the Claimant's conduct in taking the flowers was

blameworthy for the purposes of contributory fault in circumstances. Even though the Claimant acknowledged that it was a mistake, we have found that she believed that she was entitled to do take the flowers and that the sanction of dismissal was so disproportionate as to be outside of the range of reasonable responses.

75 Where the Tribunal does consider that the Claimant behaved in a foolish and blameworthy way, was her conduct during the disciplinary hearing in respect of the confusion in her evidence as to the time the flowers were left, were picked up by her and removed from the shop floor. Whilst we have found that there were no material or significant differences in the evidence between the Claimant and the Respondent employees at the time, and we have not accepted the Respondent's submission the Claimant sought to blame her colleague, the Claimant's case at the disciplinary hearing sought to give Ms Billet the clear impression that the flowers had been left behind the till for a far longer period before being removed than was in fact the case. This caused Ms Billet to conclude that the Claimant was not being honest and that was part of her reason for dismissal. Taking the case in the round, we are satisfied that this was a relatively minor contribution to the dismissal and that the appropriate reduction is 15%.

76 After adjustment for contributory fault, the basic award that will be payable is £2,203.20 and compensatory award will be £9,211.71. The damages for breach of contract are not subject to the deduction for contributory fault and remain at £1,620.

77 Section 124(1)(z)(a) provides that compensation is limited to the lower of £80,551 or 52 weeks' pay. For the purposes of today, and in the absence of any statutory provision or authority to the contrary, the Tribunal has determined that "pay" includes overtime as that is the sum used for the calculation of loss under Section 123. This gives a statutory cap of £9,216.48; a sum greater than the level of compensation awarded. As the Respondent had not anticipated that this might be an issue, the Tribunal gave leave for it to make written representations within seven days setting out any statutory provision or authority which it says requires pay to be calculated without overtime for the purposes of the statutory cap. The Claimant was afforded the opportunity to respond within seven days to any such representations. In the event, none were received.

78 The total monetary award for the purposed of recoupment is £13,034.91. The prescribed period is 12 March 2017 to 10 January 2018. The prescribed element is £6365.60. The excess of the total over the prescribed element £6,669.31.

79 The Claimant's claim having succeeded she would ordinarily have been entitled to reimbursement of her fees however following the **Unison** case these will now be refunded by the Tribunal. The administration have been notified accordingly.

Employment Judge Russell

9 May 2018