EMPLOYMENT TRIBUNALS

Claimant: Mrs K Ward

Respondent: Marks and Spencer PLC

HELD AT: Manchester **ON:** 26 April 2018

BEFORE: Employment Judge Sharkett
(sitting alone)

REPRESENTATION:

Claimant: Ms McCarthy, Solicitor
Respondent: Mr Crozier of Counsel

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's claim of unfair dismissal is not well founded and is dismissed

2. The claimant's claim of breach of contract (notice pay) is not well founded and is dismissed.

REASONS

1. The claimant brings claims of unfair dismissal and breach of contract. The issues to be determined by the Tribunal were identified at the outset as:

(1) Can the respondent show a potentially fair reason for dismissal? Here the respondent relies on the potentially fair reason of conduct.

(2) Did the respondent have a genuine belief in the alleged misconduct, and was that genuine belief held on reasonable grounds i.e. did the respondent carry out a reasonable investigation into the circumstances of the alleged misconduct?

(3) Did the respondent carry out a fair procedure?

(4) If a fair procedure was not followed thus rendering the dismissal unfair, what would the outcome have been had a fair procedure been followed applying the **Polkey** principle?

(5) Was the decision to dismiss the claimant for the reasons given within the band of reasonable responses open to the respondent as a reasonable employer?

(6) If the dismissal is unfair did the claimant contribute to her own dismissal by culpable or blameworthy conduct

(7) Was the claimant in breach of an express or an implied term of her contract of employment, and if so,

(8) Did the respondent terminate the claimant's employment in circumstances which entitled it to do so without giving notice or payment in lieu of notice?

2. The claimant was represented by Ms McCarthy and gave evidence in support of her claim. The respondent was represented by Mr Crozier of counsel who called the dismissing officer, Miss Piri-Pirnagh, a manager of the respondent, to give evidence. All witnesses gave evidence in chief by way of written witness statements, which had been exchanged and were taken as read by the Tribunal.

3. In preparation for the hearing the parties had produced a bundle of documents consisting of some 297 pages. All references to page numbers in this Judgment are references to pages in the bundle unless otherwise stated.

Findings of Fact

Having considered all the evidence both oral and documentary the Tribunal makes the following findings of fact on the balance of probabilities. The task of the Tribunal is not to make a finding of fact on every matter which arose during the course of the hearing but only on those facts which are relevant to matters to be determined by this Tribunal.

4. The claimant worked continuously for the respondent from March 2008 until her dismissal on 21 August 2017. She worked as a customer service shop assistant which involved face to face contact with customers and other members of staff.

5. In 2014, the claimant was subjected to disciplinary proceedings due to a verbal altercation she had with a customer of the respondent. She was issued with a final written warning which remained on her file for a period of 12 months. The claimant was unsuccessful in her appeal against this decision.

6. A few months after the incident which had led to the disciplinary sanction the customer concerned returned to the store and apologised to the claimant for the manner in which he had previously behaved. When he learned that the claimant had been subjected to a disciplinary sanction because of the incident he approached the store manager to ask that the sanction be overturned, accepting that what had occurred had been largely his fault. Whilst the respondent did consider whether the sanction should be changed in light of what the customer had said, the claimant was

informed that the respondent could see no reason to interfere with the original decision.

7. In February 2015 the claimant submitted a grievance on the basis of what she considered to be the respondent's unreasonable refusal to overturn the decision to issue her with a final written warning. The grievance was not upheld and the respondent informed the claimant that it was of the view that the respondent had dealt with the matter in a fair and appropriate manner. In evidence the claimant explained that she had struggled to come to terms with the injustice of this disciplinary sanction because although the customer had acknowledged fault of his part the respondent had still refused to retract the sanction.

8. There were no further incidents until March 2016 when the claimant was subjected to further disciplinary action following an altercation on the shop floor with her line manager. The claimant was issued with a final written warning on 19 April 2016. On appeal the sanction was reduced to a written warning and remained on her file for 12 months. In evidence the claimant explained that she was also unhappy about the second disciplinary sanction because she had been able to show that the other member of staff had not been truthful about the detail which led to the incident.

9. Following the incident in 2016, the claimant was absent from work for periods of time between March and September 2016. During that time, she complained of bullying by other managers and raised a grievance in relation to one. Her grievance was not successful but on her permanent return from sickness absence she was given a change of line manager in light of the difficulties she had previously experienced.

10. There were no further incidents until three months after the expiration of the 2016 written warning. In July 2017 the claimant was subjected to disciplinary proceedings because of an altercation she had with a customer on the shop floor and with a member of staff who she believed had not shown her appropriate support in respect of the incident.

11. The circumstances of the incident are that on 22 July 2017 the claimant was working on one of the tills when she was approached by a customer who wished to exchange a pair of trousers previously bought from the respondent. The customer explained that the clasps had broken on the trousers, and as he had only purchased them about a month earlier he wanted to exchange them for a new pair. The claimant explained to the customer that whilst the trousers may have become defective since purchase, in order to be eligible for a replacement the trousers would have to be in a reasonable condition, which in her opinion they were not. An additional factor for her declining to replace the trousers was the fact that the customer did not have a receipt or any other proof of purchase. The customer was not happy and the claimant approached the Commercial Manager, Mr Deer, and another member of staff to canvass their views. It is the claimant's case that they both agreed that the trousers should not be exchanged in the absence of a receipt, and she went back to the customer to confirm this. The customer was not happy with the situation but did attempt to find proof of purchase by accessing his bank statements on his phone. When he was unable to do so he still refused to leave the store without an exchange. The claimant sought support from a colleague, Mr Manning, who although reluctant to help did remember the customer from when he came to buy the trousers. It is the claimant's case that when she told Mr Manning

that Mr Deer had said the trousers could not be replaced without a receipt he suggested that she should just exchange them and “stop being a cow”.

12. Whilst the claimant did have authority to exercise her discretion and exchange the trousers, she was of the view that this was not an occasion when that discretion should be exercised even though the customer was refusing to leave without an exchange. Ultimately Mr Deer was summoned and the customer complained about the manner in which the claimant had been treating him. The exchange between the claimant and the customer thereafter deteriorated. The claimant was frustrated that the customer was changing his story and when Mr Deer walked away with the customer the claimant followed, stepping in between them, determined to make Mr Deer aware that the customer was not being truthful. The claimant persisted in this course of action even though Mr Deer had indicated that he did not wish her to continue.

13. The altercation as it unfolded was captured on CCTV which was shown to this Tribunal. Whilst there is no sound on the footage shown, the footage shows the claimant pointing at the customer and following both Mr Deer and the customer and stepping between them as they walk across the shop floor.

14. In oral evidence the claimant explained that she knew that the respondent set very high standards of customer care and that in respect of customer care she had a clear understanding of what was required of her. She explained that she understood what the respondent expected from customer assistants and that in normal circumstances when a manager takes over a customer it would not be appropriate for an employee to follow and continue a dispute with the customer. She accepted that Mr Deer had made it clear he wanted to deal with the matter alone. However, she explained that whilst the emphasis of the respondent is on fantastic customer service she did not think that everyone was always in a position to do it; on this occasion the claimant explained that this customer was not telling the truth and that she needed to make sure [Mr Deer] was clear about that. In oral evidence the claimant gives somewhat inconsistent evidence in relation to this matter, because although she accepts that in hindsight she realised this was a bad example of customer service (but says that she has seen worse), she also maintains that she saw no harm whatsoever in making sure that Mr Deer knew the customer was not telling the truth because she had not seen a receipt. When asked why she did not simply walk away as she had said she would do in future when previously disciplined, she explained that she was frustrated because she felt the customer was making her out to be a liar and she wanted Mr Deer to acknowledge what she was saying.

15. Ultimately Mr Deer allowed the customer to have a replacement pair of trousers. However, the claimant was not happy about this because it was her belief that this was against established company policy. When the customer had gone she approached Mr Manning on the shop floor and accused him of being a coward. It is the claimant's case that Mr Manning apologised to her for having referred to her as “a cow” and that when they were discussing the matter in the shoe cupboard they did so in a civil manner and not in the way suggested by another colleague, Lauren. Lauren described hearing the claimant screaming at Mr Manning and this prompted her to find Mr Deer and ask him to come to the shoe cupboard. It is the claimant’s case that as the CCTV shows that Lauren was not standing near the shoe cupboard, but was some distance away, she could not have heard what was being said as she

was not screaming. The Tribunal finds on the balance of probabilities that the claimant did raise her voice when she was in the shoe cupboard because not only do both Mr Deer and Lauren say that she did, but also given that it is not disputed that Mr Deer came to the shoe cupboard at the request of Lauren, the fact that she was not near the cupboard when she felt the need to ask Mr Deer to go there adds weight to the fact that the claimant's voice must have been raised in order for her to have felt the need to get Mr Deer in the first place.

16. When the claimant left the shoe cupboard she approached the store manager, Mr Rutland, to discuss what happened. She explained the situation in relation to the trousers and the fact that she had called Mr Manning a coward. Mr Rutland went to speak to Mr Manning on his own and found Mr Manning to be upset and embarrassed to have been called a coward on the shop floor. Mr Rutland attempted to facilitate a conversation between the claimant and Mr Manning, at the end of which the claimant alleged that Mr Manning had called the claimant a cow. In oral evidence the claimant accepts that she called Mr Manning a coward but maintains that her actions were no more hurtful than his were to her when he called her a cow – a fact that was not witnessed by anyone else and Mr Manning denied.

17. The following day the claimant returned to work and as she sensed her line manager, Miss Davies, was being negative towards her, she told her about what had happened the previous day. Later that day the claimant sensed her line manager was being offhand and she told her that if she carried on in that way she was going to go home.

18. Approximately an hour after the claimant arrived at work the next day she was told that Miss Davies, wanted to meet with her. Ms Davies informed the claimant that an investigation was going to be carried out into the incident that had occurred on 22 July 2017. On 27 July 2017 the claimant was suspended pending the outcome of that investigation (p173). In oral evidence the claimant explained that she did not think her actions warranted suspension and nor was she of the view that the respondent should be treating her behaviour as potential gross misconduct because she had seen much worse customer service during the time she had worked there. When interviewed as part of the investigation the claimant did not accept that she had given poor customer service and said she regretted nothing. She confirmed when asked by Ms Davies that there were no personal factors which may have contributed to her behaviour.

19. As part of the investigation the respondent viewed the CCTV footage and interviewed six witnesses, all of whom were critical of the claimant and all confirmed that she had been shouting. Mr Deer when interviewed expressed a view that her behaviour was one of the worst examples of customer care he had seen and this view was supported by the evidence of the others who were interviewed. The claimant meanwhile continued to maintain that she had dealt with the matter appropriately and had no regrets. The respondent decided that the claimant should be invited to a disciplinary hearing to respond to the allegations of inappropriate behaviour.

20. Prior to the hearing scheduled for 15 August 2017 the claimant was given a copy of the findings of the investigation and advised that the potential outcome of the hearing could be dismissal. The hearing was conducted Ms Piri-Pirnagh and the claimant chose not to be accompanied. The claimant was given an opportunity to

respond to the allegations against her and told Mr Piri-Pirnagh that although she accepted she had not treated the customer in a friendly manner she felt the customer owed her an apology as he had spoken to her inappropriately. Ms Piri-Pirnagh explained in evidence that throughout the discussion of this matter the claimant seemed unable to accept that she had done anything wrong. Whilst when viewing the CCTV footage she accepted that she had followed Mr Deer instead of letting matters lie and with some hesitation stated that she could see where Ms Piri-Pirnagh was 'coming from', she maintained that in the circumstances she thought that she had dealt with it very well (p233). That was a sentiment repeated by the claimant in oral evidence when she also explained that she had followed what she had been told to do by [Mr Deer];

21. In respect of the second allegation and her conduct towards Mr Manning, the claimant accepted that she had called Mr Manning a coward because he had not supported her approach with the customer. She did not accept that she had been shouting and did not accept her behaviour had been inappropriate. In oral evidence the claimant confirmed that she had called Mr Manning a coward on the shop floor but that she had not said this in front of customers and in her view the words she used were no more hurtful that when he called her a cow.

22. At the end of the meeting Mr Piri-Pirnagh adjourned the hearing for further consideration. Having considered all the evidence she concluded that

a. [The claimant] had demonstrated inappropriate behaviour towards a customer leading to poor customer service;

b. She had also demonstrated inappropriate behaviour towards a colleague and had openly criticised him;

c. The incident had taken place on the sales floor within the view and hearing of other customers.

Mr Piri-Pirnagh was aware that the claimant had been involved in other incidents with customers and colleagues but that there were no live disciplinary sanctions in place. She was aware that the previous sanctions had been imposed for very similar incidents involving disrespectful conduct towards customers or colleagues. She considered that as the claimant had previously been disciplined for similar behaviour and the claimant continued to seek to justify what she had done and had not shown any remorse for her actions, there was a likelihood that the behaviour would be repeated. The claimant did not raise any mitigating factors other than previous occasions when her good customer service had been acknowledged by the respondent but Mr Piri-Pirnagh considered all relevant factors, including the claimant's service record before concluding that the claimant's behaviour amounted to gross misconduct and justified summary dismissal. In oral evidence Ms Piri-Pirnagh volunteered that she had heard mention of other incidents that had been attributed to the claimant but she did not have regard to these incidents when making her decision as they had not been the subject of previous disciplinary proceedings. Having heard from Ms Piri-Pirnaugh and her explanation of the experience she has had in conducting disciplinary hearings and the way in which she approached this one, the Tribunal is satisfied on the balance of probabilities that Ms Piri-Pirnagh had the experience and professionalism to know the difference between information that had been tested through disciplinary proceedings and that which

was merely gossip and, that she did not take this extraneous information into account when reaching her decision.

23. The hearing was re-convened on 21 August 2017 when the claimant was informed that she was to be dismissed for gross misconduct. The claimant continued to express a view that she had not done anything wrong and was advised of her right to appeal the decision within 5 days of receiving the dismissal letter. Ms Piri-Pirnagh read through the notes of the disciplinary meeting with the claimant which the claimant then signed. At the end of the meeting and at the request of the claimant it was agreed that a typed copy of the minutes would be sent to her.

24. The claimant did not exercise her right of appeal until 20 September 2017. It is the claimant's case that she did not do it until then because she was waiting for the typed minutes of the disciplinary hearing. The respondent declined to accept the claimant's request for an appeal of the decision to dismiss her because it was submitted well outside the time limit prescribed by the respondent policy. When the claimant had previously appealed against a disciplinary sanction she had sought an extension to the time limit which had been granted. She had not requested additional time to submit her appeal on this occasion. Further the respondent decided that although the claimant had not received a copy of the typed minutes before submitting her appeal, she was aware of the content of the same having gone through them in the hearing of 21 August 2017, she was aware of the time limit for submitting an appeal, she had not sought agreement that she could wait until such time as she received the minutes before submitting the appeal and the respondent had no record of the claimant making further contact with the respondent to obtain the minutes.

Submissions

25. For the claimant Ms McCarthy submits that the respondent has failed to carry out a thorough and full investigation because it has failed to explore whether CCTV footage might have shown something relevant in relation to the Mr Manning issue and, in addition there were relevant witnesses who should have been interviewed but were not. She submits that while there is conduct that could have been better, and that this is accepted by the claimant, it is not conduct of a type that would justify dismissal. Ms McCarthy refers the Tribunal to the types of conduct which are described as amounting to gross misconduct in the respondent's disciplinary procedure. She submits that the conduct in question here does not amount to gross misconduct and in the absence of the same the respondent is not entitled to dismiss the claimant. She submits that the respondent cannot rely on expired warnings and it inconceivable that the dismissing officer did not rely on them when reaching her decision to dismiss the claimant.

26. Ms McCarthy accepts that there are circumstances where it might be possible to rely on expired warnings and refers the Tribunal to the unreported EAT decision in Stratford v Auto Trail VR Limited. However, she submits that the circumstances is that case were entirely different because the claimant was on a 19th disciplinary hearing. In addition, she submits that if a respondent is seeking to rely on previous warnings the person doing so should do more than merely look at the outcome letter. Ms Piri-Pirnagh Should have been aware that the claimant disputed that allegations against her and appealed the decision on both occasions. Ms McCarthy submits that the respondent should also have considered the claimant's medical history before

deciding what disciplinary sanction to impose because the claimant had in the past told the respondent that she had suffered from stress.

27. Ms McCathy submits that it is inconceivable that Ms Piri-Pirnagh did not consider the untrue gossip she had heard about the claimant having a customer by the throat. She further submits that Mr Piri-Pirnagh did not have regard to the fact that the claimant had in the past had awards for excellent customer service and that the documentary evidence is not reflective of the respondent taking the claimant's explanation of the allegations into account. In addition Ms MCCarthy asked the Tribunal to have regard to the fact that the claimant has previously asked for training in customer care but that the respondent has failed to provide it.

28. Ms McCathy, submits that the only reason the claimant did not appeal in time was because she wanted a copy of the typed minutes before she did. Ms McCarthy accepts that the claimant did not tell the respondent this but the respondent could and should have allowed the claimant's appeal to proceed.

29. In respect of the claim for breach of contract Ms McCarthy accepts that the claimant's behaviour fell short of what was required of her but that there were strong mitigating reasons for her behaviour and it did not amount to gross misconduct.

30. For the respondent Mr Crozier submits that there was no requirement on the respondent to carry out a full and thorough investigation and the one that was carried out went beyond the requirement to be reasonable. He submits that the witnesses to whom Ms McCarthy refers were peripheral to the matter and that the claimant accepted in oral evidence that there was no one else that would have been able to give important information. In as far as sourcing additional CCTV footage, Mr Crozier submits that this would have served no useful purpose.

31. Mr Crozier asks the Tribunal to have regard to the continued refusal on the part of the claimant to accept responsibility for her actions. He reminds the Tribunal that during the formal questioning of her she responds that she thought she had "dealt with the matter very well" and that she "regretted nothing". Whilst there was ultimately some recognition of her actions by her this was qualified with explanation and excuse. He reminds the Tribunal that even today the claimant reverts once again to denial of wrongdoing.

32. In respect of whether the decision to dismiss fell within the band of reasonable responses Mr Crozier submits that this is clearly a case where the respondent lost trust and confidence in the claimant. He submits that it cannot be the case that a respondent is not allowed to take pre-existing warnings into account just because a warning has expired, particularly where the only two previous issues were for exactly the same type of conduct. In addition, he submits that Ms McCarthy is wrong in law to say that if a respondent choses to do so, it must take into account all the facts. In support of his submission he refers the Tribunal to *Wincanton Group plc v Stone 2013 ICR D6, EAT* , which describes the circumstances where it is appropriate for a Tribunal to look behind a warning. He submits that this is not a case to which those circumstances apply and it is not pleaded as such either.

33. Mr Crozier submits that the claimant has admitted that she called Mr Manning a coward and she does not dispute her actions, which are clear from the CCTV. Other than her awards for excellent customer service she did not ask for any other

mitigating factors to be considered. In the circumstances he submits that the decision to dismiss was one that was open to the respondent and was within the band of reasonable responses.

34. In respect of the appeal, Mr Crozier submits that the claimant was told of the time limit for submitting an appeal on two occasions. He submits that an appeal process cannot be open ended, the claimant has not given any reason why she could not have submitted her appeal and it was within the band of reasonable responses for the respondent to refuse to accept her appeal when it was submitted 20 days later.

35. In respect of the claim for breach of contract Mr Crozier submits that the claimant has admitted her actions which are clear from the CCTV footage. The claimant has shown no contrition for her actions saying that she feels that she dealt with the matter well and that she has no regrets. He submits that the claimant does not see a problem with her actions and that she will do it again is highly likely given that this is the third time in three years that she has been disciplined for the same type of behaviour. He submits that by her behaviour the claimant has repudiated the contract and it would not be possible for the respondent to allow her back into store to repeat the same type of behaviour.

The Law

36. The unfair dismissal claim is brought under Part X of the Employment Rights Act 1996. The primary provision is section 98 which, so far as relevant, provides as follows:

> "(1) In determining for the purposes of this part whether the dismissal of an employee is fair or unfair it is for the employer to show –
>
> (a) The reason (or, if more than one, the principal reason) for the dismissal; and
>
> (b) That it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this subsection if it relates to the conduct of the employee.
>
> (3) …
>
> (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case."

37. If the employer fails to show a potentially fair reason for dismissal (in this case conduct) dismissal is unfair. If a potentially fair reason is shown the general test of fairness in section 98(4) must be applied.

38. In a misconduct case the correct approach under section 98(4) was helpfully summarised by Elias LJ in **Turner v East Midlands Trains Limited [2013] ICR 525** in paragraphs 16-22. Conduct dismissal can be analysed using the test which originated in **British Home Stores v Burchell [1980] ICR 303**, a decision of the Employment Appeal Tribunal which was subsequently approved in a number of decisions of the Court of Appeal. The "**Burchell** test" involves a consideration of three aspects of the employer's conduct:

(1) Did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case?

(2) Did the employer believe that the employee was guilty of the misconduct complained of?

(3) Did the employer have reasonable grounds for that belief?

39. The appeal is to be treated as part and parcel of the dismissal process (**Taylor v OCS Group Limited [2016] IRLR 613**).

40. Since **Burchell** was decided, the burden on the employer to show fairness has been removed by legislation. There is now no burden on either party to prove fairness or unfairness respectively. If the three parts of the **Burchell** test are met, the Employment Tribunal must then go on to decide whether the decision to dismiss the employee was within the band of reasonable responses, or whether that band fell short of encompassing termination of employment.

41. It is important that in carrying out this exercise the Tribunal must not substitute its own decision for that of the employer. The band of reasonable responses test applies to all aspects of the dismissal process, including the procedure adopted and whether the investigation was fair and appropriate (**Sainsbury's Supermarkets Limited v Hitt [2003] IRLR 23**). The focus must be on the fairness of the investigation, dismissal and appeal and not on whether the employee has suffered an injustice. The Tribunal must not substitute its own decision for that of the employer but instead ask whether the employer's actions and decisions fell within that band.

42. In a case where an employer purports to dismiss for a first offence because it is gross misconduct, the Tribunal must decide whether the employer acted reasonably in characterising the misconduct as gross misconduct, and also whether it acted reasonably in going on to decide that dismissal was the appropriate punishment. An assumption that gross misconduct must always mean dismissal is not appropriate as there may be mitigating factors.

43. The EAT in **Mbubaegbu v Homerton Univeristy Hospital NHS Foundation Trust EAT 0218/17** has confirmed that there is no authority to suggest that there must be a single act of gross misconduct to justify summary dismissal or any authority which states that it is impermissible to rely on a series of acts, none of which would by themselves justify summary dismissal. In other words, it is possible

for a series of acts demonstrating a pattern of conduct to be of sufficient seriousness to undermine the relationship of trust and confidence between the employer and employee to justify summary dismissal.

44. Similarly, even if the misconduct in question is not properly characterised as 'gross misconduct' this does not necessarily mean that the employer cannot reasonably dismiss for a first offence if the relationship of trust and confidence is destroyed. In **Quintiles Commercial Ltd v Barongo EAR 0255/17** the EAT pointed out that s98(4) ERA does not lay down any rule that, absent earlier disciplinary warnings, a conduct dismissal for something less than gross misconduct must be unfair. In many cases an ET may find such dismissals fall outside the bank of reasonable responses but there is no automatic assumption that this will be so absent an act of gross misconduct.

45. The issues of expired disciplinary warnings was discussed in ***Diosynth Ltd v Thomson 2006 IRLR 284, Ct Sess (Inner House)*****,** where the court held that a dismissal was unfair where an employer had decided to take into account an expired warning when deciding to dismiss an employee by reason of misconduct. The court held that the employee was entitled to assume that an expired warning would cease to have effect on any subsequent disciplinary decisions and in this case the employer would not have dismissed the employee if the warning had not been on his file. However, the Court of Appeal distinguished **Diosynth**, in **Airbus UK Ltd v Webb 2008 ICR 561, CA,** where it held that although a warning will cease to have effect as a penalty once it has expired and could not be relied on as the reason for dismissal, it did not mean that the misconduct for which warning had been imposed could not be relevant to the consideration of the reasonableness of the employer's later action for dismissing the employee for similar misconduct. Lord Justice Mummery holding that *'The language of S.98(4) is wide enough to cover the employee's earlier misconduct as a relevant circumstance of the employer's later decision to dismiss the employee, whose later misconduct is shown by the employer to the employment tribunal to be the reason or principal reason for the dismissal.'*

46. The word "equity" in section 98(4) can import considerations of consistency. The EAT pointed out in **Hadjioannou v Coral Casinos Limited [1981] IRLR 352** that evidence of more lenient treatment of other employees in truly parallel situations may support an argument that dismissal fell outside the band of reasonable responses. However, such arguments should be scrutinised with particular care because an employer is entitled to take into account not only the nature of the misconduct but also the surrounding facts and any mitigating personal circumstances affecting the employee concerned (**Paul v East Surrey District Authority [1995] IRLR 305** Court of Appeal).

Application of the Law and Secondary Findings of Fact

47. It is not disputed that the claimant's conduct fell below that which was to be expected by the respondent and therefore the respondent it able to show a potentially fair reason for dismissal. The question is whether the decision to dismiss for that misconduct was reasonable in accordance with the provisions of s98(4) ERA 1996.

48. The first issue to be determined by the Tribunal is whether the respondent had a genuine belief in the alleged misconduct. Ms McCarthy for the claimant

submits that the respondent has not carried out a thorough and full investigation because it failed to explore the possibility of CCTV footage of the exchange between Mr Manning and the claimant. In addition, she submits that there were other witnesses that could have given information. I am not persuaded by this argument because the CCTV available does not contain sound and therefore it would not be possible to hear any exchange that went on between the two individuals. In addition the claimant does not deny that she called Mr Manning a coward, what she denies is that she was shouting at him. The respondent interviewed a number of witnesses who had first-hand experience of what happened and all recount materially the same tale. The respondent is not required to conduct an extensive investigation and leave no stone unturned in anticipation of finding something that will discredit the evidence already gathered. What the respondent is required to do is carry out such investigation as is reasonable in the circumstances of the case, **(Sainsbury Store v Hitt).** The claimant confirmed in oral evidence that there were no other witnesses who she considers should have been interviewed. There is no evidence to suggest that any of the witnesses had any grudge against the claimant or ulterior motive in seeking to cause her trouble. On the contrary the claimant thought that Mr Manning was happy to draw a line under what had happened. It may be that he was, however the evidence before the respondent was that Mr Manning had been upset by the claimant's behaviour and had a duty to investigate the allegation and take action if necessary. In respect of the allegations in relation to the customer, there was clear evidence that an exchange took place between a customer and the claimant, and the respondent interviewed all witnesses relevant to the incident. It is clear therefore that a reasonable investigation was carried out prior to the disciplinary hearing taking place and that the claimant was provided with the detail of that investigation.

49. At the disciplinary hearing Ms Piri-Pirnagh discussed the findings of the investigation and afforded the claimant an opportunity to provide an explanation. Ms Piri-Pirnagh explained in oral evidence that she formed the belief from talking to the claimant that although the claimant did not deny what had happened with the customer or Mr Manning she sought to justify her actions and did not appear the take responsibility for them or believe that she had done anything wrong. I find that in these circumstances it is reasonable to conclude that Ms Piri-Pirnagh did have a genuine belief in the claimant's alleged misconduct and that she had reached that belief having considered the content of the investigation and having heard from the claimant.

50. I turn then to the question of whether the respondent followed a fair procedure and whether the decision to dismiss the claimant, for the reason it did, was within the band of reasonable responses open to a reasonable employer. Ms McCarthy makes a number of submissions in this respect. Firstly, she submits that the nature of the conduct does not warrant a finding of gross misconduct such as to justify summary dismissal. Secondly, she submits that the respondent should not have relied on the previous warnings and if it intended to do so it had a responsibility to ensure it knew all the circumstances of each warning including not only the allegations and the outcome but also whether the claimant disputed the allegations and whether she had appealed the decisions.

51. I find that it is important first of all to establish what it was that the respondent took into account when reaching a decision to dismiss the claimant. There is no doubt in my mind that it was not the fact of the previous warnings that the

respondent considered but the nature of the conduct which led to the warnings. It is clear from reading the outcome letters of 2014 and 2016, that the type of conduct which led to those warnings was almost identical to the conduct which led to her dismissal.

52. The claimant appears to hold a view that because the customer from the 2014 incident accepted that he played a part in what took place between him and the claimant, the respondent should quash the finding of misconduct. Similarly, she appears to hold the view that because the colleague had not been truthful in her account of what had happened in relation to asking the claimant to cover a shift in 2016, the respondent again should not have found that she had behaved in an inappropriate way. Unfortunately, what the claimant fails to appreciate is that the fact that the customer has apologised or that a colleague has not been truthful does not mean that she did not carry out the conduct complained of. These were facts that the respondent was entitled to take into account as mitigation when determining the appropriate sanction to impose as a result of the claimant's conduct. That they did so is evident from the fact that the second final warning was reduced to a written warning once the respondent became aware of the mitigating factors in the case.

53. In as far as it is relevant I am satisfied that the warnings were issued in good faith and that it was the nature of the claimant's earlier misconduct and not the warnings which was considered in the respondent's decision to dismiss for the later misconduct (**Airbus UK Ltd v Webb 2008 ICR 561, CA,)**. Ms Piri-Pirnagh explained that she took account of the fact that the nature of the misconduct was almost identical to the incident that had led to the previous disciplinary actions. Whilst not falling within the definition of gross misconduct under the terms of the disciplinary policy (p35), she was concerned that there was a strong possibility that the claimant would repeat her behaviour in the future if faced with similar situations. Mr Pir-Pirnagh had regard to the fact that the claimant did not accept that she had been in the wrong and although she conceded that her treatment of the customer could have been better she still did not accept that she was not justified in behaving in that way. This was a stance that the Tribunal finds the claimant continued to adopt throughout this hearing.

54. Ms Piri-Pirnagh explained that given the repetitious nature of the claimant's misconduct, which had occurred within a short period of the expiration of each disciplinary warning, the respondent felt there was a lack of trust or confidence that the claimant would not repeat her behaviour which in turn would be detrimental to the respondent. Having had regard to the authorities referred to above I find that whilst there was no live sanction in place against the claimant at the time of her dismissal, there has been a pattern of behaviour with this claimant which culminated in undermining the trust and confidence between the employer and the employee to the extent that the respondent was justified in summarily dismissing her. The claimant had been made aware in the past that her conduct was unacceptable and had been given an opportunity to improve. I do not accept that she would not have behaved in this way had she received the training she requested because she has demonstrated to this Tribunal that she is aware of what the respondent requires of her and what she should do if she encounters a difficult customer. The fact that she approached management for assistance is indicative of the fact that she knew this, however whilst she initially took the first steps she failed when asked to leave the

situation and continued to act in a manner which led to disciplinary action being taken against her.

55. I find that by acting in the manner in which she did and in the knowledge that her conduct would be found to be unacceptable by the respondent, the claimant was in breach of the implied duty of trust and confidence between and employee and employer. I find that this was a repudiatory breach going to the root of the contract and that the respondent was entitled to dismiss the claimant without notice or payment in lieu of notice.

56. Turning then to whether the respondent followed a fair procedure in accordance with the ACAS code and the requirements of s98(4). It is not disputed that the respondent refused to accept the claimant's notice of appeal because it was outside the time limit prescribed by the respondent's policy. Whilst it is not appropriate to unreasonably fetter an employee's right of appeal, I accept that there must be some limit placed on the time given to do so. This claimant was aware of the time limit for appealing because she had exercised her right in respect of appeals under the policy on two previous occasions. She was also aware that she was able to ask for an extension of time for submitting an appeal because she had done so in the past when the extension had been granted. On this occasion she made no such application and nor did she indicate that she would not be able to submit her appeal until such time as she received a copy of the typed minutes of the disciplinary meeting. She did not make any further requests for the minutes and it was only when she finally submitted her appeal that she referred to the fact that she had been waiting for them. In the circumstances of this particular claim, I find that the decision of the respondent to refuse to accept the claimant's late application to appeal was one that was open to it and within the band of reasonable responses for the reasons given above. Consequently I find there was no procedural failing such as would render the dismissal unfair.

Conclusion

57. For the reasons stated above I find that the claimant's claim of unfair dismissal is not well founded and is dismissed.

58. For the reasons stated above I find that the claimant was in breach of the implied term of trust and confidence and the respondent was entitled to dismiss without notice or payment in lieu of notice.

Employment Judge Sharkett

Date 10 July 2018

JUDGMENT AND REASONS SENT TO THE PARTIES ON

23 July 2018

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