EMPLOYMENT TRIBUNALS

Claimant: Mrs S Bailey

Respondent: The Manchester College

Heard at: Manchester **On:** 2 and 3 April 2019
17 April 2019 (In Chambers)

Before: Employment Judge Holmes

REPRESENTATION:

Claimant: In person
Respondent: Ms M Guilding, Solicitor

RESERVED JUDGMENT

It is the judgment of the Tribunal that:

1. The claimant was unfairly dismissed.

2. The claimant is entitled to a basic award, but the Tribunal reduces the same by 50% to reflect her conduct before the dismissal, pursuant to s.122(2) of the Employment Rights Act 1996.

3. The Tribunal considers the claimant is not entitled to any compensatory award as, had a fair procedure been followed, her dismissal would still have occurred on the date that it did, and consequently the Tribunal makes a 100% reduction on the basis of ***"Polkey"***.

4. The parties are invited to agree remedy in the light of the Tribunal's calculations in paragraphs 31 and 32 of this Judgment, in default of which they are to notify the Tribunal by **10 May 2019** as to whether any remedy hearing is required.

REASONS

1. The Tribunal convened to hear the claimant's complaint of unfair dismissal, and also her claims in respect of breach of contract and the respondent employer's counterclaim. The latter two claims were in fact settled during the course of the hearing by a COT3 agreement, and consequently the Tribunal has only determined

the claimant's complaint of unfair dismissal. The claimant's claim arises out of her dismissal from her post as a Student Experience Support Worker, which she held with the respondent based at the Harpurhey campus from 23 February 2009 until the date of her summary dismissal on 24 May 2018.

2. The respondent admits that the claimant was dismissed, but contends that it was for the potentially fair reason of conduct, and that it was fair in all the circumstances. Alternatively, the respondent pleads that if the claimant was unfairly dismissed, any compensation payable to her should be reduced on the basis of ***Polkey v A E Dayton Services Limited [1987] IRLR 503***, by up to 100%, and/or that both her basic award and compensatory award should be reduced for contribution.

3. The respondent called Andrew Hulme, the dismissing officer, and Rebecca Bromley-Woods, the appeals officer. The claimant gave evidence herself, and submitted a witness statement from her husband, Dean Bailey. There was an agreed bundle, to which further documents were added during the course of the hearing. The parties made submissions at the close of the evidence, the respondent making some written submissions to which Ms Guilding spoke, and the claimant replied in oral submissions. As there was insufficient time to consider the judgment and to deliver it the same day, the Tribunal reserved its judgment which is now given.

4. Having considered the evidence, and the documents presented to the Tribunal, and heard the submissions of the parties, the Tribunal now finds the following relevant facts:

4.1 The claimant's role was to provide support to learners at the respondent's colleges which operate on a number of campuses across the Manchester area. She was based primarily at the Harpurhey campus, but could be and was required to work at other locations. Some of the respondent's learners were LACs (Looked After Children), who had special needs, some of whom were the responsibility of the claimant. The respondent operated various schemes to support these learners, whereby funding was obtained from Local Authorities and other sources for the provision of equipment to assist the learners in the course of their education at the college. One such scheme operated to provide learners with equipment such as laptops, the intention of which was to incentivise them to stay at college and to assist them to complete their respective courses.

4.2 On 19 April 2017 a set of vouchers provided by Love2Shop were provided to the claimant for her to utilise to purchase equipment for a particular learner, an LAC, with the initials MS. These vouchers were in fact in £10 denominations, so consequently there were 30 such vouchers. At page 61 of the bundle is a record of the vouchers being provided to the claimant for the benefit of the learner, MS. The operation of the scheme was that the vouchers would not be given to the learner directly nor would any funding be provided direct to the learner, but that the vouchers would be utilised to obtain in this case a laptop for that learner. There was no written policy or procedure about the administration of this scheme, nor any policy or rules that the respondent operated in relation to it. The vouchers could be exchanged

with various retailers, but were limited in that not all retailers would accept them and consequently the flexibility of the vouchers was limited when compared to cash.

4.3 The matters giving rise to the claimant's dismissal came to light in March 2018. The learner, MS, had in fact left the college in or around November 2017, and on 7 March 2018 Lynn Weaver, the Safeguarding Administrator, was following up the relevant records in the college relating to this learner. At 8:45am on 7 March she sent an email to Louise Nixon, a worker in Safeguarding (page 38 of the bundle), in which she was enquiring about the status of the learner, MS. In the second paragraph of this email she referred to the Love2Shop vouchers, and said how the records showed that these vouchers had not been signed for by the learner , but had not been returned to Ms Weaver. She asked Louise Nixon if the claimant still had them , and, if so could they be returned to her as soon as possible as they were due to expire at the end of March 2018. They could be allocated to other LACs, and Ms Weaver wished to do this before they expired. Louise Nixon replied (page 38 of the bundle) to the effect that the claimant was closing down the case on "MyConcern", which was a computerised record system. Consequently, at the end of the day on 7 March 2018 Louise Nixon approached the claimant and asked her about the relevant vouchers.

4.4 There is some dispute as to precisely what was said between Louise Nixon and the claimant on 7 March 2018, but it is common ground that the claimant was asked about these vouchers, and told Louise Nixon that she had exchanged them for cash with her sister, "Caz", because her sister knew a little more about laptops than she did. The claimant asked this was a problem, and Louise Nixon told her that she would have to see Lynn Weaver the following day.

4.5 On 8 March 2018 the claimant was indeed asked into an office, which was in fact Lynn Weaver's office, where she found Rachel Pilling, the Head of Department in Safeguarding, and Louise Nixon. Again the account of this conversation is disputed, the respondent's case being set out in the notes prepared by Rachel Pilling as part of her investigation report at pages 54-56 of the bundle. The respondent has not called either Louise Nixon or Rachel Pilling.

4.6 The claimant's account of that conversation, which she made later the same day, was put onto her mobile phone, screenshots of which appear at pages 154-154B of the bundle, and which is also set out in full at page 155 of the bundle in an email from the claimant to herself. Not having heard directly from the respondent's witnesses, the Tribunal accepts the account that the claimant gives in these notes. She was asked by Rachel Pilling what had happened to the vouchers, and she explained how she had exchanged them for cash with her sister because she could get a better laptop. Rachel Pilling and Louise Nixon kept pressing her, however, and the claimant told them that it was all on MyConcern, whereupon Rachel Pilling replied that "it is not", implying that she searched that computer database. Rachel Pilling at

this point accused the claimant of stealing the vouchers from an LAC student, and was cross. The claimant denied that she had stolen anything, but Ms Pilling pointed out that there was no laptop or any vouchers which the claimant should have given to MS. The claimant was asked if the vouchers had been spent and she said that she assumed so. She had not at that time checked with her sister as to whether she had spent the vouchers, but subsequently did so. She did accept that she exchanged them for cash. She explained how she was waiting to see if MS's attendance improved. She explained how she had the money for the vouchers, and offered to go and get it, and that she would either replace the vouchers , or give Rachel Pilling the money. Upon being told that the vouchers were being audited and had serial numbers upon them the claimant said, "fuck, fuck, fuck, this looks really bad". Rachel Pilling then said that she needed advice from HR and asked her to leave the room. Louise Nixon accompanied her.

4.7 The claimant was very upset at this stage, and was looking for emails on her phone relating to the vouchers. The claimant was subsequently taken back into the office where Rachel Pilling was, where Rachel Pilling then suspended her. The claimant was upset and crying, and Rachel Pilling then went and printed off the disciplinary policy, a copy of which was provided to the Tribunal in the course of the hearing , and has been inserted in the bundle at pages 255-262. The claimant was very upset and concerned that colleagues could hear what was being said, and in particular a fellow colleague Anne- Marie La - Touch walked into the office in the middle of this exchange, embarrassing the claimant.

4.8 The claimant then went home , and was accompanied home by Louise Nixon who, at the claimant's invitation, came into her house with her. In terms of the reason for that, the claimant says that it was because there was a person who wanted to come into her house from a neighbouring house and she was anxious about that person coming in with her on her own . She allowed Louise Nixon to accompany her on that basis. Whatever the reason, the claimant agrees that Louise Nixon was allowed by the claimant to enter her home, where she stayed for some time , and they both went through the disciplinary procedure that she had been handed. Louise Nixon appeared unfamiliar with it, and was reading it herself to ascertain what its contents were.

4.9 Thereafter, the claimant received a suspension letter (pages 40 and 41 of the bundle) dated 9 March 2018. That letter refers to the reason for her suspension being the need to investigate an allegation of theft of Looked After Child vouchers. The letter informed her that her suspension was not disciplinary action , and did not imply any assumption of guilt but was a precautionary act. It went on to state how the purpose of the investigation was a factfinding exercise and "you will have the opportunity to present information relevant to the allegations". The letter went on to say how a copy of the disciplinary policy was enclosed , and how her suspension would be reviewed. The claimant was also told in that email that her email account would be suspended

and she would no longer have access to the computer network. She was, however, told that if she required access to the college premises or computer network for the purposes of obtaining any information or evidence, to inform Rachel Pilling, who had sent the letter, so that she may arrange such access under supervision. The letter continued as follows:

"You are required to cooperate in our investigations and will be required to attend the workplace for investigative interviews or disciplinary hearings."

The claimant's suspension was on full pay, which was confirmed to her.

4.10 Thereafter an ER caseworker, Aimee Tolen, was assigned to the case. She entered email correspondence with other Heads of Department with a view to one of them conducting an investigation. That email traffic between 9 and 12 March 2018 is to be found at pages 42-43 of the bundle. From it one can see that Ms Tolen approached two Heads of Department including one Amanda Sillett, with a view to her conducting the investigation. On 12 March 2018, however, Ms Tolen informed Ms Sillett that she had checked the statement from Rachel Pilling , and that this was enough to move straight to disciplinary and so, as she said in her email, "we won't need to investigate" but thanked Ms Sillett for her offer to assist.

4.11 Consequently, no external Head of Department or anyone else was appointed, and the investigation was carried out by Rachel Pilling. That investigation resulted in an investigation report (pages 50-61 of the bundle). From the first page of that document the investigation started on 9 March 2018 and ended on 15 March 2018. In the first two pages Ms Pilling set out the background and the introduction to the case, including the allegation, set out the five appendices which were attached to the report, a chronology of events, and her findings. Those findings were as follows (page 51 of the bundle):

"When questioned about the vouchers, Stacey stated that she had asked her cousin to order a laptop for a learner and gave her the vouchers to be able to purchase this. She admitted to doing what she referred to as a 'stupid thing' and explained that she could not return them as they had been spent.

Stacey stated that she did not realise that she should have given the vouchers to the student so gave them to her cousin instead to spend (2)."

4.12 That (2) is apparently a reference to the Appendix 2 to the report which was in effect Rachel Pilling's statement. In the conclusion section Ms Pilling wrote as follows:

"As per the Disciplinary and Grievance Policy, if the line manager has sufficient factual evidence without requiring witness statements, the case can progress to a formal disciplinary hearing and therefore in the

light of the preliminary investigation conducted, Stacey's conduct may not have been as required."

4.13 The first appendix was the suspension letter, but the second appendix was a document written apparently by Rachel Pilling herself (pages 54-56) in which there is an account of the events of 7 and 8 March 2018, and on page 56 Ms Pilling has signed this document but dated it 7 March 2018. This document contains, in essence, both Rachel Pilling's statement and statements of Louise Nixon and, to some extent, Lynn Weaver. In particular this is the only record of the events of 7 and 8 March 2018 , and the claimant's reaction and comments when the allegations were first put to her in these circumstances. Enquiries made by Ms Pilling as to whether and when the vouchers had been spent could not be dealt with at that time by Love2Shop, as a crime reference number would be required which was not available at that time. Consequently the investigation did not establish whether the vouchers had in fact been redeemed, and if so when.

4.14 The claimant was not invited to any investigatory interview or meeting, and the next document she received, or should have received, was an invitation to a disciplinary hearing to be held on 27 March 2018 dated 19 March 2018 (pages 66-67 of the bundle). That letter, however, was sent to a previous address of the claimant, and consequently she did not receive it. Not surprisingly the claimant did not attend the disciplinary hearing arranged for 27 March 2018 as she knew nothing about it, and on 27 March 2018 Aimee Tolen wrote her a further letter dated 27 March 2018 referring to her non attendance and how the hearing had now been rearranged for 4 April 2018 at the Openshaw campus. This letter stated that if the claimant did not attend it would proceed in her absence (see page 69 of the bundle). This too was sent to the claimant's previous address.

4.15 The claimant learnt of these two letters on 3 April 2018, and on 4 April 2018 sent an email to Aimee Tolen (pages 70-71 of the bundle) pointing out how these letters had been sent to her old address. She had telephoned Paul Brown from HR to inform him of this mistake. She expressed some concern that these letters had been opened and that anyone who saw them would be aware of the allegations against her. The claimant was at this time unwell, and informed Ms Tolen that she would be attending the doctors that morning and would not be attending the meeting , having had no notice of it.

4.16 On 4 April 2018 Barry Atkins, who was to have heard the disciplinary hearing, informed Paul Brown that the claimant had not attended for it. It was at that point that Paul Brown checked the audit trail and realised that he had not updated the claimant's address. When he realised this he telephoned Rachel Pilling, the claimant and Barry Atkins to apologise for this.

4.17 In his telephone conversation with the claimant, however, the claimant raised concerns as to the impartiality of Barry Atkins to hear her disciplinary, which he agreed to look into. The upshot of this was that

Paul Brown agreed that Barry Atkins should not chair the claimant's disciplinary hearing, and consequently when it was rearranged for 11 April 2018 Andrew Hulme, Director of Special Educational Needs Department, was appointed as the disciplinary officer. The claimant was invited to that disciplinary hearing by a letter of 5 April 2018 (pages 74-75 of the bundle) and the invitation letter (as had the previous ones) enclosed the investigation pack provided by Rachel Pilling in which the various statements and other documents previously referred to were contained. The claimant was advised in this letter of the right to be accompanied or represented at this meeting, and how her suspension on full pay would continue until the disciplinary hearing. She was also informed in this letter that the seriousness of the allegations could result in a sanction up to and including dismissal.

4.18 The claimant had indicated that she did want access to the computer system, and consequently arrangements were made for her to attend in advance of the disciplinary hearing arranged for 11 April 2018, and there is email communication to that effect in the bundle between pages 78 and 79. On 11 April 2018, however, the claimant was unwell, due to extreme anxiety and stress, and at 8:52am she sent an email to Paul Brown indicating that she would not be able to attend the hearing that day and that she had been given a sick note from her GP because of this. She agreed to provide a copy of the fit note.

4.19 Consequently attempts were made to rearrange the meeting, and a letter of 11 April 2018 was sent to the claimant rearranging it for Thursday 19 April 2018 again at the Openshaw campus. By this stage one Tom Grinstead had become involved, he being a trainee ER caseworker. Again arrangements were made for the claimant to arrive early for that meeting and meet Louise Nixon for access to her computer system. Given the receipt of the claimant's fit note, Paul Brown suggested that she attend an Occupational Health consultation by telephone, which the claimant agreed to (see the email exchange of 18 and 19 April 2018 page 88 of the bundle).

4.20 On 24 April 2018 the claimant did indeed undergo a telephone Occupational Health consultation, and the resultant report is at pages 93-94 of the bundle. In the advice provided to management, the author, Samantha Carter, advised that there was no physical or cognitive barrier that would prevent the claimant from undertaking the disciplinary meeting, but it appeared that venue was the trigger rather than the meeting itself. She referred to the claimant's recent medication and how it might take up to six weeks for improvement in the claimant's symptoms of anxiety and depression. She advised that whilst attending the proposed meetings may be anxiety provoking initially, the benefits of concluding the investigations were better for both short and long term. She did advise that any scheduled meetings be arranged at a venue other than the claimant's workplace in order to reduce her anxieties and facilitate her attendance , if operationally feasible. The claimant was provided with a copy of the Occupational Health report, and had no issues with it.

4.21 Consequently arrangements were then made for the claimant to attend a further disciplinary hearing arranged for 10 May 2018 to be held by Andrew Hulme. Again arrangements were made for the claimant to attend earlier than the meeting was scheduled to start , in order for her to have access to the computer system. In particular, given the location of the meeting, arrangements were made with Louise Nixon to bring a laptop to enable the claimant to access any materials that she felt were important. Ms Nixon agreed to do so, and the claimant was informed that this facility would be made available to her when the meeting was to be held on 10 May at the Wythenshawe campus.

4.22 On 9 May 2018, however, the claimant emailed Paul Brown (pages 108-109 of the bundle) pointing out that the Wythenshawe campus was the furthest away from her and would take her two hours to get there. Openshaw would have been a more suitable location. She also said there was no need for Louise Nixon to meet with her, saying that she had all she needed for now. Consequently the claimant's request for IT access was cancelled by Tom Grinstead by email of 8 May 2018 (page 108 of the bundle). The meeting did take place at the Wythenshawe campus, and the respondent's notes of it are at pages 111-121 of the bundle.

4.23 The claimant was subsequently invited to make amendments to those minutes, which she did at page 178 of the bundle on 25 May 2018. The claimant's amendments are not substantial, and the Tribunal accepted that the meeting notes were fairly accurate in terms of what was discussed in the disciplinary hearing. The claimant was not accompanied or represented in the meeting, the union would not represent her because she joined after the relevant event. She was happy to proceed without a colleague or representative. She confirmed that she had received the information pack , and had had sufficient opportunity to review it. Andrew Hulme went through the investigation pack and the allegations with her. One confusion that arose was whether the claimant had told Louise Nixon that she had given the vouchers to her cousin or her sister. The claimant explained that she had said her sister, who is called Caz, and that Louise Nixon, who is hearing impaired and accepts that should wear a hearing aid more often than she does, had probably misheard the word "cus" for "Caz".

4.24 The claimant showed Andrew Hulme the screenshots on her phone (see pages 154-154B) in which she had made her notes of the conversations that took place on 7 and 8 March 2018. The claimant went on to say that she had indeed exchanged the vouchers for cash and that she had never disputed this. She had been in possession of the vouchers but had never been shown any policy to reimburse them. Andrew Hulme went through the process with her , and how she came to exchange the vouchers for cash with her sister, and whether her sister was doing this as a favour to her, which the claimant agreed was the case , as she was getting no benefit from it.

4.25 The claimant made much of the events of 7 and 8 March 2018 , and the way in which she had been treated by Louise Nixon and Rachel

Pilling. She pointed out how Rachel Pilling in the investigation pack had signed a statement on 7 March 2018 which dealt with matters that had occurred on 8 March 2018 , which clearly must be an error. She agreed that she was not meant to give the vouchers to MS, and that she was delegated to spend the vouchers on her behalf to give her a laptop. She was asked how long there had been between the vouchers being issued and the incident, and when she had exchanged them for cash, which she said had been "last year". She had had the vouchers for months, but had exchanged them before December. She thought she had changed the vouchers in August or September 2017 but she clarified with the Tribunal that this was more likely to be July 2017. Andrew Hulme clarified with her that she and her sister had made a decision to swap the vouchers for cash for flexibility so that she could use her sister's expertise in spending them, to which the claimant agreed. The claimant again raised issues about the events of 8 March, how no notes were taken and how the claimant had asked to be allowed to sort the matter out. She was unaware that anything that she said on this occasion would have been minuted or noted.

4.26 Andrew Hulme did put to the claimant that her story had changed from giving the vouchers to her cousin to giving them to her sister. The claimant made reference to Louise Nixon's hearing impairment, and how she had got this wrong. Andrew Hulme did mention how this may be construed as changing her story. The claimant made it clear that she had not done so . Andrew Hulme accepted that was probably the explanation for this discrepancy.

4.27 The claimant went back to refer to the events of 8 March 2018, whereupon she became rather emotional. She went on to say that she would not steal, why would she steal, she had handled money for a long time. Going through the investigation report she agreed that MS had not signed the sheet, nor had she got a laptop. She confirmed that she still had the money, and as far as the vouchers running out was concerned, if there was a deadline they could be carried over. She did refer to her periods of sickness absence, and that she had been playing catch up . She said that it had slipped her mind to make any note or reference to the vouchers. She knew they could be carried over. The £300 was still waiting to be given to MS, but she had of course since left. The claimant made reference to Lynn Weaver apparently telling her that it did not matter if vouchers went out of time, because they could be renewed.

4.28 In relation to emails and the computer system, Andrew Hulme asked what would the claimant want to show him, and the claimant said the "targeted list" , and two emails from Lynn Weaver. He asked what they would show, and the claimant replied it would be when she got the vouchers and when they were for. He asked whether the fact that the vouchers could be carried over would also be recorded, but the claimant said she could not remember, but this may be on the "targeted list". The claimant did make the point that she had not seen any policy or guidance , nor had she received supervision in relation to the

vouchers. Andrew Hulme asked her if it was on her initiative to convert the vouchers to cash and whether anyone had advised her that she could or could not do this. The claimant replied “no, never”.

4.29 Andrew Hulme then went on to make a somewhat strange observation in relation to strict liability for pollution. He was asked about this in the hearing, and he pointed out that he was not a lawyer but he was trying to draw some form of analogy. The Tribunal considers that this appears to be some form of view in his mind that if the claimant had converted the vouchers into cash this was somehow automatic guilt. He did, however, go on to say in the meeting, “What I am trying to say, is there anything from your conscience that told you at any point that this would or could be risky?”. The claimant replied, “no, absolutely not” and went on to explain about her purchase of a speaker and microphone with cash. (This was in fact the basis of the claim for breach of contract that the claimant brought which has now been settled).

4.30 Andrew Hulme then went on to say that he would have felt nervous converting the vouchers to cash, which he amplified in the hearing. The claimant said that she had handled money , and had no doubt in her mind. She was asked if anyone else had done this, which she said that she did not know, and there was never any doubt in her mind. The meeting went on to discuss the claimant's offer to repay the £300, and she again challenged the account given in Rachel Pilling’s investigation report. She was asked why she held cash when she had had vouchers to spend on the LAC, and she said that she did not do that as she did not know whether the LAC was going to return, so she got the cash which had been in an envelope ever since. Andrew Hulme tried to explore further the rationale of what the claimant was saying and the role of her sister in this transaction. He pressed the claimant upon who was going to buy the laptop , and with what. The claimant said that her sister was going to buy it and then she could use the cash to buy something. Andrew Hulme went on to confirm that the claimant had the £300 in cash and had the money for the college. The claimant said that she knew it would have to be returned , and she knew that paperwork was needed and had to be updated, but she was a bit lax.

4.31 The claimant went on to say, correcting the note as produced by the respondent at page 119 of the bundle, that Lynn Weaver always knew that she had the vouchers, she disputed saying that Lynn Weaver always knew that she had the money because she had not told anybody that she had converted the vouchers into money. She went on to say, “the way it looks on paper makes it look like I am guilty”. There were further discussions about the process and the meetings that had not taken place because of correspondence going to the wrong address and the claimant's subsequent ill health.

4.32 At the end of the meeting Andrew Hulme retired, but considered that he did not have enough information to be able to reach a conclusion. He informed the claimant that he would undertake a further investigation with the people that the claimant had mentioned to him in the meeting. He told the claimant that it was possible that he might come to an

outcome or that he may need to meet her again. He said he would review this over until Monday , and put further questions, but that her suspension would continue on full pay until his decision.

4.33 The claimant at that point pointed out that she had the £300 with her and asked if Andrew Hulme would like her to return it there and then. Andrew Hulme did make enquiries as to whether this was possible, and tried to obtain the necessary authorisation from Finance, but as he could not enter the Finance Department he declined the claimant's offer. The claimant did not produce to the Tribunal the envelope in which the £300 cash was available to Andrew Hulme, and it was not expressly put to Andrew Hulme that this was the very envelope in which the claimant had kept the cash since it had been received from her sister in July 2017. Her evidence, however, was that on that occasion the claimant had put it in an envelope, written the learner's name on it , and had put the amount of cash in question.

4.34 After the conclusion of the meeting the notes which were sent to the claimant contained an endorsement to the effect that the claimant could make amendments , which would be appended to the original document and retained on her file. The notes, however, were not sent to her until 18 May 2018.

4.35 In the meantime, Andrew Hulme then did indeed make further enquiries of Rachel Pilling, Louise Nixon, and Lynn Weaver. Notes of his questions appear in the bundle (handwritten notes at pages 149 to 150), but he did not take notes of the answers provided. He did not consider having received that further information that he needed to see the claimant again, and consequently reached his decision and sent the claimant his outcome letter dated 24 May 2018 (pages 171-173 of the bundle).

4.36 The allegation in that letter is "theft of Love2Shop vouchers amounting to £300". Andrew Hulme in this letter went on to refer to the hearing notes which had been provided to the claimant and his findings, which were that the findings of the investigation report were upheld in their entirety. He went on to say this (page 171 of the bundle):

"You were unable to return the vouchers issued for the sole purpose of supporting a learner because they had been spent by a family member, with whom you had exchanged them for cash, which subsequently was not spent on the intended purpose whilst the learner was still enrolled at the college. After the learner left the college, there was no attempt to return the cash until the missing vouchers were identified following a departmental audit in March this year, several months later.

The overwhelming evidence is that you are guilty of the theft of Love2Shop vouchers amount to £300."

4.37 He then went on to consider the mitigation the claimant had presented, as he termed it, and dealt firstly with the claimant's complaints about the suspension process on 7 and 8 March 2018. Having interviewed

the staff concerned he considered that the process had been carried out properly, and in any event, in his evidence to the Tribunal, he indicated that he did not consider the manner in which the suspension was carried out to have any bearing upon his decision as to whether the claimant was or was not guilty of the conduct alleged against her.

4.38 Mr Hulme went on to consider other matters raised by the claimant, and in particular the absence of any explicit policy stating that the vouchers could not be converted into cash. He observed that common sense would suggest that this was an unwise thing to do. Even though, if the claimant's rationale was accepted, i.e. that better value equipment could have been purchased through the increased choice of retailer using cash, it would have been wise to communicate her intention and subsequent action. He points out that the claimant no longer had the vouchers entrusted to her and thus could not return them when the internal audit was completed. There was no evidence that the claimant was actively engaged in spending the cash on the learner over a considerable number of months , during which time the learner had already left the college. He also considered the claimant's acceptance of her actions was stupid rather than dishonest. He considered this to be an untenable argument, as there was no evidence that she was proactive over a number of months in trying to retain the student concerned, she did not report that she had converted the vouchers to cash and finally had to be prompted to return the vouchers, which she was unable to do. Consequently, the outcome was that her employment would be terminated on the grounds of gross misconduct with effect from the date of that letter, 24 May 2018.

4.39 The claimant was informed of her right of appeal, which had to be lodged within five working days from receipt of this letter and addressed the Human Resources Department clearly stating the grounds.

4.40 Having been sent the minutes of the disciplinary hearing by Tom Grinstead on 18 May 2018 (page 163 of the bundle), the claimant received the disciplinary outcome letter before she had had an opportunity to make amendments to the meeting notes, sent an email to Tom Grinstead on 25 May 2018 (page 178 of the bundle) expressing her shock at the outcome of the hearing without her amendments being considered. She then set out some amendments that she required to be made, which in the view of Andrew Hulme , when he subsequently saw them , did not substantially affect the record of the meeting and certainly would have no effect upon the decision that he made.

4.41 The claimant did appeal on 25 May 2018 by an email to Tom Grinstead (see pages 180-181 of the bundle). In those grounds of appeal, the claimant said she had not stolen anything. The format of her appeal was basically to refer to extracts of the outcome letter and to make her own comments, which are probably in different colour in the original, but sadly had only been replicated in monochrome in the version in the bundle. In essence the claimant maintained that she had not done anything wrong , and had serious concerns about the way in which the

matter had been handled and in particular the lack of minutes in relation to the suspension and investigation meetings. She made reference to the lack of a policy in relation to vouchers being exchanged for cash, and her nine years' service with the respondent without any complaint or concern being raised in relation to her previous dealings with cash. She made the point that in the disciplinary procedure that had been printed out and given to her it suggested that there would be an investigation. She referred to the length of time the process had taken, and various other factors in relation to her health. She made the point that she always knew that the money was there and that she had never had any intentions of stealing. She went also to raise a comment allegedly made by Louise Nixon in relation to her husband, when she suggested , on meeting him that the claimant may like to be a "kept woman", a reference apparently to the claimant's view that Louise Nixon would have liked her to go part-time in order to make some cost savings.

4.42 In terms of the appeal, it took the respondent some time to find someone to hear it. At one point it was proposed that Barry Atkins would hear it, and consequently on 26 June 2018 the claimant was sent a letter convening her appeal hearing for 4 July 2018 to be chaired by Barry Atkins (see page 189 of the bundle). The claimant immediately on 26 June 2018 emailed ER casework, in this instance Carly Burrows who had sent the letter of 26 June 2018, pointing out that she was not happy with this manager being asked to do the appeal as she had objected to him previously due to a conflict of interest. Consequently , the respondent did change the identity of the appeals officer, Carly Burrows arranging instead that Rebecca Bromley-Woods, Assistant Principal, would hear the appeal which was now to be heard on 3 July 2018. This letter (page 196 of the bundle) contains in the second paragraph:

"At your request we have changed the manager and therefore if you do not attend on this date, it will proceed in your absence."

4.43 The claimant intended to attend the appeal hearing and prepared to do so, however on the morning of 3 July 2018 the claimant learnt that an uncle had died suddenly, that her mother was very upset and consequently she was unable to attend the appeal hearing. She emailed the respondent's ER casework email address, at 09:49 (page 200 of the bundle) confirming that she had received some very sad news , and had left a message with switchboard due to her being unable to get through to ER casework. Rebecca Bromley-Woods was sitting with Shameela Anjum, HR Adviser, and preparing to hear the appeal. When the claimant did not attend enquiries were made and the message was found that the claimant had been unable to attend for the reasons set out briefly in her email.

4.44 At that point Rebecca Bromley-Woods considered whether the hearing should proceed. Her initial view was that it should. In reaching that view she took into account the terms of the letter from Carly Burrows of 28 June 2018 in which it had been expressly stated that because the

respondent had changed the manager at the claimant's request that if she did not attend on this date the appeal would proceed in her absence. Further, she took into account her understanding of the claimant's medical history and how there had been a suggestion that delaying the process may be harmful to her. She accepted, however, in evidence, that the only Occupational Health report available to her was that which related to the claimant's disciplinary hearing and was obtained in April 2018. There had been nothing since that date to suggest that the claimant's health was being affected by the process, and the claimant had indeed indicated that she would be attending this hearing.

4.45 In those circumstances Rebecca Bromley-Woods decided that she would proceed, to the extent of considering the claimant's appeal and the information available to her. If, upon doing so, she considered that the appeal raised matters which did require the claimant to attend she would reconsider the position and would consider adjourning the appeal for the claimant to attend. Having reviewed the claimant's grounds of appeal , the respondent's investigation pack, and Andrew Hulme's notes and outcome letter, she concluded that there was nothing that required her to have the claimant attend to speak to her grounds of appeal, and consequently she dismissed the appeal. The form of the appeal was, under the respondent's disciplinary policy, a review and not a re-hearing.

4.46 During 3 July 2018, the claimant was in further email communication with Tom Grinstead who replied to her email at 11:38 that day (page 200 of the bundle) making reference to the previous invitation letter which told the claimant that the hearing would proceed in her absence if she did not attend, and telling her that she would receive the outcome of the appeal in the post , and the matter was now closed. The claimant wrote further to him at 14:24 that day (page 201 of the bundle), asking why they could not rearrange. She explained how her uncle had passed away and how her mother had rung her very distressed when she was almost at the campus for the appeal. She was too upset to continue with the journey and needed to be with her family. She followed this email with a further email at 15:37, explaining further that she needed to mention that she had never requested a change of date: this was done by the respondent due to the respondent asking the first manager, Barry Atkins, to do the appeal hearing when they were fully aware of the situation relating to the conflict of interest she had raised. She pointed out that the appeal hearing could have remained on the same date (4 July 2018), but with a different manager. She went on to say the matter was not closed "on my behalf". There is no reply to that email.

4.47 The outcome of the appeal dated 5 July 2018 was sent to the claimant that day (pages 202-204 of the bundle). In that letter Rebecca Bromley-Woods set out at five bullet points her summary of the grounds of appeal, namely:

- Procedures were not clear and you were not treated with care and support.
- You questioned the process around tracking and audit of the vouchers.
- You were not told about the disciplinary procedure at the time leading to suspension.
- Letters had been sent to the wrong address in the run up to the hearing.
- Additional information relating to comment made by "LN" prior to the event related to the investigation submitted as part of your appeal.

4.48 She went on to say that as the claimant had not attended the hearing she had considered the above grounds for appeal in her absence. In relation to the first bullet point, as the claimant had not attended the appeal hearing (although described as the "disciplinary hearing"), she had been unable to establish which specific procedures were unclear to the claimant, and this point of appeal was not upheld. In relation to the other bullet points, the decision was that the various points were covered in the disciplinary hearing and the appeal was accordingly not upheld in respect of the process around tracking and audit of the vouchers. Rebecca Bromley-Woods then went on to express that she was satisfied the process had been handled professionally, and that the claimant was duly informed of the suspension and disciplinary process before leaving the site. In relation to letters being sent to the wrong address, she acknowledged the delay that this caused, but did not consider it a ground of appeal. Finally, in relation to the alleged comment made by Louise Nixon, this did not relate to the incident in question , and had no bearing on the disciplinary outcome and therefore that appeal point was not upheld either. Consequently Rebecca Bromley-Woods' decision on appeal was to uphold the finding of Andrew Hulme to dismiss.

4.49 The claimant's account to the Tribunal of what actually occurred was that , having obtained the vouchers in the manner with which the claimant was familiar having dealt with similar schemes in the past, it had been her intention to use them to improve the attendance of the learner, MS. Receiving such vouchers was not commonplace, and the claimant would only have responsibility for a few students to whom such voucher schemes may apply in the course of a given year. Consequently , it was unlikely that there were any other or many other students for whom the claimant was administering vouchers in this way. MS's attendance had been an issue up until July 2017, and she was experiencing difficulty at home and in accessing laptops in libraries, which is why the potential for obtaining a laptop for her was attractive. She had discussed with her sister, who was more aware of the range of available laptops than she was, the possibility of exchanging vouchers for cash in order to achieve this flexibility. These

discussions had been in or around July 2017, but she had deliberately not progressed with the purchase of any laptop until she was sure that the learner would return in September 2017. Consequently it would appear that , although the vouchers were exchanged for cash in or around July 2017, the claimant was not intending to actually spend that cash until at least September 2017 when she was sure that the learner returned. The learner did return, but there were further difficulties with her attendance and she subsequently did leave the college in or about November 2017. The claimant all this time had the £300 in cash in an envelope upon which she had written the learner's name and the amount of the cash sum inside. She had removed the vouchers from her workplace and had taken them home, and the cash which she had exchanged the vouchers for with her sister had remained in her possession at home , and was not brought to work. She had not told anybody at work that she had exchanged the vouchers for cash in this way.

4.50 During the autumn term the claimant had periods of sickness absence, and was being moved around from site to site to some extent. She had not, she accepted, appreciated that the learner in question had left when she did, but considered that she may have made some reference to it or the vouchers or cash on a computer system on either MyConcern or the "targeted list". She had no specific recollection of making any such entries, and it was pointed out to her that Rachel Pilling had in the discussion prior to her suspension, on the claimant's own version, said that "there was no note on MyConcern", implying that she had searched that database. The claimant considered that because she had been moved to a different campus and had had some period of absence (which was clarified by her absence record which has been inserted in the bundle at page 263), she had not actioned the departure of the learner, MS, and had not at that point realised that there were outstanding vouchers , or cash , in relation to the learner that she needed to deal with.

4.51 In relation to the respondent's disciplinary policies, the Tribunal was struck by the apparent lack of familiarity with those documents on the part of both the respondent's witnesses. There were two such policies in the bundle, one which was dated 1 September 2016 and a later version which was dated 30 April 2018. Andrew Hulme appeared to be unclear as to which of the two that he was using, as did Rebecca Bromley-Woods. The claimant produced a third version which had been provided to her at the time of her suspension which has no date, but which is only a disciplinary policy running to some 15 pages and which has been inserted at the back of the bundle. This appears to replicate, however, the terms of the 2016 procedure. In terms of suspension, that and the 2016 procedure under section 5 headed "Operating the Disciplinary Procedure", sets out the investigation procedures, and the suspension procedure. In relation to suspension, paragraph 5.2.8 provides as follows:

"All suspensions will be confirmed in writing immediately and if necessary further detail will be given within five working days. The written confirmation should state the reason for the suspension (allegation) and where possible, known times, and dates of any alleged incidents. The letter must tell the employee that they will be invited to an investigation meeting as soon as possible. Every effort must be made to ensure that the period of suspension is minimised and reason for suspension should be reviewed throughout the investigation."

4.52 At paragraph 5.4 of the same policy, under the heading "Investigations", 5.4.1 provides as follows:

"The investigation meeting is to establish the facts of the allegation and should not by itself result in any disciplinary action."

4.53 Paragraph 5.4.3 provides as follows:

"The investigation meeting will be used as a way to fact-find the allegation made against an employee. The manager conducting the meeting will provide the employee with the factual evidence they have collected to support the allegation. They will do this at the beginning of the meeting and ask whether the employee wants representation or not and give them an opportunity to look at the information."

4.54 Section 5.1 of this policy, however, also refers to investigation procedures, and at 5.1.2 the third bullet point provides:

"The line manager has sufficient factual evidence without requiring witness statements to warrant proceeding to a formal disciplinary meeting. In these cases the line manager will collect all the factual evidence and progress to a disciplinary meeting."

5. Those then are the relevant facts. In terms of the disputed facts, where there are disputes mainly in relation to the events of 7 and 8 March, the respondent not having called the relevant witnesses, the Tribunal sees no reason not to accept the claimant's account, which she made very contemporaneously in her notes to herself sent to her mobile phone , and then in the email set out at page 155 of the bundle. The Tribunal accordingly accepts that evidence. In relation to other matters, the Tribunal does accept that the notes of the disciplinary hearing are, save for the amendments made by the claimant, likely to be fairly accurate account of that meeting , and considers that it can rely upon them and the evidence of Mr Hulme. Little turns upon the veracity of Mr Hulme , or indeed Rebecca Bromley-Woods, and in relation to the claimant, the Tribunal accepts her evidence largely in relation to the events of 7 and 8 March , and indeed what happened in the disciplinary hearing and in connection with the appeal.

Submissions

6. Both parties made submissions, with Ms Guilding having prepared some written submissions, and the claimant subsequently having made oral submissions. The respondent's submissions, as one would expect, focussed upon the correct legal test to be applied to conduct dismissals of this nature, and in the alternative

advanced arguments in relation to deductions on the basis of ***Polkey*** and/or for contribution in respect of any awards that the Tribunal may make if the claimant's claims succeed. The claimant, not being a lawyer or legally represented, focussed upon her denial of any wrongdoing, the manner in which the respondent carried out in particular the suspension and the lack of any investigation meeting before the disciplinary meeting was held, and the unfairness of the appeal proceeding in her absence.

The Law

7. The relevant statutory provisions are set out in the Annex to this Judgment. In relation to the tests to be applied in respect of unfair dismissal cases, as the respondent's submissions rightly set out in determining whether the dismissal was fair the Tribunal considers whether the decision of the employer fell within the band of reasonable responses, both procedurally and substantively, and must not substitute its own view for that of the employer (***Foley v Post Office*** and ***Midland Bank v Madden [2000] ICR 1283***).

8. Further, in relation to the test to be applied in relation to conduct dismissals, the classic statement of the law to be applied is contained in ***British Home Stores Ltd v Burchell [1978] IRLR 379***, which laid down many years ago the principles to be followed in determining whether a conduct dismissal was fair. They are that, first of all, there must be established by the employer the fact of the belief in the guilt of the employee, and that the employer did actually believe that. Secondly, that the employer had in its mind reasonable grounds upon which to sustain that belief, and thirdly that the employer at the stage at which the employer formed that belief on those grounds had carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

9. The respondent's submissions have made reference to "gross misconduct" and cited case law in relation to that term. Section 98, however, of course does not require the respondent to establish gross misconduct, conduct is sufficient, and whilst the categorisation or gross misconduct matters in respect of claims of wrongful dismissal, it is not necessary for the purposes of determining whether a dismissal was fair or unfair that the conduct has to have been "gross". The respondent has also referred to two authorities: ***Royal Society for the Protection of Birds v Croucher [1984] IRLR 425***, and ***Sharkey v Lloyds Bank PLC [2015] UKEAT 0005/15***, in the context of how the Tribunal should approach procedural flaws.

Discussion and Findings

10. The first issue, therefore, is whether the respondent has established a potentially fair reason for the dismissal. Whilst the claimant has suggested that Louise Nixon had indicated that she wished the claimant to go part-time or even to make further cost savings, the Tribunal rejects any suggestion that Andrew Hulme's decision to dismiss was influenced by any such considerations. Andrew Hulme is senior to Louise Nixon and indeed Rachel Pilling, and does not operate in the same area. The Tribunal considers that whatever Louise Nixon's wishes or desires in relation to the long-term future employment of the claimant may have been, they are irrelevant to the decision to dismiss. In particular, it is to be noted that it was not Louise Nixon or Rachel Pilling who initiated this enquiry in the first place, it was Lynn Weaver. The facts that emerged in this enquiry are not in dispute: the vouchers had

been issued in respect of the learner, MS, which had not been redeemed and which the claimant accepted had been exchanged for cash of which the respondent was unaware. Those basic facts are not disputed, and were discovered upon a routine audit of the vouchers , and the discovery that the learner in question had left. Therefore whatever the motivation of Louise Nixon or anybody else, the Tribunal is quite satisfied that this was not any form of disciplinary action initiated by any of the claimant's line managers, and her suggestion that they have influenced the dismissal is one the Tribunal does not accept.

11. Having accepted that the respondent has established a potentially fair reason for dismissal, namely the claimant's conduct, the next and indeed central issue in this case is whether the dismissal was fair in all the circumstances, and it is to that issue the Tribunal now turns.

12. In terms of the fairness of this decision, the Tribunal has to look at both the procedure followed and the substantive decision taken. Much of the claimant's complaints about the process relate to its commencement on 7 and 8 March 2018 when she was suspended. She makes great complaint about the manner of her suspension, and the Tribunal largely accepts her evidence as to how that was carried out. That said, however, the Tribunal takes Andrew Hulme's point that the manner of the suspension in itself was not really germane to his decision to dismiss. The Tribunal cannot find that a dismissal that would otherwise be unfair becomes unfair simply because the manner in which a preceding suspension was carried out was unfair or unreasonable in itself.

13. The manner of the suspension, therefore, is not a relevant issue in itself, but there is one issue that the Tribunal considers is very pertinent to the overall fairness of the dismissal. An employer will not usually act reasonably if it does not follow its own disciplinary procedures. Whilst taking on board the approach of the EAT in the ***Sharkey*** case cited by Ms Guilding, the fact remains that an employer who does not follow its own procedures will rarely be held to have acted reasonably, it being an expectation that no reasonable would, without good reason, depart from procedures that the employer has itself set out. The concerning thing in this case has been the absence of any investigatory meeting with the claimant. The claimant's suspension and what she said on that occasion has taken the place of an investigatory meeting. The respondent relied heavily, in the investigation report compiled by Rachel Pilling, upon the claimant's initial reaction to her suspension , and what she allegedly said at that time. There was no opportunity afforded to her before the disciplinary meeting to sit down, calmly and with adequate notice of the allegations, to give her own account of what she had done. The claimant was clearly, as the respondent's own account shows, very upset at the suspension meeting. No proper notes were taken at that time but the account of Rachel Pilling and Louise Nixon in terms of what the claimant said was subsequently a significant part of the investigation report and was in many senses used against the claimant. The apparent discrepancy, for example, between the claimant saying that she had swapped the vouchers for cash with her cousin, but which was later accepted to be a reference to her sister, highlights the dangers of such a process. Andrew Hulme himself in the course of the disciplinary meeting observed how it might appear that the claimant was changing her story. The claimant was not in fact changing her story, and Andrew Hulme in fact subsequently accepted that Louise Nixon may have misheard two very similar sounding terms. The fact that the claimant's initial reaction in these heightened circumstances , where

there was no accurate record being made in an ordered meeting to investigate her account of the incident, highlights how important such investigation meetings often are.

14. Further, the respondent's own procedures clearly indicate that an investigatory meeting was expected. That is clear from section 5.2.8 of the disciplinary policy, which requires that the suspension letter must tell the employee that they will be invited to an investigation meeting as soon as possible. The suspension letter in this case did not do so. Further, section 5.4 of the same policy indicates at 5.4.1 that "the investigation meeting" is to be held to establish the facts of the allegation. 5.4.3 goes on to indicate that that investigation meeting will be held with the employee and that the manager conducting will provide the employee with the factual evidence that has been collected to support the allegation. Consequently, there is clearly an expectation in the respondent's own procedures that there will be an investigatory meeting.

15. The respondent relies, however, as indeed did Rachel Pilling in her investigation report summary, upon section 5.1.2 of the same procedure, which provides that where a line manager has sufficient factual evidence without requiring witness statements to warrant proceeding to a formal disciplinary meeting he or she may do so. With all due respect to Ms Pilling, and indeed to the HR adviser involved at the time, the Tribunal does not see how a reasonable employer in these circumstances could have concluded , without a further investigatory meeting with the claimant , that this provision could be satisfied. The Tribunal was somewhat alarmed at the haste with which the decision was taken, notwithstanding that Aimee Tolen clearly herself anticipated that an investigatory manager would be appointed, and possibly thereafter that an investigatory meeting would be held. Rachel Pilling, from whom the Tribunal did not hear, instead proceeded straight to the investigatory report, and her recommendation that then led to the disciplinary meeting being held.

16. Consequently, the Tribunal finds the respondent did not follow its own procedure, but in many ways that is irrelevant because , even if it had not been laid down in the respondent's own procedures , the Tribunal would have found that failure to hold an investigatory meeting with the claimant before the disciplinary meeting was itself unreasonable and something which would render the dismissal unfair. There was no reason why the claimant could not attend an investigatory meeting, and indeed was probably expecting to do so. Further, whilst the ACAS Code of Practice – Section 5 , under the heading "Establish the facts of each case" does not lay down a requirement to hold an investigatory meeting in every case, the 2017 Guide , under the same heading says this:

"Investigating cases

When investigating a disciplinary matter take care to deal with the employee in a fair and reasonable manner. The nature and extent of the investigations will depend on the seriousness of the matter and the more serious it is then the more thorough the investigation should be. It is important to keep an open mind and look for evidence which supports the employee's case as well as evidence against.

It is not always necessary to hold an investigatory meeting (often called a fact finding meeting). If such a meeting is held , give the employee advance warning and time to prepare."

17. To the extent that the Tribunal should look at the overall impact of the alleged procedural unfairness, the Tribunal does so , and appreciates that mere technical failures to comply with procedure , if they ultimately made no difference may still not affect the fairness of the dismissal, although obviously such matters may be relevant to issues of ***Polkey*** reduction; but the Tribunal does take the respondent's point that it should not take an over analytical and isolated approach to this issue. The Tribunal does not do so.

18. It is, however, a fundamental requirement of any fair conduct dismissal that there be a reasonable investigation. Reasonable investigation requires investigation not only with witnesses but with the "accused" herself. These were serious allegations of theft. The suspension took place in circumstances of heightened emotion where the claimant was clearly very upset, and had not been provided with very much information in advance other than that the vouchers had been discovered to have been unredeemed , and the claimant was alleged to have stolen them. Whilst she was subsequently provided with the investigation report and evidence that the respondent had assembled, that was at the stage of the disciplinary meeting. In effect, it is difficult to avoid the conclusion that the disciplinary meeting was in fact the investigatory meeting that the claimant should have had, a fact rather reinforced by the fact that , rather than reach a conclusion , at the end of that meeting Andrew Hulme then had to make further investigations himself with other witnesses. He then made a decision. All that, however, was at a stage when the claimant was at risk of dismissal , and was dealing with these matters in a disciplinary hearing whereas they could, and in the Tribunal's view, when considering what a reasonable employer would have been done, should have been carried out before the disciplinary meeting and had formed part of the investigation. For those reasons, notwithstanding the manner of the suspension itself which the Tribunal agrees is in itself irrelevant, the absence of an investigatory meeting stage , given the expectations in the respondent's own procedures, the seriousness of allegations, the sudden nature of the matters being raised with her, and her highly emotional and distressed reaction to them, reasonableness and natural justice required that the claimant be given an opportunity before the disciplinary hearing to answer the allegations in a calm and reasoned manner , in a safe environment and at an appropriate time. The Tribunal considers that that failure to conduct an investigatory meeting with her renders the dismissal unfair.

19. Further, however, there is another aspect which renders the dismissal unfair and that is in relation to the appeal. The respondent , quite properly , afforded the claimant a right of appeal , and indeed the claimant availed herself of that right. The appeal was arranged with some delay on the part of the respondent, which is not to blame it unduly, but the fact remains that it took a month or so before the appeal could be arranged, which was initially arranged for 4 July 2018. The claimant had already raised objection to Barry Atkins conducting the disciplinary hearing, an objection that Paul Brown had acted upon , and had removed from Mr Atkins as the potential hearer of the disciplinary. Whatever his reasons, the claimant was entitled to assume that the respondent had therefore accepted there was a potential conflict of interest on the part of Mr Atkins dealing with her case. When, therefore, it was proposed that Mr Atkins then deal with the appeal, it was not unreasonable for the claimant to object to that, which objection the respondent again acted upon. It was as a result of that objection that the date of the appeal hearing was , in fact , brought forward by one day from 4 July to 3 July 2018. Consequently when the claimant was,

for reasons that have not been challenged and were obviously very serious (the sudden death of the claimant's uncle), unable to attend on 3 July, the respondent then had to consider whether to grant a postponement.

20. Rebecca Bromley-Woods, the Tribunal appreciates, did consider whether to adjourn in these circumstances. She chose not to do so , being influenced, as she told the Tribunal, by the terms of the invitation letter of 28 June. That letter contains the somewhat draconian sentence in the second paragraph, warning the claimant (as had indeed previous letters in relation to her disciplinary hearing) that failure to attend would lead to the appeal being determined in her absence. The Tribunal notes the wording of this paragraph (written by Carly Burrows) of the use of the word "will" as opposed to "may". In other words, Rebecca Bromley-Woods was very influenced by that statement, which is absolute. She was also influenced, she told the Tribunal, by the possibility of further delay impacting upon the claimant's health. Upon examination of that reason, however, the Tribunal notes that there was only one Occupational Health report prepared in April 2018 in relation to the disciplinary hearing, which concluded the claimant was fit to attend such a hearing , as indeed she subsequently did. Thereafter there was no suggestion that the claimant remained unfit to attend any further meetings or the appeal, or that any delay in this process was going to have any adverse effect upon her health.

21. Finally, in any event, the claimant gave a reason for her non - attendance which was completely separate from any health reasons that might previously have affected her ability to attend the hearing. There was no evidence before the Tribunal as to how long it would take to reconvene the appeal hearing, and given that one was re-arranged from the original date of 4 July to bring it forward by one day, there seems no reason to suggest that any re-arranged appeal could not be heard reasonably soon. Thus in terms of those reasons, the Tribunal considers that Rebecca Bromley-Woods, whilst doubtless giving the matter some consideration, did not make a decision which fell within the band of reasonable responses. The Tribunal appreciates that she then went on to consider the appeal , and had taken the view that if anything came up in the course of her reading of the claimant's grounds and the respondent's response to the appeal that led her to believe that the claimant needed to attend she would then have adjourned the matter for her to do so. That is obviously a reasonable approach , but it is not one that the Tribunal considers can expunge the decision that was taken to proceed with the appeal at all in those circumstances. Further, the email communications during that day in which the claimant was clearly raising these issues with Tom Grinstead and asked that the matter be postponed, were met with a very swift response to the effect that the decision was being taken and the claimant would get an outcome letter. Her final email to Tom Grinstead , in which she pointed out that the reason she had asked for a postponement of the original hearing had been her objection to Barry Atkins, went unanswered. The Tribunal considers in these circumstances no reasonable employer, accepting the genuineness of the reasons why the claimant, who was clearly on her way to the appeal when the family emergency arose, could not attend would then have proceeded in her absence. This too, therefore, renders the dismissal unfair in the view of the Tribunal.

Remedy and Deductions

22. The Tribunal thus finds that the dismissal , whilst for the potentially fair reason of conduct on the part of the claimant, was unfair. The respondent, however, invites

the Tribunal to reduce any award that it makes in terms of the compensatory award on the basis of ***Polkey***, and/or in relation to both basic and compensatory awards on the basis of contribution by the claimant.

23. In relation to ***Polkey***, this is a reference to the case of ***Polkey v A E Dayton Services Limited***, well known to employment lawyers but probably new to the claimant, in which it was established that if a dismissal is unfair because of procedural failings the Tribunal should reduce the amount of compensation to reflect the chance that there would have been a fair dismissal in any event if the dismissal had not been procedurally unfair. In terms of how this is to be applied in practice, the guidance of the EAT in a case called ***Software 2000 Ltd v Andrews [2007] IRLR 568*** from Elias, then the President, is helpful, where he said this:

"(1) In assessing compensation the task of the Tribunal is to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice. In the normal case that requires it to assess for how long the employee would have been employed but for the dismissal.

(2) If the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for him to adduce any relevant evidence on which he wishes to rely. However, the Tribunal must have regard to all the evidence when making that assessment, including any evidence from the employee himself. (He might, for example, have given evidence that he had intended to retire in the near future.)

(3) However, there will be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so unreliable that the tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made.

(4) Whether that is the position is a matter of impression and judgment for the Tribunal. But in reaching that decision the Tribunal must direct itself properly. It must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence.

(5) An appellate court must be wary about interfering with the Tribunal's assessment that the exercise is too speculative. However, it must interfere if the Tribunal has not directed itself properly and has taken too narrow a view of its role.

(6) [Now irrelevant following repeal of s 98A(2) ERA] ……..It follows that even if a Tribunal considers that some of the evidence or potential evidence to be too speculative to form any sensible view as to whether dismissal would have occurred on the balance of probabilities, it must nevertheless take into account any evidence on which it considers it can properly rely and from which it could in principle conclude

that the employment may have come to an end when it did, or alternatively would not have continued indefinitely.

(7) Having considered the evidence, the Tribunal may determine

(a) That if fair procedures had been complied with, the employer has satisfied it—the onus being firmly on the employer—that on the balance of probabilities the dismissal would have occurred when it did in any event. ……...

(b) [N/a]

(c) That employment would have continued but only for a limited fixed period. The evidence demonstrating that may be wholly unrelated to the circumstances relating to the dismissal itself, as in the ***O'Donoghue*** *case.*

(d) Employment would have continued indefinitely.

However, this last finding should be reached only where the evidence that it might have been terminated earlier is so scant that it can effectively be ignored."

24. Thus it is clear that the range of options open to a Tribunal is considerable. It may make a 100% reduction in an appropriate case, a lesser reduction if it thinks the changes of the claimant being fairly dismissed are less than 100%, or may make none.

25. In this case the Tribunal has considered whether or not it should make such a reduction and considers that it should. It has considered what the claimant in fact went on to say in the disciplinary meeting , and the subsequent investigations carried out by Mr Hulme. It has also considered what the claimant has said in the appeal grounds, and her evidence to the Tribunal. The Tribunal has considered what the position would have been if all that material had been available to the respondent by means of an investigatory meeting , before the disciplinary hearing took place. The Tribunal's conclusion is that even if all that information had been available to the respondent in a proper investigatory meeting before the disciplinary hearing took place the result would have been the same. The essential question in a conduct dismissal of this kind is not whether the claimant was in fact guilty of theft (it is not the Tribunal's remit to make that decision and it does not do so), but whether the respondent reasonably believed on reasonable grounds after the appropriate reasonable investigation , that that was the case. Had the reasonable investigation been carried out, as the Tribunal considers it should have been, the Tribunal is quite satisfied that the result would have been the same. The basic facts were that the claimant had received vouchers which she had exchanged for cash, but had not informed anybody in her employers that she had made that arrangement. She did not account for the cash , and she did not account for the vouchers and it was not until the matter was raised with her in March 2018 that these matters came to light. As the claimant herself conceded in her own account of the meeting on 8 March 2018, this did indeed "look bad". By that the claimant clearly acknowledged, and the Tribunal acknowledges, that anyone viewing these circumstances and facts could conclude that the claimant had indeed intended to steal either the vouchers or their proceeds. That was a view that Mr Hulme came to in his disciplinary meeting and after his further investigations, and it is one that the Tribunal considers he would

have been entitled to come to had there been a previous and proper investigatory meeting and had all the information which the claimant would have given to him at that stage been available to him sooner, or indeed any other points that the claimant has gone on to make. This is indeed a classic case in which had the respondent carried out the appropriate fair procedure in terms of holding an investigatory meeting before the disciplinary meeting this would have made no difference and the claimant would still have been fairly dismissed at that time.

26. The Tribunal has considered whether the timing is in fact affected by this defect, as it sometimes occurs that a ***Polkey*** reduction is made save in respect of a period of time which would have been taken had a fair procedure been carried out. In this case, given that there was some delay between the suspension and the subsequent disciplinary hearing on 10 May, and that in the intervening period the claimant had been certified as fit to be able to attend meetings (of any sort), the Tribunal considers that an investigatory meeting with her could and would have been held before the disciplinary hearing on 10 May. There was ample time for such a meeting, and consequently the Tribunal considers that this is not a case where had a fair procedure been carried out it would have delayed the dismissal, so as to entitle the Tribunal to make an award in respect of a period of delay of that nature. The investigatory meeting would have been likely to have been carried out before the disciplinary meeting which would have then proceeded and the same result would have ensued. Consequently the Tribunal considers it should make a 100% reduction for the chance that he claimant would have been fairly dismissed in any event.

27. Dealing with the appeal, however, that is somewhat irrelevant in terms of a ***Polkey*** reduction, as it was always going to be held, as it was held, after the event. The claimant's dismissal had already occurred at that stage and consequently the appeal being adjourned and the claimant being allowed to attend it would have occurred after her dismissal in any event. The Tribunal has considered what would have happened if the claimant had been able to attend the appeal, and has similarly concluded that it would have made no difference to the outcome of that appeal. The appeal was a review not a re-hearing, and to the extent that Rebecca Bromley-Woods did consider the matters raised by the claimant, having heard those matters and everything else the claimant has said in evidence to the Tribunal, the Tribunal considers that the appeal outcome would have been the same had the claimant been able to attend it. Consequently , there were no bases for altering the Tribunal's decision that the ***Polkey*** reduction that should be made should be 100%.

28. In those circumstances it is not necessary to consider whether any reduction should be made for contributory fault pursuant to section 123(6) of the Employment Rights Act 1995 (see ***Rao v Civil Aviation Authority [1994] ICR 495)***, which determined that the correct order of reductions in these circumstances is for the Tribunal to apply the ***Polkey*** reduction first, and then to apply any reduction for contributory fault at that stage. Given100% reduction for ***Polkey***, there is no requirement for the Tribunal to consider contributory fault.

29. Moving on, however, to the basic award, the Tribunal has considered section 122(2) of the Employment Rights Act 1996, whereby if the Tribunal considers that any conduct of the complainant before the dismissal was such that it would be just and equitable to reduce the amount of the basic award to any extent then the Tribunal shall reduce that amount accordingly. This is a slightly different provision from section 123(6) which applies to the compensatory award. There is no

requirement for the conduct in question to have contributed to the dismissal, although the authorities make it clear that it would be rare to make a reduction under section 123(6) without also making the same reduction in respect of section 122(2).

30. The Tribunal does consider that it would in this instance be just and equitable to reduce the basic award. Whilst not concluding that the claimant was guilty of theft (but concluding that the reasonably believed that she was), the Tribunal does conclude that the claimant's conduct before her dismissal was such that it would be just and equitable to reduce the amount of her basic award. On any view, the claimant behaved in a foolhardy way. She exchanged vouchers entrusted into her care, that were to be used for the benefit of the learner , for cash. She did not inform anybody that she had done this, and kept the cash for a long period of time, at home, long after the initial contemplation of purchase of the laptop for the learner. Whilst the claimant may have been unaware that the learner had left, and advanced a number of reasons in relation to her work and personal life as to why this may be so, she clearly paid little or no attention to this rather unusual transaction. She accepted that these vouchers were not very commonplace, and she also accepted that she had never previously exchanged a voucher for cash in this way. It is therefore surprising, to say the least , that this matter had slipped her mind completely until March 2018 when the enquiry was made. On any view, therefore, as the claimant herself in fact seemed to acknowledge in her account of the meeting of 8 March, she had been “stupid”. She appreciated what this “looked like”. She can hardly therefore be surprised that her employers did come to the conclusion that they did. This Tribunal does not have to decide whether the claimant in fact intended to keep the cash , and thereby effectively stole from her employers, but it has nonetheless concluded that her conduct in this manner in relation to the voucher and exchanging it for cash in these circumstances was , at the very least , foolhardy. That said, however, there were serious deficiencies in relation to the respondent’s handling of this matter, and on that basis the Tribunal considers it would not be just and equitable to deprive the claimant of the whole of her basic award , but that the appropriate reduction would be 50%, and the Tribunal accordingly proposes to reduce the basic award by that amount.

31. In terms of the calculation of the basic award, the Tribunal notes that in the claimant's Schedule of Loss she has sought a basic award based on gross weekly earnings of £346.60. In the respondents’ response, they have provided a different figure for the claimant's earnings from that which the claimant provided , in that the respondent has put her gross monthly earnings at £1,545.66. This equates, by the Tribunal’s calculation, to a weekly gross wage of £356.92. The claimant, however, in her Schedule of Loss , for some reason , has sought 17 weeks’ pay for the basic award. Given that the claimant had nine years of service, the last one of which was over the age of 41 in respect of which the claimant is entitled to 1.5 weeks, the Tribunal cannot understand how she reached this figure.

32. The Tribunal calculates that the appropriate basic award is likely to be 9.5 weeks at £356.69 per week. That would give a basic award , before any reduction , of £3,388.55. Applying the 50% reduction would reduce that to £1,694.27. The Tribunal, however, does not presently make an award in that sum , but invites the parties to consider this calculation and, if there is no dispute about it, to agree the appropriate basic award , and to so notify the Tribunal. If, however, there is any dispute as to the calculation of the basic award, or any other issues that require a

hearing to determine remedy, the parties are to notify the Tribunal accordingly as directed above.

Employment Judge Holmes

Dated: 17 April 2019

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

26 April 2019

FOR THE TRIBUNAL OFFICE

ANNEX

The relevant statutory provisions : the Employment Rights Act 1996.

98 General

(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—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)—

(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(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.

122 Basic award: reductions

(1) [N/a]

(2) Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.

(3) [N/a]

123 Compensatory award

(1) Subject to the provisions of this section and sections 124[, 124A and 126], the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

(2) The loss referred to in subsection (1) shall be taken to include—

(a) any expenses reasonably incurred by the complainant in consequence of the dismissal, and

(b) subject to subsection (3), loss of any benefit which he might reasonably be expected to have had but for the dismissal.

(3) [N/a]

(4) In ascertaining the loss referred to in subsection (1) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales or (as the case may be) Scotland.

(5) [N/a]

(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.
