



EMPLOYMENT TRIBUNALS

Claimant: Ms C Berrington

Respondent: Tesco PLC

Heard at: Manchester

On: 13 and 14 June 2019

Before: Employment Judge Hoey

REPRESENTATION:

Claimant: Mr B Norman, Counsel

Respondent: Ms S Chan, Counsel

JUDGMENT having been sent to the parties on 25 June 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided.

REASONS

1. This was a claim for unfair dismissal and wrongful dismissal which was presented to the Employment Tribunal on 29 June 2018. Both parties were represented by counsel and I was presented with a bundle of papers running to some 529 pages.

2. At the conclusion of the hearing I was able to adjourn and issue a relatively short oral judgment which summarised my findings and the outcome in this matter. The respondent sought written reasons. These written reasons do not change the decision that was issued at the time but provide the detailed reasoning for my decision.

Issues

3. The issues to be determined in this case had been agreed between the parties and were set out in a written list of issues. The claimant had been dismissed

by reason of gross misconduct. The claimant argued that the dismissal was unfair essentially due to the alleged unfair investigation and that the claimant was not guilty of any misconduct. The respondent argued that the dismissal was fair.

4. The issues to be determined were in three parts.
5. Firstly, in relation to unfair dismissal and fairness:
 - a. What was the reason for the dismissal
 - b. Was this potentially fair
 - c. Did the respondent hold a genuine belief in the claimant's guilt, were there reasonable grounds for this and was there a reasonable investigation
 - d. Was dismissal within the range of reasonable responses
 - e. Did the respondent comply with the ACAS Code and if not what uplift should be awarded
6. Secondly, in relation to remedy:
 - a. What compensation should be awarded
 - b. Should there be any reduction, whether by reason of **Polkey** or otherwise
 - c. Has the claimant mitigated her loss
7. Finally, in relation to wrongful dismissal:
 - a. Did the claimant breach her contract of employment
 - b. If so, was the breach repudiatory
 - c. Did the respondent waive the breach
8. Written statements were lodged by the claimant, the dismissing officer and the appeal officer. The dismissing officer and the claimant gave oral evidence but the appeal officer was unable to attend the Hearing. As the claimant was unable to cross examine the appeal officer and some of the minutes were unable to be read (due to the handwriting) limited weight was placed upon the evidence in relation to the appeal. Both witnesses were credible but I preferred the claimant's evidence where conflict arose, as I explain below. The dismissing officer's evidence was contradictory in some places whereas the claimant's evidence was clear and consistent.
9. I was also asked to view excerpts from CCTV footage which the respondent agreed was relevant for the purposes of the wrongful dismissal complaint. This was done.

10. An issue also arose as to the absence of typed appeal hearing minutes. The minutes were handwritten and illegible in places and the claimant's agent asked for a typed copy. The day before the Hearing the respondent's agent had tried to type up the minute but there were still blanks. I asked that the parties work together, in light of the overriding objective, to try and complete the blanks where possible. They did seek to do this, albeit some blanks remained. Unfortunately, the minute of the second appeal meeting was handwritten and illegible in places.

Findings of fact

11. I make the following findings of fact, which I do having heard oral evidence and having been directed to the appropriate papers within the bundle. I make these findings on the basis of the balance of probabilities. Reference to page numbers are to pages of the bundle to which I was referred. I only make findings in relation to the issues that require to be determined.

12. The respondent is a well-known large retailer that operates throughout the United Kingdom. The respondent has a number of HR and related policy documents in connection with disciplinary matters and staff are trained in this area.

13. The respondent employed the claimant from 30 August 2005 as a General Assistant in their Burnage store. She became Counter Team Manager in 2010 and was responsible for supervising the counter team. She oversaw 15-20 members of staff. The claimant had a clean disciplinary record. Her honesty and integrity had never been an issue.

Contract and policy issues

14. The claimant was subject to a contract of employment together with a number of policy documents including the disciplinary policy at page 48. Theft and fraud amount to gross misconduct as does deliberate disregard/abuse of procedures.

15. The claimant believed that staff are able to purchase reduced items in store provided the staff member in question did not reduce the price of the item being purchased and the item had been offered for sale to the public. She also understood that it was permissible to store items that had been purchased behind the counter.

16. There was a letter setting out operational guidelines at page 64 but there was no evidence that the claimant had received a copy of this letter. This set out that purchased items should be stored in lockers or the car. The claimant was not cross examined on this issue.

17. It was accepted by both parties that staff should not reduce items and then conceal the items from public sale.

Suspension

18. On 8 January 2018 the claimant was suspended as a result of allegations that she was said to have breached procedure. The claimant was issued with a letter on 20 January 2018 (page 136) confirming that she had been suspended on 8 January 2018. An investigation was to take place into an allegation that she had "reduced

counter stock and sold it from an unauthorised location while not putting it on general sale”.

19. The claimant was suspended for 23 days.

Investigation

20. An investigation was commenced. There was a number of meetings that took place in relation to this and CCTV footage of the two days in question, namely 24 December 2017 and 31 December 2017 was considered. Summary reports had been provided by the team who were engaged by the respondent to identify suspicious behaviour. The first of these summary reports (found at pages 86-98) includes stills from CCTV footage in relation to conduct on 24 December 2017. That also included a summary of purchases of reduced items which the claimant accepted she had bought. The second summary report is found at pages 104-117 and includes reduced item purchases and CCTV stills from 31 December 2017. These reports refer to the CCTV still images and the claimant's purchases only and do not contain any witness evidence. The claimant was working on both days.

21. The following meetings took place (with individuals who worked on the counter in question):

- An investigation meeting with Mr A on 25 January 2018;
- An investigation meeting with Mr B on 25 January 2018;
- An investigation meeting with Mr C on 25 January 2018;
- An investigation meeting with Mr T on 25 January 2018.

22. There was also an investigation meeting with the claimant on 31 January 2018 and a further investigation meeting with both Mr C and then the claimant on 5 February 2018.

23. Part of the claimant's duties were to ensure that stock is sold via the relevant fridges at the optimum price and that waste is reduced. She oversaw the counter staff who had been trained in connection with the process to be undertaken in relation to reductions and when these are to take place.

24. The claimant accepted that she had purchased a large number of reduced goods on both days. On 24 December 2017 the claimant paid £29.93 for goods which were originally worth £188.59, saving £158.66. This was in respect of 25 items which had been reduced. On 31 December 2017 the claimant paid the sum of £8.91 for 12 items which were worth £68.40 thereby saving on the face of it £59.49.

25. The claimant's position was that the items she purchased on both days were items that had been reduced legitimately and purchased by her in the normal course of business. There was no prohibition upon staff buying reduced items *per se*. She maintained that the items she purchased were items that had been offered to the public for sale and she was unaware of any issues regarding the purchases.

26. Not all of the reduced items for both days are relied upon by the respondent as being items that were improperly purchased. The respondent accepts that some of the items paid for by the claimant on both days were reduced legitimately for which no issue arises. The respondent is unable to say precisely which of the reduced items the claimant purchased in breach of their policies.

27. The witness evidence that was obtained suggested that the claimant had told her colleagues to reduce the prices, place the items in the fridge behind the counter and sell the items to colleagues without placing these items for public sale. They had said that the claimant had asked items be reserved for herself too. The witness statements were not fully detailed and were lacking in reasoning in places.

28. The colleagues who were interviewed provided slightly differing accounts as to exactly what the claimant is alleged to have done, what and when she is alleged to have said the things alleged, what discounts the claimant is said to have instructed and when said discounts were to be applied. There was a lack of consistency with regard to the important detail around the specific allegation.

29. Mr A (page 139) stated that on Christmas Eve the claimant told him to reduce items and sell them to colleagues. He said that there was a discussion around 3.00pm with Messrs C, B and T present when the claimant is alleged to have told her staff this. He said that on New Year's Eve something similar happened and the claimant told the team to reduce the items for each other, firstly by 50% then by 90%. He said initials were written on the items, including the claimant's (page 139).

30. Mr B (page 146) said that the claimant told him to reduce the items at 3.00pm to 90% and that colleagues could buy the items.

31. Mr C (page 155) said that the claimant told him they can put reductions in the fridge and were to do so at about 2pm at 90%. Mr C's position was that the claimant told both Mr T, Mr R and himself this. He explained that he knew it was in breach of the policy and the reduced items should have gone on the shop floor but the claimant advised him he could do so.

32. Mr C revised his position in some respects by the second meeting which is set out below.

33. Mr T (page 161) said that the claimant had spoken to the team and that they were not to worry as they can reduce items for colleagues.

34. The claimant disputed this vehemently (page 176), denying that she had given the team any instructions whether by way of reductions or that they should be placed outwith public control. She was clear in that she had complied with the rules as she understood them.

35. The respondent spoke again to Mr C (page 187) when he said that on Christmas Eve the claimant had told him that staff should depart from normal policy and not place items on public display. He suggested the claimant told him to start the reductions at 75%, put in the fridge (not the shop floor) thereafter reducing to 90% at 3.00pm.

36. Mr C also stated that the claimant said “Tom is here, please give him my reductions” when the claimant's partner arrived at the store, and that she had told him what she had wanted reduced in advance.

37. The claimant does not call her partner “Tom”. She calls him “Tommy”. She maintained that she was not present (nor in the vicinity) when her husband was given the reduced items by Mr C.

38. The CCTV footage showed a very short interaction between the claimant's husband and Mr C on 31 December. There was no evidence on the CCTV of the claimant having any discussion with Mr C at this time.

39. At page 192 Mr C says that on New Year's Eve the claimant told him that items could be bought by colleagues. He confirmed that the claimant had chosen items she was looking for. He said the claimant advised the individuals that reductions were to be made in respect of the team at 90% around 3.00pm, place these straight in the fridge and not on the shop floor.

40. At the further meeting with the claimant at page 198 the claimant strongly disputed this. She argued that she did not tell the colleagues to reduce the goods and she disputed that she was around at the relevant time in question. The claimant strongly denied that there was any collusion. She said the three individuals were trying to limit blame for their own wrongdoing by claiming she was the ring leader.

41. The respondent in its investigation sought out facts that supported their belief that the 3 witnesses who provided detail about the claimant were telling the truth (or made inferences to support that belief) and failed to look for facts that supported the claimant's position. This is seen, by way of example, in the adverse inference made by the respondent from the CCV generally (which they concluded supported the 3 witness's position), the failure to investigate what was said (and by whom) between Mr C, the claimant's husband and the claimant (with regard to the important interaction between the claimant's husband and Mr C), the failure to consider the CCTV footage that showed the claimant's facial expressions when she sees reductions being brought out late and the adverse inference drawn from the way the claimant paid for items. The general failure to go beyond the 3 individuals is also evidence of this approach.

Disciplinary hearing

42. A disciplinary hearing was convened and an invite letter is sent to the claimant for the hearing on 10 February 2018 (page 224), which was subsequently adjourned to allow the claimant to receive copies of typed investigation notes. The allegation set out in the disciplinary hearing letter is that there was “an abuse of the reduction process against company policy and a breach of the colleague shopping policy”. That letter states that it enclosed an investigation report, notes and the witness statements. The investigation report was the summary report with stills and purchases. It did not refer to the witness evidence. There was no report setting out the position in relation to what was investigated and what each witness said and any issues arising in connection with the witness and other evidence relied upon. The claimant was advised dismissal could be an option and that she was entitled to bring a colleague.

43. The minutes of the meeting are at pages 228-247. The respondent argued that the claimant was shown CCTV footage during this meeting but this is disputed by the claimant. I find that the claimant was not shown the CCTV footage in the course of this meeting but that she was given a copy of stills. This is evidenced by the fact that at the appeal meeting the claimant asked to see the footage as she had not seen it before (which is found in the minutes). The dismissing officer's evidence in relation to this point was not consistent during cross examination and I prefer the claimant's evidence which was clear and is supported by the minutes.

44. The claimant strongly disputed the allegations against her. She argued she had done nothing wrong and the colleagues in question were seeking to deflect blame from their own wrongdoing and blame the claimant.

45. The claimant explained that due to the shorter timeframe on 24 December they had to bring forward the time to reduce items. It was a Sunday and Christmas time. She had 5 colleagues working with her on that day.

46. The claimant told the hearing she was concerned that there was a large amount of unsold stock at around 1pm and advised her staff that she would check the position with the store manager around 2pm. The claimant told the hearing she believed her staff would have reduced the items in the usual way. Those employees had been trained in this area.

47. Upon leaving the store at 3.50pm, 10 minutes before closing time, she saw Mr B bring out 2 trays of unsold meat which he had explained he had failed to bring out due to this being his first Christmas and his being too busy. The claimant told the hearing she took a management decision to ensure the items were sold rather than wasted.

48. The CCTV footage showed the claimant being surprised when Mr C brought reduced items from behind the counter. It also showed the claimant making a mobile telephone call following that incident. The claimant said she called the store manager but no enquiries were made by the respondent to check who was called.

49. The claimant told the hearing that on 31 December 2017 the claimant told staff to ensure unsold products were reduced earlier and placed onto the shop floor. She stated that she asked her colleagues around 3pm if the reductions had been made and she was told there were no unsold items in the fridge.

50. The claimant said her husband was in the store with her son and he had subsequently advised her that Mr C went to her husband who approached the counter, telling him he had "some goodies" for him and placed them in the trolley. The claimant was not present when this happened and was not aware of it at the time.

51. The claimant met her husband later in the store and paid for the items in the usual way. She explained that she had no reason to doubt the items in the trolley were legitimately purchased. The claimant was speaking to a colleague at the time she was paying for the goods and she did not have her glasses on.

52. She was not surprised there were reduced items in the trolley given she had chosen some herself (from the public display) and it was after closing time. It was normal to buy reduced items at that time.

53. She did not know precisely what was in the trolley as she was not present when her husband had selected the items and she was speaking with a colleague when paying for the items. It was not unusual (or wrong) to have reduced items at that time of the day. The items she had selected had been on sale to the public. The claimant again made representations that her three colleagues were targeting her with a view to deflecting blame from themselves.

54. The outcome of the disciplinary hearing is found at page 248, which is the letter dated 19 February 2018. The respondent decided to summarily dismiss the claimant on grounds of gross misconduct. That letter does not set out the reasoning for upholding the allegation and summarily dismissing the claimant.

55. The dismissing officer's reasoning was that the respondent believed the claimant was guilty of gross misconduct. The respondent believed the claimant had planned to sell the items to colleagues for a significantly reduced price and had ensured they were not placed for public sale. He believed she was responsible for preselecting items for purchase later in the day. This resulted in the respondent's view of products being prevented from being sold to customers at potentially a higher price. The respondent concluded they could not trust her and believed that the claimant's decision to purchase the reduced goods was premeditated and that she had a complete disregard for the policy.

56. The dismissing officer relied on the CCTV footage and said that this showed the reduced items had been pre-selected by the claimant for the claimant's husband. He believed this because the claimant had said there was a conversation between the claimant's husband and Mr C (about being told there were "goodies") but he said the CCTV showed "little or no conversation".

57. He also said his decision was "mainly" based on the CCTV footage and reports (which contained the CCTV still images) – and not on the witness statements. In his view the CCTV footage "corroborated" the witness statements obtained during the investigation. He was of the view that the respondent had obtained "concrete evidence", such as the CCTV footage which he believed supported the allegation. He said that he believed the CCTV footage clearly showed the claimant guilty of the allegation.

Appeal

58. The claimant appealed against this dismissal (pages 262 and 263) on a number of grounds. These included:

- a. The penalty was too harsh
- b. The penalty was inconsistent with a similar case
- c. The investigation was not complete
- d. There was no fair hearing

e. New evidence needs to be considered

59. The appeal letter also stated that there was conflicting statements and evidence and that not everyone who bought reduced items had been investigated. She referred to the fact she had not been shown the CCTV.

60. The appeal hearing took place on 13 April 2018.

61. The Employment Tribunal did not hear oral evidence from the appeal officer but did take account of the statement he had provided (placing appropriate weight on it, bearing in mind that the claimant did not have the opportunity to cross examine the appeal officer) and the points raised by the parties in relation to the appeal process. The minute of the appeal hearing is set out at pages 287-327. While it is handwritten and illegible in places and the respondent had attempted to type this up shortly before the Hearing, some blanks remained.

62. The claimant brought the bags that she had been given with the items in question to the appeal hearing. These showed that there were no initials on the bag, which contradicted the evidence within Mr A's statement on which the respondent relied. The claimant also maintained her position that there was collusion amongst the 3 individuals the respondent relied upon and maintained that she was not guilty of the allegation. She presented a number of colleagues' details which would support her position and asked that these persons be contacted to confirm her position.

63. The outcome is found at pages 341-348 whereby the decision was taken to uphold the decision to dismiss her summarily. This is a handwritten note which is illegible in places.

64. The respondent argued that the claimant was shown the entire CCTV footage during the hearing but the claimant argued she was shown only a small excerpt. I find that at the appeal hearing only a few minutes of the CCTV footage was shown. This is because the minute shows that the viewing took place between 1.26pm and 1.43pm which included time to leave the room and watch the footage (which was in a room a few minutes away) - page 372K.

65. At page 327L and M the claimant raised a number of issues during the appeal as to the witness evidence that the respondent had relied upon and inconsistencies. She also raised the issue as to the absence of initials on the bags she was given. She points out at page 327N that the investigation was not full given the inconsistencies in the witness evidence relied upon by the respondent.

66. The claimant had provided the appeal officer with exchanges she had with a colleague which supported the claimant's position. See pages 334 to 338. This appeared to suggest that the individuals relied upon by the respondent had colluded to blame the claimant. That person also refers to others within the business who had purchased reduced items on the day in question.

67. There was no further investigation undertaken following the appeal meeting by the appeal officer. He did not undertake any further enquiries or take further action in relation to the points the claimant raised during the appeal, including the

checking of the CCTV footage to assess whether or not the points made by the claimant were meritorious or not.

68. The appeal officer convened a separate meeting to read out his decision which happened on 4 May 2018. He decided to uphold the original decision to dismiss for the reasons set out in the outcome letter at page 354 on 14 May 2018. The appeal officer stated that he believed the claimant had abused the reduction process and had not followed shopping processes. He believed the claimant had planned to put items aside and reduce them by up to 90% and she had personally benefitted.

69. The appeal officer believed that this was not a genuine error since it happened on two occasions. He believed that on 24 and 31 December the items were taken from the fridge behind the counter without being on sale to the public and the claimant had made a premeditated decision to breach the policy, which the respondent believed was supported by witness statements and CCTV. He found the way she purchased the items (which was seen from CCTV) supported the decision.

70. Her appeal was therefore dismissed. That was her final appeal.

Claimant's earnings

71. The claimant earned a gross annual salary of £24,221.64 with the respondent which resulted in gross weekly pay of £465.80. Her net annual pay was £18,131.04 and net weekly basic pay was £348.67. She had 12 complete year's service and was 49 as at the date of her dismissal.

72. The claimant was subject to a 12 week notice period.

Mitigation

73. The claimant sought to mitigate her loss by applying for around 70 jobs. The claimant eventually secured part-time employment which commenced on 20 May 2019 earning £174.86 a week (net).

Findings in fact for the purposes of the wrongful dismissal claim

74. The claimant was not involved in the plan that the witnesses had set out. The claimant did not reduce items for sale and conceal these from the public. The claimant was not guilty of the misconduct as alleged by the respondent.

The Law

Unfair dismissal

75. Section 98 (1) of the Employment Rights Act 1996:-

“In determining 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.”

76. Section 98(2) of the Employment Rights Act 1996:-

“A reason falls within this subsection if it... relates to the conduct of the employee”.

77. Section 98(4) of the Employment Rights Act 1996:

“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 reasons 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”.

78. In accordance with the tests set out in ***British Home Stores Ltd v Burchell*** 1980 ICR 303 the Tribunal must consider:-

- (i) Did the respondent believe the claimant was guilty of misconduct?
- (ii) Did the respondent have in its mind reasonable grounds upon which to sustain that belief? and
- (iii) At the stage at which that belief was formed, had it carried out as much investigation into the matter as was reasonable in the circumstances of the case?

79. Range of reasonable responses:-

- (i) When assessing whether the **Burchell** test has been met, the Tribunal must ask whether dismissal fell within the range of reasonable responses of a reasonable employer and this test applies both to the decision to dismiss and to the procedure. The correct approach is to consider together all the circumstances of the case, both substantive and procedural, and reach a conclusion in all the circumstances. The band of reasonable responses test applies as much to the question of whether the investigation was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss.

- (ii) The starting point should always be the words of section 98(4) themselves. In applying the section the Tribunal must consider the reasonableness of the employer's conduct, not simply whether it considers the dismissal to be fair. In judging the reasonableness of the dismissal the Tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer; it is not for the Tribunal to impose its own standards. The Tribunal has to decide whether the dismissal and procedure lay within the range of conduct which a reasonable employer could have adopted.
- (iii) In many cases there is a band of reasonable responses to the employee's conduct within which one employer might take one view, and another might quite reasonably take another. The function of the Tribunal is to determine in the particular circumstances of each case whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair. However, the band is not infinitely wide and is not a matter of procedural box ticking

80. The Employment Tribunal must not substitute its decision for that of the employer and must look at the matter through the lens of a reasonable employer: could a reasonable employer have carried out the procedure that was undertaken, and could a reasonable employer have dismissed for the reasons relied upon in this case? In other words, it is important not to substitute the Tribunal's decision for that of the employer, and the matter must be looked at in the round to decide whether or not the respondent acted reasonably: **Sainsburys v Hitt** 2003 IRLR 23 and **Secretary of State v Lown** 2016 IRLR 22.

81. As it is not a criminal trial, the employer does not need to prove the guilt of the employee beyond reasonable doubt – it is sufficient that the employer acted reasonably in treating the misconduct as a sufficient reason to dismiss in the circumstances known to the employer at the time.

82. If the facts are in dispute it is important that an employer conducts a fair investigation particularly if criminal misbehaviour is involved. In such cases the employer should investigate the matter very carefully and conscientiously, bearing in mind it is not a criminal trial.

83. When determining whether the employer acted within the range of reasonable responses, it is relevant to have regard to the nature and consequences of the allegations, A reasonable employer should have regard to the gravity of the consequences when determining the nature and scope of the investigation.

84. The reasonableness of the decision to dismiss is scrutinised at the time of the final decision to dismiss – at the conclusion of the appeal process (**West Midland v Tipton** 1986 ICR 192).

Compensation

85. In addition to a basic award (Section 119) Employment Rights Act 1996, Section 123(1) Employment Rights Act 1996 provides for a compensatory award which is 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 (capped at a year's pay).

86. Contributory conduct:-

(i) Section 122(2) Employment Rights Act 1996 states:

Where the Tribunal considers that any conduct of the claimant before the dismissal ... 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

(ii) Section 123(6) Employment Rights Act 1996 states:

Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the claimant, it shall reduce the amount of the compensatory award by such proportion regard to that finding.

Polkey

87. Where evidence is adduced as to what would have happened had proper procedures been complied with, there are a number of potential findings a Tribunal could make. In some cases it may be clear that the employee would have been retained if proper procedures had been adopted. In such cases the full compensatory award should be made. In others, the Tribunal may conclude that the dismissal would have occurred in any event. This may result in a small additional compensatory award only to take account of any additional period for which the employee would have been employed had proper procedures been carried out. In other circumstances it may be impossible to make a determination one way or the other. It is in those cases that the Tribunal must make a percentage assessment of the likelihood that the employee would have been retained.

88. The Tribunal has also considered section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and in particular section 207A(2), (referred to as "Section 207A(2)") and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures 2009 ("the ACAS Code").

"(2) If it appears to the Tribunal that -

(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,

(b) the employer has failed to comply with that Code in relation to that matter, and

(c) that failure was unreasonable;

The Employment Tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.

Wrongful dismissal

89. Section 3(2) of the Employment Rights Act 1996 and Article 3 of Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 SI 1994/1624 gives the Tribunal jurisdiction to hear claims for damages for breach of contract of this kind provided the claim arose on termination of the contract of employment and has been brought in time.

90. Subject to any defining terms in the contract of employment, summary dismissal is only permissible if the claimant's conduct amounted to a repudiatory or fundamental breach of contract.

91. In the case of a wrongful dismissal the Tribunal is required to find that there was a fundamental breach of contract, in which case the Tribunal must be satisfied on the facts that there was an actual breach of contract. There is no place for deciding what is reasonable. The Tribunal must decide as a matter of fact what happened and decide whether this conduct justified the respondent in summarily dismissing the claimant. The question is whether or not as a matter of fact, on the balance of probabilities, there was a fundamental breach of contract that entitled the claimant to be summarily dismissed.

Submissions for claimant

92. Mr Norman stated that in relation to the wrongful dismissal claim, it is important to note that the claimant was the only person who gave evidence under oath in relation to the issues under consideration for this claim. As there were no serious credibility concerns, he submitted that her evidence should be accepted as to what actually happened. The dismissing officer was the only other person who gave evidence and he was not present at the relevant time.

93. The CCTV evidence does not show the he CCTV evidence does not show the claimant doing anything in relation to the allegations in question. Mr Norman submitted that the CCTV evidence shows counter members reducing items for each other, putting them in fridge and buying them later on. It does not show the claimant ordering any reductions or doing anything wrong. The CCTV evidence also shows the counter staff behaving confidently and without hesitation. There is nothing to support the allegation the claimant had pre-planned the reductions.

94. Mr Norman also noted that there is no evidence that the claimant told the staff to reduce at the times suggested. The reaction of the individuals on the footage is not consistent with the claimant having instructed them to break the rules.

95. Mr Norman argued that the fact 3 colleagues blame the claimant is not surprising. They knew there was CCTV footage showing they had done wrong and so it was convenient for them to blame the claimant to deflect blame from themselves.

96. Mr Norman argued that the witness statements are inconsistent. The statements have important differences, including when they were told to apply the discounts, what the discounts were and the process that allegedly happened. For example, why would the claimant tell them to reduce items by 50% first and then 90% if they were never being put on public sale. Mr Norman stated that the 3 statements do not support the respondent's position. While they appear consistent, when they are looked at properly, significant gaps appear. In his submission the 3 witnesses were not telling the truth about the claimant's involvement and the claimant's evidence should be preferred.

97. This is supported, for example, by the fact the claimant was able to show the bags she purchased did not have her initials written upon them, which contradicted the witness statement. Mr Norman invited me to accept what the claimant said on oath rather than what an employee said who was being investigated in relation to potential misconduct.

98. Mr Norman also asked that I consider the information presented at the appeal from the claimant's colleague. She presented powerful evidence about the existence of collusion. That individual noted that the witnesses relied upon by the respondent were not reliable – they had met and agreed to blame the claimant - see page 335.

99. The claimant took the oath and presented her evidence in a credible way. The evidence relied upon by the respondent was contradictory in places and was not given under oath. The claimant sought to help the Tribunal by giving her evidence candidly.

100. Mr Norman noted that the claimant was never challenged as to her understanding of the policy which was that staff are not able to buy items they have reduced themselves but otherwise they can buy reduced items.

101. Her 3 colleagues were trained at a higher level than the claimant in relation to the processes in question.

102. The final inconsistency relied upon in this regard is that the respondent suggests the claimant is somehow working with her husband in relation to the reduced items. Her husband had come to the store on a number of occasions over the last 3 years. He knew the staff who worked on the counters. Those staff therefore knew the types of items the claimant's husband would purchase and therefore it is not surprising the individual is able to give her husband "goodies" since they would know what he liked.

103. The witness statement which suggested the claimant said "here's Tom, give him my reductions" is not supported by the CCTV. The claimant never referred to her husband as Tom. In any event the claimant was not present at the time it is alleged she told her colleague to hand her husband the reduced items. The CCTV evidence shows that there is no way the person who deals with the claimant's husband is having a discussion with the claimant. The footage shows him in middle of screen with the husband. He does not look to the deli counter where the claimant is working and there is no evidence showing the claimant tell him anything.

104. Mr Norman concluded by saying there is no evidence supporting the assertion the claimant was engaged in any premeditation at all. The respondent leapt to unfounded conclusions absent proper investigation or evidence.

105. He submitted there is no evidence of any breach of contract, far less a material breach, and the claim for wrongful dismissal should be upheld.

106. With regard to the claim for unfair dismissal, he accepted that the respondent dismissed for a potentially fair reason - misconduct. He asserted that case law shows that the scope of investigation should be wider where very serious allegations are made, such as dishonesty.

107. In this case the claimant had been employed for 13 years and had a clean disciplinary record. No issues with regard to her integrity or honesty had ever arisen. She was being accused of an extensive, intricate and largescale fraud which involved a number of staff and was very serious. A reasonable employer would carry out a thorough investigation and not simply accept statements of staff whose misconduct was on CCTV and who would know that this would be the case.

108. Mr Norman submitted a reasonable employer would investigate the issue carefully given the issues in this case. A reasonable employer would not simply accept the word of 3 colleagues in this situation.

109. He argued a reasonable employer would investigate whether the 3 employees are telling truth. A reasonable employer would do more than blindly accept what the individuals have said. A reasonable employer would check the details: what specifically did each witness say; when was this said; where was the claimant; what were the parties' reactions; who else was present; who supports what the individuals say etc.

110. In this case the 3 individuals' statements were essentially accepted with no probing at all. Their positions were not investigated. They were accepted at face value with a superficial investigation having taken place. No steps were taken to look for evidence that supported the claimant's position.

111. Mr Norman pointed out this derives from the fact these witnesses were being investigated in their own right. That was the purpose of their statements. Rather than separately and fully investigate the position, the respondent simply gets an admission from the 3 individuals as to wrongdoing and then use those statements to find the claimant guilty. No attempt is made to get to the bottom of whether a long standing honest employee has in fact orchestrated the fraud or not. No attempt is made, for example, to check CCTV footage from the deli counter where the claimant was working most of the day.

112. A reasonable employer would have gone beyond the 3 statements to investigate the position. Checking the other CCTV footage would be something a reasonable employer would do. In this case the respondent did nothing other than accept the 3 individuals' account.

113. Mr Norman noted that the dismissing officer said just because the claimant is not seen saying anything does not mean she did not tell the individuals to do it. Yet

Mr Norman noted the respondent did not check the CCTV that would show the claimant at work at the time in question. The respondent just accepted what the individuals said without properly investigating the issue which would have been what a reasonable employer would have done given how important this was to the claimant and her honesty.

114. The claimant noted that there are other people who were working at the time in question and in the vicinity. A reasonable employer would have checked with some of these individuals to check the statements of the 3 individuals were credible. The claimant worked nearby and others could have been asked about what the claimant is alleged to have told the staff given this was not suggested to be private. The claimant gave specific names but again no attempt was made by the respondent to challenge the 3 statements. That, said Mr Norman, was unreasonable.

115. Mr Norman also submitted that the fact the claimant was not given the chance to look at the CCTV footage was also unreasonable since she could have explained why the footage supports her position rather than rely upon the respondent draw inferences from it. The claimant had made valid points about the position and reaction of certain people which could have swayed the dismissing or appeal officer but she was not given the chance to do so and that was unreasonable.

116. Mr Norman also submitted that the appeal is a major issue in this case. He argued that there is a duty on the respondent to carry out a fair process, which includes the appeal process. In this case Mr Norman argued that at the appeal hearing the claimant had given the respondent many of the shortcomings of the process which, if rectified, could have resulted in a fair dismissal. She set out the specific ways in which the dismissal had been rendered unfair. Instead of deal with them properly, the respondent essentially rubber stamped the decision of the dismissing officer.

117. Mr Norman stated the appeal notes show the issues the claimant raised. He notes, for example, that at page 327C half way the claimant provides an explanation for her acting in the way she and the other individual did. This explains what happened on the days in question. He argued that the respondent was relying on the fact the issues happened twice and that this was significant – and could not be a coincidence. But the claimant provided an explanation which is not taken into account.

118. He also noted that at the end of page 327C the claimant tells the appeal officer about what happened when her husband is given the reduced items. The respondent was on notice that the claimant's husband was known to the individual who handed him the reduced items. That ought to have been investigated since that could well mean that the claimant's husband and the individual in question knew each other and that the claimant was not involved in the matter at all. This was not considered by the respondent who assumed that the claimant must somehow be involved. A reasonable employer would not proceed on the basis of assumptions but would investigate this matter.

119. Similarly, at page 327D the claimant shows the absence of any initials on the bags. The respondent takes no action in relation to this point and simply confirms the

decision of the dismissing officer. A reasonable employer would investigate this further.

120. Mr Norman notes that the respondent takes no step to check with any other person whether or not the 3 witnesses were telling the truth or not. The evidence presented by the claimant by her colleague was not investigated at all. That evidence suggested the 3 individuals had got together to get their “stories right”. A reasonable employer would pursue this issue given its importance and the significance placed upon the 3 witness statements and the absence of any direct evidence implicating the claimant.

121. Mr Norman also referred to page 327D where it is noted that from the CCTV footage Mr R was present. He had left the company but a reasonable employer would consider this. He noted that the claimant pointed out during the appeal that Mr R was married to one of the claimant’s colleagues who was working at the deli who could provide evidence that showed the claimant was not involved in the scheme at all. A reasonable employer would have investigated this but nothing was done.

122. Mr Norman said the individuals the claimant identified during the appeal process, at page 327D, should have been spoken to, given the issues in this case. A reasonable employer would have done so.

123. He also pointed to page 327F where the claimant told the respondent she was not at the department at the time the witness alleged the claimant told him to give her husband the reduced items. The CCTV supports her evidence in this regard but again the respondent did not consider the position and accepted the 3 statements.

124. The claimant asked the respondent at page 327G to re-question Mr B in relation to specific issues and the inconsistencies. A reasonable employer would have done so. The claimant also raised, at page 327H, that counter staff would be able to support what the claimant said happened (which the claimant said is supported by the CCTV footage). The respondent did nothing in that regard.

125. Mr Norman pointed out that at page 327L the claimant sets out in great detail the inconsistencies in the witness statements but nothing appears to have been done or considered about this.

126. Mr Norman referred to the appeal outcome letter which essentially amounts to the respondent upholding what the dismissing officer believed from the information he had rather than properly and fairly engage in the points made by the claimant during the appeal. The appeal officer “rubber stamps” what happened.

127. The fact the claimant is the manager of the staff in question does not mean she had any influence on what happened. The respondent alleged the claimant had planned the process and there was premeditation involved. They ought to have properly investigated the facts to support that assertion.

128. Mr Norman notes that reliance is placed by the appeal officer at page 346 that the claimant showed little hesitation when paying for the items. Yet she is buying the items after 4pm when the store had closed. It was entirely legitimate to do so and placing reliance on how she “looked” in reaching a decision was unfair.

129. Mr Norman also noted that the appeal officer uses the CCTV to support his view as to how the claimant looked when purchasing the items but refused to look at the CCTV to check what the claimant was saying about it and why it supported her position. That, he maintained, was unfair.

130. The rest of the appeal outcome is generic and fails to engage with the points made by the claimant. The evidence presented by the claimant was ignored. The general disregard of the evidence the claimant brought to the appeal rendered the decision to dismiss the claimant for dishonesty, a person with 13 years' service, with no previous issues as to her honesty, unfair.

Submissions for respondent

131. With regard to unfair dismissal, Ms Chan noted that the range of reasonable responses test applies both to the decision to dismiss and the procedure carried out, which includes the investigation. She noted that the facts of that case compare to those in **Sainsburys**. In that case the employer was alleged to have failed to interview key witnesses. The claimant was a baker who was dismissed after razor blades were found in his locker. Other than the claimant the only other person with a key was the manager. Mr Hitt argued that the respondent had failed to carry out a proper investigation as it ought to have checked with others who had a key. He was alleging that there was collusion.

132. Ms Chan noted the Tribunal and Employment Appeal Tribunal found for the claimant but the Court of Appeal (seen from the headnote at page 2) found that the range of reasonable responses test applies as much to the investigation as to other substantive and procedural aspects of the dismissal. The Tribunal had erred in not applying the range of reasonable responses test to the investigation.

133. Ms Chan submitted that the objective standards of a reasonable employer should be applied to the entire process. Here the objective standard of a reasonable employer would not require the respondent to carry out further investigations. Suggesting other investigations should be carried out would involve the Tribunal substituting its own standards as to what is expected. The purpose of the investigation is not to determine whether the claimant was guilty of theft but whether there were reasonable grounds for the respondent to believe she was guilty.

134. Ms Chan argued this case is relevant to the case under consideration as the claimant was arguing the respondent should speak to many other individuals. These were peripheral witnesses, in Ms Chan's submission, and it was unclear what such individuals would say in any event.

135. The respondent had given the claimant numerous opportunities to comment on the allegations. In short there was no credible evidence presented by the claimant which supported the assertion the 3 individuals were making their statements up. The claimant was given the chance to comment on their statements and one individual was interviewed twice. The second statement was more damning than the first. All 3 of the individuals talked about the claimant being involved and that was sufficient for the respondent to believe the claimant was guilty.

136. Ms Chan argued there was no reason why the individuals would involve the claimant in the plan if she was not in fact complicit in it.

137. Ms Chan accepted the CCTV does not show the claimant doing that which was alleged but it does not support the claimant's suggestion that she was not involved at all. The respondent relied upon the shortness of conversation of the claimant's husband with the employee to show the claimant must have preselected the items. She argued the footage allows an inference to be drawn that the claimant was involved.

138. Ms Chan also noted that the Tribunal should avoid using the CCTV footage to substitute its view, which was the position from **Lown** 2016 IRLR 22. In that case CCTV recorded intervention between the claimant, a prison officer, and a prisoner. The allegation was that the duty governor present at the intervention reported seeing the claimant strike the prisoner with his fist 3 times. Expert evidence about use of force had been led and a claim for unfair and wrongful dismissal was raised.

139. The Tribunal viewed video evidence and reached its own view of the evidence. It concluded that it couldn't be seen where the arm landed. The Employment Appeal Tribunal allowed the employer's appeal as the Tribunal fell into the substitution mindset. It is not enough simply to say what a reasonable employer would do if in reality the Tribunal substitutes its view. The only question, for unfair dismissal, is whether what the employer did fell within the range of reasonable responses.

140. Mr Chan submitted that she did not put the policy at page 64 to the claimant in cross examination as while she denied seeing the document, she knew what the allegation was. The allegation is that she was dishonest. She knew she should not reduce products which are then stored away from public sale. The policy at page 64 is not relevant as she knows she is not supposed to do the things that are alleged.

141. The allegation is deliberately placing items out of public sale and reducing them by up to 90%. There was clear premeditation and avoiding public sale. Ms Chan said there was nothing wrong with buying goods if they were placed for public sale but it was reserving them in advance. This case related to dishonesty or theft in securing goods for a fraction of their price.

142. In this case there were 3 statements from colleagues who implicated the claimant. There were inferences that could be drawn from the CCTV footage and the claimant accepted that she had bought the items, the vast majority of which were reduced. She had clearly benefited to a large degree.

143. Ms Chan accepted that it is not possible to make any findings as to exactly which of the reduced goods were taken without having first been on public sale, since some of the items taken by the claimant (and paid for) (and possibly some taken by her husband) had been legitimately purchased. The respondent was relying upon the fact the CCTV footage shows a number of items being placed in the trolley from the fridge. Ms Chan invited me to draw a link between the items taken from the fridge and what was ultimately paid for.

144. Ms Chan said there is a clear inference from the evidence that the claimant had preselected these items. It was reasonable for the decision maker to believe the claimant was guilty. The claimant does not challenge the genuineness of that belief. In **Lown** that was challenged.

145. In short Ms Chan says it was a reasonable investigation on the facts. The investigation was detailed given the sheer number of pages. It was very thorough and the allegations were put to the claimant. She was given the chance to answer the issues and respond to the additional points at the second meeting.

The investigation fell within the range of reasonable responses.

146. In addition, it is submitted that the decision to dismiss was within the band of reasonable responses open to a reasonable employer. The claimant was an experienced manager – she should have known better.

147. Ms Chan accepted that if the dismissal was found to be unfair, there was no issue as to contribution or **Polkey**. While it was logically conceivable that a **Polkey** issue could arise, that would require the Tribunal to have evidence that speaking to other witnesses would have made some difference and Ms Chan accepted there was no such evidence.

148. The additional evidence relied upon by the claimant is speculative. There was no clear evidence that the individuals had not told the truth. There was no formal witness statement or detail before the respondent.

149. The failure to investigate the absence of initials on the bags was not something that had been raised at the original hearing as it was only raised at the appeal hearing. The fact the bags did not have initials at the appeal hearing did not mean the initials were not present at the time, albeit this was not a point put to the claimant in cross examination. This was in any event a small part of the evidence and factual circumstances.

150. Ms Chan submitted similar issues arise in relation to the points raised by the claimant about the CCTV. The only CCTV that was looked at was the footage of the meat counter. Checking other footage might have been fruitless. The claimant did not ask to see other cameras at the disciplinary hearing.

151. Issues are now being made of the investigation which were not raised during the dismissal process. She had the chance to make these points and did not raise them. This is not a counsel of perfection and the respondent acted reasonably.

152. There were long periods of time when conversations could have happened. It is possible the discussions happened outwith the view of the cameras which do not record audio in any event. The best evidence is what the witnesses and the claimant say. It is too much to say the respondent should go and check other footage.

153. The issues in this case are similar to that in **Sainsburys** and a reasonable investigation was carried out. The suggestion that the 3 witnesses were colluding is not credible. The easiest option for them was to have avoided any criticism at all and simply say it was an accident or error.

154. Ms Chan noted that the respondent relies on the reasoning from page 245 of the dismissing officer and appeal officer (page 341 onwards). She maintains that the appeal officer goes through the specific appeal grounds and upholds the dismissing officer's reasons. Page 354 summarises the outcome.

155. In short Ms Chan argued the dismissal is fair. She says if it is unfair, there is no contribution argued. **Polkey** could only be relied upon if another witness should have been spoken to but that would have made no difference. In short this is an "all of nothing case". The outcome would in all probability not have changed had the respondent spoken to the others alleged.

156. In relation to wrongful dismissal, the same matters are relied upon. Ms Chan argues the respondent can rely on the witness statements of the 3 witnesses. It is open to the respondent to prefer these statements. CCTV supports the position. The events of 24 December are repeated on 31 December which reduced items being brought directly from the fridge. This conduct is all linked and there is an inference the claimant is involved.

157. For all those reasons the respondent argued that on the balance of probabilities misconduct did occur and the claimant is not entitled to notice pay.

Claimant's response

158. Mr Norman argued that the respondent was looking to "have its cake and eat it". It was relying on parts of the CCTV footage to support some of its findings but then not rely on parts the claimant had drawn to their attention. That was inconsistent and unreasonable.

159. He argued the same point arises about the bags. The respondent did not bother to ask the questions and was relying upon an inadequate investigation to say that it would not make any difference. The respondent was essentially saying "we did not investigate these points and so we can't say they would have made any difference and so it was not unfair to do so". That ought to work against the respondent. It was for the respondent to carry out a fair investigation. They did not do so and that renders the dismissal unfair. It goes to the substance of the dismissal.

160. Mr Norman argued that the failure to properly investigate the matter amounts to a u unreasonable failure to comply with the ACAS Code. This is found at paragraph 5 of the Code. In his submission there was a failure to properly engage with the investigation such that there was an unreasonable failure to comply with the Code. He argued there was a significant failure and sought an uplift of 20%.

161. Ms Chan resisted any uplift. There was no unfairness and no unreasonable failure to comply with the Code.

Reasons

162. The first question I have to determine is what the reason for the dismissal was. In this case the parties accepted that the respondent dismissed for a potentially fair reason, namely for matters relating to the claimant's conduct.

163. The next question in this case is whether or not the respondent acted fairly and reasonably in dismissing for that reason, namely the claimant's conduct, in light of the size, resources, equity and the merits of the case. It is not for the Employment Tribunal to substitute its decision and decide whether it would have dismissed or undertaken the procedure in question but instead the question is whether the actions of the respondent amount to those of a reasonable employer, both in terms of the procedure that was undertaken as set out in the **Sainsbury's** case and in respect of the decision that was undertaken.

164. As the parties have agreed, there are three issues to be determined in this regard:

- (1) whether the respondent genuinely believed in the guilt of the claimant;
- (2) whether that was sustained on reasonable grounds; and
- (3) whether or not a reasonable investigation was undertaken that allowed the respondent to believe genuinely of the claimant's guilt.

Genuine belief

165. I accept in this case that the respondent did genuinely believe in the guilt of the claimant. The allegation was that the claimant colluded with staff and her team in directing them to reduce items by up to 90% without selling them to the public. The respondent genuinely believed that the claimant was guilty of this.

Reasonable grounds for the belief

166. In order to sustain a genuine belief, the respondent requires to have reasonable grounds for the belief. In this case the grounds for the belief are inextricably linked with the investigation that was carried out. I shall therefore turn to the investigation since the parties had agreed that the fairness of the dismissal was dependent upon whether or not the investigation in all the circumstances was reasonable.

Investigation

167. This case turns on whether or not that there was a reasonable investigation carried out by the respondent that entitled them to entertain their belief in the claimant's guilt of the allegation. That issue in this case would also determine whether or not the belief in the claimant's guilt was reasonable.

168. I have concluded after carefully considering the detailed submissions of both parties, together with the papers, that in the circumstances the respondent did not act reasonably in respect of the investigation in this matter. In my view the investigation they carried out was not that of a reasonable employer in the circumstances and resulted in this dismissal being unfair. I concluded that the investigation fell outwith the range of reasonable responses open to a reasonable employer facing the circumstances of the respondent. I set out my reasons.

169. The witnesses on the face of it provide grounds that suggest the claimant was responsible. Superficially the matter looks straightforward and the position is clear.

However, I accept the claimant's counsel's submissions in this matter in respect of the fairness of the investigation which carefully demonstrate why in this particular case no reasonable employer would simply accept the statements at face value without undertaking further investigations to check the veracity of these statements.

170. The allegation facing the claimant was a serious one and amounted to dishonesty/theft. The claimant had a clean record and no issues relating to her honesty had been raised before. The investigation required was not one akin to a criminal investigation or a criminal trial but the investigation required to be fair. Given the seriousness of the allegations a reasonable employer would investigate the matter very carefully and conscientiously.

171. In considering the scope of the investigation the respondent required to have regard to the nature and consequences of the allegations. The fact the allegation was tantamount to theft, and criminal wrongdoing, which could impact upon the claimant's ability to secure future employment was a matter that required to be considered when assessing the extent of the investigation, bearing in mind the individual colleagues who provided the statements to the respondent admitted their own wrongdoing (which was already captured on CCTV), their evidence was inconsistent in places, those individuals were seeking to blame the claimant (and suggest she was the ringleader) and the claimant strongly disputed any wrongdoing at all. It is also relevant that there was no other evidence that showed the claimant was guilty.

172. It was accepted by the respondent at the Hearing that the CCTV footage did not in fact show the claimant doing anything wrong with regard to the allegations. The respondent relied upon it as it created an *inference* as to the claimant's guilt. They believed that it showed the claimant's husband being given reduced items with little discussion which the respondent argued showed the claimant had been part of the plan. This was disputed by the claimant. The fact there was little discussion between the claimant's husband and the respondent's employee could equally show the claimant was not involved in the process since it is entirely possible there was a pre-existing relationship as between the claimant's husband and the individual in question. A reasonable employer would not find that such footage provides support for the claimant's guilt and a reasonable employer would undertake further investigations.

173. The dismissing officer's evidence was that he relied "mainly" on the CCTV evidence which he found to "corroborate" the witness statements. He was unable to say precisely how the CCTV footage clearly shows the claimant's guilt or why he felt such evidence was "concrete" when it was accepted by the respondent in submissions that the CCTV evidence did not in fact directly show the claimant doing anything wrong. She had selected items which were available for the public to purchase. There was no suggestion the CCTV footage showed the claimant planning to reduce items and remove them from public sale. He accepted in cross examination the purchases the claimant makes of the reduced items from the counter were not part of his reason to dismiss. This was not something that had been disclosed to the claimant prior to the Hearing.

174. I also accept the claimant's counsel's submission that this was a significant issue for the claimant given she had never previously had her trust, honesty or

integrity challenged throughout her 13 years' service. The respondent knew the claimant denied the wrongdoing and that the statements were not totally consistent. Given the gravity, nature and consequence of the allegation, a reasonable employer would look beyond the 3 statements and seek to ensure the information they had was accurate. It was Mr A, Mr B and Mr C who commented upon the timings of the claimant's alleged discussions.

175. The witness statements had differing times as to when the claimant was alleged to have told the staff about the reductions and the amount of the reductions also varied. Mr C suggested that there was to be 2 reductions on Christmas Eve. Mr C was not asked why there would be 2 reductions if the claimant had instructed the items be placed behind the counter away from public sale. If the claimant had been part of a plan to reduce items and sell to colleagues at significantly reduced price, there would be little point in having 2 separate reductions. One statement also referred to initials being placed on bags which was not mentioned by others. The claimant is also alleged to have called her husband a name that she does not use.

176. The decision not to investigate further to confirm the position set out by the 3 witnesses given the seriousness of the allegation and impact upon the claimant was a decision that no reasonable employer would have made in the circumstances.

177. While the statements from the witnesses do broadly provide support for the claimant's guilt, the issues arising in this case are such that a reasonable employer would not accept that evidence without further inquiry. The statements are lacking in detail in places. The approach taken by the respondent in this case was to draw inferences and look for evidence that supported that evidence rather than fairly consider the whole matter.

178. The respondent said the CCTV footage supported the allegations and the claimant's wrongdoing. The dismissing officer placed very significant weight on it. Given the gravity of the allegation and the heavy reliance placed upon the CCTV footage (which the respondent believed supported their position) a reasonable employer would have provided the footage to the claimant prior to the disciplinary hearing just as it provided the written statements. Given the witnesses refer to specific times when the claimant is alleged to have issued various instructions and given the reliance the respondent placed upon it, the absence of the footage placed the claimant at a disadvantage during the disciplinary process. A reasonable employer would have provided the claimant with the chance to view the footage and time to provide comments to support her position during the disciplinary hearing. The footage is much more powerful than still images given facial expressions etc.

179. The claimant is alleged to have provided her colleagues with a specific instruction at a specific time. Had the footage been given to the claimant she would have checked her location and identified where she was. That information would have then been considered by the dismissing officer who may have instructed further enquiries (such as by viewing other CCTV footage) or even changed his decision. The claimant also maintains that her expressions on the CCTV show that she was surprised when she saw reduced items, which she said supported her position and this would have been a point she would have made had she seen the evidence before the disciplinary hearing. That could have materially affected the outcome.

180. A reasonable employer would have checked the CCTV footage to confirm the position set out by the witnesses relied upon and where necessary considered other footage. For example, it was alleged the claimant specifically instructed Mr C to pass to her husband items she had reserved for herself. This was said to have happened at 1pm. The CCTV footage relied upon by the respondent does not show the claimant at all at this time and a short discussion between Mr C and the claimant's husband. The claimant was working at the deli which has its own CCTV. Viewing that footage would have ensured a fair investigation was carried out, rather than assuming Mr C was truthful.

181. The respondent relies on the fact that the claimant was dishonest and one of the significant factors related to the exchange between the respondent, Mr C, and the claimant's husband. I also accept the claimant's counsel's submission that a reasonable employer would have investigated that specific exchange further not least by speaking to Mr C about specifically what was said at that point in question and also any connection Mr C had with the claimant's husband. This was a significant part of the respondent's case as they believed that the claimant had specifically told colleagues to provide items for her husband and that she instructed these to be placed in his trolley (thereby supporting the inference she had participated in the plan). A reasonable employer would have asked Mr C about this issue given its importance, including relevant knowledge of the claimant's husband, whether or not there was prior knowledge or the items had been chosen for particular reasons. None of those other persons present was asked about this exchange. These points were raised by the claimant but no further enquiries were undertaken. A reasonable employer would have made such enquiries.

182. A similar point arises in relation to the initials being placed on the bags in respect of the relevant reduced produce. This was a matter raised by the claimant at the appeal stage. She produced credible evidence to challenge that point which raised concerns about the veracity of the witness statements. The appeal stage is part of the dismissal process.

183. Regrettably in this case I have heard no oral evidence from the appeal officer, whose oral evidence was therefore not able to be challenged. It was possible, for example, that those individuals might well have explained the position in relation to, for example, the initialling on the bag and why no further steps were taken in that regard. The appeal officer did appear to "rubber stamp" the decision of the dismissing officer rather than properly engage with the appeal process and the substantive points the claimant raised.

184. In my view claimant's counsel submission that a reasonable employer would have spoken to the other individuals raised by the claimant to check the position of the 3 witnesses that arose in this matter is a sound one. 3 of the claimant's staff were facing disciplinary action as a result of activity that had been captured on CCTV. Those individuals alleged the claimant was the ring leader and instructing them to breach the rules. The claimant had stated that colleagues that suggested these individuals had chosen to collude against the claimant. A reasonable employer would not ignore this evidence. A reasonable employer would take reasonable steps to check the veracity of such statements given the existence of alternative sources that could readily confirm the position. The respondent was told of a number of individuals who could confirm the claimant's position and challenge the evidence

provided by the 3 colleagues. No explanation was given by the respondent for its decision to rely upon the 3 witnesses alone and take no further steps to check the position.

185. I do not accept the submission by the respondent's counsel that a reasonable employer could choose to accept the three witness's statements without further consideration. I accept it is not a counsel of perfection nor a criminal trial but it is critical that the respondent carry out a reasonable investigation in the circumstances known to the respondent at the time. The evidence provided by the 3 witnesses was not identical and there were concerns as to their veracity raised by the claimant. The individuals were themselves admitting misconduct and the claimant's position was that they were seeking to deflect blame to her by alleging she was the ringleader. The CCTV footage was also unable to confirm the position. A reasonable employer, given the size and resources of the respondent, and given the seriousness of the allegation and the circumstances of this case, would have investigated further.

186. The appeal officer appeared to take into account CCTV evidence that showed how the claimant acted when she paid for her goods when he viewed the CCTV footage, but did not use the CCTV footage to check the points the claimant had raised around the interaction with her husband which she said supported her position. That is not what a reasonable employer would do.

187. While I accept the respondent's counsel's submission that the claimant was given a number of opportunities to put her case and respond to the allegations that had been put to her in around 3 meetings, the respondent needed to ensure that a reasonable investigation was carried out. The failure of the respondent to investigate the veracity of the 3 witnesses meant it was not possible to say what could have happened had a reasonable investigation taken place. That does not mean doing so would have made no difference, since it is possible having carried out the further inquiries to test the witness's evidence, evidence that challenged the statements could have surfaced.

188. There was no direct evidence that linked the claimant with the allegations in question. The CCTV footage did not show the claimant telling her staff to reduce goods and avoid selling them to the public. There was no evidence in the respondent's possession (aside from her 3 colleagues) which showed the claimant had done anything wrong. The facts she had paid for a large number of reduced items by itself is not evidence of wrongdoing. The fact the issue happens on 2 separate occasions is also not evidence that shows the claimant did anything wrong given the claimant's suggestion that this was a plan her colleagues had carried out with the claimant not being part of it. It is not reasonable to assume that because this matter happened on 2 occasions, given the circumstances of each case, the claimant must have been involved in the wrongdoing. There was no reasonable basis to make that assumption.

189. Other than the 3 witnesses (whom the claimant believed were conspiring against her), there was no evidence of any wrongdoing by the claimant. This differs from the situation in **Sainsburys** where the claimant in that case was found to have stolen goods in his locker. In that situation the employer could reasonably have concluded that the individual was responsible and a reasonable employer could well conclude little further investigation was needed. In this case, however, there was no

direct link between the claimant and the allegations (the allegation she had pre-planned the selling of reduced items to colleagues only). The fact her colleagues implicated her was something that a reasonable employer in the circumstances facing the respondent would have investigated carefully and thoroughly which was not done in this case.

190. The point of a reasonable investigation is to ensure that the evidence is properly tested, particularly where an individual's honesty and integrity is in question. Had a reasonable investigation been undertaken in this case, the respondent's position in respect of the witness evidence might well have differed.

191. It was accepted by the respondent's counsel that the CCTV position in this case was used to conclude, by reason of inference, that the claimant had been involved in premeditation. That evidence does not by itself reasonably show the claimant was guilty of premeditation. No reasonable employer would have found the CCTV evidence to provide "concrete" evidence supporting the witness statements. The dismissing officer's evidence was that the CCTV evidence was highly important. He was unable to show why this was so given the lack of direct evidence of any wrongdoing by the claimant. He argued that the statements "corroborated" the footage. Objectively viewed, no reasonable employer would have reached that conclusion from the specific facts in this case.

192. The claimant provided an explanation as to how the goods were paid for and that she was not aware of the nature of the reduced items. Her position was that she spoke to the manager at the time she was paying for the goods and she did not have her glasses on. It is undoubtedly right for the respondent to be suspicious in this case, but no reasonable employer would have assumed such evidence supports the position that the claimant was guilty of the allegation.

193. The claimant purchased items from the top of the counter which were significantly reduced at or around closing time on one of the days in question. The dismissing officer accepted that those purchases did not form the basis of the disciplinary allegation (which was a new admission). The claimant and her husband had clearly bought items (potentially a significant number of items) on both days that were entirely legitimate. Counsel for the respondent accepted that there was no evidence as to which or how many of the reduced purchases were relied on as part of the disciplinary process but that it was reasonable to assume that a number were.

194. I accept that it is a reasonable inference to conclude that a number of the items purchased were those falling within the disciplinary process, such as those given to the claimant's husband, but the difficulty in this case is connecting the claimant with the allegation that she had somehow planned these purchases in the absence of direct evidence given the issues with the witnesses and given the respondent's decision not to undertake further reasonable inquiries.

195. It is important that I do not make a decision based upon my view nor is this a counsel of perfection, and I have carefully considered whether or not the investigation carried out by the respondent as a whole was reasonable. I consider the facts from a standpoint of an objectively reasonable employer given the range of reasonable responses open to a reasonable employer.

196. In this case the investigation goes to the heart of the issue, and the question in the employer's mind was whether or not the claimant was guilty of premeditation in that she is alleged to have connected the purchases or asked that the purchases be reduced by around 90% and not placed in the public view.

197. I need to make a judgement as to whether the investigation the respondent carried out in the facts amounts to a reasonable investigation such that it falls within the range of reasonable responses open to a reasonable employer. There are necessarily different options open to different employers all of which could be reasonable. There is also a point in that range where the approach falls short of the reasonable employer taking account of all the relevant circumstances.

198. In this case I have found that once the respondent had the statements from the witnesses that suggested the claimant was the ring leader, the respondent sought to identify evidence that supported that position rather than fairly look for evidence which could equally support the claimant's position. The inference the respondent drew from the CCTV footage as set out above together with their approach in relation to the above points around challenging the witness's position show the respondent's narrow approach to the investigation.

199. In all the circumstances I find that the investigation undertaken by the respondent (up to and including the appeal outcome) was one in which no reasonable employer, with the size and resources of the respondent, would have carried out. The equity and substantial merits of the case support the claimant's submissions that the investigation was one which no reasonable employer, objectively viewed, would have carried out.

200. I also conclude that there was no reasonable basis for the respondent holding its genuine belief in the claimant's guilt, the respondent having failed to conduct a reasonable investigation into facts which might tend explain whether or not the claimant was party to the collusion alleged.

Dismissal within range of reasonable responses?

201. I also require to determine whether or not the dismissal was within the range of reasonable responses open to the respondent. The claimant had a clean disciplinary record and no issues had been raised before relating to her honesty. She accepted, that if she had been guilty of the allegation, dismissal would have been a reasonable outcome. I accept that position. In other words, if the respondent had carried out a reasonable investigation and reasonably believed that the claimant was guilty of the conduct alleged, a reasonable employer could have dismissed.

ACAS Code

202. I was asked to consider whether or not there was an unreasonable failure to follow the ACAS Code of Practice. The respondent did carry out a procedure which involved an investigation, a disciplinary hearing and an appeal hearing. The claimant's argument was that the investigation was unreasonable and as such the requirement of the ACAS Code (paragraph 5) to carry out "necessary investigations" and to "establish the facts of the case" had not been followed.

203. I accept claimant's counsel's submission that there was an unreasonable failure in this regard. The investigation stage of a disciplinary process is fundamental since that sets out the facts upon which decisions are made. The ACAS Code is not simply about "box ticking" but rather about following a process in relation to disciplinary matters. It is a substantive issue.

204. In this case the respondent had failed to carry out a reasonable investigation given the circumstances arising in this matter and on that basis I find there was an unreasonable failure to comply with the Code. The respondent failed to establish relevant facts and carry out a necessary investigation as required by the Code.

205. I conclude that given the procedure that was followed it is just to order a 5% uplift to the compensation given the procedure that was followed. I accept there were the relevant hearings and meetings but the failure related to the obtaining of the relevant facts during the investigation process. The respondent had not established the facts of the case given the areas that were not investigated.

Remedy

206. The claimant seeks compensation and the parties had agreed between themselves that this case unusually resulted in an "all of nothing" approach. While there was initially a suggestion that it could be possible that compensation could be reduced in light of **Polkey**, counsel for both parties conceded there was no evidence to allow any speculation as to what could have happened had a fair procedure been followed.

207. It is too speculative to say what could have happened had a reasonable procedure been followed. It is entirely possible that the dismissing officer could well have been persuaded to change the outcome had a reasonable investigation taken place. For those reasons it is not appropriate to make any reduction in compensation.

208. It is not alleged that the claimant contributed to her dismissal in any way and I make no reduction for contribution.

209. The parties had agreed the position in relation to quantum. There was no issue with regard to recoupment.

210. The parties agreed that the basic award amounted to £7,452.80

211. The parties had also agreed that given the position in relation to the claimant's losses (with mitigation not an issue), the compensatory award that would be awarded, in the event of a finding of unfair dismissal was as follows. The claimant's loss of earnings to date amounted to £24,058.23 (69 x £348.670) less mitigation of £699.44. This left £23,358.79 with future loss and the failure to follow the ACAS award to be added. Given the cap on the compensatory award in this case is £24,221.64, the parties agreed that the compensatory award would therefore be £24,221.64.

Wrongful dismissal

212. The findings in fact for a wrongful dismissal are usually different from those in relation to unfair dismissal. This is because in a wrongful dismissal claim the Tribunal requires to determine what actually happened. There is no place for reasonableness. Instead I require to determine whether the claimant was in breach of her contract of employment. Was there a fundamental breach of the contract of employment by the claimant's actions (as a matter of fact) that thereby entitled the respondent to dismiss the claimant without notice?

213. I accept the claimant's evidence as to the issues in this case. She was credible and reliable. She was the only person whose evidence I heard who was present on the days in question. Even if I take account of the footage from the CCTV which I was shown, there is no evidence that shows the claimant was guilty of misconduct entitling the respondent to summarily dismiss her. There was no evidence of any misconduct at all. There was therefore no breach of contract by the claimant.

214. It follows that the claimant was wrongfully dismissed. The parties agreed that the award in this regard was £4,184.04.

Observations

215. I made a number of final observations following the issuing of the oral judgment in this case.

216. Firstly, the Tribunal did not have the benefit of oral evidence from the appeal officer in this case. This created a number of issues given the appeal officer could not be cross examined. The appeal was a very important part of the dismissal process in this case.

217. I also explained to the parties that in this case it appeared to the Tribunal that the respondent had genuinely believed the claimant was guilty but had not taken a step back to consider what a reasonable employer would do given the gravity of the allegation and the specifics of the evidence obtained as part of the investigation. An investigation report that set out the findings by the investigator in relation to each of the witnesses and other material could assist in ensuring the relevant issues are carefully considered given the issues arising.

218. I also wish to formally thank both counsel for their professionalism during this case.

Employment Judge Hoey

Date 27 June 2019

JUDGMENT AND REASONS SENT TO THE PARTIES ON

9 July 2019

FOR THE TRIBUNAL OFFICE

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