EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4106411/2019

Hearing held at Dundee on 12 and 13 September 2019

Employment Judge I McFatridge

Miss D Dikmoniene	**Claimant** **Represented by** **Mr Edozien** **Friend**
NIC Services Group Ltd	**Respondent** **Represented by** **Mr MacLean** **Consultant**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the claimant was unfairly dismissed by the respondent. The respondent shall pay to the claimant a monetary award of One Hundred and Twenty Pounds (£120). The compensation has been reduced to take account of (1) the claimant's contribution to her dismissal in terms of sections 122(2) and 123(6) of the Employment Rights Act 1996 and (2) the Polkey principle. There is no prescribed element.

The above Judgment was issued on 3 October 2019 and I advised that full written reasons would follow. These are now set out below.

REASONS

1. The claimant submitted a claim to the Tribunal in which she claimed that she had been unfairly dismissed by the respondent. The respondent submitted a response in which they denied the claim. It was their position that the claimant had been summarily dismissed for gross misconduct and that the dismissal was procedurally and substantively fair. The hearing took place over two days on 12 and 13 September 2019. Evidence was given on behalf of the respondent from Mr L Zstefanski their Area Manager and Ms M Panek their Regional Support Manager. The claimant gave evidence on her own behalf and Mr Ramsay a Trade Union representative who had accompanied the claimant to the disciplinary meeting also gave evidence on her behalf. The claimant gave her evidence via a Lithuanian interpreter. The respondent's witnesses although both non-native English speakers had indicated they did not require an interpreter and I was satisfied that they had sufficient knowledge of English to fully take part in the proceedings. A joint bundle of productions was lodged. On the basis of the evidence and the productions I found the following essential facts relevant to the case to be proved or agreed.

Findings in fact

2. The respondent is a nationwide cleaning and facilities management company employing over 5000 employees across over 1000 sites within the UK. The claimant commenced employment with the respondent on or about 26 February 2016. The claimant had obtained employment with the respondent through a Thomas Stumbre who was the son of the man with whom she was in a relationship. Mr Stumbre, at that time was an Area Manager with the respondent. He looked after the contracts which they had with Tesco Express and Tesco Metro stores. The claimant initially worked at the Tesco store in Kingsway, Dundee however in or about October 2018 she moved to

work at Tesco's Riverside store. In neither of these stores did she report to Thomas Stumbre and Mr Stumbre was not in any way responsible for either of these stores. At some point in 2018 the claimant's relationship with Mr Stumbre's father ended. The claimant's view was that this had some influence on what occurred thereafter.

3. The claimant had initially been employed by Servest however the contracts which Servest had with Tesco were taken over by the respondent in or about August 2017.

4. At around this time the respondent NIC went through a process of updating their employee's terms and conditions. Employees were required to complete a start form. This was done electronically by their manager who input their responses on to an iPad. The claimant went through this process with her manager. During the course of the process she provided her manager with a copy of her passport and a credit card together with a letter addressed to her by Ramsay Travel. The documentation in relation to this was lodged (p52-61). The claimant's signature was input on the iPad electronically and appears on page 61 as DD.

5. Annexed to the start form was a copy of the company's disciplinary procedure and disciplinary rules. I was satisfied that they were in the document which the claimant signed and were brought to the claimant's attention.

6. The claimant's role involved her working as a cleaner in Tesco. The claimant worked in the evening. Usually there would be no Supervisor from the respondent present when the claimant was working. The respondent required to place a considerable amount of trust in the claimant that she would carry out her work unsupervised. The claimant started with Servest and operated their signing in and signing out procedure. During the period with Servest and during the first few months with NIC the position regarding signing in and signing out was that the claimant would use her mobile phone to telephone a central number when she started work and would then use the same number to telephone to indicate that she had finished work. The claimant's pay was based on this signing in and signing out information. In or about September

2018 the system was changed and the claimant required to sign a book to indicate when she started work and sign it again to indicate when she finished work. Once again her pay would be based on these signing in and sign out times. The respondent relied on the claimant completing this information accurately.

7. In November 2018 the claimant was sent a "letter of concern" by Ms Panek the respondent's Regional Support Manager. The letter was lodged (p28). It stated

> "I write to you concerning your poor performance and unauthorised breaks.
>
> You are a valued member of the team, and we would like to bring these matters to your attention in order for this to be rectified. Should there be an underlying issue that we may have missed then please contact your line manager to discuss further.
>
> Please treat this as a letter of concern, the Company would like to see a sustained improvement with regards to these concerns to avoid any further action been taken.
>
> If you do not agree with or wish to raise with me the points within this letter I will be freely available to discuss with you."

8. On 15 February 2019 the respondent's HR department wrote to the claimant. The letter was lodged (p29). Although the letter bears to be in the name of Lukasz Stefanski their Area Services Manager the letter was actually written by the respondent's HR department. It was sent with Mr Stefanski's knowledge and permission. It stated

> "I am writing to invite you to attend a Disciplinary meeting due to a serious allegation made against you of Gross Misconduct. The details of this allegation are as follows:
>
> - Fraudulently completing timesheets
>
> May I remind you that such allegations are a charge of gross misconduct and if found to be true summary dismissal may apply.

> I intend to hold this meeting on Thursday 21st February 2019 at 09.00am. Please meet me at Tesco Dundee Riverside.
>
> I would like to remind you of your right to be accompanied by either a work colleague or Trade Union representative if you so wish.
>
> Should you have any queries prior to this meeting please do not hesitate to contact me."

9. Mr Stefanski is the Regional Manager with responsibility for the store in which the claimant works. He is responsible for 21 stores ranging throughout the north of Scotland and around 120 staff. In advance of the disciplinary hearing Mr Stefanski was provided with two statements. One was from Lukasz Gierad who was a Grocery Team Manager with Tesco who were the respondent's customer. The letter is signed by Mr Gierad and states

> "I was a duty manager on Friday 25/01/19 and 01/02/19. I've seen janitor for the last time at about 21:15 on both occasions. On 25/01 have tried to contact her before 22:00 however she was absent. Similar situation had taken place week after on 01/02 also failed to attend a call out. Janitors log book showed that she has signed herself off at 22:15 which wasn't the true reflection of actual working time." (p35)

He was also provided with a statement from Karen Edwards the Fruit and Fresh Produce Manager with Tesco the respondent's customer. This was also lodged (p36). The section lodged contains the following:

> "Later I went up to canteen to speak to a colleague then attended Team 5 at 9.15 – about 9.20 I went up to female toilets and saw the cleaning colleague in the changing room, in her bag and using the mirror. From another colleague I was told that in between me leaving the canteen and coming up to use the toilet she had been sitting having a drink."

This statement is said to be dated 4 February 2019 and was signed by Ms Edwards. Mr Stefanski's understanding was that the "janitor" referred to by Mr Gierad and the "cleaning colleague" referred to by Ms Edwards was the claimant.

10. The meeting was rearranged from 21 February to 26 February as the claimant's union representative was not available on 21 February. The meeting duly took place on 26 February. Mr Stefanski was present as was the claimant. Mr George Ramsay union representative advised present representing the claimant. The claimant does not speak English and Mr Stefanski arranged for Mantas Stancikas an employee of the respondent who spoke the claimant's language to be present as note taker and also to act as interpreter during the meeting. Handwritten notes of the meeting were taken by Mr Stancikas and lodged (p30-32). At the end of the meeting all present including the claimant signed these notes to confirm that they were accurate. A typewritten version of the notes was also lodged (p33-35). I found this to be an accurate record of what took place at the meeting. Given that the notes are in fairly short compass it is probably as well to set this out in full.

"Present
Lukasz Stefanski area manager
Dalia Dikmoniene cleaner
George Ramsay union rep
Mantas Stancikas translator/note taker
LS – reason for the meeting explained. Do you know sign in and sign out policy?
DD – Yes I know
LS – Do you sign in and sign out daily?
DD – Yes everyday. I have off on Thursday and Sunday. Wednesdays working 3 hours 6-9am
LS – Could you please talk me through sign in and sign out procedure?
DD – I sign in when I'm coming to work and sign out when I finish
LS – Could you tell me what time did you start and finish on 1st February 2019?
DD – Started 7:15pm Finished 21:40 because I take medicines and felt not well
LS – Did you finish earlier because you didn't have medicines with you or you felt not well and went home to take medicines
DD – I have got medicines with me but often taking the tablets I felt sick

LS – What time do you usually take medicines and when

DD – I take medicine when I have stress

LS – Statement from Tesco grocery manager shown (p35)

LS – Why you said you finished at 21:40 and you put 22:15 that you left the store

DD – I put the time as I normally finish. Was feeling unwell and didn't think about that

LS – Did you inform your line manager that you felt unwell and you finished earlier

DD – No

LS – Statement from 04.02.2019 shown Statement from Karen Edwards F&F manager (p36)

DD – It was time that I was for a drink I take my medicines I finished job earlier and had some time for a drink

LS – Did you get a letter of concerns from Head Office about taking breaks

DD – No

LS – George the union rep said that he has seen the letter

DD –Yes I got it

LS – Would you like to tell me anything else

DD – I'm doing my job I'm coming to work everyday no sick I think that I'm doing my job properly

11:08 – 11:45 meeting adjourned

LS – Taking all provided information under consideration I made a decision that you are dismissed with immediate effect. You have a right to appeal within 5 working days from my decision after getting a letter."

11. Subsequent to this Mr Stefanski wrote to the claimant on 28 February 2019. The letter was lodged (p37). It stated

"I am writing to confirm the outcome of the Disciplinary Hearing which was held at Tesco Dundee Riverside on Thursday 21st February 2019.

The Hearing had been arranged to discuss an alleged breach of the Company Disciplinary Rules for:

- Fraudulently completing timesheets

You were given the opportunity to give a full account of your actions and having reviewed all the evidence and the lack of any credible answers to the questions asked, I do consider your actions to be Gross Misconduct and I have no alternative but to take the severest sanction an employer can take against an employee and to dismiss you. Your last day has been recorded as 21st February 2019.

I have enclosed a copy of the minutes for your information.

You are not entitled to notice pay, but I will arrange for your P45 to be forwarded to you in due course, together with payment for any outstanding holiday you may have accrued.

You have the right to appeal against my decision. This should be made in writing, addressed to our HR department within 5 working days from the receipt of this written confirmation."

12. Mr Stefanski's reason for dismissing was that he considered the claimant's action to be gross misconduct. The respondent's rules and disciplinary procedure was lodged (p62-70). The rules regarding timekeeping are set out on page 62. Section 2.5 states

"2.5 Time sheet/signing in and out books, you must ensure that the time sheet/signing in and out books reflects a true and accurate record of your hours worked. Wrongful or inaccurate recording will be/must be reported to your line manager.

2.6 If you are required to clock in and out either manually or electronically you must ensure that that these reflect a true and accurate record of your hours worked. Wrongful or inaccurate recordings must be reported to your line manager. See point 10.10 under Gross Misconduct."

Section 10 gives a number of examples of gross misconduct offences and states that these will render employees liable to summary dismissal. The list is not said to be exhaustive. Section 10.9 refers to

> "Falsifying time sheets, making an entry on another employee's time sheet, failure to report an unauthorised recording, or receiving money for hours not worked.
> 10.10 Falsifying clock cards, clocking another employee's clock card, failure to report an unauthorised recording, or receiving money for hours not worked."

Mr Stefanski's view was that given that the claimant was working unsupervised, the respondent required to trust her. He noted in this case that the claimant accepted that on two occasions she had falsely completed her form. One of these was on 25 January witnessed by Mr Gierad and the other one witnessed by Ms Edwards.

13. He considered it relevant that there were two statements coming from the client, not the respondent's employees. He felt that the respondent's reputation with their customer was at stake. Mr Stefanski had spoken with Mr Gierad himself prior to the hearing and Mr Gierad had confirmed what was in his statement. He had not spoken to Ms Edward but relied on the statement. He had not spoken to the claimant or carried out any other investigation prior to the disciplinary hearing.

14. The claimant appealed the decision to dismiss her in a letter dated 4 March. This was lodged (p38-39). Again it is probably as well to set out her letter in full.

> "I was helped with gained employment into this company by Tomas Stumbra (area service manager) and his wife Jurate Stumbre (line manager) who are son and inlaw to my ex partner and all work for this company at Tesco Riverside and other Dundee branches. I have worked for this company more than two years and there were no issues or complaints until now. My relationship with my ex partner broke down abruptly and since then I have been picked upon deliberately by Tomas Stumbra and his wife Jurate Stumbre in an attempt to get me out of the company.

The more than two years I have worked for this company I have not been off sick once. I also worked at Kingsway Tesco and other branches and I have had no issues or complaints from these other branches that I worked at.

Addressing the complaint against me about filling out time sheet fraudulently as this was definitely not the case. On this particular day (1st February) in question I admit I left work 40 minutes early as I became very unwell and dizzy. I had been diagnosed with depression and on constant medication with side effects and evidence attached. I have made no mention of this before as I consider it private and confidential. I am aware of the stigma attached to people with depression and I did not feel safe telling my line manager about it because I feared she would not keep this private (Jurate Stumbre).

I was asked why did I not tell anyone by Lukasz Stefanski (area service manager) which I found insulting as he treated my medical condition as trivial and not an issue. I have no formal communication with my line manager (Jurate Stumbre) for the past year and this added to my stress in trying to do my job on day to day basis.

First I was picked on for taking unauthorised tea break for how do you clean for more than 2 hours and not take any break at all. The same unauthorised breaks that everyone else takes as well as people taking cigarette breaks but somehow I seem to be the only person pointed out. Since I had received the first letter about unauthorised breaks I was afraid to take a break on the days I was entitled to. I used to have my lunch in the cleaners cupboard which is absolutely disgraceful that I had to be so afraid and demoralised at my workplace.

I was asked to attend a disciplinary meeting knowing fully well I do not speak English and attended with my Union rep and an interpreter was provided by Lukasz Stefanski who surprisingly was a friend (Mantas Stancikas) to Tomas Stumbra and my line manager (Jurate Stumbre) and they were all having coffee and chatting at coffee shop before we went in for the supposed meeting. My understanding of disciplinary meeting is that it is independent and fair. Why was there no independent interpreter

provided, why was Lukasz Stefanski the only manager there and nobody from the HR, even my union rep took note of this.

At this supposed meeting as I laid out my working environment and the fact that I had faced constant intimidation and bullying al being followed about in the shop as I carried out my job but Lukasz Stefanski took no notice of this. The same way he took no notice of me working in the company for more than 2 years and being on medication and not been sick once. As this was my first disciplinary meeting and what you expect is a formal warning and support provided to help me carry out my job effectively. The same way he refused to listen to my Union rep George Ramsay or his intervention on my behalf. The whole meeting had been compromised from the start and judgment made even before the meeting started. Lukasz Stefanski said other manager complained about me but no formal evidence provided to support this claim. I had requested to be moved to other branches since I had no issues or complaints there Lukasz Stefanski refused to take this into consideration either. He managed to take a break in between the meeting and after he returned he just told me I have been dismissed from work.

It is evidenced that this was not fair hearing and the whole process was based clearly with the intention to get me dismissed one way or the other. This is not how you treat an employee with more than 2 years of service with near 100 percent work record.

My stress level has increased ever since and I am now emotionally broken down at this unfair decision and the way I have been victimised because I refused to mention my medical condition to everyone. In lieu of this shameless and shambolic way I have been unfairly treated I intend to take legal action to address my loss in wages and seek financial compensation for the way and manner I have been unfairly dismissed and treated as an object. It's with intent I will be going to the employment tribunal for this is a disgrace.

And in the letter that I have received from Lukasz Stefanski after the meeting it states that my last day recorded has been 21st February 2019 which is not true I have worked up to 26th of February 2019 same day as

> the meeting has been held and I attended the meeting after I have finished my working hours."

15. The respondent's HR department wrote to the claimant on 4 April 2019 inviting her to attend an appeal hearing on Thursday 11 April 2019. The claimant was advised it would be chaired by Monika Panek the respondent's Regional Support Manager. Ms Panek is the partner of Mr Stefanski the Area Manager.

16. On 11 April the claimant did not attend the meeting however she did e-mail the respondent's HR department in advance of the meeting. She stated

> "Hi James,
> Unfortunately I can not attend this morning meeting at Riverside Tesco due to my medical condition. I would appreciate that the decision of the appeal would be sent to me via post or email.
> Thank you" (p43-44).

Mr O'Brien of the respondent's HR department responded to the claimant stating

> "Thank you for your email, I will advise the hearing manager that you will not be able to attend, and ensure that consideration is given to all of the points you have raised in your letter before an outcome is reached." (p41)

17. Ms Panek the respondent's Regional Manager was due to attend the hearing with the claimant. When the claimant did not turn up Ms Panek used the time to sit down and consider matters and write out her rationale for a decision. Since Ms Panek was in the store she also took the opportunity to take further statements from Tesco staff including a statement from Chris Robertson the Lead General Manager and Fruit and Fresh Manager (p51). This statement expanded on one of the incidents raised by Mr Gierad. It stated

> "We were looking for the Janitor on the 5/2/19 at 20.25 to help us clear on spillage on the shopfloor. We put a call out at the customer service desk but no response then we went looking for her around the shopfloor including Dobbies café but could not find her."

Ms Panek set out her findings which were lodged (p48-50). As well as the incident on 1 February and 25 January referred to by Mr Gierad she makes reference to the incident mentioned by Mr Robertson on 5 February. She also refers to an incident on 18 January where someone said the ISCM was said to be looking for the claimant at 9.00am but couldn't find her and that on that date the claimant was not meant to finish until 9.40. She also referred to an incident on 22 January when it would appear Ms Panek was at the store for a conference call at 8.30. She had then gone to the toilet and noticed the claimant sitting at the cloakroom playing with her phone. Ms Panek indicated that she had introduced herself and asked if the claimant had already finished her work and the claimant had said yes, put on her jacket and left the store. None of these other incidents had been put to the claimant at any time and the claimant had not had any opportunity to respond to them.

18. Ms Panek also set down her decision making process with regard to the points raised by the claimant. She stated

> "We have not been aware of any medical condition at any point. I don't understand the sentence 'I have no formal communication with my line manager . . .'
>
> From what I see there was a communication as Dalia was requesting holidays which were getting approved. She was asked on many occasions if she would like to do some overtime on HK shifts or morning/evening like all other employees. She did some overtimes in store back to November 2018 and earlier. She said no a few times as well as she had other commitments which is fine.
>
> Based on this information I can't see any breakdown in communication with line manager.
>
> 3. Following letter of concern regarding unauthorised breaks Dalia emailed me back in December when she received the letter. I did try to get more information on other member of staff who she was saying were having breaks as well but no details were given. I had no other complaints from Tesco management team either.

4. Mantas Stancikas – is our mobile support and he responds directly to Tomas Stumbra. Tomas is looking after Express & Metro format stores means he is not getting involved in Super/Extra format stores. Mantas attended the meeting as translator. He wasn't there to make any decision. From I see here decision was based on the information gathered by Lukasz.

5. There was no communication regarding bullying highlighted before the meeting. There is no record of any medical condition before the meeting. 'Break in between the meeting' – The meeting was adjourned for Lukasz to consider evidence and go over the meeting notes so he could make the decision."

19. Ms Panek decided not to uphold the appeal. On 4 April 2019 she wrote to the claimant confirming this (p46). She enclosed with her letter the meeting notes at page 47-50 setting out her reasoning in the matter.

20. Shortly after the claimant's dismissal – on 10 March 2018 the claimant injured her leg. As a result of this injury she was unable to work from that date. The claimant was successful in obtaining another offer of employment but was unable to take it up because of the injury to her leg. The company indicated to her that they were not prepared to wait any longer for her to get better. The claimant remains on state benefits which are paid at the rate of £317.82 per month.

Matters arising from the evidence

21. I found both the respondent's witnesses to be truthful witnesses who were seeking to assist the Tribunal by giving complete and truthful answers to all the questions they were asked. During cross examination they made appropriate concessions. Their evidence was in accordance with the contemporary documents. Neither of them sought to dissimulate about the various alleged shortcomings in the process which had taken place in this case. I found their evidence to be credible and reliable. With regard to the claimant the principal difficulty was that her representative, who I understood to be a friend, adopted a somewhat scattergun approach to the evidence and sought to lead evidence

from the claimant about matters which were entirely irrelevant to the matters before the Tribunal and also raised a number of issues with the claimant which had not been put to the respondent's witnesses and did not appear to form part of the claimant's case on record. This made it very difficult to discern what the actual difference is between the claimant's version of events and the respondent's version of events. It was clear that the claimant had it fixed in her mind that her dismissal was a result of a conspiracy involving the son and daughter in law of her former partner. She made blanket accusations, many of which did not make any real sense or have any relevance to the matters before the Tribunal. She was heavily critical of the fact that Mr Stancikas was used as note taker and interpreter at the disciplinary hearing. This was on the basis that he reported to Mr Stumbre. It appeared to be her position, although she was not clear on this, that certain things had been said at the disciplinary hearing which were not in the minutes. She could not explain why not only she, but also her union representative had signed the handwritten copy of the minute if it was not complete. It was her representative's position that the claimant had not been provided with a copy of her new particulars of employment by the respondent and in particular that she had not received notification that falsifying a time sheet was a disciplinary offence. Not only did I find the premise of this suggestion to be somewhat strange I was also in no doubt that the documentation lodged by the respondent clearly showed that the claimant had electronically completed the new particulars of employment form with the respondent. The claimant was asked in cross examination how, if as she said she had never been involved in this, the respondent had photographs of her passport, credit card and letter. The claimant could not answer this. During evidence the claimant freely accepted that she had in fact left work early on the day in question. She said that this was as a result of her health. She said that there were no NIC managers on site. She accepted that essentially she left work early but didn't tell anyone. She accepted that she was aware of the process of signing in and out. She confirmed that up until September 2018 the previous process had involved using a telephone and PIN. The claimant accepted in cross examination that she had suffered an injury to her leg on 10 March 2019, some two weeks after the date of dismissal.

The claimant indicated that she had obtained an offer of alternative employment but was unable to take this up as a result of the injury to her leg

22. With regard to Mr Ramsay there was again a difficulty due to the claimant's representative attempting to put a number of matters to him which had not been foreshadowed either in cross examination of the respondent's witnesses or in the claimant's pleadings. I generally found Mr Ramsay to be a credible witness although his evidence was somewhat limited. It was also clear to me that he had little real recollection. He required to be prompted several times before he remembered that he had in fact been shown a copy of the letter of complaint from Tesco managers. He confirmed that during the course of the hearing the claimant had been asked if she had received the letter of concern and had responded no. He said that he knew for a fact that the claimant had received this letter of concern and asked that the question be asked again to which the claimant had responded yes. Mr Ramsay also said that he had produced his own note of the meeting which was lodged (p82-83). This is in many ways similar to the note produced by the respondent. I did not find the differences to be of any great significance but in any event I preferred the note provided by the respondent which had been signed by all present including Mr Ramsay.

Issues

23. The main issue before the Tribunal was whether or not the claimant had been unfairly dismissed by the respondent. The respondent's primary position was that the dismissal was on the grounds of gross misconduct and that it was fair. The respondent acknowledged some defects in procedure but believed that overall the dismissal was fair. If the Tribunal was not with them it was their position that both the basic award and the compensatory award should be reduced by 100% to take account of the claimant's contribution. It was also their position that if the Tribunal considered that the dismissal was procedurally unfair then there was a 100% chance that the claimant would have been dismissed in any event had a fair procedure been carried out. It was their position that in any event the compensatory award should be limited to the

period up to 10 March. The claimant's evidence was that she had suffered an injury to her leg on that date and that she had been unable to work as a result of that. Her evidence was that she had in fact found other work and would have been able to start this had it not been for the injury to her leg. It therefore followed that any wage loss after 10 March was as a result of her leg injury and not as a result of her dismissal. The claimant sought compensation in the sum of £14,900.

24. She also sought an uplift in respect of an alleged failure to follow the ACAS Code.

25. In the Schedule of Loss the claimant made reference to a claim for wrongful dismissal but no such claim was made in her ET1. The claimant also sought an award under section 38 of the Employment Act 2002 in respect of the alleged failure of the respondent to provide her with a statement of particulars of employment.

Discussion and decision

26. Both parties made submissions. Rather than set these out at length they will be referred to where appropriate in the discussion below.

Failure to provide particulars of employment

27. It is as well to deal with this claim first. I found on the basis of the evidence that the claimant had been provided with a statement of particulars of employment by the respondent and this is the document lodged by the respondent from page 52 onwards and signed by the claimant electronically using her initials on page 61. This claim is not well founded.

Wrongful dismissal

28. It was my view that there was no claim for wrongful dismissal contained in the ET1. In any event, I was satisfied on the basis of the evidence including the claimant's own testimony that the claimant had left work early but completed the signing in book as if she had worked her full hours. This is gross misconduct in terms of the respondent's Rules. It is also quite clearly gross

misconduct in that it goes to the very root of the contract and demonstrates that the claimant was acting in a way entirely inconsistent with the employment contract. It is therefore my view that had there been such a claim then it would not have succeeded.

Unfair dismissal

29. The right not to be unfairly dismissed is contained in section 98 of the Employment Rights Act 1996. It states

> "(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."

30. In this case it was the respondent's position that the reason for the claimant's dismissal was conduct which is a potentially fair reason falling within section 98(2)(b) of the said Act. In my view, having heard the evidence it was that there was no doubt that this was the reason in the mind of the respondent's representatives at the time of dismissal. I therefore considered that the respondent had established a potentially fair reason for dismissal.

31. Section 98(4) of the 1996 Act then goes on to say

> "(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."

32. Over the years the higher courts have provided a considerable amount of guidance to Tribunals as to the manner in which they should approach the test set out in section 98(4). It is important to note that it is not for the Tribunal to come to its own view as to whether or not the claimant was guilty of the misconduct in question. Instead the focus is on the actings of the employer. The well known case of ***British Home Stores Ltd v Burchell [1978] ICR 303*** states that an Employment Tribunal has to decide whether the employer who discharged the employee on the grounds of the misconduct in question entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. This involves three elements. First there must be established by the employer the fact of that belief that the employer did believe it. Second it must be shown that the employer had in his mind reasonable grounds upon which to sustain that belief and finally, the employer at the stage at which he formed that belief on those grounds must have carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

33. In the present case I was satisfied that Mr Stefanski and indeed Ms Panek did have a genuine belief that the claimant was guilty of leaving her job early yet still completing her timesheet as if she had worked to the end of her shift. I am also satisfied that Mr Stefanski had reasonable grounds for the belief that this had happened on 25 January and 1 February. This is confirmed by the statements obtained from the Tesco employees, Mr Gierad and Ms Edwards together with the claimant's own admission at the disciplinary hearing that she had left early on one of those dates. With regard to investigation I have two concerns. The first is that there appears to have been little investigation of the claimant's averred reason for leaving her post early. The claimant's position by the time of the Tribunal hearing was that she was suffering from stress and anxiety and had been for some months. She had been prescribed anti-depressants. It was her position that she was feeling stressed and anxious and had left her role early in order to take an anti-depressant. There was a suggestion at least in Mr Ramsay's note of the meeting that the fact that the claimant was on medication would be mitigation for her forgetting to inform her line manager that she had done so. The second reason is that although both

of the letters were put to the claimant at the disciplinary hearing it would appear that Mr Stefanski only asked for her explanation in respect of one of the absences.

34. Furthermore, it is of concern that when she was considering the appeal Ms Panek looked at various other allegations against the claimant which the claimant was not aware of at the time and where the claimant had no effective opportunity of putting her side of the story.

35. The case of ***Sainsbury's Supermarket v Hitt [2003] IRLR 23 CA*** makes it clear that the question of whether or not an investigation is reasonable is one to which the band of reasonable responses test applies. This is a test which is well known in employment law and recognises that there is not a "one size fits all" approach. An employer is entitled to investigate matters as they choose and so long as the investigation they carry out is within the band of responses of a reasonable employer, then the Tribunal will not interfere with it. The question for me in this case was whether the failures to investigate simply showed that the employer could have done better in the circumstances or whether the investigation was outwith the band of reasonable responses. I note that the employers are a large organisation with around 5000 employees. I note that this is a matter which I am required to take into account in terms of section 98(4). Having considered matters carefully, my feeling on balance is that a reasonable employer would have asked the claimant in more detail for her response to both allegations on the two dates. At the end of the day I did not consider that I could make a finding that a reasonable employer would have been required to ask the claimant in more detail about her medical conditions. The claimant clearly had the opportunity to give more detail than she did. I did not feel that I could make a finding that no reasonable employer would fail to have asked the claimant more probing questions about this. It is also my view that no reasonable employer would have behaved as Ms Panek did and considered matters at the appeal hearing which had not been put to the claimant at all.

36. It is also clear that procedural fairness is an important part of overall fairness. In this case I felt that there was a degree of procedural unfairness in that the claimant was not properly given the opportunity to explain the second absence nor was she given the opportunity to explain her position in relation to the other unauthorised absences where she appears to have incorrectly completed the signing in book which were discovered by Ms Panek at the appeal stage.

37. The claimant's representative suggested that it had not been appropriate for Ms Panek to proceed with the appeal in the absence of the claimant at all. I did not agree with this. The claimant's e-mail clearly envisages that the hearing will proceed in her absence and the claimant indeed asks for the outcome to be e-mailed to her. I note that by this stage in proceedings the claimant had injured her leg and would possibly have been unable to return to work in any event.

38. With regard to remedy the claimant had two full years' service as at the date of dismissal. She had been over the age of 41 years during both of these years and is therefore entitled to a basic award (before deduction) of three week's pay amounting to £600.

39. Section 122(2) of the Employment Rights Act 1996 provides that

> "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."

40. In this case I considered that the claimant's conduct was certainly such as would make it just and equitable to reduce the amount of the basic award. The claimant was in a trusted position. She was generally unsupervised. She knew the process for signing in and out and knew that her wages were calculated on the basis of this. It was her own admission she left her work early, signed the book as if she had stayed until her usual finishing time. She accepted that she had done this on at least one occasion. In my view the information provided

by the Tesco managers at the time of the disciplinary hearing indicated that this had been done on two occasions. In any event even if it was one this was a gross breach of trust which went to the root of the contract of employment. The claimant was claiming pay for hours she had not worked. The claimant claims that she was sick but made no attempt to contact any of the respondent's managers. The matter was clearly of considerable concern to the respondent who are a service company. They were no doubt billing their client Tesco for the services provided by the claimant. The fact that Tesco managers complained to them that the claimant was not there whilst the respondent was no doubt billing Tesco for their time would clearly be a cause of some embarrassment to the respondent and could potentially cause them commercial loss. As noted above I consider that there is no question but that the claimant was guilty of gross misconduct. It is therefore my view that it would be just and equitable to produce the basic award by 80% in this case.

41. The claimant is therefore entitled to a basic award of £120.

42. With regard to the compensatory award section 123 of the Employment Rights Act provides that this

> "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."

43. In this case the claimant remains unemployed. In evidence however she accepted that she had obtained an offer of alternative employment but was unable to take this up because of the injury to her leg on 10 March. My view is that the wage loss for which the respondent could potentially be responsible is therefore the wage loss for the period from 26 February when she was summarily dismissed to 10 March. Although this is only 12 days I would fix the figure at two weeks' pay amounting to £369.24. (The claimant's net pay is £184.62 per week). The claimant sought an uplift of this figure on the basis that the respondent had failed to follow the ACAS Code. I understood the failure to refer to the appeal. In my view the respondent did not fail to offer the

claimant an appeal. The respondent did offer the claimant an appeal but the claimant herself did not turn up for this. The claimant herself indicated that she expected the appeal to be dealt with in her absence and the respondent proceeded to do this. I do not therefore consider that any uplift would apply. In any event if I am wrong in this I would have found that any such failure was not unreasonable in terms of section 207A(3)(c) of the Trade Union and Labour Relations (Consolidation) Act 1992 on the basis that the respondent's belief was that the claimant wished the appeal to go ahead in her absence. In any event, I would find that in all the circumstances it would not be just and equitable to make any such uplift.

44. As with the basic award the respondent sought that the compensatory award be reduced to nil in terms of section 123(6) of the 1996 Act. This states

> "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."

45. In my view this case clearly shows that the dismissal was entirely caused by the action of the complainant. In the circumstances it is my view that the compensatory award should be reduced by 100% to nil.

46. Further and in any event the respondent's position was that if I had found the dismissal to be unfair then compensation should be reduced to nil under the ***Polkey*** principle. This principle is named after the case of ***Polkey v A E Dayton Services Ltd [1987] IRLR 503 HL***. It covers a situation where although a dismissal is unfair, the Tribunal finds that had a fair process been carried out then there was a possibility that the claimant would have been fairly dismissed in any event. The Tribunal is entitled to reduce the compensatory award accordingly. In my view this case is one to which that principle applies. It appears to me there is little doubt that had the respondent carried out a proper investigation of the matter and asked the claimant about the other incidents referred to in the documents the claimant would still have been dismissed and been dismissed fairly. All the claimant could really offer would

be a denial. I considered that in the circumstances particularly given the trust which was given to the claimant and the importance to the respondent's business that employees in the position of the claimant accurately complete the signing in and signing out book there is little doubt that the claimant would have been fairly dismissed in any event. Had the compensatory award not already been reduced to nil on the basis of contribution then I would reduce it to nil on the Polkey principle.

47. The claimant's evidence was that she had been on benefit since shortly after the date of dismissal. Given however that there is no compensation for wage loss there is no prescribed element in this case and the recoupment regulations do not apply.

Employment Judge: **Ian McFatridge**
Date of Judgment: **25 October 2019**
Date sent to parties: **25 October 2019**