



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss C Winn  
**Respondent:** Rotherham Metropolitan Borough Council  
**Heard at:** Sheffield **On:** 6 & 7 November 2019

**Before:** Employment Judge Little

## Representation

**Claimant:** In person  
**Respondent:** Miss L Quigley of Counsel

# RESERVED JUDGMENT

My Judgment is that the complaint of unfair dismissal fails and so this claim is dismissed.

# REASONS

1. It was necessary to reserve this Judgment in circumstances where, due to flooding in Sheffield on 7 November, it was necessary to close the court building before there was time for me to deliver Judgment in open Tribunal.

## 2. The complaint

In a claim form presented on 3 April 2019 Miss Winn complained that she had been unfairly dismissed from her employment as a hospitality assistant with the respondent.

The respondent's case was that it had a genuine belief that the claimant had committed gross misconduct and so it summarily dismissed her.

## 3. The issues

The issues which I have had to determine are as follows:-

3.1. Can the respondent show the potentially fair reason of conduct?

3.2. If so, was that an actually fair reason?

In particular:-

- Did the respondent carry out a reasonable investigation?
  - Did it reasonably believe that the claimant was guilty of the misconduct?
  - At the time when the decision to dismiss was taken, did the respondent have reasonable grounds to sustain that belief?
  - With particular regard to the investigation, the claimant raises the following issues:-
    - ❖ The respondent failed to take proper account of the fact that the clock on the till and the clock on the CCTV were not in sync.
    - ❖ There was insufficient enquiry as to whether the claimant was in work on 24 February 2018.
    - ❖ Inaccurate rotas had been relied upon.
    - ❖ The respondent had by its own admission lost till receipts for two days within the sample period considered during the investigation and disciplinary process.
    - ❖ Insufficient consideration was given to the lax arrangements at the Granary café in terms of cash handling and security.
  - Had the claimant's supervisor, Mrs Patterson, been pursuing a vendetta against the claimant which had led to the report which commenced the disciplinary process?
  - In terms of procedural fairness, did the fact that the disciplinary hearing on 4 December 2018 proceeded in the claimant's absence render the dismissal procedurally unfair?
  - Was there procedural unfairness because the subsequent appeal hearing (which the claimant did attend) proceeded as a review and the claimant's request to call witnesses and have documents produced was refused?
  - Should the respondent have undertaken a stock take?
  - Should the respondent have investigated other employees?
- 3.3. If the dismissal was found to be procedurally unfair, would a fair procedure have made any difference and if so what?
- 3.4. If the dismissal was held to be substantively unfair, did the claimant contribute to her dismissal and if so to what extent? How should that be reflected in terms of remedy?

**4. Evidence**

The claimant has given evidence but called no other witnesses.

The respondent's evidence has been given by Mrs K Patterson, catering and hospitality officer (supervisor) and the claimant's line manager;

Miss Rachel Stothard, commercial manager; Mrs G White, operational manager (libraries and community hubs) and in this case the investigating officer; Mrs K Phillips, head of catering and facilities service and in this case the dismissing officer and Councillor M S Alam, who, as an elected member, was part of the panel which heard the appeal against dismissal.

## 5. Documents

There was an agreed trial bundle before me. The parties have prepared that on the basis that one section, 'B', contains what are described as the respondent's documents and another smaller section, 'C', contains what are described as the claimant's documents.

## 6. The relevant facts

- 6.1. The claimant's employment commenced on 10 March 2010. As noted above, that was as what the respondent calls a hospitality assistant although the claimant refers to herself as a catering assistant. She worked within the Granary café which was part of the Clifton Park Museum operated by the respondent.
- 6.2. The claimant was part of a small number of employees working in the café. There were four in total including Mrs Patterson who was the supervisor. The claimant's two colleagues were Beverley Boardman and Linda Duke.
- 6.3. On 9 June 2017 the claimant received a favourable review at a performance and development review (PDR) meeting conducted by Ms Stothard. A copy is at pages B202 to B206. The claimant was described as being a person willing to go the extra mile who had worked extra shifts and helped her colleagues, because at that time there were vacancies. Although the claimant apparently had a clean disciplinary record and there were no formal concerns about her performance, Ms Stothard's evidence to me was that the claimant's PDR, and perhaps that of other employees at that particular time, was expressed in generous and morale boosting terms because the museum or café had undergone a restructure and there had been some staff shortages.
- 6.4. The claimant contends that "*from the summer of 2017 I felt things started to change at work*" (see paragraph 4 of her witness statement). She refers to being offered less shifts, although in cross-examination she accepted that whilst she had been working extra shifts when the café was understaffed, less extra shifts were available once more staff were recruited.
- 6.5. The claimant also refers to being called into a meeting in January 2018 because she had left a shift early. During cross-examination the claimant accepted that she had left the shift early, but said that that was something she and her colleagues did when it was a quiet period. It appears that no formal disciplinary sanction was given to the claimant, although, as I understand it, this is an aspect of what the claimant now contends was an agenda or vendetta that Mrs Patterson, for some unexplained reason, had against the claimant. Whilst the vendetta issue is part of the claim before me, it was not raised by the claimant during the course of the internal disciplinary process.

- 6.6. I find that the cash handling and security procedures in the café at the material time left a lot to be desired. In particular, the till, which was relatively old, no longer permitted individual users to log in so that the transactions done by a particular catering assistant could be identified. Instead, the password for everyone was “Leonie”. Banking sheets were not always completed at the end of a day’s trading. If the till was significantly up or down, some members of staff would take it upon themselves to send a text to Mrs Patterson to inform her of that state of affairs and so as to ‘protect their backs’. The claimant also suggests that Mrs Patterson would take a rather relaxed attitude to any shortfalls or surpluses, along the lines of ‘it would sort itself out’.
- 6.7. There was one CCTV camera in the café. Although this would show the counter and till area (somewhat in the background) it was not positioned so as to show the till drawer. The camera appears to have been pointing towards that area and so could not take in either a side or rear view. During the course of this hearing I have seen fairly brief CCTV footage of three transactions during the course of 5 March 2018 – the critical date because it is those three transactions in particular which ultimately led the respondent to dismiss the claimant.
- 6.8. Whilst the till had a “clock” – so that on the till receipts the time of the transaction would be shown - the time shown on the till was not the same as that shown on the CCTV clock. In fact during the course of the investigation the respondent would conclude that the time on the till was 1 hour 16 minutes ahead of the time on the CCTV system. The CCTV system is on a seven day cycle and the tape or video file is overridden at the end of the seven days.
- 6.9. On 5 March 2018 only the claimant and Mrs Patterson were working in the café. Linda Duke should have been working alongside the claimant and her name appears on the rota (see B23a), however it is common ground that she did not attend because she was on leave or ill. In those circumstances, Mrs Patterson, who would not very often work ‘hands on’ in the café (but instead in her office upstairs) was working with the claimant. The usual arrangements were that staff would informally rotate between serving customers and so using the till and the work of preparing the food and drinks.
- 6.10. On 5 March Mrs Patterson was having her lunch in the café and was sitting at a table quite close to the counter and till. At that time it was the claimant therefore who was the only person serving. Whilst eating her lunch, Mrs Patterson’s attention was drawn to the till counter area because she heard the till, which was being operated at that time by the claimant, making more beeping noises than would be the case if an order was simply being rung in. On the CCTV footage which I have seen, Mrs Patterson can be seen initially either reading or looking down at her food but then moving her head to look left towards the claimant at the till. Although Mrs Patterson may not have been able to see this at the time, the transaction involved a male customer who ordered two lattes and a sausage roll. It is common ground that there was no alteration to that order. The customer paid (as it would turn out the sum of £5). Mrs Patterson would not have been able to see from

the position she was in the till drawer and so whether or not money received from this customer was put into the till.

- 6.11. There is a dispute between Mrs Patterson's evidence and the claimant's evidence as to whether after hearing the till making these unexpected noises Mrs Patterson went to the claimant to ask if she was ok (which is Mrs Patterson's evidence) or whether that did not occur at all (which is the claimant's evidence). In any event, on my enquiry, Mrs Patterson confirmed that whatever she may have said to the claimant did not involve a question about why the till was apparently making noises that it should not have for that type of transaction.
- 6.12. Shortly after the latte/sausage roll customer was served the claimant's shift ended, at approximately 2pm and she went home. Mrs Patterson immediately went to check the till by doing what is called an X reading. Mrs Patterson describes this as being a snapshot of the cash and card transactions up to the moment that that reading is taken. It is different from an X re-setting which would only be done at the end of the day for cashing up and audit purposes. Mrs Patterson had noticed that the two lattes/sausage roll transaction having been entered into the till had then been completely voided off. Her evidence was that what she had heard from her position at the nearby table was three beeps when the two drinks and sausage roll were inputted, but then a further three beeps when each of those items had been cancelled or voided.
- 6.13. There are a substantial number of till receipts in the bundle and the readings for 5 March are at pages B114 to B117. When these were examined further, two other voids were discovered. Two mugs of tea and a latte had been entered and then voided and an order involving a cappuccino, a filter coffee and two scones had been voided. Mrs Patterson in these circumstances expected the till to be up. In respect of the latte/sausage roll transaction that she had witnessed as the money had been handed over by the customer and the items of food and drink taken away (with no change of mind or re-ordering) the voiding would or should have had the result that the till had £5 more in it than the till receipts would suggest. However that was found not to be the case.
- 6.14. Having taken the precaution of asking a colleague, Hannah Jackson, who worked as a park ranger to witness these initial investigations and cashing up, Mrs Patterson went to her manager to explain her concerns. That concern was, as far as Ms Stothard recollected when she was subsequently interviewed, that "Claire had stolen some money" (see page B172).
- 6.15. On 9 March 2018 the claimant was suspended at a brief meeting conducted by Andy Lee, Urban Green Spaces Manager. A letter of the same date to the claimant confirmed the suspension and that was because of an allegation of theft. A copy of that letter is at pages C1 to C2.
- 6.16. On 14 March 2018 the claimant raised a grievance. A copy is at pages C3 to C6. She complained about the January 2018 leaving early incident and she made allegations against Mrs Patterson to the effect that previously, when discrepancies with the till had been reported to

Mrs Patterson she had said “I will sort it don’t worry” and the claimant felt that Mrs Patterson was not informing her own manager Mrs Stothard of those matters. The claimant went on to refer to occasions when, because of what the claimant believed was an inadequate system, the float had been inaccurate, the amount of money in change bags was not accurate and on one occasion the till had been £15 up. The claimant went on to complain about being suspended. She felt that Mrs Patterson had felt the need to single her out.

- 6.17. On 18 April 2018 the claimant was interviewed as part of the disciplinary investigation that by this time was being conducted by Mrs White with assistance from Ms Greaves an HR consultant. Notes of this meeting, at which the claimant was represented by two people from her union GMB, is at pages B148 to B158. Prior to this meeting and as part of Ms Stothard’s initial investigation she had realised that there was a discrepancy between the till time and the CCTV time. However by carrying out the practical experiment of being in shot at the till from the CCTV camera she was able to work out that as noted above the time on the till was 1 hour and 16 minutes ahead of the time shown on the CCTV system. The respondent’s investigation proceeded on the basis that whilst there was this discrepancy between the two clocks, nevertheless each clock was keeping “good” time so that the one hour 16 minute discrepancy was constant. Both Ms Stothard and subsequently Mrs White concluded that the CCTV footage for 5 March showed, once the time adjustment was taken into account, that it was the claimant who conducted the three void transactions. Of course Mrs Patterson had seen one of those transactions with her own eyes.
- 6.18. Returning to the 18 April 2018 investigatory meeting, the claimant was asked to explain the voids on 5 March. The claimant said that she had a couple of customers who had changed their minds whilst they were ordering. She went on to say that Mrs Patterson had also used the till that day. Mrs White then asked the claimant about the two lattes/sausage roll transaction. The claimant said that she had rung it in. She was asked if she recalled voiding it off and she answered no. The claimant was given the opportunity of viewing the CCTV footage. The claimant said that she could not remember voiding it off. She had taken the money and put it in the till and given change.
- 6.19. The claimant was then informed by Mrs white that she had looked back over a two week period – 19 February to week commencing 5 March - and had noticed that there were numerous voids on various dates. The claimant was asked whether she had worked particular dates and she said ‘yes’ to each. One of the dates was 24 February 2018, a Saturday. However subsequently the claimant changed her account because she believed that she had been on holiday that day. Her parents who would normally look after her children when she was working, were abroad on holiday and the claimant had therefore not been able to go to work and had taken leave, she said, to look after the children. The respondent’s record of holidays did not support that (page B208) but in evidence before me the claimant said that either

that was not her holiday record, or it had been completed incorrectly by Mrs Patterson. The 24 February was a significant day because there had been 11 voids totalling over £75 on that occasion. Later in the meeting Ms Greaves pointed out to the claimant that the voids were in respect of a number of items on each occasion and usually it was all, or at least the majority of the items entered which were then subsequently voided. The claimant's answer was that she could not say why there had been those voids. Nothing came to mind that she could remember. She did not understand and did not know why that had been done. There was discussion about the claimant's knowledge of tills and the claimant said that she had had no formal training in this employment although she had been using the till throughout the eight years of her employment and had also previously worked in both a nightclub and a pub when she used tills.

- 6.20. Towards the end of the interview the claimant was asked about 10 plates that had gone missing. In a subsequent interview the claimant would be asked about a cake which she had ordered from a different supplier than usual and which was more expensive than the cakes normally sold in the café. Both the plates and the cake issue had been raised by Mrs Patterson, but only when asked in her interview whether there was anything else she thought that was relevant. Ultimately the respondent decided to take no action in respect of either plates or cake. For this reason the investigation report which Mrs White subsequently produced was redacted before it was provided to Mrs Phillips and when it was put before the elected members who subsequently heard the appeal. Whilst the claimant considered that this redaction was in some way sinister, I find that this was simply done to protect the claimant in the sense that it avoided any prejudice which could have occurred if these unsubstantiated matters had been put before the decision makers. As I understand it, the claimant's vendetta argument is also based upon the plates and cake issue being raised by Mrs Patterson.
- 6.21. In the period from 19 March 2018 to 9 May 2018 the respondent interviewed Mrs Patterson twice, Ms Jackson, who had observed the cashing up on 5 March and the claimant's colleagues Ms Boardman and Ms Duke. Ms Stothard conducted some of the early interviews, including the first interview with Mrs Patterson but subsequently Mrs White took over. It was Mrs White who interviewed Mrs Stothard on 9 May 2018.
- 6.22. Ms Boardman had previously been on good terms with the claimant but when being interviewed by Mrs White on 10 April 2018 she said that that friendship had cooled in the last six months. She was asked if she could think of any reason why it would be necessary to void off an entire transaction. Ms Boardman replied that she could not give any reason and that she hadn't done it in the 10 years she had worked there. She acknowledged that sometimes customers, particularly children, might change their mind mid order, but that would be dealt with by pressing the error correct button rather than voiding the whole order (page B133). She was asked whether she could think of any reason why someone might open the till after voiding the transaction

and she said she couldn't really. It is common ground that the till would only open if the cashing off button is pressed. It was not necessary to open the till to do the error correct function either. Ms Boardman when asked why the claimant might have been distancing herself from her. She mentioned that the claimant had had problems with her phone contract owing the company £300 and that she had been taken to court (see B138 to 139). I should add that the claimant denies this and has produced copies of mobile phone bills from the company Three, which are at pages C34 to C37 and which do not suggest any debt owed.

- 6.23. When Ms Duke was interviewed Mrs White asked her if she could think of any reason to use the void function and she explained that the only void function she used was if someone orders something that wasn't in stock or the customer changed their mind. She was asked whether she would ever void off an entire transaction and replied that she would not know how to do that. She would do what she described as an error void for the relevant item. She also confirmed that the till would not open if a full order was voided off. It would only open if you cashed it off (B143). When Mrs White asked her if there was anything she wished to add she replied that only thing that ever annoyed her with the claimant was that she, Ms Duke, could never work the till when the claimant was working. There was not the usual sharing of duties as would apply when she was working with Ms Boardman (page B146).
- 6.24. Mrs Patterson's first interview was conducted by Ms Stothard. She was asked to explain what she had observed and done on 5 March. In relation to the lattes/sausage roll transaction she said that she had seen the customer take the goods, so that she knew that he had paid. She went on to refer to earlier suspicions she had had about the claimant. That was because as Mrs Patterson did the banking, if Ms Duke or Ms Boardman or even Mrs Patterson herself had been working on the tills the banking would always fluctuate up or down to a degree. However whenever the claimant had been operating the till the till would be spot on consistently. Mrs Patterson went on to say that she accepted that she herself would make errors and a lot of customers might say 'keep the change' and so some discrepancies were almost inevitable. Ms Greaves asked Mrs Patterson whether there was anything else that made her suspicious (page B124) and Mrs Patterson related the incident on 23 February 2018 when at the end of the day Ms Boardman had found that the till was £15 up. This was one of the occasions when a text was sent to Mrs Patterson. However Mrs Patterson then expected to find that £15 in the till but the next day only found an £8 difference ( the till was 'up' to that amount) and so was unsure where the rest had gone. She was then asked if there had been any other incidents and she mentioned that some plates had gone missing and she also reported that both Ms Boardman and Ms Duke had suspected that the claimant had been stealing food for her sister's company. She went on to suggest that when the plates were discovered missing the claimant's parents had also been in the café. Mrs Patterson was then asked whether she had ever voided an order and cashed it off and she replied no. She was asked if she could think of any reason why someone would in those circumstances cash it off. Mrs Patterson explained that the cash button opened the till and



so it would look like a sale. Ms Greaves asked Mrs Patterson whether she had noticed any stock going down more quickly than expected and during this exchange Mrs Patterson mentioned an expensive cake which the claimant had ordered from a different supplier (see page B127).

- 6.25. Mrs Patterson was interviewed a second time on 1 May 2018 and this was conducted by Mrs White. Mrs White asked Mrs Patterson to explain why all transactions were logged as being processed by 'Leonie' and how in those circumstances could it be identified who had processed each transaction. Mrs Patterson acknowledged that that could not be done. Mrs White went on to ask whether that left staff vulnerable and Mrs Patterson said that before this incident she had felt fine as she trusted her staff. She accepted that this was something that would now need to be looked at, but it would cost money that they didn't have at the moment (page B161). Mrs Patterson was asked about banking sheets and she acknowledged that "*they weren't being used much at that time*" but she said that arrangements had now really been stepped up and "*were really tight now*" (page B163). Much of the rest of the interview dealt with the cake issue.
- 6.26. However Mrs White went on to explain to Mrs Patterson that both the claimant and colleagues who she had interviewed had said that on numerous occasions when there were discrepancies on the till Mrs Patterson's response had been that she would sort it out and not to worry about it and even that she had advised them not to tell Ms Stothard. Mrs Patterson denied that. She said that it was usually when one member of staff had left the till down so the next day the float would be up. Usually by the time she had done the week's banking it was not a lot of money, just a couple of pounds and that it sorted itself out (page B166). Mrs Patterson denied that she had instructed the claimant to "no sale" items when there were discrepancies with the till.
- 6.27. On or about 14 May 2018 the claimant provided a fit note to the respondent (C7) which signed the claimant off work for four weeks from that date by reason of work related stress, depression. The claimant was of course suspended from work in any event at this time.
- 6.28. Nevertheless the claimant was able to attend a second investigatory meeting on 22 May 2018. This interview was conducted by Mrs White and notes are at pages B184 to B192. The claimant was asked about the cake and cake orders in general in some detail. However Mrs White then returned to the issue of till voids. Mrs White explained to the claimant that in respect of each of the three voids on 5 March, Ms Stothard had viewed the CCTV and could see that on all three occasions when these voids were processed the claimant could be seen serving the food. She was asked whether she could recall this and the CCTV footage was run. The claimant was asked in respect of each occurrence whether she could explain why all the transactions were voided off but the customers could be seen walking away with their order. The claimant could not explain. She could not remember doing the voids. The claimant went on to suggest that if things that had been ordered by customers turned out not to be in stock that would be voided off. However during cross-examination in our hearing the

claimant confirmed that none of the items ordered in the voided transactions on 5 March, eg sausage rolls, had been out of stock.

- 6.29. Mrs White then prepared her investigation report which is dated 25 June 2018 and begins at page B15. Towards the end of that report Mrs White wrote the following:

*“When the issue of the additional voided transactions was raised with Claire, she once again stated that she could not recall voiding off any of these. Claire could give no reasonable explanation why on 5 out of the 6 shifts which she worked during the period 19 February 2018 to 5 March 2018 a total of £169.35 worth of items were voided off the system. Claire stated that she does not recall processing these nor does she understand why this would have been done.*

*CCTV footage was requested for the dates and time corresponding with the voids from 19 February to 5 March 2018, however Rachel Stothard was unable to obtain this due to footage only being stored for one week.*

*The lack of any reasonable explanation leaves the investigating manager with concerns. It is felt that there is a case to answer in relation to this matter”.*

Mrs White went on to suggest that the appropriate charge would be that the claimant had processed numerous voids on the till for the reason of personal financial gain. During the course of the investigation Mrs White had prepared an annotated copy of the rota for the café for the sample period of 5 February to 17 March and a copy appears at B23A in the bundle. This shows four occasions prior to 5 March 2018 when the claimant worked and when there were voids. As mentioned above the claimant disputes that she was working on one of those days, 24 February. There are shifts at which the claimant worked where there are no voids, but there are no shifts when the claimant was not working that show any voids. On the earlier four void days the claimant was working on one occasion with Mrs Duke, on one occasion apparently on her own, although Mrs Patterson was probably in the office. On the disputed Saturday the claimant would have been working with Mrs Patterson and on the other occasion the claimant was working with Ms Boardman.

- 6.30. On 16 July 2018 Ms Greaves wrote to the claimant inviting her to attend a disciplinary hearing on 15 August 2018. That was to answer the allegation –

*“That you processed numerous voids on the till at the Granary café for personal financial gain”.*

The claimant was informed that that represented a potential breach of the code of conduct and that certain actions constituted gross misconduct which could result in summary dismissal. That letter is at B1 to B2. The claimant was unable to attend this hearing because she advised that she would be on holiday. Although it seems that it was not raised at the time, the respondent now says that this holiday was unauthorised because its duration, three weeks, would have required managerial approval.

- 6.31. The claimant was then invited to a re-arranged meeting to be held on 19 September 2018, the invitation letter being at B3 to B4. However the claimant explained that she could not attend this hearing because of ill health. A fit note was issued on 14 September 2018 for a two week period which described the claimant's condition as bereavement and anxiety (C8).
- 6.32. On 16 October 2018 Ms Greaves wrote a further invitation letter to the claimant acknowledging a letter the claimant had written on 1 October indicating that she was still not well enough to attend the hearing which had in the meantime been re-arranged for 10 October 2018. The claimant was now informed that the re-arranged disciplinary hearing would take place on 14 November 2018 (see B5 to B6). It seems that the 1 October letter had in fact been written on the claimant's behalf by a Lisa Taylor (the claimant's sister) (C12).
- 6.33. However the claimant was also unable to attend this hearing because of ill health. A further fit note had been issued on 28 September 2018 for one month which described the claimant's condition as work related stress and depression/recent bereavement (page C11).
- 6.34. On 14 November 2018 Ms Greaves again wrote to the claimant (B7 to B8). She had spoken to the claimant on the telephone that day and was sorry to hear that she was still not well. She had also spoken to the claimant's mother who had explained that the claimant had not been well enough to attend the hearing on 14 November. The letter goes on to inform the claimant that the hearing has now been postponed to 4 December 2018. The letter also says that if the claimant did not attend on that date the case would be heard in her absence. If she was unable to attend she could either make arrangements for her union representative to attend and submit a case on her behalf, or the claimant could submit her case in writing directly to Mrs Phillips by 26 November 2018.
- 6.35. The claimant did not provide anything in writing by 26 November 2018 or at all.
- 6.36. The hearing took place on 4 December 2018 before Mrs Phillips. No one from the GMB attended on behalf of the claimant and the claimant herself did not attend. Mrs Phillips' evidence is that the hearing was conducted in the same manner as it would have been if the claimant had been in attendance. There was therefore, she said, a presentation of the facts by the investigating officer Mrs White and some questions were asked of Mrs White and Ms Greaves who was also present from HR. Unfortunately no notes or minutes were made of this hearing. Mrs Phillips suggested that that would never be done, which gives some cause for concern. In any event the decision was taken that the claimant would be dismissed.
- 6.37. That decision was communicated to the claimant in Mrs Phillips' letter of 5 December 2018 (pages B9 to B10). The letter does not purport to be in the nature of a minute of the meeting, but in it Mrs Phillips explains that her decision is based upon the evidence from 5 March 2018 and she had taken the view that the claimant had made a number of unexplained void transactions of complete orders with the CCTV

recording confirming that the claimant had served the relevant customers. It was also noted that the claimant's actions had been witnessed and reported by a member of staff (in other words Mrs Patterson). Mrs Phillips went on to write that she had considered that there had been a number of highly irregular void transactions on a number of previous occasions which suggested that the activity was not limited to 5 March. It was noted that the claimant could not provide any explanation for those actions. The conclusion which Mrs Phillips reached was that -

*“you were receiving money from customers for goods which they received, and had then voided the complete transactions off the till and that till balances at the end of the day did not explain this activity. I therefore believe that your unexplained and irregular actions were either for the purposes of keeping the money and/or fraudulently giving customers goods for which they had not paid, which would amount to theft in both circumstances”.*

Accordingly the claimant was to be dismissed with immediate effect due to gross misconduct. She was informed that she had a right of appeal (see B9 to B10).

- 6.38. On 12 December 2018 the claimant wrote to the respondent indicating that she would like to lodge an appeal (B11).
- 6.39. On 10 January 2019 the claimant wrote again setting out the grounds of her appeal (B13 to B14). She referred to the reasons that she was unable to attend the disciplinary hearing and she referred to various areas of the evidence in the management case that she wished to dispute. She said staff rotas were inaccurate (this was a reference to the 24 February attendance or leave question). She went on to say that the CCTV footage and the way it had been used was incorrect; she referred to discrepancies on the till and said that staff statements were contradictory and false, but gave no detail of why. She complained about the suspension procedure and that there had been a breach of confidentiality as she alleged that some customers knew that she had been suspended. She referred to having undergone tests at the hospital but that she was now in a position to represent herself. Finally she referred to the redaction of the investigation report.
- 6.40. Unfortunately it was not possible to arrange the appeal hearing until 1 March 2019. The appeal had to be before three elected members and I was told that it was particularly difficult to get three elected members available at the same time.
- 6.41. On 31 January 2019 the claimant had written to Rebecca Boyle of HR requesting that various named witnesses be made available for the appeal hearing (C19). On 12 February 2019 she wrote again, asking that various documents be made available for the hearing (C21).
- 6.42. Rebecca Boyle replied to the claimant on 26 February 2019 (C24) informing the claimant that the process of the appeal hearing would be by way of review. Ms Boyle felt that what the claimant had been asking

for was new or additional information that had not been considered as part of the original investigation. She was told that for this reason those requests could not now be considered. She was also informed that further CCTV footage could not be released because of data protection issues, although arrangements could be made for those to be viewed if the claimant wished.

- 6.43. The appeal hearing duly took place on 1 March 2019. I have heard from Mr Alam, one of the three counsellors who was on the panel. The claimant attended that hearing and was accompanied by Amanda Horsman, her union representative. The management case was presented by Mrs Phillips. No notes or minutes were kept of this important meeting. When I asked counsellor Alam about this he said that it was not the practice ever to keep minutes of such meetings, which I found to be a further cause for concern generally, although ultimately not something which weighed in the decision that I have made in this case.
- 6.44. The appeal outcome letter is brief although the version in the bundle (C25) appears incomplete as it is only one page. I was told that all that was missing was the signature. Oddly this appears as one of the claimant's documents. The appeal was not upheld and the explanation for this was that:

*"The panel were clear that your actions fell short of the standards expected of its employees, and that, in particular, this could have resulted in a loss of trust and confidence in you by both the council as your employer, and by our customers".*

Accordingly the appeal outcome letter did not deal with any of the specifics of the case or points which the claimant had raised in her grounds of appeal.

## 7. The parties' submissions

### 7.1. The claimant's submission

The claimant read from a document which she had prepared, although I was not provided with a copy. She referred to Mrs Patterson having jumped to the conclusion that she had been stealing and there had been a campaign to prove her guilt. The evidence was weak. The 'Leonie' sign on was a problem. From the sample period, two days of receipts were missing. The time frame for the sample should have been broader. The claimant suggested, I think for the first time, that the timing on the till itself was wrong. This had not previously been put forward. There had not been a complete CCTV footage record, for example to show Mrs Patterson going to the till on 5 March. The claimant pointed out that the CCTV did not actually show her taking money out of the till. As Mrs Patterson had been sitting nearly next to the claimant on 5 March when the transactions were being done, why had Mrs Patterson not spoken to her then. There should have been a stock take. That could have established that an excess of stock supported the respondent's case, but its absence would assist the claimant. The banking sheets had not been filled in properly. The evidence which Ms Boardman had given about the claimant's mobile

telephone bill had been false. The leave sheet was wrong. The claimant thought that she had been labelled as the guilty party at the outset. She referred to the personal friendship between Mrs Patterson and Karen Jackson. She also mentioned that Mrs Patterson's aunt had been given some work in the café around the time of the claimant's suspension so Mrs Patterson stood to benefit by the claimant being suspended.

7.2. Respondent's submission

Miss Quigley had prepared outline submissions and also addressed me orally. The starting point was 5 March. There was no evidence of any other member of staff being responsible. Only at the hearing today had the claimant suggested that Mrs Patterson could have been responsible for the voids. That was a hollow allegation bearing in mind what the CCTV showed and that it included Mrs Patterson having her lunch during the course of one of the transactions. The sample period had been reasonable. The loss of two days' till rolls was unfortunate. A stock take would not have been appropriate because there was no allegation of a theft of stock and in any event because the respondent only did annual stock takes this would not have provided an accurate record. There had been overwhelming evidence against the claimant. There was no suggestion that the voids had occurred because of a fault on the till. The claimant had not been able to provide any proper explanation.

In terms of procedural fairness, the claimant had been invited to present written representations and the respondent had postponed the disciplinary hearing on numerous occasions. As of 4 December 2018 there was no indication of when the claimant was going to be fit to proceed. Throughout this period the claimant was being paid. The claimant had not during the course of this hearing challenged Ms Stothard on her calculation of the difference between the time on the till and that on the CCTV system. If an unfair dismissal was found there should be a 100% Polkey reduction and in any event a 100% contribution.

**8. The Tribunal's conclusions**

8.1. Can the respondent show a potentially fair reason?

Conduct is one of the reasons which Parliament has provided can potentially be a fair reason to dismiss an employee. It is one of the reasons set out in the Employment Rights Act 1996 section 98(2).

This respondent relies upon the reason of conduct and therefore I find that there is a potentially fair reason shown.

8.2. Was that reason actually fair?

The appropriate test is that set out in the Employment Rights Act 1996 at section 98(4). It is in these terms:

*"Where the employer has fulfilled the requirements of subsection 1 (eg showing a potentially fair reason to dismiss) 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”*

The approach to this question is often described as being an enquiry as to whether the employer's decision comes within a reasonable band. In the circumstances of the given case would a reasonable employer have dismissed?

The question is not therefore whether the Tribunal would have dismissed had it been the employer. I have explained to the claimant at the beginning of this hearing that this is not of course a criminal trial and so I am not deciding whether or not the claimant was guilty of the alleged dishonest actions. Instead I am considering whether, on the material before this employer, a reasonable employer could have concluded on the balance of probabilities that the misconduct had occurred and that dismissal was an appropriate sanction.

### 8.3. Was there a reasonable investigation?

An employer in this type of case is not expected to carry out the level of investigation that would be the case if a criminal matter was being considered by the police. The investigation is one of the matters that must be considered as part of the reasonable band test.

The claimant has various criticisms of the investigation:

- She suggests that Mrs Patterson had an agenda and so the claimant's guilt was pre-judged. This is not a matter that the claimant raised in any sort of detail during the disciplinary process, although her 10 January 2019 appeal grounds letter does refer to *“the campaign of allegations aimed at me”* (B14). In any event I find that credible explanations have been given by the respondent for a relatively informal word about the occasion when the claimant left early and for the reduction in the number of extra shifts that were available for the claimant. Whilst it is unfortunate that Mrs Patterson expressed herself in such robust terms to Mrs Stothard when reporting the matter on 5 March, it is abundantly clear from the lengthy and detailed investigation subsequently conducted by Mrs Stothard but mainly by Mrs White, that the respondent was by no means going through the motions.
- There has been no suggestion that Mrs Patterson in some way set the claimant up on 5 March. It is perfectly understandable that having witnessed what she did she would have had concerns and quite properly reported that to her own manager. It appears that the respondent kept an open mind and whilst no charges were brought against any of the other potential culprits

all members of staff, including Mrs Patterson were interviewed. However the statistical evidence which Mrs White was able to garner concerning the sample period did show a distinct pattern as far as the claimant's attendance at work and coincidence of the voids. This was a pattern which was not shown in respect of any of the other three employees working in the café, including Mrs Patterson.

- The clock on the till not being in sync with the clock on the CCTV system. It is regrettable that this state of affairs existed, particularly as the standard 'Leonie' log in made it impossible to determine from the till itself who had been the operator at a particular time. As the CCTV was therefore an important means of determining that question it is regrettable that the respondent had not ensured that both clocks were synchronised. However the respondent both realised that there was that problem and then carried out a practical exercise which permitted it to make a scientific calculation so that it could be confident when the appropriate adjustment was made that it had been the claimant who had been operating the till on each of the three void occasions on 5 March.
- Uncertainty as to whether the claimant was in work on 24 February 2018. This is really the same allegation as "inaccurate rotas". Accordingly it only applies to one of the sample days when voids were shown – albeit an occasion when 11 voids were done. The claimant had initially said that she was in work that day but then realised that perhaps she hadn't been. It seems that ultimately the respondent concluded that she had. However it must be borne in mind that this date was *not* the primary reason for the claimant's dismissal. Even if the 24 February were excluded that still left three days (not counting 5 March) when there were numerous voids when the claimant had been working and in respect of which she could give no proper explanation.
- The two day's missing receipts. Again, it is unfortunate that these were lost, apparently by Mrs Stothard. Accordingly it will never be known whether or not there were voids on those two days. However again in terms of what a reasonable employer is required to do, I do not find that that detracts from the evidence which this employer had. That was very clear evidence about what had happened on 5 March and at least fairly strong evidence (minus CCTV evidence) of what had happened on three or possibly four of the days within the sample period.

#### 8.4. The shortcomings in the respondent's cash and till procedures

It is clear that these were lax. In general terms that is a matter of concern – and clearly other employees were concerned that they might be falsely accused, hence reporting the till being up in Ms Boardman's case. Whilst this may have made the investigator's task more difficult,



none of the shortcomings diluted the evidence which the investigators were able to obtain.

8.5. Did the respondent have a genuine belief in the claimant's guilt and was there material to sustain that belief?

Again this question must be approached on the basis of the reasonable employer. I find that on the basis of the investigation, which was in my judgment a thorough and careful investigation, any reasonable employer would have concluded that on the balance of probability the claimant had been voiding transactions with the intention of removing from the till at some later point in time the money which had been received. Although the claimant was not caught "red handed" there was overwhelming evidence that she had been voiding transactions when there was absolutely no need to do so and, certainly in respect of the transaction directly observed by Mrs Patterson, causing the till to open so that it would appear that the transaction was normal. The absence of the money in the till from those transactions again led on the balance of probabilities to the conclusion that subsequently the claimant had removed that money from the till for her own benefit.

In all these circumstances I conclude that this was a substantially fair dismissal.

8.6. Was the dismissal procedurally unfair?

The only live issue here is that the claimant was dismissed at a hearing which she did not attend and the subsequent appeal was no more than a review and, it appears somewhat perfunctory.

The norm would of course be that an employee should be heard and given the opportunity to put forward their case and challenge the management case before such a significant question as dismissal is decided on. That accords with natural justice and is part of the basic procedure set out in the ACAS Code of Practice on Disciplinary and Grievance Procedures.

However against this backdrop, it is clear that the respondent took strenuous steps to try to get the claimant to the disciplinary hearing. Beginning in July 2018 there were at least three proposed disciplinary hearing dates which had to be postponed because of the claimant's inability to attend either because of holiday or ill health. The respondent has confirmed that it did not doubt the genuineness of the claimant's illness. However it's case is that a decision could not be put off indefinitely and there was a concern that the claimant continued for a lengthy period to be suspended, apparently on full pay. The respondent therefore took the view that the hearing had to take place on 4 December 2018 whether or not the claimant attended. Sensibly the respondent offered the claimant the option of providing written submissions, or alternatively sending her union representative along to represent her interests. The claimant says that she could do neither of these things because of ill health. However it is to be noted that the claimant appears to have undergone a rapid recovery shortly after she was notified of her dismissal.

It is appropriate to consider the passage of time. The claimant had been suspended in March 2018. Accordingly by the time that Ms Greaves was writing her letter of 14 November 2018 giving the invitation for the 4 December 2018 disciplinary hearing, the passage of time was in excess of seven months. The limited medical evidence which the claimant had provided (a series of fit notes) gave no prognosis or indication as to when the claimant would be fit. There was certainly nothing to suggest that if the respondent had waited until January 2019 the claimant would have been reporting herself as fit to represent herself and instruct her union (although that is what the claimant did say in her letter of 10 January 2019).

It is perhaps unfortunate in these circumstances that the respondent's disciplinary procedure does not allow the appeal to be a re-hearing but only a review. The respondent has clearly not covered itself in glory in terms of various basic requirements in terms of note taking or clear explanation of its rationale, certainly in the case of the appeal.

However, the picture which emerges is certainly not of an employer who acted precipitously. Whilst normally attendance at a dismissal hearing would be very much the norm, I am satisfied that in the particular circumstances of this case there was no procedural unfairness when, eventually the respondent proceeded to determine the question in the absence of the claimant.

For all these reasons I conclude that this was a fair dismissal and so the claim must be dismissed.

**Employment Judge Little**

Date 14<sup>th</sup> November 2019

RESERVED JUDGMENT & REASONS SENT TO