EMPLOYMENT TRIBUNALS

Claimant: Mrs M Balloch

Respondent: EE Ltd

RESERVED JUDGMENT

Heard at: North Shields **On: 1st, 2nd, 3rd October 2019**

Before: Employment Judge Sweeney (sitting alone)

Representation:

For the claimant: Ms G Crew, counsel
For the respondent: Mr J Boyd, counsel

The Judgment of the Tribunal is as follows:

1. **The Claimant's claim of unfair dismissal is well founded and succeeds.**

2. **The compensatory award is reduced by 75% to reflect the fact that the Claimant could have been fairly dismissed.**

3. **The Claimant contributed towards her own dismissal and the basic and compensatory awards are reduced by 60%.**

4. **The Claimant's claim of wrongful dismissal is well founded and succeeds.**

5. **The parties should inform the Tribunal whether a remedy hearing is required within 21 days of receipt of the reserved judgment.**

REASONS

The Claimant's claims

1. By a Claim Form presented on 02 November 2018, the Claimant brings claims of unfair dismissal and wrongful dismissal arising out of her summary dismissal on 17 July 2018. In respect of the unfair dismissal claim, the Respondent maintains

that she was fairly dismissed for a reason related to conduct. As regards the claim of wrongful dismissal, the Respondent maintains that it was entitled to summarily terminate the Claimant's contract of employment on the basis that she had committed gross misconduct, alternatively that she was grossly negligent.

The Hearing

2. The claimant was represented by counsel, Ms Gillian Crew. The Respondent was also represented by counsel, Mr James Boyd. The parties had prepared an agreed bundle running to 515 pages. They had also prepared an agreed list of issues.

3. The Respondent called four witnesses:

   (1) Mr Benjamin Evans, Regional Commercial Manager (investigating manager),
   (2) Ms Dionne Benton, Regional Manager in small business (dismissing manager),
   (3) Mr David Byrne, regional Manager, East of Scotland (appeal manager).

4. The Claimant gave evidence on her own behalf.

The facts

5. Having considered all the evidence before it (written and oral) and the submissions made by the representatives on behalf of the parties, the Tribunal finds the following facts.

6. The Claimant was employed by the Respondent as a Store Manager. She commenced her employment in July 2014 and was based at the Respondent's store in Eldon Square, Newcastle Upon Tyne. By the time of the events with which these proceedings are concerned came about, the Claimant had been employed by the Respondent for some four years.

Job description

7. The Claimant's job description is at page **201** of the bundle which sets out her key responsibilities. Her role was, as the title suggests, to manage the Eldon Square store. By and large, she did not sell products to customers - that was the role of the sales advisers. She would only occasionally process a sale herself. Her involved among other things leading a team of employees.

Company Policies

8. The Respondent has a large number of policies, approximately 80 in all. Many if not all of these were available within a 'suite' or collection of policies referred to by the respondent as 'Albert' which was accessible to staff. Two 'Albert' policies featured prominently in these proceedings, namely:

(1) The 'proofs' policy –at page **110 – 119** of the bundle;

(2) The 'ADS' policy –at page **121 - 127** of the bundle

9. Another 'Albert' policy referred in evidence albeit not in any detail was the Ethical Selling Policy [page **128**].

The Proofs Policy

10. At the top of the first page of the proofs policy is a statement (some of the wording is missing on copying but the full wording appears elsewhere in the bundle):

"Failure to adhere to this Policy may result in action being taken under the Company's Disciplinary Policy which could lead to dismissal, Civil recovery and criminal prosecution."

11. This statement is repeated in the ADS policy and in the Ethical Selling Policy. It does not appear on some of the other documents in the bundle such as 'The Way We Work' and 'Standards of Behaviour' – however, these documents appear to be more statements of values and principles as opposed to 'policies'. Ms Balloch said in evidence that the statement appeared on all of the respondent's policies. If the implication to be taken from this is that the importance of the statement is diminished by overuse, I reject this. I find that the statement is a reflection of the seriousness genuinely attached to these policies by the Respondent.

12. The Proofs Policy states on page **110**:

"To protect our customers and business from fraud we perform Proof Checks to verify the identity of the person in store. These checks must be performed on all Consumer and Business Pay Monthly connections as well as Pay As You Go Upgrades. Do not ignore or manipulate the proof checks in order to obtain a sale."

"…. All ID checks excluding AVS must be carried out before starting the application in Domino."

"Wherever proof of ID/photo ID is required, the ID must always be checked via the ID scanner. Where ID scan fails, the process must end. This is applicable to all processes requiring photo ID (eg Deliver To Store, if the ID scan fails, the device must not be given to the customer)."

13. On page **111** there is a heading 'Proof Checklist & High risk Device List'. Among other things it states:

"It's the store Manager's responsibility to brief their team on any changes made to our ID requirements.…Once briefed each member of staff must complete the Sign Off."

14. The reference to the 'Sign Off' is reference to a document which the Claimant, and other employees, signed to say that they had been briefed and understood the proof requirements set out in this document (page **514-521**).

The ADS Policy

15. This policy, which stands for Assisted Digital Sales, states at pages **121-122**:

"This policy covers ordering devices for customers if the offer isn't available in store or you're unable to use Excalibur lite, including processes for new, additional, migrations and upgrades, the digital portal, delivery options and escalations."

16. Under the section headed "popular queries" at point number three the policy states (with my emphasis underlined): "*the proofs process is the same as if you were processing the customer using Domino*." The policy goes on to say "*ADS is used to order devices for customers if the offer is available in store or you are unable to use Excalibur Lite*." It further states "*this process must be followed in line with the ethical selling policy*."

17. There is then a section headed "proofs and ID" which states: "*you must complete proof checks before you enter the customer information in digital portal. It is mandatory to use the ID scanner. See the proofs and identification policy for full details*." There is a further section under the heading "*new and additional*" where under the first bullet point that process is stated as requiring the sales advisor to "*complete all the relevant fields in the portal-the customer details must match the customers proof/ID*."

18. Under the section headed "processing through the till" (page **124**) the policy states "*once you've completed the online journey, process the transaction through the till*."

Ethical Sales Policy

19. This policy is at page **128-131** of the bundle. As indicated above, it carries the same warning regarding failure to adhere to it. At page **131**, the final bullet point identifies as an example of unethical selling: "*Selling products with the aim to artificially inflate sales figures*".

20. All these policies are disseminated to stores and it is the responsibility of the Store Manager to inform him/herself of the policies, to understand them and to brief their team on the policies.

Software used by employees in relation to transactions

21. The Respondent company utilises a number of different pieces of software when transacting with customers. Which system is used will depend on the nature of

the transaction, for example whether the item is in stock within the store, or if it is a student discount ('Unidays') transaction.

Domino

22. Domino is the name given to software which is used for sales of phones and other devices which the store has in stock.

Excalibur Lite

23. This is the name given to software which is used when a customer wishes to buy a device which is not in stock within the store. Excalibur Lite was introduced in about September 2017.

ADS

24. ADS was the predecessor system to Excalibur Lite. It is a web based system. Like Excalibur Lite, ADS was used when a customer wished to purchase a device which was not in stock. Any transaction processed using this system is known as an 'ADS transaction'. The proofs/ID checking and credit checking process for all three systems (Domino, ADS, Excalibur Lite) is the same. The only difference is that on an ADS/Excalibur Lite transaction the customer did not get the phone on the day because it was not available in the store. The customer has to return to the store or have it delivered to their home. They must then produce photo id on collection or delivery.

On line purchases

25. The respondent also sells its products on line. Anyone can order and pay for their phone on line and collect it from the store or have it delivered to their home. In those circumstances, the customer must produce photo ID when collecting the phone from the store or receiving delivery of it. The advisers who work in the store have a limited role when it comes to on line purchases and that is to check that the customer is who they say they are on collection by checking that he has a valid ID.

Validation and internal compliance

26. The Respondent employs a team of employees, not based in stores whose role is to carry out checks or validate transactions. About 90% of processed transactions were subject to validation checks. At the material time, ADS sales were not validated by the company, which meant that the Respondent did not quality assure ADS transactions. It now does.

27. Employees of the Respondent's internal compliance team visited the store regularly to carry out certain compliance checks. The Claimant accepted that each time compliance visited the store she read again all the policies and that

she confirmed that she had read and understood them. Compliance had visited the store on about 12 occasions prior to these events.

Disciplinary policy/procedure

28. The Respondent has a disciplinary policy ('Handling misconduct fairly') [pages **58-70**]. Section 5, on page **61** provides examples of 'misconduct'. Section 9 on page **63** provides examples of 'gross misconduct'.

29. The Respondent also has a guide to managing investigations [pages **71-81**]. At the bottom of page **73**, the 4th bullet point states that '*any new evidence that comes to light after the investigation meeting will need to be put to them and will therefore require a further meeting*.'

A typical transaction

30. A typical 'in store' transaction involves a customer entering the store and asking to speak to an adviser. The customer will discuss the choice of phone with the adviser. Once they commit to a particular phone, certain checks must be carried out. The adviser must check that the customer has a valid up-to-date photo ID. The ID must be run through an ID scanner which will either accept or reject the ID. The adviser performs a chip and pin check on the customer's debit card. An AVS (Address Verification System) check is carried out in order to verify the address of the customer. The adviser also carries out an EIV credit check.

31. Sometimes an adviser may have to call the credit checking team if the internal credit check is unsuccessful. At page **262** there is an example of an ADS transaction where the result of the check is an instruction 'please call us to discuss'.

32. When the customer's ID is scanned onto the scanner it checks the authenticity of the ID. If the customer does not have photo ID or if the scanner does not accept the ID, or if the internal credit checking stage results in a 'FAIL' then the transaction should not progress further. It must come to an end and there should be nothing processed through the till. On page **263** of the bundle there is an example of a transaction which has passed the internal credit checking exercise. On page **264** there is an example of a validated ID check.

33. Documents relating to each transaction are placed in an envelope which is dated. It contains the paperwork associated with the transactions of the day. One of the Claimant's responsibilities was to check the daily paperwork. This required her to go through the envelope and check the previous day's transactions (assuming she was in work the following day) checking for example, if the right proofs were there and whether contracts were signed.

34. The Respondent operates a bonus scheme which has at least two elements relating to value of sales and the number of transaction in the store. Although

there was extremely little evidence on the nature of the bonus scheme, it was common ground between the parties that it was possible to earn some bonus by hitting targets related to volume of transactions and that bonus was not solely determined by the value of the sales. The Claimant earned a bonus of £30 in about March 2018. However, it was not suggested by the Respondent that this bonus was earned fraudulently. Ms Benton's evidence was that there had been no financial gain by the Claimant from the acts of misconduct which she found her to have committed.

Mr Evans investigation – 8th June 2018

35. On 08 June 2018, Mr Evans and another Regional Manager, Stephen Potter, visited the Eldon Square store. They did so because the store had been highlighted for scrutiny by the respondent's loss and internal compliance team. Mr Evans was asked to investigate 37 ADS transactions and to report on his findings. The list of transactions is at page **194** of the bundle.

36. On arriving at the Eldon Square store he met with the Claimant. He explained that he was there because a number of transactions had been flagged by the compliance team. The claimant fully cooperated with Mr Evans and Mr Potter. Together all three went through the boxes of papers to pull out from the envelopes the paperwork that related to the 37 ADS transactions. The paperwork was placed into a sealed bag. Mr Evans and Mr Potter left the store taking the paperwork with them. They went to a nearby store on Northumberland Street where they reviewed the paperwork (in the bundle at pages **446-513**).

37. The 37 transactions looked at occurred over a 4 month period from January to April 2018.The most in one month was 13, (April 2018). Having examined the paperwork relating to the transactions. Mr Evans then decided then that he needed to undertake an investigation meeting with the claimant.

38. I pause here to address a particular dispute between the parties. It was part of the claimant's case that her dismissal was pre-determined from the outset and that Mr Evans had also pre-determined the fact that the claimant would be subject to a disciplinary investigation – even prior to going to Eldon Square that morning. The Claimant maintained that the wider compliance issue (which went beyond her store) was of such a concern for the Respondent that she had been caught up in a wider pre-judged campaign to dismiss those store managers at the offending stores.

39. I reject this contention. Had that been the case, I would have expected Mr Evans to have visited the store, retrieved the paper-work and suspended the claimant there and then. I accept his evidence that he only decided to interview the claimant once he had gone through the paperwork at the store in Northumberland Street, where he could see that the transactions did not appear to have processed in accordance with policy.

40. I shall say at this point that I also reject the suggestion that Ms Benton had pre-determined the claimant's dismissal. However, I address that later at the appropriate point in the sequence of events.

41. Returning to the facts as I have found them, Mr Evans then asked the Claimant to come to the Northumberland Street store. She did so. He and Mr Potter interviewed the claimant. The Claimant fully co-operated. The notes of the 8th June meeting are at page **219-221**.The paperwork which lay behind the transactions on page **194** was there in the room to be referred to if necessary. During the meeting the claimant was able to refer to the paperwork and did so in order to check a particular transaction. However, apart from the one she asked to see, she did not review all of the paperwork. Mr Evans accepted this in his evidence.

42. This paperwork was not copied and given to the claimant to take away with her either at the end of that meeting or at any point thereafter up to and including the appeal hearing. There was an issue between the parties as to whether (in the context of conducting a reasonable investigation and following a fair procedure) the Respondent acted reasonably either on that day or thereafter by not providing the Claimant with the underlying paperwork.

43. Putting the question of fairness to one side for now, I find that the claimant was afforded the opportunity of looking at the paperwork during the meeting of 8th June 2018 in the presence of Mr Evans and Mr Potter – in the sense that she was in no way prevented from reviewing it. It can be seen from the notes of interview on page **220** that the claimant asked to be passed the paperwork on the subject of a particular transaction. However, she was not afforded any break in order to do review the documents more widely nor was she given copies to take away. The Claimant could have asked to do this but she did not. However, she cannot be criticised for failing to do so, as from her perspective she was simply cooperating with senior management at their request and answering their questions. She had not been told that she was facing any allegations of misconduct at this stage (although she believed that matters could lead to disciplinary allegations). It cannot be right that the onus should be on the claimant to ask for a break or to ask to be provided with the paperwork. That responsibility primarily rests with the Respondent.

44. As much the Claimant could have asked for copies to be provided, as the Respondent submits, it would have been easy for Mr Evans of his own volition to arrange for the documents to be photocopied and provided to the Claimant. The facilities were there for this to happen. He did not have to provide copies on the day – he could have provided them later. Mr Evans did not consciously decide not to provide the Claimant with copies. He simply did not think of doing this.

45. The Claimant understood during this meeting that Mr Evans was investigating the issue of breach of ADS and proofs policies and the processing of declined transactions through the till. She understood that she was being asked to explain

her understanding of the policies, how the breaches had happened and whether she had deliberately bypassed procedures and policies in order to achieve a sale. For example, she was asked about a transaction which was declined on Excalibur at 14:05 on 05 February 2018 but the transaction was put through the till at 14:15. She accepted that this should not happen. She asked to see if she was in the store on that day. She was. She asked which adviser did this transaction and was told that it was 'Robert'. She understood during that meeting that these matters could potentially lead to disciplinary proceedings.

46. The claimant accepted that the ADS policy regarding ID proofs and processing transactions was not adhered to but denied that she did this maliciously or that she had instructed her team to bypass procedures. The claimant also explained to Mr Evans that, in the case of sales which were not connected (and therefore did not complete) she believed that these 'came off the numbers'. This was a reference to the Claimant's stated belief that the unconnected ADS transactions came off the store's records in respect of both 'value' and 'volume' of sales – so that unconnected (or non-completed) transactions would not count towards the store's performance in respect of both sales volume or sales revenue so that there could be no benefit to her or to the store in deliberately bypassing the ADS and proofs policies. In fact, sales which are 'unconnected' (to the network) come off 'value' but not 'volume' for the purposes of assessing store performance and calculating bonuses.

47. At the end of the meeting the Claimant was suspended for failing to adhere to the proofs policy in relation to ADS sales on 37 occasions and for potential further breaches regarding unconnected ADS sales between 01 January 2018 and the end of April 2018. A letter dated 12 June 2018 [page **207-209**] was sent to the claimant confirming the suspension.

48. Following the meeting with the claimant on 08 June 2018 Mr Evans interviewed a number of sales advisers, namely:

    (1) Iqbal Chowdhury ('IC') [page **195** & **222**]
    (2) Rhowena Hall ('RH') [page **196** & **223**]
    (3) Emily Sadler ('ES') [page **197** & **224**]
    (4) Christopher McAnaney ('CM') [page **199-200** & **226-227**]

    Mr Evans tried to speak to Bethany Free and Antonia Reay but was unable to.

49. ES said that advisers would process sales through ADS if an item was not in stock or if it was a student discount transaction ('Unidays') or if the customer did not have the right ID on the day. On this latter point she said that the Claimant and Bethany Freer (the Senior Adviser) instructed her to use ADS if a customer did not have a passport or driving license. She said she had never been briefed on the correct policy.

50. RH said that she believed the process on ADS sales was similar to the process undertaken on an online order; that if the customer had no ID on the day they

they place the order in the store it does not matter as they had to produce it when they collected the phone. She said that if a customer was declined on an EIV check she would still process the transaction through the till because this was what she was instructed to do by the Store Manager (the Claimant) and the 'senior' (Bethany Freer). She said that they both told her that if a customer did not have ID on the day to process a sale through ADS. She said she had never been taken through the policy.

51. IC said that he did not know he was supposed to take an ID scan or do an EIV check. He said he understood that the ADS team would carry out the EIV check. He said that if a customer was declined, he would still process the transaction through the till because he had been told to do this by Bethany Freer. He said he had never been taken through the correct process and that he had never been made aware of the proofs policy on ADS sales

52. CM said that he believed that proof of ID was required when the customer returned to collect the device and that when calling the ADS team, the EIV check would be done by them. He said that he was told this by Bethany Freer. He said he was never taken through the proofs policy by the Claimant. He said he had never been instructed to use ADS when customers were declined in store or if they had failed EIV or did not have any photo ID.

53. These statements were obtained after the Claimant had been interviewed. Mr Evans did not interview the Claimant again to obtain her response to these statements which is not on the face of things in accordance with the Respondent's investigation procedures under section 4 (final bullet point on **page 73**).

54. Mr Evans prepared the report at page **214-227**. The analysis part of the report is short. It consists of a short summary on page **218**. The remainder is a copy of the interview notes of the four employees referred to above.

55. under section 4, "summary of facts and investigating managers recommendation" Mr Evans wrote:

"There have been several breaches of the proofs policy in store, which indicates a lack of management control and failing to follow policies and procedures as set outlined in the store manager role profile.

The mitigation to these allegations were that Megan didn't deem these sales to be her transactions personally as in she didn't process them. There is a lack of knowledge from the Megan and team around the policies, in particular the proofs policy for ADS sales, this is highlighted in the investigation notes.

Megan has instructed advisers to use the ADS systems to process high-end handset sales in order to bypass certain aspects of the proofs policy in order to gain a sale, this is highlighted in statements from the members of the team.

The list of the policies breached are Proof Policy, Assisted Digital Sales Policy, Unethical Selling Policy, The Way We Work and Standards Of Behaviour Policy.

I recommend that this case is progressed as gross misconduct under the company's disciplinary procedure. In the interim Megan has been suspended from 8 June 2018 pending the discipline meeting."

56. The Claimant was invited to a disciplinary hearing (page **51-54**). The letter set out the following allegations:

"It is alleged that you were negligent in carrying out your role of store manager which has been specifically demonstrated by the following:

1 failure to comply with the correct company procedure/working practices.

2 failure to comply with your managerial responsibilities

3 gross negligence

57. Detail of the allegations was then provided under 5 bullet points.

Disciplinary Hearing: 9th July 2019

58. The claimant attended a disciplinary hearing on 9th July 2018 before Ms Benton. In fact, as it turned out the hearing was split over three separate dates. The claimant was accompanied by another store manager, Hazel Sharp. The notes of the 9th July meeting are at pages **229-240**. Ms Benton was aware from the point at which she was asked to chair the disciplinary meeting that there were other similar investigations in relation to non-adherence to the ADS policy in other stores. She did not know any of the details of those cases save that there had been two dismissals.

59. Regarding the allegations set out in the letter inviting the Claimant to a disciplinary hearing, Ms Benton understood the first bullet point in the disciplinary invite letter to be an allegation of dishonesty. The third bullet point related to the Claimant's position as Store Manager and her alleged failure to ensure that the policies were adhered to, amounting to gross negligence. Enclosed with the letter was a number of documents among them, the ADS Policy, the Proof Policy, the notes of the claimant investigation meeting with Mr Evans (of 8th June 2018), the interview notes of the four employees referred to in paragraph 48 above and the spreadsheet at page **194**.

60. The disciplinary hearing did not conclude on 9th July because Ms Benton decided that she needed to undertake some further investigations in light of the claimant's representations. It was reconvened on 16th July 2018. The notes of that reconvened meeting are at pages **268-276**. There was then a third meeting 17th of July 2018. Notes of that meeting are at pages **291-299**. At the end of that third

meeting, Ms Benton made her decision and delivered the outcome to the Claimant, which was that she was to be summarily dismissed.

61. Ms Benton did not look at any of the underlying paperwork herself and it was not available at the disciplinary hearings. The spreadsheet on page **194** does not show who processed each sale. In cross-examination Ms Benton accepted that the underlying documentation would show who processed each transaction; that from a study of the documentation you might potentially find that one or two individuals were processing more ADS sales than others in breach of policy; and that this in turn could potentially support the suggestion – if those same persons had been putting the blame on to the Claimant - that they might have a reason for doing so, to deflect criticism of themselves.

62. The claimant brought with her to the disciplinary hearing two statements, one from Antonia Reay (page **317**) and the other from Bethany Freer (page **318**). Antonia Reay's statement was supportive and said that the claimant had never asked her to do anything outside procedure or policy and had never put pressure on her or to process any sales, including ADS, incorrectly. Bethany Freer's statement was to similar effect. All of the statements were considered and discussed at the hearing.

63. The claimant strenuously denied instructing ES to put a sale through if a customer did not have ID. She could not think why ES would say this. She also said she could not understand why RH would say that the claimant had instructed her to process declined customers through the till.

64. At this meeting the Claimant accepted that she, and therefore the store, had not adhered to the ADS policy because proof of ID was not taken at the outset of the transactions. The claimant explained to Ms Benton that she believed, in respect of ADS sales, that the policy was to check for proof of ID only at the point of collection – that is, when the customer returned to the store to collect the phone and not at the outset of the transaction.

65. Ms Benton was of the view that if what the Claimant was saying was true – namely that she did not understand that the ADS policy required proof of ID to be taken at the beginning of an ADS transaction and had not instructed her team to bypass procedures – this could be confirmed by checking the documentation for ADS sales prior to January 2018. Mr Evan's investigation had only looked at the particular ADS transactions which had been highlighted to him in the period January – April 2018.Therefore, the disciplinary meeting was adjourned. Ms Benton personally went to the Eldon Square store to investigate ADS sales prior to January 2018.

Ms Benton's further investigations

66. Ms Benton found ADS transactions on:

- 04 November 2017 (x 1)
- 20 November 2017 (x 4)
- 24 November 2017 (x 2)
- 01 December 2017 (x 1)
- 31 December 2017 (x 1)

These are summarised in the email of 13th July 2019 [page **241**].

67. The advisers involved in those 9 transactions were Robert, Antonia, Rhowena (RH), Bethany and Iqbal (IC). The documents within the daily envelopes showed that the transactions were undertaken in accordance with the policies, in that ID had been validated at the beginning of the transaction - for example, Antonia's transaction on 20 November 2017 on pages **243, 244 and 245** and Rhowena's two transactions on that day at pages **249-252**.

68. Ms Crew put to Ms Benton that while her intentions in going to investigate were commendable she was, nevertheless, selective in the information she pulled out. I reject this suggestion. Ms Benton went to investigate for the right reason – to see if there was information which might support what the claimant said. It is inconsistent with that (accepted) state of mind to suggest that she then selected, for example, only those ADS sales which were done correctly or did not pull out all ADS transactions in the two month period. This suggestion by Ms Crew was related to the wider submission that the Claimant's fate had been pre-determined. I reject the suggestion that Ms Benton had pre-determined the Claimant's fate, just as I reject the suggestion that Mr Evans had pre-determined it.

69. Ms Crew submitted that Ms Benton's oral evidence that she had 'randomly' selected November and December was unreliable and inconsistent with her witness statement at paragraphs 9-10. I do not agree. There is no or no substantial inconsistency. The wording of the witness statement may not be precise but the effect of both Ms Benton's witness statement and her oral evidence is clear, namely she did not go with any pre-determined idea of selecting only records of connected ADS sales, or only documents which counted against the Claimant. I accept that evidence. Her approach was 'random' in the sense that she did not know what she was going to obtain when she looked at the first month which happened to be November (and to that extent was 'random'). She then looked at December on the same basis.

70. What Ms Benton found was a number of ADS sales which were accompanied by proof of ID, which she regarded as demonstrating that the policy had been correctly followed in those months. Ms Benton genuinely believed she had retrieved all the ADS sales for those two months from the paperwork which she inspected. Of the ADS sales transacted in November-December 2017, she found that all of them had been done in accordance with the policy (e.g. page **264**). It later transpired that there was in fact more than just the ADS transactions discovered by Ms Benton in that period. How many more was an issue between

the parties. Mr Byrne's evidence was that there was 1 additional ADS sale in that period (which Ms Benton had missed).

71. Ms Crew invited me to reject Mr Byrne's evidence that there was only 'one' additional ADS sale, because if that had been the case she submitted that Mr Adair would not have referred to there being '*more but not a significant number*.' Ms Crew submitted that on the balance of probabilities there must have been more than one additional ADS sale in the period, as suggested by Mr Byrne's witness statement, paragraph 29. Ms Crew has no evidence to support the assertion that there was more than one which was missed.

72. I accept the evidence of Mr Byrne that there was one additional ADS sale during the period of November-December. His evidence must be looked at in the context of Ms Benton taking the initiative of going to the store and genuinely looking for ADS sales records that would confirm the Claimant's case. She believed that she had retrieved all the ADS sales for that period albeit she could not be 100%. While it is entirely possible that she might miss a sale when checking through the records I consider it unlikely that she would miss a significant number.

73. Mr Byrne's reference in his witness statement to 'not a significant number' is not inconsistent with his evidence that there was one additional ADS sale. When he first spoke to Mr Adair he (Mr Adair) did not have the records in front of him. I take account of the fact that there is no note of the subsequent conversation between Mr Byrne and Mr Adair when Mr Adair confirmed to him that there had in fact been one more. I am alive to the very real risk of a witness embellishing matters to suit the argument as it develops in the course of a hearing. However, everyone, including the claimant, was agreed that ADS sales were relatively small in number compared to other sales. I take Mr Byrne's evidence alongside that of the Claimant and also the evidence of Ms Benton who went through the documents personally. Further, although Ms Crew suggested that there must have been more than one other ADS sale she had no evidence to support this assertion.

74. I conclude that it is unlikely that there were many more than the 9 located by Ms Benton. I accept that Mr Byrne was being truthful when he said that Mr Adair subsequently told him there was one further ADS transaction – his oral evidence was not inconsistent with his written statement. In any event, the issue is what the Respondent genuinely and reasonably understood to be the case at the time. The substance of the point in issue was that there was, on Ms Benton's assessment (and subsequently Mr Byrne's) evidence of an apparent change in process before and after January 2017.

75. In cross examination Ms Benton was asked why she did not widen her investigation and look at all ADS sales over say a quarterly period. She said that she did not feel she needed to because from what she saw the claimant (or at least the sales advisers) had understood the policy because the transactions had been done in accordance with it. If the claimant's and the team's understanding

of the policy had never changed, she reasoned that all or most of the transactions in November-December would in all likelihood also have been done incorrectly as they had been in the January-April 2018 period. The sales records which she had obtained showed the ID process being followed correctly on ADS transactions.

16 July 2018

76. The reconvened disciplinary meeting took place on 16 July 2018.The claimant had by this date sent to Ms Benton a "mitigating statement" (**page 278-281**). In that statement, the claimant said that of the 37 sales she had only been in the store on 15 occasions. She mentioned that it was unfair that statements had not been taken from the whole team and mentioned, in particular, obtaining statements from Ellen Kearney and Michaela Sewell. She again reiterated her innocence accepting that she had not applied the policy correctly and stating that there was no loss to the business or any increased risk of fraud because ID was checked when the customer came to the store to collect the phone. She also highlighted her good record with the company. She referred to some difficult personal circumstances which had put her under considerable stress at home. She apologised for failing to follow the ADS policy.

77. Ms Benton told the claimant that she had found examples of ADS sales being processed correctly in the past. Ms Benton noted that Antonia had carried out an ADS transaction correctly before January 2018 but incorrectly after that date and that Beth had also carried out transactions before January in the correct manner but incorrectly after that. The claimant could not explain why this had happened and added that they were not instructed by her to do things any differently.

78. The claimant explained that some of her staff had come from other stores including Robert (from Dundee in September 2017), Antonia (from South Yorkshire November 2017), best (from North East – Metro 3) in October 2017 and Rhowena (from North East – Metro 3) in June 2017. The claimant's point, was that the change of staff and in particular the arrival of new staff in the latter part of 2017 may well explain the fact that ADS sales were being processed incorrectly. She said that none of these staff brought to her attention that the procedure in the Claimant's store was different to other stores. At the end of the meeting the claimant said that Emily and Rhowena were unreliable.

79. Following this meeting, on 17th of July 2017 Miss Benton, on the Claimant's request, interviewed Michaela Sewell and Ellen Kearney. The Ellen Kearney interview is at page **282**. The Michaella Sewell interview is recorded on pages **284-285**. Ellen confirmed her understanding of the ADS policy, she mentioned that the claimant had never asked her to do anything outside of policy. She understood the ADF policy to require checking ID. She said that she left the Eldon Square store in September October 2017. She said that although they did not do many ADS sales, to her knowledge the policy had been followed. She could only

assume that the claimant was aware of the ADS policy. Michaela confirmed that the claimant had not given any instruction to go outside any policy in store. She referred to one occasion where she says that the claimant undermined her by telling her to instruct a sales adviser to put through a sale even though the customer had no proof of ID.

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80. The final disciplinary meeting took place 17 July 2018. The notes of this meeting are pages **291 to 299**. As she had on the other occasions, Ms Benton asked the claimant whether she had any questions before they start. The claimant replied that she did not. Again this was an opportunity for her to ask for copies of the paperwork which sat behind the transactions. The claimant again maintained her innocence of any wrongdoing while accepting that she had misunderstood the ADS policy and had not ensured that it was correctly applied.

81. Ms Benton found all three allegations proved. She dismissed the Claimant and communicated her decision to her at the end of the hearing. She wrote to the claimant on 25th of July 2018 setting out her reasons for summary dismissal (page **321 - 332**). Ms Benton believed the allegations came under 'misconduct' on page **61** of the disciplinary policy but also under 'gross misconduct' on page **63** and **64**.

82. In cross examination Ms Benton accepted that the essential difference between 'conduct' and 'gross misconduct' was 'intentionality'. She believed that dishonesty was at the heart of the first allegation. She also believed that, whether dishonest or not, because of the lack of management control by the Claimant the Claimant's conduct fell under gross negligence (under the disciplinary procedure section "what's gross misconduct") on page **63** of the bundle. She accepted in cross examination that the Claimant would probably have addressed issues regarding ADS had compliance drawn them to her attention during their compliance visits.

83. In evidence Ms Benton said that while manipulation was at the heart of the allegations both the manipulation and the lack of management control by the claimant in applying the policies came together in her conclusion to dismiss. She said that she believed the failure to follow the policies fell under 'gross negligence' on page **63** and that she would have dismissed the Claimant summarily on that alone.

84. In relation to gross negligence the evidence and her conclusions are found on **page 326-329**. At the final disciplinary meeting on 17th July 2018, she concluded (**page 297**) that '*The policy has previously been adhered to and you have been unable to provide a clear reason for the change in behaviour in store. This raised concerns on the level of trust in you in your role as a store manager*.' That was a reference to the evidence obtained by Ms Benton's further investigation of matters in November and December 2017.

85. Ms Benton also concluded in relation to the allegation of gross negligence (on **page 297**) that '*the impact on the business and your colleagues is clear, you are in a role as store manager with a high level of trust and previous customer lead. This amount of unconnected sales shows gross negligence and breach of trust in your as a store manager and of the ethical selling policy…You have explained your reason for incorrect process is due to your lack of knowledge, yet I fail to see how you were able to be unaware of this process when it has been completed correctly in store previously and witness statements to show the store was awareness of the process. Along with paper work evidence*.'

86. In the letter of dismissal at pages **329** and **330** it is clear that Ms Benton dismissed because of the overall conduct the Claimant. There was a number of reasons which operated on her mind and caused her to dismiss the Claimant: her belief and conclusion that the Claimant had deliberately breached processes so as to manipulate sales figures; that she had instructed her staff to breach processes; that she had seriously failed in her key responsibilities as a store manager to apply and cascade to her staff and to ensure that they followed the Respondent's policies on proofs and sales in connection with ADS sales. These reasons made up one composite reason for the Claimant's dismissal.

Appeal against dismissal

87. The claimant appealed the decision by way of a letter dated 6th August 2018. The appeal was heard by Mr David Byrne, regional manager on 23rd August 2018. The notes of the appeal meeting pages **364** to **376**. The appeal was dismissed and the outcome was sent to the claimant on 25 September 2018 (pages **399 – 419**).

88. Mr Byrne went through each point raised in the appeal. While it is right to say that some of the points are dealt with briefly in the outcome letter, it does not follow from this that he did not give the matters careful consideration, as was submitted by Ms Crew. It is necessary to stand back and look at the document as a whole. It is clear that Mr Byrne addressed all of the grounds of appeal, he considered all of the evidence before him and Ms Benton. He concluded that he could find no basis for overturning Ms Benton's decision.

89. Mr Byrne considered the points raised by the Claimant in relation to the statements provided by ES and RH. He concluded that even based on what the claimant had said (recorded at **page 404(e) and (f) and 405(i)**) there was no basis for suggesting that either had an axe to grind against the Claimant (which is what the Claimant had effectively suggested). However, neither he or Ms Benton – nor Mr Evans - had ever put any of the Claimant's points to the employee witnesses.

90. It was also put to Mr Byrne by Ms Crew that he was not approaching the claimant's appeal with an open mind – because he was aware of other

investigations into stores in his region and that he was annoyed that this was happening 'on his patch' (again part of the pre-determined point). I reject this. Mr Byrne was aware that other stores were being investigated. However, there was no evidence that he was involved in any of the disciplinary action taken in those cases, or that he knew anything more than that one investigation had resulted in a dismissal, which is what he said his understanding was at the time of the Claimant's appeal. This goes nowhere near showing that he did not approach the Claimant's case with an open mind. This point was not put by Ms Crew with much enthusiasm or vigour.

91. Mr Byrne was asked by Ms Crew why he did not arrange for the claimant to be provided with the paperwork which sat behind the 37 ADS transactions. Mr Byrne said that he agreed that the claimant should have been provided with the paperwork (indeed he said as much in the appeal outcome letter) but that he did not regard her statement that she had not been provided with the documents as a request to be provided with them for the purposes of the appeal.

92. I find it difficult to accept this. A reasonable employer would not have regarded the Claimant's reference to not receiving the paperwork as a mere statement of fact, as opposed to that plus a request to be provided with the paperwork. It is a pedantic and literal construction. In any event, even as a statement, any reasonable employer having seen that the employee was advancing as a ground of appeal that there had been a failure to provide her with appropriate documentation would have ensured that she was provided with it for the purposes of the appeal. The point of making the statement was that she saw this failure as being unfair to her.

93. At **page 497(a)** Mr Byrne agreed that the Claimant should have been provided with the documents and that this was in breach of ACAS code of practise and EE's policy but added that this did not change the fact that she should have been aware of these sales and controlling what happened in her store. This misses the point that the Claimant was dismissed not only for not controlling what happened in the store but for dishonest manipulation of processes. The paperwork was relevant (it was only after a perusal of it that Mr Evans decided to proceed to an investigatory meeting, and Mr Bryne regarded it as being relevant).

Relevant law

Unfair dismissal

94. It is for the employer to show the principal reason for dismissal and that it is a reason falling within section 98(2) or that it is for some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. The reference to the 'reason' or 'principal reason' in section 98(1)(a) and s98(4) is not a reference to the category of reasons in section 98(2)(a)-(d) or for that matter in section 98(1)(b). It is a reference to the actual reason for dismissal (**Robinson v Combat Stress** UKEAT/0310/14

unreported). The categorisation of that reason (i.e. within which of subsection 98(2)(a)-(d) it falls) is a matter of legal analysis: **Wilson v Post Office** [2000] IRLR 834, CA.

95. A reason for dismissal 'is the set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee: **Abernethy v Mott, Hay and Anderson** [1974] ICR 323, CA. In a more recent analysis in **Croydon Health Services NHS Trust v Beatt** [2017] ICR 1240, CA, Underhill LJ said that the 'reason' for dismissal connotes the factor or factors operating on the mind of the decision maker which causes them to take the decision. It is a case of considering the decision-maker's motivation.

96. An employer may have multiple reasons for dismissing an employee. In **Robinson v Combat Stress** Langstaff P said at paragraphs 20 and 21:

"where an employer has a number of reasons which together form a composite reason for dismissal, the tribunal's task is to have regard to the whole of those reasons in assessing fairness. Where dismissal is for a number of events which have taken place separately, each of which is to the discredit of the employee in the eyes of the employer, then to ask if that dismissal would have occurred if only some of those incidents had been established to the employer's satisfaction, rather than all involves close evaluation of the employer's reasoning. Was it actually that once satisfied of one event, the second merely leant emphasis to what had already been decided? There may be many situations in which, having regard to the whole of the reason the employer actually had for dismissal, it is nonetheless fair to dismiss.

All must depend on the employer's evidence and the Tribunal's approach to it. But that approach must be to ask first what the reason was for the dismissal, and to deal with whether the employer acted reasonably or unreasonably by having regard to that reason: that is, the totality of the reason which the employer gives."

97. Where the reason is a composite of a number of conclusions about a number of different events the tribunal must examine all of the employer's reasoning as that was the actual reason for its dismissal.

98. In a 'misconduct' dismissal, the employer must also show that the principal reason for dismissal relates to the conduct of the employee. If it is established that the reason for dismissal relates to conduct the next question is whether the employer has acted reasonably in treating that reason as a sufficient reason for dismissal – s98(4) ERA 1996. The burden here is, of course, neutral. It is not for the employer to prove that it acted reasonably in this regard. The Tribunal must not put itself in the position of the employer. The Tribunal must confine its consideration of the facts to those found by the employer at the time of dismissal and not its own findings of fact regarding the employee's conduct.

99. Section 98(4) poses a single question namely whether the employer acted reasonably or unreasonably in treating the reason for dismissal as a sufficient reason for dismissing the Claimant. It requires the Tribunal to apply an objective standard to the reasonableness of the investigation, the procedure adopted and the decision itself. However, they are not separate questions – they all feed into the single question under section 98(4). Whilst an unfair dismissal case will often require a tribunal to consider what are referred to as 'substantive' and 'procedural' fairness it is important to recognise that the tribunal is not answering whether there has been 'substantive' or 'procedural' fairness as separate questions.

100. The approach to be taken when considering s98(4) is the well-known band of reasonable responses, summarised by the EAT in **Iceland v Frozen Foods Ltd v Jones** [1983] I.C.R. 17. The Tribunal must take as the starting point the words of s98(4). It must determine whether in the particular circumstances the decision to dismiss was within the band of reasonable responses which a reasonable employer might have adopted. In assessing the reasonableness of the response it must do so by reference to the objective standard of the hypothetical reasonable employer (**Tayeh v Barchester Healthcare Ltd** [2013] IRLR 387, CA @ para 49). The Tribunal must not substitute its own view as to what was the right course of action.

101. In misconduct cases, the approach which a Tribunal takes is guided by the well known decision of **British Home Stores v Burchell** [1978] IRLR 379, EAT. Once the employer has shown a valid reason for dismissal the Tribunal there are three questions:

(i) Did the employer carry out a reasonable investigation?

(ii) Did the employer believe that the employee was guilty of the conduct complained of?

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

102. In gross misconduct unfair dismissal cases, in determining the question of fairness, it is unnecessary for the Tribunal to embark on any analysis of whether the conduct for which the employee was dismissed amounts to gross misconduct. However, where an employer dismisses an employee for gross misconduct, it is relevant to ask whether the employer acted reasonably in characterising the conduct as gross misconduct – and this means inevitably asking whether the conduct for which the employee was dismissed was capable of amounting to gross misconduct – see **Sandwell & West Birmingham Hospitals NHS Trust v Westwood** (UKEAT/0032/09/LA) [2009] and **Eastland Homes Partnership Ltd v Cunningham** (EAT/0272/13). This means asking two questions:

(1) is the conduct for which the employee was dismissed conduct which, looked at objectively, capable of amounting to gross misconduct, and

(2) Did the employer act reasonably in characterising the conduct as gross misconduct?

Fair procedures

103. A dismissal may be unfair because the employer has failed to follow a fair procedure. In considering whether an employer adopted a fair procedure, the range of reasonable responses test applies: **Sainsbury plc v Hitt** [2003] I.C.R. 111, CA. The fairness of a process which results in dismissal must be assessed overall.

Polkey

104. What is known as 'the Polkey principle' (**Polkey v AD Dayton Services** [1988] I.C.R. 142,HL) is an example of the application of section 123(1). Under this section the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer. A tribunal may reduce the compensatory award where the unfairly dismissed employee could have been dismissed fairly at a later stage or if a proper and fair procedure had been followed. Thus the 'Polkey' exercise is predictive in the sense that the Tribunal should consider whether the particular employer could have dismissed fairly and if so the chances whether it would have done so. The tribunal is not deciding the matter on balance. It is not to ask what it would have done if it were the employer. It is assessing the chances of what the actual employer would have done: **Hill v Governing Body of Great Tey Primary School** [2013] I.C.R. 691, EAT.

105. Whilst the Tribunal will undertake the exercise based on an evaluation of the evidence before it, the exercise almost inevitably involves a consideration of uncertainties and an element of speculation. The principles are most helpfully summarised in the judgment of Elias J (as he was) in **Software 2000 Ltd v Andrews** [2007] I.C.R. 825, EAT (paragraphs 53 and 54).

Contributory conduct

106. If a dismissal is found to be unfair, under section 123(6) ERA where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it must reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding even in cases where the parties do not raise it as an issue (**Swallow Security Services Ltd v Millicent** [2009] ALL ER (D) 299, EAT). The relevant conduct must be culpable or blameworthy and (for the purposes of considering a reduction of the compensatory award) must have actually caused or contributed to the dismissal: **Nelson v BBC (No2)** [1980] I.C.R. 110, CA. For the purposes of the compensatory award there must be a causal connection between the conduct

and the dismissal. The conduct must be to some extent culpable or blameworthy (**Nelson v BBC (No.2)** [1980] I.C.R. 110, CA). Langstaff J offered tribunals some guidance in the case of **Steen v ASP Packaging** [2014] I.C.R. 56, EAT, namely that the following questions should be asked: (1) what was the conduct in question? (2) was it blameworthy? (3) did it cause or contribute to the dismissal? (for the purposes of the compensatory award) (4) to what extent should the award be reduced?

107. There is an equivalent provision for reduction of the basic award, section 122(2) which states that '*where the tribunal considers that any conduct of the complainant before the dismissal…was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly*'. The tribunal has a wider discretion to reduce the basic award on grounds of any conduct of the employee prior to dismissal. It is not limited to conduct which has caused or contributed to the dismissal.

108. Unlike the position under section 98(4) ERA where the Tribunal must confine its consideration of the facts to those found by the employer at the time of the dismissal, the position is different when the Tribunal comes to consider whether, and if so to what extent, the employee might be said to have contributed to the dismissal. In this regard, the Tribunal is bound to come to its own view on the evidence before it. Decisions on contributory fault are for the Tribunal to make, if a decision is held to be unfair. It is the claimant's conduct that is in issue and not that of any others. The conduct must be established by the evidence.

Wrongful dismissal – breach of contract

109. If an employee is dismissed with no notice or in adequate notice in circumstances which do not entitle the employer to dismiss summarily, this will amount to a wrongful dismissal and the employee will be entitled to claim damages in respect of the contractual notice.

110. An employer is entitled to terminate a contract without notice in circumstances where the employee has committed an act of gross misconduct. It is for the employer to prove on the balance of probabilities whether the employee has committed gross misconduct. Whether an employee has committed gross misconduct entitling the employer to terminate summarily is a question of fact in each case. However, the courts have considered when 'misconduct' might properly be described as 'gross': **Neary v Dean of Westminster** IRLR [1999] 288 (para 22). In **Neary**, Lord Jauncey of Tulichettle rejected a submission that gross misconduct was limited to cases of dishonesty or intentional wrongdoing.

111. **Neary** was considered more recently by the Court of Appeal in **Adesokan v Sainsbury's Supermarkets Ltd** [2017 I.C.R. 590. At paragraph 23, Elias LJ said that the focus was on the damage to the relationship between the parties;

that dishonesty and other deliberate actions which poison the relationship obviously fall into the category of gross misconduct but so in an appropriate case can an act of gross negligence. The question in any particular case will be whether a negligent dereliction of duty is so grave and weighty as to amount to a justification for summary dismissal. This involves an evaluation of the primary facts and an exercise of judgment. Whist the exercise is one of judgment, in paragraph 24 Elias LJ cautioned that the parameters of the exercise are not boundless and that "*it ought not readily to be found that a failure to act where there was no intentional decision to act contrary to or to undermine the employer's policies constitutes such a grave act of misconduct as to justify summary dismissal*."

Submissions

112. For the Claimant, Ms Crew said that she did not challenge the genuineness of Ms Benton's belief that the Claimant was guilty of the conduct charged against her. Despite that she submitted that the decision to dismiss had been pre-judged – albeit she did not advance this submission with much vigour. Ms Crew's main challenge was to the reasonableness of the Respondent's belief. In particular, she submitted that the investigation which was carried out was unreasonable; that it ought to have been over a wider period, examining at least the quarter period ending with December 2017, not just the months of November and December. She submitted that more employees should have been interviewed – for example Robert in Dundee and Antonia in S Yorkshire – that the failure to do so was unreasonable and that the failure to provide the Claimant with the underlying paperwork was a serious procedural flaw outside a band of reasonable responses resulting in unfairness to the Claimant. The Claimant should have been given copies of the paperwork if not during the investigatory meeting with Mr Evans then later. Had she been given the paperwork this would have enabled her to ask questions as to the identity of those who had processed the particular sales which were the subject of the investigation. This may have caused the Respondent to question the motivation of certain employees for pointing the finger at the Claimant.

113. Ms Crew said that the key finding was deliberate manipulation of the monthly sales figures. Referring to the Respondent's disciplinary procedure at pages **61** and **63** of the bundle she submitted that mere failure to comply with policies (to which the Claimant admitted) was misconduct, not gross misconduct, that the difference lay in the issue of 'intentionality'. The conduct of the Claimant in failing to adhere to the policies, Ms Crew submitted, was more akin to capability than misconduct and could have been addressed through training. She referred to Ms Benton's evidence in cross-examination that had concerns regarding breaches of ADS policy been brought to the Claimant's attention by the internal compliance visit, Ms Benton believed that the Claimant would have addressed the concerns. Ms Crew submitted that at the time of dismissal the Respondent closed its eyes to non-dishonest explanations for the failures to adhere to policy. She submitted that had a fair procedure been carried out the Respondent would

not have dismissed the Claimant. Ms Crew also submitted that the Claimant was not guilty of any blameworthy conduct.

114. On behalf of the Respondent, Mr Boyd reminded the tribunal that the range of reasonable responses test applied to all aspects of the dismissal process, including the investigation. It was not unreasonable not to provide the Claimant with the underlying paperwork because she understood the allegations and the issues and did not ask for it. Mr Boyd submitted that it was not a case of being denied paperwork. The Claimant could have asked for it but did not. As regards the complaint about not widening the investigation beyond November and December, while one employer might have done this, it was not unreasonable not to do so.

115. Mr Boyd emphasised the number of compliance visits (12 plus) after each of which the Claimant reviewed and accepted that she had reviewed all of the policies. The Claimant had never suggested she was confused or did not understand the policy. Mr Boyd submitted that the examples of gross misconduct on page **63** are not exhaustive. The Respondent does not have to prove that the Claimant's action was wilful and deliberate, although he submitted that it was, referring to the frequency of compliance visits and confirmation by her that she had read the policies.

116. He submitted that in terms of the witnesses interviewed during the investigation it was not a question of counting the number of statements in support of the Claimant and the number of statements that went against her. What was required was an overall assessment which is what Ms Benton did. Mr Boyd submitted that the evidence of Mr Byrne regarding the number of ADS sales in November and December should be accepted and that in any event the dispute went nowhere as there was a clear grounding in fact for the conclusion that procedures before the end of 2017 were followed whereas from January 2018 they were not.

117. Mr Boyd submitted that there was clearly an abject failure by the Claimant to apply the ADS policy, which she had read and which he submitted had to go beyond mere misunderstanding; that at the very least there had been a failure to read that which is absolutely clear and fundamental to the Respondent and to properly cascade it down. He submitted that the Claimant was guilty of a serious dereliction of duty of a weighty matter and that the tribunal should have regard to the potential if not the actual damage to the Respondent as a result.

118. Mr Boyd submitted that should the tribunal find any procedural unfairness there should be a very high percentage 'Polkey' reduction in the compensatory award to reflect the fact that the Claimant would have been fairly dismissed in any event.

119. Further, the basic and compensatory awards should be reduced in that the Claimant had contributed to her own dismissal by at the very least not

properly reading the policy following the 12 compliance visits when she said that she had; not cascading the policy down to staff and not briefing them on it; not appreciating that the documentation in November and December 2017 showed a particular process being adhered to (i.e. proof of ID being taken at the beginning of transaction) whereas January to April 2018 documentation showed a different process (no proof of ID being taken at the beginning of the transaction). Mr Boyd submitted that if the Claimant had been 'on the ball' in reviewing her paperwork, which was one of her key duties, one would expect her to have seen the differences and have acted on them.

Conclusions

Reason for dismissal

120. There was no serious challenge to the category of the reason for dismissal. Ms Crew accepted that the Respondent's reason for dismissal was one relating to conduct, albeit she submitted it sailed close to the wind, in that the reason almost had the appearance of a capability. However, I must first of all determine what the actual reason for dismissal was – before considering how that actual reason is to be categorised within section 98.

121. I conclude that Ms Benton dismissed the Claimant because she genuinely believed and concluded that:

(a) she deliberately (and dishonestly) bypassed the ADS/proofs policy and instructed her team to do so and

(b) she was guilty of a serious dereliction of her duties as a Store Manager by not ensuring management control over the application and cascading of policies amounting to gross negligence

122. Therefore, there were two reasons both of which formed a composite reason and which constitute the 'principal reason' for the Claimant's position. This is clear from the letter of dismissal (page **329** and **330**) and from the evidence of Ms Benton. The respondent has satisfied me that the reason for dismissal was related to conduct (which was not in any event challenged) and potentially fair.

Reasonableness of decision to dismiss – investigation and procedure

123. As stated above, section 98(4) poses a single question: whether the employer acted reasonably or unreasonably in treating the principal reason for dismissal as a sufficient reason for dismissing the employee. Although it is helpful to consider substantive and procedural aspects of the dismissal separately, the tribunal must then stand back and look at the overall picture to answer that single question. Even if Ms Benton could have rejected the allegation of dishonest manipulation and upheld the allegation of gross negligence and dismissed for that reason alone – the fact is that she did not. She dismissed for both of these things. As the principal reason for dismissal was in respect of both matters, I am

required to consider the overall fairness, including the fairness of the investigation and procedures adopted by the Respondent, having regard to both aspects. That Ms Benton might fairly have dismissed for one matter only can be reflected in remedy.

124. As regards reasonableness, Ms Crew submitted that a mere failure to follow a policy was misconduct (**page 61**) and that there were no reasonable grounds to conclude gross misconduct (**page 63**). I consider this as a submission that the Respondent acted unreasonably in characterising the Claimant's conduct as gross misconduct. Based on the overall findings of Ms Benton and the beliefs she held I conclude that the Claimant's conduct was capable of amounting to gross misconduct/gross negligence and that she acted reasonably in so characterising it. The policies were important policies of the Respondent and there was a clear warning that the policies were regarded as such and that dismissal might ensue on breach of the policies.

125. I have found that Ms Benton's conclusion and reason for dismissal was not based only on the allegation of deliberate manipulation. She concluded that the Claimant was grossly negligent in the performance of her duties. In evidence she said that the Claimant had failed to manage the store to ensure that the correct policy was adhered to. The Claimant admitted as much. She accepted that each time compliance visited she would and did review all the policies. She had signed a sheet saying that she had read the proofs policy which applied to all in store purchases. There was in this respect a complete failure to apply the proofs policy, which I conclude was not ambiguous in any way. There was no reasonable basis on which the Claimant could have considered that the proofs requirement for ADS sales was like that for online sales.

126. Considering the findings of fact overall, I find that the Claimant was unfairly dismissed because certain aspects of the investigation and the procedure adopted by the Respondent into the allegation of dishonest manipulation and instruction of staff were outside a range of reasonable responses open to a reasonable employer. Although the Respondent had a genuine belief based on the information available to it, the belief that the Claimant had intentionally/deliberately breached policies so as to manipulate sales figures was not based on a reasonable investigation. An employer must carry out as much investigation as was reasonable in all the circumstances. There is no hard and fast rule as to the level of inquiry required – that depends on the particular circumstances including the gravity of the allegation. The allegation that the Claimant dishonestly manipulated, and instructed her staff to do so is a particularly serious allegation. The ACAS Guide on Discipline and Grievance says that the nature and extent of the investigations will depend on the seriousness of the matter and the more serious it is then the more thorough the investigation should be. Although tribunals are not required to have regard to the ACAS Guide, the suggestion that more serious allegations warrant a more thorough investigation is uncontroversial.

Failure to put the Claimant's account to the witnesses

127. A reasonable employer would have ensured that points which the Claimant made about the transactions and the employees who were involved in the transactions were put to them for comment. The failure to do so deprived the Claimant of the benefit of their responses to the points she made about their statements – Ms Benton could then have weighed their full accounts against the Claimant's account.

128. The Respondent's own procedure (at page **73**) states that new evidence that comes to light after the investigation meeting **will** need to be put to the employee and **will** therefore require a further investigatory meeting. There was significant new evidence obtained after the one and only investigatory meeting with the Claimant (which took place before the Claimant was charged with any particular allegations), namely the four statements of the employees and in particular the statements of ES, RH and IC which were adverse to her. Whilst the failure to follow its own procedure will not in itself result in a finding of unfair dismissal, it is a factor in the overall assessment of reasonableness. I have considered the overall extent of the failure.

129. There must be a reason that the Respondent's own policy mandates a further investigatory meeting where significant evidence is gathered after the initial interview – I find that it is to ensure that the Claimant is presented with an opportunity, at the investigation stage, to know what evidence has been gathered, and to have an opportunity to respond to that evidence, so that those responses could be considered by the investigator prior to making any recommendation regarding disciplinary action. It would enable the Claimant to ask the investigator to put questions to those employees or simply to provide the investigator with her account so that the investigator may then decide if it is necessary to return to the employees in question and test the accounts of the employees. This is particularly important in a case such as this where a serious allegation of dishonestly manipulating procedures amounting to gross misconduct is made against her and the Claimant has no other avenue by which to put points to the employees or to raise questions of them other than through the investigator and/or the decision-maker.

Failure to provide the documentation/underlying paperwork behind the transactions

130. Mr Evans failed to provide the Claimant with the underlying documentation lying behind the transactions identified on the spreadsheets. I do not believe Mr Evans can be criticised for not providing copies at the investigatory meeting on 08 June 2019. He had the documents with him in the room and the Claimant had an opportunity to consider them and she did look at certainly one transaction. However, a reasonable employer would, thereafter, have provided her with a copy of the documents. They were plainly relevant documents. It was only after perusing the documents that Mr Evans decided that he needed to interview the

Claimant about the transactions. They were on his account relevant to his assessment of the situation. A reasonable employer would have recognised that the Claimant should, as a matter of procedural fairness, receive copies after that first meeting to afford her time and opportunity to process the details away from the pressure of an investigatory meeting.

131. I have taken into consideration the fact that the Claimant did not ask for the paperwork to be provided to her and that she first raised any issue about not having been given the documents at the appeal stage. However, it is the procedure adopted by the Respondent which I have to consider, and not the failings of the Claimant. As with every aspect of the procedure undertaken, I must assess what the Respondent actually did by reference to the band of reasonable responses. I have asked whether a reasonable employer would have proceeded on these serious allegations without providing the Claimant with copies of the paperwork relevant to transactions which she is alleged to have manipulated. I conclude that a reasonable employer would have provided the Claimant with the paperwork.

132. Mr Byrne failed to provide the Claimant with the papers after she had submitted her appeal against dismissal. Mr Byrne said that she did not even then request the paperwork. A reasonable employer would have regarded this as a request to be provided with the papers – and in any event would have provided them to ensure that the Claimant was able to consider whether the documents might offer up any explanation as to why some of the advisers might have said what they said. No reasonable employer would have considered that the fact that the documents were in the room during the meeting on 08 July 2019 as being sufficient for the Claimant's purpose. While the Claimant could have asked for copies – and perhaps should have earlier – the fact that she did not is no answer to the Respondent's failings.

133. As regards the failure to interview further employees - Robert in Dundee and Antonia in S Yorkshire - While one employer might have interviewed them I conclude that it was not unreasonable for the Respondent not to interview them. The allegation was that the Claimant had manipulated the procedures. If two or three members of staff have said that they were instructed to do certain things by the Claimant, extending the investigation by interviewing others would not have changed what these individuals were saying. It was not a question of adding up the numbers of those who said they were not instructed to do certain things versus those that said they were instructed.

134. As to Ms Crew's submission regarding the scope of the investigation, Ms Benton cannot be criticised as being unreasonable for not expanding the investigation beyond the two months of November and December 2017. In so far as this aspect is concerned, what Ms Benton did was that which a reasonable employer might do. There was evidence that the correct procedures had largely been adhered to in the months leading up to January 2018 and evidence that they had largely not been adhered to after December 2017.

135. In conclusion, because of the failings in the investigation and procedure as outlined above, I conclude that the Respondent did not act reasonably in treating the principal reason for dismissal as sufficient reason for dismissing the Claimant.

136. I now turn to other aspects: Polkey and Contribution

Polkey

137. I must consider now whether the Respondent could have fairly dismissed had it acted as a reasonable employer would have, and what are the chances that it would have done? I find that the Respondent could have fairly dismissed the Claimant and that the chances that it would have fairly dismissed the Claimant had it acted reasonably are 75%.

138. The Claimant was in possession of the underlying paperwork for the purposes of the tribunal proceedings. I asked her what she would have said about it had she been provided with it. The one thing it might have revealed to her was who had performed the particular transactions. This in turn may have revealed that one or two individuals had been carrying out more ADS sales than others. It is not easy to assess how far this would have taken the Claimant as she had accepted she did not understand the correct policy. This might have revealed no more than that those advisers did not understand the policy either. However, it might have suggested that by processing more than others contrary to policy they were deliberately breaching it – this would not in itself have addressed the fact that some had said the Claimant instructed them to process things in certain ways. It may have enabled her to ask more questions of the way the employees were processing sales and to ask Mr Evans or Ms Benton to ask for those to be put to the witnesses.

139. The Claimant suggested (as did Ms Crew) that ES and RH had an axe to grind. However, the underlying paperwork would not have revealed this – and in any event I conclude that based on the Claimant's own evidence there was nothing to suggest that either ES or RH had an axe to grind against the Claimant. What the Claimant was really saying was that the employees might have misunderstood the policies of their own volition and/or might have been deliberately breaching them of their own volition and improperly passing responsibility on to the Claimant this should have been tested by the Respondent. That in turn might have altered Ms Benton's perception of whether the Claimant's role in the policy breach was deliberate.

140. It is also difficult to assess what outcome there might have been had the Respondent re-interviewed the Claimant and returned to RH, ES and IC to test their accounts more fully. Where the employee has no opportunity to ask questions directly of witnesses on very serious allegations, it is incumbent on the employer to ensure that the employee's position is adequately and fairly

considered by returning to those employees to put the Claimant's contrary case and to hear their responses. That did not happen. Had the Respondent done so it is possible that one or more of them might well have said something favourable to the claimant or might have have changed or explained their earlier account or put it in a different context.

141. I conclude that it is possible that something might have emerged from further interviews of those employees which could well have altered Ms Benton's conclusion on the allegation of dishonest manipulation/instruction to staff – particularly bearing in mind Ms Benton's acknowledgement that had internal compliance alerted the Claimant to the breaches during their visits she probably would have addressed them. This demonstrates that Ms Benton saw the Claimant generally as being someone who made efforts to adhere to procedure. However, I reject Ms Crew's submission that had a fair procedure been followed the Claimant would not have been dismissed. Although Ms Benton accepted that the Claimant would have addressed issues regarding ADS had compliance drawn this to her attention, the fact remains that she did not adhere to the policies; she was the Store Manager and she had confirmed that she reviewed the policies each time compliance visited. The policies were clear and there was no reasonable basis for concluding that the policy was the same as on line (see paragraphs 10-20 above).

142. There is also Ms Benton's conclusion on the absence of store management by the Claimant in respect of the ADS sales – the gross negligence allegation. This was not dependent on a finding of 'intentionality' (as Ms Crew put it). Ms Benton said that she would have dismissed the Claimant for this alone and she might well have done fairly. However, there is in my judgement a real possibility that, had Ms Benton's conclusion on the dishonest manipulation charge been different, that there was a chance that this would have affected her conclusion on sanction in relation to the admitted failures to apply the correct policy.

143. Standing back and looking at matters overall, realistically the chances that Ms Benton would fairly have dismissed the Claimant are high. I bear in mind in particular the statements of the employees that were obtained and also the admitted failures in relation to management of and adherence to the policies. I assess the prospect that the Respondent would have fairly dismissed as 75% and reduce the compensatory award by that proportion.

Contributory conduct

144. The Claimant admitted that she had failed to follow the correct procedure. She had failed to manage a key policy regarding proofs/identification and to cascade it to staff. There is no doubt that his was a key factor in causing her dismissal in terms of the gross negligence finding. The conduct was blameworthy in the sense that the Claimant's role included understanding and applying the

policies – which were designed to prevent fraud. She confirmed that she had read and understood them each time compliance had visited the store. She signed off as having read and understood the policies. She undertook paperwork checks but did not diligently check to see if paperwork in respect of ADS transactions complied with the Respondent's policies. The policies were clear and the Claimant did not suggest that she did not suggest that the wording was ambiguous. Her failures were significant and played a significant part in the decision to dismiss her. I have regard to the need to assess contribution on a just and equitable basis. Having regard to the Polkey reduction, I further reduce the compensatory award by 60% to reflect the fact that the Claimant's own conduct was blameworthy and contributed to her dismissal.

Wrongful dismissal

145. Did the Claimant deliberately and dishonestly manipulate the procedures? I find that that the Respondent has not established this on the evidence. The burden is on the Respondent to prove that the Claimant did that which she was accused of doing. It has not proved this to my satisfaction applying the civil standard of proof on the balance of probabilities. The Respondent did not call any of the employee witnesses on whose statements Ms Benton relied. I accept the evidence of Ms Balloch, whom I regarded as a truthful witness – that does not affect my finding on the unfair dismissal claim, as it is not for me to substitute my view for that of Ms Benton. On the evidence before me I was not satisfied that Ms Balloch had instructed her staff to breach policies and procedures whether with a view to manipulating sales figures or otherwise.

146. Perhaps in recognition of this, Mr Boyd relied more on gross negligence than gross misconduct as justification for summary dismissal. I have asked was C in serious dereliction of her duty? Certainly her failure to manage the proper application of the proofs policy in connection with ADS sales was capable of amounting to gross negligence - given her role and the seriousness attached to application of the correct processes - and I do not criticise Ms Benton for characterising it as such.

147. However, on the wrongful dismissal claim, the question for me is whether the Respondent has established that the Claimant was in fact grossly negligent. She accepted that the store advisers, in transacting ADS sales in the way that they had been, were doing so in breach of policy. The Claimant, as Store Manager, was responsible for ensuring that advisers acted in accordance with the policy. The Claimant had read the policy on a number of occasions. The policy is clear and carries the headline that failure to adhere to it is a serious matter. The Claimant's position that she did not know or understand the policy can only be due to her not having read it or not having taken in what it said. However, she confirmed that she would review all the policies after compliance visits, not that she reviewed only some of them. It may be that the company has a lot of policies but this was an important policy aimed at preventing or minimising fraud to the company.

148. At the very least, the Claimant's failure to apply the proofs policy and to ensure others applied it, and her approach that if the staff were doing ADS sales in a particular way she assumed it was right, was a serious dereliction of her duty in light of her obligations to ensure the policy was adhered to. However, was it of such a grave and weighty matter that it justified summary dismissal? In the end, this is ultimately a question of judgement and in my judgement it was not. I remind myself of the principles in **Adesokan v Sainsbury's Supermarkets Ltd** and of what is said there about the damage to the relationship and to the potential for damage.

149. I conclude that the Claimant did not act intentionally to undermine the policies or to benefit directly or indirectly. The Respondent has not satisfied me on the evidence that this was the case. The Claimant was certainly culpable in not ensuring that the policy was adhered to. However, Ms Benton accepted that when things had been drawn to the Claimant's attention in the past she addressed and resolved the issues. There is nothing to suggest that, had the breach of ADS been specifically drawn to her attention, that she would have failed to rectify the practice. There was no gain to the Claimant and no loss to the Respondent. In so far as the 'potential for loss' is concerned, I do not consider on the evidence before me that there was a potential for loss – and in any event even if there was, it is speculative. There was no evidence as to what that loss might be. There was no completed sale. No device was passed to a customer which should not have been and no evidence was adduced as to how that would or could have happened. Whilst a serious matter for the Respondent, it was not so grave and weighty matter as to justify summary dismissal.

150. Therefore, in conclusion I conclude that the Claimant was wrongfully dismissed. She is entitled to damages for breach of contract.

151. In light of my conclusions, the parties must inform the Tribunal within 21 days of receipt of this reserved judgment whether they will be able to resolve all matters of remedy or whether they require a remedies hearing to be listed.

Employment Judge Sweeney

13 November 2019