EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103004/2019

Hearing Held at Dundee on 1 and 2 July 2019

Employment Judge I McFatridge

Miss AJ Coyle	**Claimant** **Represented by:** **Mr RR Russell** **Solicitor**
BT PLC	**Respondents** **Represented by:** **Mr G Mitchell** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the claimant was not unfairly dismissed by the respondents. The claim is dismissed.

REASONS

Introduction

1. On 19 July 2019 I issued a short judgment advising the parties of the outcome of this case and indicating that written reasons would follow. The written reasons are now set out below.

Background

2. The claimant submitted a claim to the Tribunal in which she claimed that she had been unfairly dismissed by the respondents. The respondents submitted a response in which they denied the claim. It was their position that the claimant had been summarily dismissed for gross misconduct and that the dismissal was procedurally and substantively fair. At the hearing evidence was led on behalf of the respondents from Michael Bell, a Call Centre Manager with the respondents who conducted the disciplinary hearing and decided to dismiss the claimant and Alison MacKenzie who conducted the appeal hearing. The claimant gave evidence on her own behalf. A joint bundle of productions was lodged by the parties. On the basis of the evidence and the productions I found the following essential facts relevant to the claim to be proved or agreed.

Findings in fact

3. The respondents are BT who are a substantial PLC which are involved in the telecommunications field. The claimant was employed by them from 8 June 2006. She worked at their call centre in Dundee. The claimant had a history of poor performance and had been issued with final formal warnings in the past which had expired. A document dating from 2016 setting out her previous warnings was lodged (page 187). On or about 7 September 2017 the claimant was issued with a final written warning for failing to carry out work in accordance with company quality standards. The details of this were set out in a decision letter which was lodged. Various versions of this were lodged however the most complete version appears to be the one at page 191-194. It makes it clear that the hearing was in relation to claims that the claimant had

- Failed to validate callers (potential security breach)
- Failed to follow correct process by not opening diagnosis flow
- Failed to capture customer's details fully in order to arrange call back.

4. The claimant was placed on an 18 month final written warning. The decisionmaker's rationale for the decision was lodged (page 210-212). The respondents' disciplinary policy was lodged (page 327-329). The disciplinary procedure was also lodged (page 330-342). In the normal course of events a final written warning would last for 12 months. It is only in exceptional cases that a final written warning is extended so that it remains valid for a period of 18 months. The letter sent to the claimant outlining the warning (page 191-194) narrates that dismissal with notice was a realistic option but that a decision was taken to step back from dismissal.

5. The claimant suffered a number of personal issues during 2018. The claimant was carer for her parents (who lived separately) and had previously obtained an adjustment passport from the respondents to enable her to discharge her caring responsibilities. In early 2018 the claimant's father was diagnosed with a progressive disease and thereafter died. The claimant was extremely upset by this and was off work from 12 March to 18 April, a period of 38 calendar days. She then returned to work but felt she had returned too soon and was off for a further day on 1 May. The claimant thereafter went on holiday from around 14 June. Unfortunately, she suffered a fall on holiday and broke her ankle. This resulted in her having to have an operation in Spain before she could be returned to the UK. Unfortunately, shortly after her return to the UK her wound was found to be infected and she required to have a further operation. The claimant was absent as a result of this for a total of 61 calendar days from 20 June 2018 onwards. The claimant's sickness and absence record was lodged (pages 226-227).

6. The claimant's absences were reviewed by the respondents and during this process a letter was obtained from the claimant's GP outlining the particular issues with her ankle. This was lodged (page 236). The claimant eventually

returned to work on a phased return to work starting on 26 October 2018. The respondents agreed that the claimant would work a phased return as per a schedule set out in a document lodged at page 242. This initially provided for the claimant returning to work for two hours per day on 25 and 26 October. She would then work two hours per day for the whole of the next week (29 October, 2 November). This was then meant to increase to three hours from 5 to 9 November and thereafter four hours from 12 to 16 November.

7. The claimant's role in 2018 involved her working in a small team dealing with people who were on what the respondents term a 'provision journey'. These were business customers who were having some kind of service or provision either added to their existing package with the respondents or becoming a customer of the respondents for the first time. The claimant's team was called CXR which was an acronym for Customer Experience Laboratory. Her role involved contacting customers. The claimant had previously worked on inbound calls. The customer experience lab also took inbound calls but more usually dealt with customers who initially contacted the respondents through other technologies. In particular the respondents had a system where an SMS text message or email would be sent to a customer to ask if everything was okay. The customer was given the opportunity to respond to this. The customer would be responding by text or email. The respondents had a limited AI (artificial Intelligence) system which could interpret these responses and in some cases the respondents' system would simply send an automated reply to the customer. If the customer response was such that it was not appropriate to send an automated response then a "job" was created which was then picked up by the claimant and her colleagues who picked jobs out of a queue. They might respond to the customer either by text, email or telephone. Generally speaking what happened at the stage where an automatic response could not be given was that the claimant or one of her colleagues would contact the customer by telephone.

8. In all aspects of customer contact the respondents place considerable emphasis on customer validation. At its simplest this involves ensuring that the person that a customer adviser such as the claimant is conversing with

about the account is someone who is authorised to speak about the account and make decisions. This is an absolutely fundamental part of the respondents' business. It applies to customer advisers who are taking inbound or making outbound calls as well as to members of the customer experience lab such as the claimant.

9. The respondents place considerable emphasis on this in training. The purpose of the process is to protect the customer and the business and the adviser and to ensure that any transaction that changes a bill or order has been authorised by the correct account holder. Validation is something that has been around within the respondents for a considerable period of time. Over the years the validation process has been improved so as to deal with changing technology and indeed changing threats.

10. Quite apart from the general advisability of ensuring that changes to a customer's account which might lead to changes to that customer's bill being properly authorised by the customer, the respondents also see validation as a way of protecting themselves against scammer attacks. Over the years the respondents have become familiar with the fact that a number of criminals target them and their customers. On occasions the purpose of the attack is to obtain personal information regarding the customer which can then be used to target the customer's bank accounts. Examples are given in training of customers whose personal details have been inadvertently given out by the respondents' customer advisers which have led to that customer's email correspondence being diverted which has led to their bank account being targeted and on occasions to all of their bank accounts being completely drained by such criminals.

11. The respondents have used a number of systems over the years, some of which involved the use of a password or account number. The claimant was trained in all of these systems at the time. Over the last few years the respondents have moved away from systems which involve using an account number or password although in certain circumstances a password can still be set up for an account. The current system of validation which is most often used by the respondents is something called RIKCI. This is a system which

relies on the respondents already having a customer account set up which account will have details of the customer's mobile number and/or email address. The RIKCI system generates a PIN number which will then be sent to the customer either by email or by SMS text message. This will be done whilst the customer is on the telephone. The customer will then be required to read back the PIN number to the customer adviser. The customer adviser then knows that the person they are speaking to is someone who has access to the mobile telephone or email address which was set up at the same time as the account.

12. The respondents consider that it is particularly important that validation is used with customers who are on a provision journey. There are a number of things which can go wrong. Orders can be cancelled, dates can be changed and orders can be upgraded or downgraded. They consider it is important that if someone calls in to do any of these things they 100% know they are speaking to the right persons and that any changes are properly authorised.

13. The respondents provide their customer advisers with a considerable amount of training on validation processes. The claimant's training record was lodged (page 326A-326K). This shows the claimant attended a substantial amount of training during the course of her employment. In addition to this, following the claimant's return to work the respondents arranged for her to attend a coaching session specifically on the RIKCI process which the claimant attended on 29 October 2018.

14. The respondents' outbound validation process was lodged (pages 342.43 to 343.46). The respondents' inbound validation process was also lodged (pages 342.47-342.52). The inbound process contains a helpful flow chart on page 342.51 and 342.52.

15. As noted above the claimant had received a final written warning which was to last for 18 months on 20 September 2017. The allegations at that time included the claimant's failure to validate customers. A note of the fact finding interview which summarises what is alleged to have happened in each case together

with the claimant's response was lodged (pages 139-153). The summary on page 153 noted

"
- Adele has not complied with process for confirming who is calling, what their name is, what the business name is and what the business address is, during the calls listened to for 25th/26th/28th July 2017.
- Adele has failed to validate that the person calling has the authority to deal with any queries regarding the telephone or Broadband services. She has provided account specific information without following the process, has not opened diagnostic flows where she should have, has not validated customer via security question or confirmed that the person calling is on the contact list/authorised to deal with any queries on the account.
- She has failed to capture contact numbers for the people calling, in case calls gets disconnected so that we can contact the caller back. Also to SMS customer if required now, or at a future date.
- Adele had a fact finding case in April for the same issues, and the decision from that was to close as a local discussion, Adele is aware that the above evidence captured is the same type of evidence captured earlier in the year.
- Adele was unable to provide any mitigating circumstances or offer any explanation as to why she has not been properly validating customers, and why she has not been following due process, as per above.
- No further evidence during this investigation has come to light."

16. Prior to that in April 2017 the claimant had also faced an allegation that she had failed to validate customers correctly before giving them account sensitive information. A misconduct investigation was carried out by the claimant's then line manager Gail Cameron. A summary of the investigation report was lodged at pages 163-186. The outcome of this investigation was that Ms Cameron found that, as set out on page 183, the claimant had failed to fully check she

was speaking to authorised personnel. She had not followed process by opening fault cases on AD to track customer's fault progress and not adding relevant notes and that she had failed to validate and ensure full security checks had been completed prior to imparting account information to her customers.

17. Notwithstanding that, Ms Cameron decided to deal with the matter informally by means of what is described in the respondents' discipline procedure as a local discussion. Accordingly, the matter did not progress any further at that stage.

18. As noted above the claimant returned to work on her phased return on 26 October 2018. On 1 November 2018 an incident occurred which led the claimant's line manager Gail Cameron to carry out a misconduct investigation. The circumstances in which Ms Cameron became aware of the issue were that one of the claimant's colleagues (KM) sent her an email on 1 November. It stated

> "Hi Gail. Was advised by Steve to pass this information on to you regarding an issue I found with a case on CE.
> Adele picked up this case and her notes state that she had a failed contact to this customer. Her notes don't say she left voicemail, but the customer advised that they were left a voicemail."

KM then attaches a screenshot which shows the claimant's notes for the interaction which were "W2S/CE 1st failed contact, bb acc shows as service restriction debt, Removed." The email goes on

> "I have added the above screenshot to show you her notes in CE – those notes clearly state that she's identified that the customers service has a restriction due to debt.
> After investigating with Steve, we established that Adele has entered collections desktop and 'reconnected' the customers service without having a conversation with them or carrying out validation.

> When I spoke with the customer, he wasn't even aware of a restriction of services. I have now fully resolved the issue for the customer and he is very happy.
> Was asked by Steve to get you to check for any calls relating to this from Adele before you feed this back.
> I've also added below a screen shot of collections desktop and highlighted the message that indicates action has been taken to restore the customers service."

The email was lodged (page 278).

19. Ms Cameron's misconduct investigation report was lodged (pages 267-274). The allegation is set out on page 268. The allegation was that the claimant had modified a customer's account without validating them or speaking to them to get agreement to make the changes. It is stated

> "Adele lifted a call barring from a customer's telephone line/broadband service without speaking to the customer or seeking payment of the outstanding bill, which had caused the services to be restricted in the first place. Adele called the landline and left a voicemail advising we would call back, she then lifted the call barring with no validation or discussion with the customer or any of the business associates."

The note goes on to state

> "One of Adele's colleagues dealt with the customer query, as the customer contacted us to advise could not get his broadband working, and ensured customer paid the £583.98 bill that was outstanding. The restriction that Adele tried to remove takes 24 hours so was still in place when customer contacted us again. The details were then passed to me as he was surprised and concerned that a billing restriction removal had been attempted when no contact made with the customer/no validation and no attempt to seek payment of the debt."

20. Ms Cameron met with the claimant on 12 November to discuss the allegation and an account of the meeting is contained within the report (pages 271-272).

The claimant is noted as answering the question as to why she lifted the restriction as being

> "Hardly know what I am doing at the moment, always asking colleagues questions. Normally check to see if outstanding amount and then lift barring if no outstanding bill. Can also do a promise to pay if required. Vaguely remember this process. Can't remember this particular case."

When asked "Why did you modify this customer's account without speaking to the customer or a customer representative?" the response was

> "Can't remember, thinks asked a colleague (can't remember who) and they advised just to lift it as sometimes the system advises bad debt but no debt on the account. Can't remember exact details on this one."

The claimant is then asked if she understood the importance of using RIKCI. The claimant explained the process and confirmed that she did understand the importance of validating customers and customers' representatives. She was then asked why in this case she did not feel the need to validate prior to lifting the restriction and her response was

> "No as couldn't see debt and thought was doing the best for the customer. Again asked for help from a colleague who advised to lift the restriction."

21. Ms Cameron summarised the position on page 274 and recommended that matters proceed on the basis of gross misconduct. She did not make any recommendation that the claimant be suspended whilst the process took place.

22. Following her meeting with the claimant on 12 November Ms Cameron emailed KM asking him to provide details of how he managed to find the outstanding bill on the account when the customer had contacted him back (page 277). KM responded. There were two responses lodged though one appears to be a partial copy of the other. The response timed at 09:29 states

> "● When I entered the account before speaking to the customer, I noticed a "Debt" restriction notice on the broadband asset (number)

highlighted in red (this is no longer showing as a restriction removed).

- The payment I took on the 1st of November from the customer was for £583.98 which was outstanding on account [redacted].
- There was no real effort made in finding this outstanding bill, I just immediately went into the VP account as I normally would, saw the outstanding balance and advised the customer of the outstanding balance to pay.
- After advising the customer on the outstanding amount, the customer made it clear to me that he never received this bill in the post as he normally would/has with his previous bills. I then sent the customer a copy bill via email. I then took payment from the customer for the outstanding balance.
- If I had originally dealt with this case and could not reach customer on my first contract to them, I would never remove a restriction/ make changes to an account as we would firstly need to validate the account holder before we make any changes."

23. On 13 November the claimant sent an email to Ms Cameron which was lodged (page 289). The claimant felt that she had remembered a bit more about the issue since her meeting with Ms Cameron. The email states

"Hi Gail

As I have only lifted this one billing restriction I am pretty sure my memory of the case is as follows:

I noticed the restriction after I had left vm, and as I had been off for several months I looked into further why it had been restricted.

It seemed that the restriction had been put on prematurely as due date was a few days in the future this is when I sought advice, it was general consensus that it was a sys error and redbill reminder.

I was still in the case 10 mins after note left as couldn't remember how and was looking for someone free to help which is when I asked Gilliam on IM. She showed me how to do this in collections desktop and am

pretty sure I left a note in the reason field in collections desktop if not also in a billing enquiry note.
I would say 65% sure it was Steve I spoke to about this case.
Just like to also say for future I won't remove any restrictions unless I have spoken to and validated the customer.
In this instance I wasn't aware had to validate when in an offline role to remove a billing restriction where it seemed to be a sys error, but I am now."

24. Following receipt of the claimant's email Ms Cameron emailed GK and SL stating

"You have both been named as possible source of assistance for Adele with this customer – (customer reference) – CE issue. Can you provide, if you can recall this, a summary of what advise you provided to Adele?" (page 288).

SL responded on 14 November stating

"Hi Gail,
I vaguely remember this and I advised her that if there is a restriction on the account it would have to be removed before service would work. At no point I told Adele to remove the restriction and under no circumstances I would have advised to do it without validation and just cause.
As is often the problem people only ask me a certain part of the whole story and in this case I feel this was the situation." (page 288).

GK also responded. She said

"Hi Gail
Not much involvement from me for this from what I recall?

Adele couldn't remember how to remove a restriction from an account so asked me to show her. I walked her through how to remove a restriction via collections desktop." (page 290)

25. After receiving the emails Ms Cameron passed the case to Michael Bell who was her line manager. The reason for the case being passed to Mr Bell the second line manager was because it involved an allegation of gross misconduct. Mr Bell wrote to the claimant on 16 November 2018 inviting her to a disciplinary hearing. Again, a number of copies of the same letter at various stages of completion were lodged. The most complete version is lodged at page 296-298. It states that the company had carried out its investigations and specifically

> "● Unauthorised Access and Modifications to Systems and Failure to comply with Company Procedure and Working Practices in that on 1st November 2018, you have allegedly modified a customer's account without validating them or speaking to them to get agreement to make the changes. You had lifted a call barring from a customer's telephone line/broadband service without speaking to the customer or seeking payment of the outstanding bill to the total of £583.98."

The claimant was advised that the hearing would be recorded and advised of her right to bring a representative. Included with the letter were copies of documentation listed on page 297 included the misconduct investigation report and discipline reports which indicated the claimant was on a live final written warning. The claimant was advised that the allegations could amount to gross misconduct which, if confirmed, could mean that the claimant would be dismissed. The claimant was referred to the respondents' disciplinary policy and procedure. Copies were attached and the claimant was also directed to the intranet site. The claimant was advised of her ability to obtain counselling.

26. The disciplinary meeting took place on 28 November. It was attended by the claimant and her CWU representative. Mr Bell convened the meeting and minutes were taken by a Kirsty Cameron. In addition to this the meeting was recorded however neither party sought to lodge the recording with the Tribunal. Ms Cameron's notes of the meeting were lodged (page 299-301). The claimant has signed these on page 301 accepting that they were accurate.

27. Mr Bell was an experienced manager who was extremely familiar with the respondents' validation process and the requirement for it. He was in absolutely no doubt that the claimant had acted incorrectly and that she should not have removed the bar on the customer's account without speaking to the customer and validating the customer. Quite apart from the fact that there was a bill of £583 involved Mr Bell was aware that in many cases a customer will be charged when a call bar is removed. His view was that it was totally unacceptable under any circumstances for the claimant to have removed the bar on the account without speaking to the customer and validating the customer. He noted that this had also been the view expressed by KM and SL.

28. Ms Cameron's notes of the disciplinary meeting were lodged (page 299-301). I consider these to be an accurate record of what took place at the hearing. During the hearing the claimant was asked about the issues. Her trade union representative said that the claimant had only worked six weeks in an eight month period and that the incident occurred on day three of her two hour phased return to work. He advised the issue was that the claimant was confident or up to scratch but that she had learnt from the mistake and that no harm was done. He also noted that she was on painkillers. He noted that the claimant had not had any issues in the 14 months of the 18 month warning. The claimant indicated that this would never happen again and was now over-cautious about validation. The meeting ended after around 18 minutes with Mr Bell stating that he would get a decision letter to the claimant by 7 December.

29. In the meantime Mr Bell had, prior to the disciplinary hearing, become aware of an exchange of emails relating to a concern about the interaction between the requirement to validate customers and a particular use of the respondents' contact engine. The email chain was lodged (page 253.1-253.3). It began with SL emailing a manager with the respondents known as KH saying

> "Sorry to be annoying and chasing you once again regarding using Rikci via Contact Engine but we really need an answer. Having to call

> customers every time we require higher validation is causing a reduction in productivity as we are calling more customers than before.
> Contact engine messages are triggered by a customer's response so they will be expecting contact and we are not 'cold contacting' them. Really hoping we can resolve this ASAP." (page 253.3)

The correspondence ended on 12 November with an email from the respondents' M Reid stating

> "In simple terms you can make changes to orders without high level validation if the customers contacted us through CE."

Mr Bell's understanding of the position was that this correspondence related to orders. In that circumstance it was appropriate to deal with the contact engine enquiry without the necessity of going through validation. This was a totally different situation from that which had been encountered by the claimant. Mr Bell was in absolutely no doubt that the claimant ought to have spoken with the customer and validated the customer before taking action to unblock his account.

30. Before coming to his conclusion Mr Bell reviewed the evidence and also reviewed the claimant's records. He noted that the claimant had received an informal local discussion in April 2017 for issues relating to validation. He was aware that since this was outwith the 12 month period it was not something he could specifically take into account in totting matters up. He was also aware that the claimant had an extant 18 month final written warning again for failing to validate which dated from September the previous year.

31. His view was that the claimant's actings on 1 November amounted to gross misconduct. His view was that in looking at the sanction he was entitled to take into account the fact that the claimant was on her final written warning albeit he considered the misconduct sufficient to amount to gross misconduct in its own right. He decided that the appropriate action to take was to dismiss the claimant. He wrote to the claimant setting out his decision in a letter dated 3 December 2018 which was lodged (page 302-303). He attached to this a

rationale document setting out his reasons for the decision which was also lodged (pages 305-307). He confirmed that the claimant was summarily dismissed for gross misconduct and that her last day of employment would be 5 December 2018. The claimant was advised of her right of appeal.

32. In the rationale document Mr Bell noted the history of the matter and in particular that the claimant had just returned from a four month absence. He noted that the claimant had indicated in her email of 13 November that she had spoken to a colleague and a coach and that the claimant had said that she was unaware she had to validate in those circumstances but that she now knew she did. Mr Bell indicated that he was not prepared to accept any of this as mitigation. He stated

> "You are an experienced adviser and as covered in the fact find were aware of the importance of validation, in your own words 'when making changes on the account'. You also received coaching on the RIKCI validation tool on 29th October 2018, just 3 days before the date concerned. You state that you were unable to see an outstanding bill and that is why you removed the restriction, yet your colleague was able to find the outstanding bill immediately upon dealing with the subsequent call from the customer, indeed whilst you asked for help to remove the restriction you clearly didn't query the lack of the bill or indeed how to find the bill with your coach or colleague, just how to remove the restriction and indeed your own note about leaving a voicemail states that the account was restricted due to debt."

He then went on to discuss the warning. He stated

> "As discussed at our meeting you were issued with a 18 month Final Written Warning in September 2017 so is still current and on reviewing that warning it was also for failing to validate and failing to follow correct procedures and it was on the back of yet another discipline case from April 2017 for very similar offences which ended in a Local Discussion. Following both these cases you had committed to following procedures and yet again you have failed to do so and in the rationale for the final

written warning it states that dismissal had been considered but the discipline manager had 'stepped back' from that decision as she believed a final written warning would be sufficiently corrective." (page 306)

In his conclusion on page 307 Mr Bell states

"I simply cannot accept the 'excuse' that you were rusty, due to absence, you sought guidance on how to remove the restriction, thus it was a deliberate act on your behalf. You are a very experienced advisor and acknowledged within the fact find that you were aware of the rules regarding validation and account changes and have been warned about this on 2 previous disciplinary warnings, in each case committing to following procedures in the future, yet still again fail to comply to the correct procedures, leaving me with no other option than to progress to dismissal."

33. The claimant decided to appeal the decision to dismiss her. The claimant's email of appeal was lodged (page 326.3). This stated

"I wish to appeal against the decision of dismissal on 05 12 18.
In this instance I believe I was acting on a coaches advice.
Also, I had been off long term sick and although came back to work on 25th November this was only my 3rd day @ 2 hrs a day on a phased return of dealing with CE cases.
I have had 2 periods of absence this year, 1 in March due to bereavement of a parent, and then June to November due to a freak accident on holiday which resulted in an operation in Spain and a further operation here a few weeks later.
I would like to have an appeal meeting at your earliest convenient where a Union representative will be present."

34. The email was sent to the respondents' HR department and the HR department passed this to Alison MacKenzie a contact centre manager with the respondents who is currently Head of Business Customer Support through the UK with 850 employees reporting to her. She had been aware of the claimant

from a period earlier in her career when she managed the Dundee contact centre. She was not the claimant's direct line manager at this point but was asked to do the appeal by Martin Williams who was the claimant's third line manager but was based in Chester. After she received the email Ms MacKenzie contacted the HR case manager and arranged to get access to the system on which all of the case papers were loaded. She had access to all of the papers which had been available to Mr Bell together with the minute of meeting and Mr Bell's decision letter and rationale document. On receiving the claimant's email Ms MacKenzie also contacted the claimant to ascertain whether she wanted to have the meeting before or after Christmas. The claimant expressed the wish to have it before Christmas. This was on the basis that the outcome would probably not be available until after Christmas.

35. The claimant duly attended an appeal hearing which was arranged for 20 December 2018. Following the meeting on 7 January Ms MacKenzie wrote to the claimant confirming her decision which was that she was upholding the outcome of the disciplinary meeting held on 28 November 2018 at which the claimant had been dismissed. She advised there was no further appeal. The letter was lodged (page 308). Ms MacKenzie also lodged her rationale document which was lodged (page 309-312). This was sent to the claimant along with the outcome letter.

36. Ms MacKenzie accurately summarised the points raised by the claimant in five numbered paragraphs on page 309-310. The points which the claimant had made were

> "1 That you work in the CX Lab within Help & Support and lots of advisors in that team are dealing with customer accounts whilst not having the customer on the phone.
>
> 2 That in your view, in this specific instance, before taking the actions in question you sought the advice of a coach (SL) and you believed he told you to take the action you then undertook, as detailed in the charge. You realise you were on a Final Warning in relation to validation already, but you are of the view that you asked the coach what you should do and that he told you this was the action to take.

3 That on the day in question, you had only just returned from a prolonged period of absence following the death of your father and then an injury, which was a distressing period for you. At the time of the incident in question, you were on a phased return to work, working two hours a day.

4 That after returning to work from this period of absence and up to the point of this incident, you had received no coaching

5 That everyone makes mistakes and that the decision taken by Mike Bell to dismiss you was too harsh in the circumstances."

37. Ms MacKenzie confirmed that she had reviewed the misconduct investigation report and the statements given by SL along with the other evidence included in the original investigation. She answered the points made by the claimant in numbered paragraphs. She set out her view that the claimant had not presented any new evidence or information which had not already been presented to Mr Bell. She confirmed that she was satisfied the discipline policy had been considered appropriately and that Mr Bell had taken into account the mitigation put forward. Her decision was to reject the appeal and uphold the initial decision.

38. Following her dismissal the claimant registered for Universal Credit. She subsequently asked to close this claim as she had received a small inheritance and was no longer eligible. She was still looking for work at this stage. She searched online and in newspapers. She also asked friends and walked around looking for adverts for vacancies. She was successful in finding alternative employment with Energy Dundee starting on or about 18 March. She works 36 hours per week and earns around £1098.65 per month. Following the renewal of her Universal Credit claim she received £1714.66. This was paid in March but related to a period before this. She has not applied for any other jobs after obtaining the job with Energy Dundee on 18 March.

39. Whilst employed with the respondents the claimant's gross weekly wage was £461.54 and her net weekly wage was £381.84. The claimant calculates her ongoing weekly loss the difference between her wages with Energy Dundee and her wages with the respondents as being £107.18 per week.

Matters arising from the evidence

40. I considered both Mr Bell and Ms MacKenzie to be credible and reliable witnesses. Their evidence essentially coincided with the documentary productions. Each was cross examined extensively about a range of matters and it was clear that each was attempting to answer the questions fairly and honestly. I considered that the claimant was also giving truthful evidence as she saw it although I was somewhat concerned that by the time of the Tribunal she had obviously gone over matters in her mind and things which she had been very unsure about earlier on in the process according to the contemporary documents were now matters where she expressed absolute certainty. One example of this was in relation to the seeking of advice from SL. In the original misconduct investigation with Ms Cameron she said she did not remember who she had spoken to. By the following day she was able to say that she was 65% certain it was SL. This did not change unduly during the disciplinary hearing but by the time of the appeal she was quite clear about the instructions she had been given. At the Tribunal hearing she gave extremely detailed evidence about what she said had happened and what she had done. I felt that this evidence was to some extent at least tailored to show what she wanted to have happened rather than based on any real memory. I rejected the suggestion that SL had given her the advice which she now claimed to have received, essentially for the same reasons this was rejected by Mr Bell and Ms MacKenzie. It is absolutely clear from the contemporary emails that both of the claimant's colleagues were in absolutely no doubt as to what the proper procedure was and that the claimant should have validated the customer before taking the actions she did. Furthermore, it was clear from the email chain that KM had "spoken to Steve" before he had decided to refer the matter to Ms Cameron. I would agree with Mr Bell and Ms MacKenzie that in those circumstances it is almost inconceivable that Steve (SL) would have told KM to refer the matter to Ms Cameron if Steve was aware that he had advised the claimant to do precisely the thing which would now be the subject of an investigation. At the end of the day however I considered that this was a case where there was little real factual dispute over the factual matrix relevant to my decision.

Issues

41. The sole issue to be determined was whether or not the claimant had been unfairly dismissed by the respondents. There was no claim of wrongful dismissal. In the event that the claimant had been successful she was seeking compensation.

Discussion and Decision

42. Both parties made full submissions. Both made written submissions which were supplemented orally. Rather than try, and no doubt fail, to do full justice to them by summarising them I shall refer to them where appropriate in the discussion below.

43. Both parties were in agreement as to the statutory background. The right not to be unfairly dismissed is contained in section 94. The relevant test is set out in section 98. Section 98(1) states

> "In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held."

44. It was the respondents' position that the reason for dismissal was conduct which is a potentially fair reason for dismissal falling within section 98(2)(b) of the said Act. In this case I accepted the respondents' position that the reason for dismissal was indeed conduct. There was some suggestion by the claimant that the respondents ought to have characterised the matter as one of performance. In my view it is clear that Mr Bell did consider this but decided for the reasons set out in his rationale that the issue was one of conduct rather than performance. As can be seen below I consider that he was correct in doing so.

45. Having established a potentially fair reason for dismissal I then require to consider the terms of section 98(4). This states

> "(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case."

46. Stepping aside for one moment, I observe that the concept of unfair dismissal is purely a statutory one. The role of the Tribunal is to apply the terms of the statute. The Tribunal has no overall discretion in the matter to decide whether or not, on general principles, the dismissal was fair. The Tribunal requires to apply the terms of the statute and to decide whether the employer acted reasonably or unreasonably in treating the reason as a sufficient reason for dismissing the employee and is required to determine this in accordance with equity and the substantial merits of the case.

47. The approach which a Tribunal is required to take in cases of dismissal for alleged misconduct has been extensively considered by the higher courts. The well-known case of ***British Home Stores Ltd v Burchell [1978] IRLR 379 EAT*** sets out the general approach to be taken. As noted above it is not for the Tribunal to reach its own view as to whether or not the Tribunal would have dismissed the employee in question for the reason given. The Tribunal has to decide whether the employer entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. This famously involves three elements, first there must be established by the employer the facts of that belief that the employer did believe it; second it must be shown that the employer had in his mind reasonable grounds upon which to sustain that belief; and third the employer at the stage at which he formed

that belief on those grounds must have carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

48. Applying the threefold test to the circumstances of this case there is no doubt in my mind that the decision maker in the person of Mr Bell did have a genuine belief in the claimant's guilt. Mr Bell had seen the misconduct report. It quite clearly sets out what she had done. As mentioned above Mr Bell considered whether this was a matter of conduct or a matter of performance. He has clearly come to the conclusion that it was a matter of conduct as set out in his rationale. I had no doubt that his belief was genuine. I also considered that he had reasonable grounds for coming to that belief. He had the misconduct report and the various documents. During the Tribunal hearing there was some suggestion that what the claimant had done was somehow alright. I note that this was not something which the claimant pursued with any enthusiasm at the time of the disciplinary hearing. I entirely accepted the explanations given by Mr Bell and indeed Ms MacKenzie during the Tribunal hearing to the effect that what the claimant did was quite clearly contrary to her training and contrary to the respondents' policies regarding validation. During cross examination Mr Bell was referred to the correspondence about whether or not there was a requirement to telephone a customer and validate them using RIKCI when they were already in communication with the respondents over the contact system in relation to an order. Mr Bell's evidence was quite clear to the effect that he was well aware of this correspondence at the time and indeed, aware of the questions that were being asked. His response had the ring of truth about it when he said "all of these people work for me". I accepted his evidence that the issue which they were discussing had no relevance to the issue raised by the claimant. The fact of the matter was that the claimant had breached the respondents' rules by removing the bar from the customer's account without first speaking to the customer and validating the customer. During intense cross examination Mr Bell repeated his position on various occasions that this was totally contrary to all of the respondents' processes. The claimant was changing details on an account without authorisation from the customer. Even if I had been inclined to doubt Mr Bell it is clear to me from the emails from the

claimant's two colleagues that they were also in no doubt that the claimant had breached procedure.

49. Finally I required to consider the question of whether or not the respondents had carried out as much investigation as was reasonable. The case of ***Sainsbury's Supermarkets v Hitt*** makes it clear that the "range of reasonable responses" test applies to the issue of reasonableness of investigation as well as to other aspects of an employer's decision to dismiss. There is an appreciation that whilst some employers may choose to do things in a certain way other employers may choose to do things in a different way. So long as the approach is within the range of reasonable responses then the Tribunal will not interfere.

50. In this case the suggestion was that the respondents ought to have further investigated the position regarding SL and that the respondents should have further investigated the claimant's assertions to the effect that she had only done what she had been told to do by SL.

51. The situation here is that SL had been involved in the original decision to refer the matter to Ms Cameron. Ms Cameron had then emailed him and he had provided a fairly categoric response. In the circumstances I do not consider that the respondents were acting outwith the range of reasonable responses when they decided that they did not require to speak to SL again. In my view the investigation carried out was entirely reasonable in all the circumstances.

52. A specific point which was clear to me is that the claimant accepted what she had done. Both Ms MacKenzie and Mr Bell are experienced managers with the respondents and knew exactly the context in which the claimant's conduct had occurred and how this matter is viewed by the respondents and how their view is communicated to staff. In all the circumstances there is no doubt in my mind that the respondents were perfectly entitled to reach the view that the claimant had committed a serious breach of their processes which in terms of their publicised conduct standards amounted to gross misconduct.

53. That having been said I considered that the real meat of the issue in this case was whether or not their response, dismissal, was within the band of reasonable responses. The claimant did have mitigation in the sense that she had only just returned to work after a substantial period of illness and her own position was that she was confused albeit Mr Bell did not accept that this excused her from such a flagrant disregard of procedures. Furthermore, the claimant's argument was that there was a serious problem with inconsistency. This was not the first time the claimant had been subject to criticism for failing to validate customers. In the first instance, in April 2017 there were a substantial number of offences and this did not even result in a formal process. The second incident did not result in dismissal but only a final written warning despite the fact that there were five incidents rather than only one as in this incident which did lead to dismissal.

54. I do not consider that there is merit in this argument. It is clear from the documentation that both on the occasion when the claimant received an informal warning and on the occasion when she received her final written warning she was clearly told that the circumstances merited a finding of gross misconduct. On each occasion the manager drew back from that. On the first occasion in April 2017 both Mr Bell and Ms MacKenzie expressed some surprise at the fact that the manager had shown such leniency. I observe that based on the claimant's discipline record she was on a final written warning in April 2017 and had the matter proceeded formally she may well have been dismissed then. In my view the documents provided in respect of the two previous incidents clearly show that the claimant was being told that her conduct merited dismissal but she was being given a further chance. I do not consider that there is inconsistency on the part of the respondents if they then decide, faced with a further incident, which in itself amounts to gross misconduct, that they will no longer show such leniency and give the employee even more chances.

55. There was a suggestion that there was something improper about Mr Bell taking into account the April informal discussion. I do not agree with this. The way that he took it into account is clearly stated in his rationale. He was well

aware that this was not a formal warning and that it was not something which could be taken into account in his decision making. His decision however was that the claimant's single act on 1 November amounted to gross misconduct. He was entitled to take into account the fact that the claimant was already on a final warning dating from September and in my view he was entitled, as he did, to take into account the fact that that final written warning followed on from the claimant being given a further chance by having had an informal discussion in respect of the issue in April.

56. At the end of the day I have no doubt that the claimant feels that the decision to dismiss was harsh in all the circumstances. There is no doubt that some employers may have decided to treat her more leniently or to give greater weight to the fact that she was returning to work after a period of absence. On the other hand the Tribunal is only entitled to interfere with the respondents' decision if the dismissal is unfair in terms of section 98 of the Employment Rights Act. In my view the respondents complied with all of their obligations and the dismissal was fair within the terms of the statute. The claim is therefore dismissed.

Employment Judge: **Ian McFatridge**
Date of Judgment: **04 December 2019**
Date sent to parties: **04 December 2019**