EMPLOYMENT TRIBUNALS

Claimant		***Respondents***
Ms N Brown	**AND**	Castlerock Group Ltd

Heard at: London Central **On**: 17-18 October 2019
13 -14 January 2020

Before: Employment Judge Nicolle
Members:

Representation
For the Claimant: Mr L Ogilvy, Friend
For the Respondent: Ms L Quigley, of Counsel

JUDGMENT

1. The claim for unfair dismissal is upheld but on the basis of a 100% deduction from the compensatory award under Polkey, and also for contributory conduct under S.123(6) of the Employment Rights Act 1996 (the "ERA") and a 100% deduction from the basic award under s.122(2) of the ERA, the compensation awarded to the claimant is nil.

2. The claim for wrongful dismissal (notice pay) fails and is dismissed.

REASONS

1. I delivered my reasons orally on the afternoon of 14 January 2020, but Mr Ogilvy requested at the conclusion of my judgement that I provide written reasons.

Claims and Issues

2. The Claimant brings claims for unfair dismissal and wrongful dismissal. The Claimant was dismissed for gross misconduct for theft from an elderly service user. The issues are as follows:

Unfair dismissal

1.1 Has the Respondent shown the reason for dismissal?

1.2 Was the dismissal fair or unfair applying the band of reasonable responses? As part of that:

1.2.1 following the 3-stage test in *British Home Stores v Burchell* [1978] IRLR 379

1.2.2 - did the Respondent genuinely believe the Claimant was guilty of misconduct?
- did they hold that belief on reasonable grounds?
- did they carry out a proper and adequate investigation?

1.2.3 was dismissal a fair sanction?

1.3 Was there a breach of the ACAS Code on Disciplinary and Grievance procedures?

1.4 If the dismissal was unfair, what is the chance that the Respondent would have dismissed the Claimant even if they had followed a fair procedure and on what date would the dismissal have taken place?

1.5 Should there be any deduction from the basic award for conduct prior to dismissal? Regarding the compensatory award, did the Claimant cause or contribute to her dismissal and if so, to what extent?

1.6 Should the Claimant succeed, remedy.

Wrongful dismissal

1.7 Whether the Claimant committed gross misconduct.
1.8 If not, the amount of notice to which the Claimant was entitled.

The Hearing

2. The Tribunal heard evidence from the Claimant and Fon Mbatang, who worked as a Senior Coordinator for the Respondent from 14 August 2017 to 26 March 2019 (Mr Mbatang) and for the Respondent from Diana Underwood, Director of Quality and Care (Ms Underwood). There was an agreed trial bundle of 420 pages.

The Claimant's Dates of Employment

3. It was agreed at the start of the hearing that the Claimant's dates of employment with the Respondent were from 11 October 2011 to 14 January 2019. The Respondent therefore agreed that the Claimant should be paid salary up to and including 14 January 2019 from what was originally considered to be the Claimant's termination date of 12 December 2018. Whilst it was suggested that the Claimant had not attended work in the period subsequent to 12 December 2018 the Claimant was on a pre-booked holiday over the Christmas period between 13 or 14 December 2018 and 8 or 9 January 2019 and therefore should be paid for these dates as a minimum. This matter has been resolved between the parties.

Findings of Fact

The Respondent

4. The Respondent provides Care Services (the "Services") to elderly and vulnerable adults. This includes a contract to provide the Services to the Royal Borough of Kensington and Chelsea ("RBKC").

The Claimant

5. The Claimant was employed by the Respondent from 21 December 2011 until the termination of her employment by reason of gross misconduct on 14 January 2019. At the time of her dismissal the Claimant was employed as a Field Care Supervisor ("FCS").

6. The Claimant's contract of employment was a letter of engagement with a start date of 21 December 2011 and signed by her on 4 January 2012. There is no evidence of a later contract of employment.

7. Clause 15 of the letter of engagement concerns the company's disciplinary procedure and states as follows:

> The Company's Disciplinary Policy and Grievance policy and Procedures are detailed in the Support Worker Guide and Staff Handbook and you should read these details and familiarise yourself with the process. Copies are also available from the registered Branch Manager. For the avoidance of doubt these are for guidance only and do not form part of your contractual terms.

8. Prior to March 2018 there was no evidence of any performance or conduct concerns regarding the Claimant.

9. As part of her duties the Claimant would attend elderly and vulnerable adults in their homes to provide required services to ensure their wellbeing and assist them in their day to day living arrangements. This would include, in some instances, doing shopping.

Handling Monies and Sound Financial Recording Policy

10. Given the vulnerability of service users the Respondent has strict policies regarding cash handling and access to service users' bank accounts.

11. The Respondent has a policy entitled "Handling Monies and Sound Financial Recording Policy" (the "Policy"). Whilst the version included in the bundle was dated June 2018 Ms Underwood's evidence was that the same, or substantially the same, version of the Policy would have existed at the time of the matters giving arise to the Claimant's dismissal in March and April 2018.

12. Key provisions within the Policy in the context of the matters giving rise to the Claimant's dismissal are:

- Staff should ensure that service users retain effective control of their own money in all cases except where it is explicitly stated that they require aid;
- Where the money of individual service users is handled by staff (for example during unaccompanied shopping or paying bills) they should check and keep all the receipts of transactions);
- The amount and purpose of all financial transactions undertaken on behalf of a service user, including shopping should be recorded appropriately on the visit record held at the service user's home signed and dated by the care worker and checked by service user, if able to do so, or their relative or representative on their behalf as appropriate;
- It is extremely important for the organisation to impress upon staff the importance of maintaining high standards in dealing with service users' money;
- Care staff working for the organisation should ensure that they act with the highest standards of care, probity and honesty at all times; and
- report to their Line Manager any discrepancies or problems relating to service users' money or finances immediately, including worries or concerns that a service user may be being cheated or defrauded by a third party or has otherwise lost or mislaid money or valuables.

13. Further the Policy provides in a section entitled "Investigation of Allegations of Financial Irregularities":

> Staff from this organisation work with vulnerable people where trust is of fundamental importance to the relationship. This organisation therefore views any potential breach of that trust as a very serious matter indeed and any allegations relating to financial irregularities, the mishandling of service users' money or financial affairs, dishonesty, theft or fraud will be rigorously investigated by the organisation according to its complaints or disciplinary procedure, the police being involved wherever indicated. All substantial cases of dishonesty, theft or fraud will be considered by the organisation as Gross Misconduct and subject to summary dismissal.

14. I was also referred to a document entitled "London Multi Agency Adult Safeguarding Policy and Procedures" most recently updated August 2016. This is a substantial document and the only section which is directly relevant in the context of this matter is at page 86 in the bundle and is the sub section entitled "financial or material abuse". This includes a reference to theft and fraud and

goes onto refer to financial transactions or the misuse or misappropriation of property, possessions or benefits are all forms of financial abuse and are more often than not targeted at adults at risk. The adults at risk can be persuaded to part with large sums of money and in some cases their life savings.

Service User Complaint

15. In March and April of 2018, RBKC received complaints from a service user, an elderly housebound vulnerable adult, Ms LS, that the Claimant whilst carrying out her duties of providing care had stolen money from her. These complaints were in respect of:

> A request from Ms LS for the Claimant to withdraw £100 cash from her Post Office account on or around 22 March 2018. The Claimant handed Ms LS £100 in cash withdrawn from her account, yet Ms LS noted that the receipt from the Post Office was for a £200 withdrawal.
>
> That the Claimant had made three unauthorised ATM withdrawals of cash from Ms LS's HSBC account without her knowledge or consent and that the Claimant had not given the money to Ms LS. The withdrawals were as follows:
>
> - £300 on 2 March 2018
> - £300 on 3 March 2018; and
> - £200 on 6 March 2018.

16. The concerns raised by Ms LS were recorded in a note made by Sarah Mattock, Occupational Therapist and Lead Social Worker of RBKC (Ms Mattock) dated 22 March 2018.

17. Ms Mattock's note records that when Ms LS had confronted the Claimant regarding the additional money withdrawn from her Post Office account the Claimant refunded the additional £100 the following day. The Claimant was recorded as having advised Ms LS that she had returned to the Post Office, who admitted their error, and refunded the additional £100.

18. Ms Mattock's note states that she discussed the issue with Catherine Aka (Ms Aka), who was employed by the Respondent at the time as Manager of the Hammersmith Branch, and which had designated responsibility for the RBKC local authority contract.

19. Also, in Ms Mattock's note of 22 March 2018 she stated:

> They have not had any previous problems with Nadine and nothing relating to finance and she is known to be a good carer. However, Nadine had not informed them that she was cashing money for Ms LS and carers are not supposed to be handling personal cards and PIN numbers. Catherine said she would call Nadine in tomorrow and make enquiries and would get back to her team.

20. In an email from Ms Aka to Ms Maddock dated 9 April 2018 she advised that she was going to send a team leader around the following day to help Ms LS check her bank statement.

21. In an email from Ms Mattock to Ms Aka of 11 April 2018 she advised that she and Ms LS had contacted HSBC that day and it had been confirmed that money had been taken from the account. Ms Mattock said that she would need to raise these concerns as safeguarding issues and contact the police. She went on to state "I am assuming the staff member has been suspended?". Her note also referred to the visit the previous day by a team leader called Gladys to Ms LS's home during which she had taken her HSBC bank statements from her and stated that these would need to be returned.

22. In a conversation on 18 April 2018 between Ms Mattock and Mr Mbatang who, at that time, was employed by the Respondent as a Senior Care Coordinator for the RBKC contract, the following was recorded by Ms Mattock.

> Telephone call from Fon (that is Mr Mbatang) from CRG who are doing an internal investigation regarding the incident of the £200 withdrawn from the Post Office when Ms LS had requested only £100 and the carer returning the second £100 the following day and after an apparent error on behalf of the Post Office. Fon explained that the carer had documented the returned money to Ms LS in her diary and asked if this can be confirmed. I explained that Ms LS agreed that the second £100 had been returned to her and this was not disputed it was whether the error had been on the part of the Post Office or whether the carer had withdrawn £200 intending to keep a £100 for herself and only returned the next day after Ms LS had confronted her about the receipt. I explained to Fon that a letter or an email from the Post Office that had the Post Office logo on admitting the error had been on their part would be evidence.

Police Interview on 8 September 2018

23. As a result of the concerns regarding the Claimant's conduct the matter was referred to the police and the Claimant attended an interview at Notting Hill Police Station on 8 September 2018 with PC McMeekin, the Police Officer in charge of the criminal investigation into the Claimant for the purpose of a voluntary caution. A summary note of this interview included a record of the Claimant making the following comments:

- that she had used Ms LS's bank card or Post Office account to take money out for her on numerous occasions;
- the money withdrawn was to pay bills and for normal shopping;
- that she could not remember if she had permission from the company to use the bank cards;
- in relation to the HSBC cash withdrawals on 2, 3 and 6 March 2018 that she could not remember, but when it was put to her that she

was working on those days, she stated that "it must have been her" that used the card on those dates; and

- that Ms LS would have asked her for the amounts of £200 or £300 when she had asked her to get money for her.

Safeguarding Meeting on 12 September 2018

24. A safeguarding meeting about this issue took place on 12 September 2018. This was attending by PC McMeekin, as well as Ms Mattock and Mr Mbatang, standing in for Ms Axa, who was on annual leave at the time. PC McMeekin provided the meeting with summary notes of his interview with the Claimant on 8 September 2018. PC McMeekin described the Claimant as having been "arrogant" during the interview and at times had answered "no comment" stating that she knew she could do that having seen it on television.

25. The note of the meeting included the following summary of the HSBC withdrawals:

- On to March 2018 the Claimant had been scheduled to visit Ms LS between 12:15 and 13:00 hours and her actual visit was recorded as being between 12:37 and 13:22. The withdrawal from Ms LS's HSBC bank account was recorded as being at 13:21. Whilst it is apparent that there was self-evidently a minor discrepancy in the time recording between the times at which the Claimant was at Ms LS's premises and the time of the ATM withdrawal I consider that this is a minor discrepancy in time recording and not a material issue.

- On 3 March 2018 the Claimant had been scheduled to visit Ms LS between 12:15 and 12:45pm but her actual visit was recorded as taking place between 10:29 and 11:14am. The withdrawal from Ms LS's HSBC bank account was recorded as being at 11:22am.

- On 6 March 2018 the Claimant had been scheduled to visit Ms LS between 12:15 and 12:45pm but her actual visit was recorded as being between 10:35 and 11:20am. The withdrawal from Ms LS's HSBC bank account was recorded as being at 10:15am.

26. Mr Mbatang confirmed that staff are allowed to use Post Office cards and cash payment cards when they are part of a service agreement with social services, but they are not allowed to use bank cards.

27. The note of the meeting refers to Ms Mattock having asked Mr Mbatang to request a letter from the Post Office confirming their error regarding the overpayment to the Claimant from Ms LS's account on 22 March 2018. Mr Mbatang asked the Claimant to request such a letter, but it was not followed up.

28. Mr Mbatang stated that he was not aware of the cash withdrawals from Ms LS's HSBC bank account.

Mr Mbatang visit to Ms LS on 18 September 2018

29. On 18 September 2018 Mr Mbatang decided to visit Ms LS at his own initiative. He asked her whether she could recall giving her bank card and pin number to the Claimant to which she said yes. She confirmed that there had been no previous occasions of money going missing from her accounts. Ms LS said that she realised that there was a problem when there was no money in her HSBC bank account when she went to were pay bills. Mr Mbatang did not ask Ms LS any specific questions regarding the sum withdrawn from her Post Office account or the three withdrawals from her HSBC account. Ms LS said that she recalled giving out the Claimant her bank card to get money for her on a couple of occasions.

30. I find that in undertaking this meeting Mr Mbatang was acting outside the scope of his authority. I consider that the interview was much less detailed than one would have expected giving that there were very specific grounds of concern regarding the Claimant's conduct and are inclined to suggest that his investigation was less diligent than it might have been and possibly with a view to avoiding further evidence incriminating the Claimant.

31. Mr Mbatang's evidence to the Tribunal was that if a service user had mental capacity there would not be a concern regarding sudden large and unexpected cash withdrawals. I find this to be surprising. His evidence was that such sudden and out of the ordinary cash withdrawals would not give rise to a suspicion of financial abuse. Again, I consider this to be surprising.

32. Mr Mbatang said that when a carer arrived at a service user's premises that they would log in and then log out on departure. In relation to the care workers' phones containing an App for the purposes of logging in and logging out Mr Mbatang stated that this had not existed at the time of the TUPE transfer on 20 September 2017. The care workers had the App by March 2018.

33. Mr Mbatang denied that he had interviewed Ms LS without authority. He gave evidence that he had told Abe Ouja of the Respondent of his intention to do so.

34. In response to cross examination from Ms Quigley, Mr Mbatang stated that he just wants "justice". He denied that the Claimant was his friend.

Safeguarding Meeting on 12 October 2018

35. There was a further safeguarding meeting on the issue on 12 October 2018. In attendance at the meeting were PC McMeekin, Ms Aka, Mr Mbatang, Ms Maddock and Nick Murray, Safeguarding Adult Manager employed by the Central and North-West London NHS Foundation Trust (Mr Murray).

36. During the meeting PS McMeekin expressed dissatisfaction that the Respondent had taken no action against the Claimant following the police investigation. Ms Aka advised the meeting that the Claimant would be suspended that day pending the Respondent's disciplinary process following its course.

37. The transcript of the meeting records the concerns raised by Ms LS regarding the money withdrawn from her HSBC bank account. She was recorded as stating she never used ATM machines and used her Post Office account as her main account. She had previously changed the pin numbers on all her cards to the same number to help her remember them. She had given the pin number to the Claimant for the Post Office account and Ms LS believed that the Claimant could have taken both the HSBC and Post Office cards out of her purse at the same time and then used the HSBC card.

38. During the course of the meeting both Mr Murray and PC McMeekin expressed concern regarding the interview undertaken by Mr Mbatang with Ms LS on 18 September 2018.

Mr Mbatang investigatory meeting with the Claimant on 16 October 2018

39. Mr Mbatang conducted an investigatory meeting with the Claimant on 16 October 2018. The Claimant admitted using Ms LS's bank card to withdraw money from ATM machines for her but again stated that this was at her request and that she gave Ms LS all the money that she withdrew. The Claimant said that she filled in the financial services transaction forms.

Care Quality Commission statutory notification

40. A Care Quality Commission ("CQC") statutory notification was completed and submitted by the Respondent on 23 October 2018.

41. The document was completed by Ms Aka. It is relevant that it includes the following statement in the section entitled "additional relevant information":

> "We advised that it is correct we shall discipline the care worker for breaching policies regarding financial transactions, however we should not be hasty to dismiss the care worker as there is no concrete evidence, she is responsible for the transactions".

Ms Underwood's Involvement

42. It was not until the middle of October 2018 that Ms Underwood became involved. She gave evidence that she was extremely concerned that no action had been taken against the Claimant notwithstanding the passage of seven months from the matters of concern first being reported to the Respondent by Ms Mattock.

43. Given the significant passage of time Ms Underwood sought input from Debbie Dabreo and Mary Wynne, both employed by the RBKC as Quality Assurance Leads.

44. Ms Wynne replied to Ms Underwood in an email of 25 October 2018 to include making the following statement:

> "It appears from the information provided by Ms Mattock below that the evidence is strong, this member of staff presents a risk and that the reasons to suspend can be justified"

Suspension of Claimant

45. It was not until late October 2018 that the Claimant was suspended from providing active care duties in service users' homes. Ms Underwood acknowledged that this represented a serious short coming by the Respondent. She was not personally aware of the concerns relating to the Claimant until October 2018.

Concerns re Handling of the Issue

46. Ms Underwood instructed Sheetal Lodhia, then the Respondent's Regional Manager for London (Ms Lodhia) to carry out an investigation and report on the Respondent's management's handling of the safeguarding issue.

47. As a result of serious concerns in the Respondent's handling of the matter being identified by Ms Lodhia, Ms Aka was demoted. Mr Mbatang was interviewed, however after this he resigned and left the Respondent's employment on 26 March 2019.

48. Mr Murray sent a letter to Ms Underwood dated 20 November 2018. He sought an update on the employment status of the three members of staff at the Respondent which included the Claimant. He concluded by stating that this represented an "unsatisfactory situation" and requires a more robust response from the Respondent.

49. In an email from Ms Underwood to Sue Frith, HR and copied to Ms Lodhia of 26 November 2018 she stated:

> "I am confident with the social workers evidence and the other evidence that we can achieve a desired outcome in line with the procedure".

Safeguarding Meeting on 30 November 2018

50. It is relevant to refer to the note from 30 November 2018 safeguarding meeting. PC McMeekin is recorded as stating that he had agreed to his summary of the police interview being used in the disciplinary proceedings but not to be retained by either of the people being disciplined. He confirmed that the Claimant had made admissions in interview that she took money out of the client's account on several occasions but denied ever keeping the money. He

went on to state at s.6 of the note of the meeting that he had made it clear to Mr Mbatang that he had put himself in the frame for witness intimidation by interviewing Ms LS at all and especially on his own. He had never given his investigation report as requested and in the meeting on 8 June 2018 had attempted to disprove police evidence. Ms Underwood is recorded as saying that while Mr Mbatang was unlikely to be dismissed it was highly likely that he would be given a final written warning.

Disciplinary Process and Dismissal

51. Ms Lodhia sent a letter to the Claimant dated 30 November 2018 inviting her to attend a disciplinary hearing on 4 December 2018. The purpose of the hearing was to discuss her alleged gross misconduct, namely an allegation of theft from service user Ms LS. Ms Lodhia attached her investigation meeting notes dated 16 October 2018 (the note of Mr Mbtang's meeting with the Claimant) together with Ms LS's HSBC bank transaction record for the dates in question. These were not the actual HSBC bank statements but rather a summary version of the times that ATM withdrawals had been made in the context of the Claimant's scheduled and actual visits to Ms LS. However, I consider that the Claimant would have been aware of the amounts of the transactions in question given that these had been specifically referred to during the course of the police interview on 8 September 2018.

52. The disciplinary hearing did not take place on 4 December 2018. This was due to the Claimant's chosen representative to accompany her at the hearing, Mr Mbatang, being regarded as inappropriate as a result of the Respondent's concern that he had contributed to failings in the process and therefore there would be a potential conflict of interest. The hearing was therefore adjourned until 11 December 2018. This was confirmed in a letter from Ms Lodhia to the Claimant dated 5 December 2018.

53. Mr Ogilvy sent a five-page letter in reply to John Preston, Ms Lodhia and Ms Underwood at 10:13am on 10 December 2018. He made a series of criticisms of the Respondent's conduct of the disciplinary process to include:

- there having been no thorough investigation;
- prejudging of the case;
- that Mr Mbatang had already carried out a formal enquiry into what actually happened, and his enquiry did not purport to reach any findings and conclusion;
- that it was inappropriate that Mr Mbatang had not been permitted to attend the hearing scheduled for 4 December 2018 as the Claimant's accompanying representative; and
- that the Claimant required sight of various documents to properly prepare for a disciplinary hearing to include:

    - the staff grievance procedure,
    - the disciplinary procedure,

- receipts of shopping made by the Claimant on two separate occasions upon being instructed to do so by the service user and the receipts being in the possession of that service user,
- the employee code of conduct for handling service users' property/bank card, including cash shopping,
- all documents signed by the Claimant on her HR file; and
- written confirmation that she had no previous warnings.

54. During the course of her witness evidence the Claimant referred for the first time to an email she claimed to have sent on the 10 December 2018 regarding her son having a scheduled hospital appointment the following day and so therefore being unable to attend the scheduled disciplinary hearing. Mr Ogilvy said that this was not a matter relied on. There is no evidence in the bundle of such an email being sent.

55. In an email from the Respondent's Human Resources email account of 17:07 on 10 December 2018, Mr Ogilvy was advised that the disciplinary hearing would go ahead as planned the following day and that should the Claimant fail to attend then a decision would be made in her absence.

56. Mr Ogilvy responded in an email of 10 December in which he said "my client shall not be attending tomorrow given the very serious concerns raised and the various reasonable requests for disclosure of documents and policies which is inclusive of evidence.

57. The Claimant did not attend the reconvened disciplinary hearing on 11 December 2018.

58. In a letter dated 12 December 2018 Ms Lodhia stated that she had considered all the evidence and had established that based on the balance of probability the allegation of theft is substantiated. The letter confirmed Ms Lodhia's decision to terminate the Claimant's employment with effect from 11 December 2018. The Claimant was advised of her right of appeal against the decision.

59. No rationale was provided by Ms Lodhia to explain the basis of decision and what evidence she relied on in concluding that the Claimant was guilty of gross misconduct.

60. Ms Underwood explained that the Respondent had decided that it would not be appropriate for Ms Lodhia to attend the Tribunal as a witness. She said that Ms Lodhia had left the Respondent's employment in acrimonious circumstances and had not responded to a request to give witness evidence in this hearing.

61. The Claimant did not receive the letter dated 12 December 2018.

62. The Claimant was on holiday from 13 or 14 December 2018 to 8 or 9 January 2019. She did not make any contact with the Respondent during the period from 12 December 2018 until her attempted return to work on 14 January 2019 when she was advised that she had been dismissed.

63. Somewhat bizarrely the bundle contained a further letter from Ms Lodhia to the Claimant dated 24 January 2018 (should have read 2019) inviting her to attend a rearranged disciplinary hearing on 30 January 2019. It is not clear whether this letter was actually sent.

64. Further, the bundle contained a letter from Michelle Lines, Area Manager for Essex, to the Claimant dated 29 January 2019 inviting her to attend an investigatory meeting on 31 January 2019. Again, it is not clear whether this letter was sent.

65. A further letter was sent to the Claimant by Jo Collingwood, HR Business Partner dated 12 February 2019. In this letter Ms Collingwood referred to the Claimant not having received the disciplinary outcome letter dated 12 December 2019. Ms Collingwood advised the Claimant that the outcome of the disciplinary hearing on 11 December was that her employment had been terminated for gross misconduct. She reiterated the Claimant's right to appeal against the decision.

66. The Claimant decided not to appeal against her dismissal. It is also relevant that she had commenced Employment Tribunal proceedings on 7 February 2019.

The Claimant's Evidence to the Tribunal

67. It is relevant for me to refer to matters which arose for the first time during the course of the Claimant's cross examination and questions I put to her.

68. "That service users lie about a lot of people and a lot of things".

69. That prior to making cash withdrawals whether from Ms LS's Post Office or HSBC account that the Claimant first telephoned the responsible coordinator, Alan Hkabangue, and that included telling him that she was going to use Ms LS's bank card. This was the first occasion upon which this had been mentioned.

70. The Claimant stated that when the £100 had been returned from the Post Office that this had been recorded in her diary.

71. The Claimant was asked whether she regarded a combined £800 as a large sum of money. She stated yes, she did. She was then asked whether she regarded this level of withdrawal in a short period of time as being unusual to which she responded yes. She did, however, refer to other occasions when there had been £200 withdrawals from Ms LS's accounts.

72. She said that she gave Ms LS all the receipts for ATM withdrawals.

73. That no financial transaction sheet was recorded, or if it was, only sometimes but it would be recorded in the care notebook.

74. that there was no signed receipt from Ms LS for the withdrawals and explained this on the basis that Ms LS found it difficult to sign as a result of her arthritis.

75. that she was not sure how Ms LS spent the money but said that she would typically pay her gas and phone bills at the Post Office in cash.

76. She was asked whether she had returned subsequent to the ATM HSBC cash withdrawals on 2, 3 and 6 March with the cash but she could not remember if she had logged in or not given the log in times as recorded.

77. I asked the Claimant what a typical level of withdrawal from Ms LS's Post Office and HSBC accounts would be in any given monthly period. The Claimant indicated that a typical sum would be between £500 and £600 from her Post Office account and between £600 and £800 from her HSBC account. This was subsequently modified as a typical combined monthly average of between £500 and £600.

78. When asked by me as to the uses of such money the Claimant referred to food shopping typically from M&S, dry cleaning bills, payment of her phone bill, gas bill, land line bills and occasional trips to Oxford Street to buy more irregular items such as bedsheets. She again confirmed that she would telephone her coordinator in the office each time before making cash withdrawals and agreed that they would need to be recorded in the care plan.

The Law

79. Under section 98(1)(a) of the ERA it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal. Under section 98(1)(b) the employer must show that the reason falls within subsection (2) or is some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. A reason may come within section 98(2)(b) if it relates to the conduct of the employee. At this stage, the burden in showing the reason is on the respondent.

80. Under s98(4) the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) 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 shall be determined in accordance with equity and the substantial merits of the case.

81. In considering whether or not the employer has made out a reason related to conduct, in the case of alleged misconduct, the tribunal must have regard to the test in British Home Stores v Burchell [1980] ICR 303, and in particular the employer must show that the employer believed that the employee was guilty of the conduct. This goes to the respondent's reason. Further, the tribunal must

assess (the burden here being neutral) whether the respondent had reasonable grounds on which to sustain that belief, and whether at the stage when the respondent formed that belief on those grounds it had carried out as much investigation into the matter as was reasonable in all the circumstances. This goes to the question of the reasonableness of the dismissal as confirmed by the EAT in Sheffield Health and Social Care NHS Foundation Trust v Crabtree EAT/0331/09.

82. In considering the fairness of the dismissal, the tribunal must have regard to the case of Iceland Frozen Foods v Jones [1982] IRLR 439 and have in mind the approach summarised in that case. The starting point should be the wording of section 98(4) of the ERA. Applying that section, the tribunal must consider the reasonableness of the employer's conduct, not simply whether the tribunal considers the dismissal to be fair. The burden is neutral. In judging the reasonableness of the employer's conduct, the tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer. In many, though not all, cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably take another view. The function of the tribunal is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within that band, the dismissal is fair. If the dismissal falls outside that band, it is unfair.

83. The band of reasonable responses test applies to the investigation. If the investigation was one that was open to a reasonable employer acting reasonably, that will suffice (Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23.)

84. In reaching their decision, Tribunals must also take into account the ACAS Code on Disciplinary and Grievance Procedures. By virtue of section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992, the Code is admissible in evidence and if any provision of the Code appears to the Tribunal to be relevant to any question arising in the proceedings, it shall be taken into account in determining that question.

85. The ACAS Code provides, with underlining added where applicable for emphasis:

5*. It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case. In some cases, this will require the holding of an investigatory meeting with the employee before proceeding to any disciplinary hearing. In others, the investigatory stage will be the collation of evidence by the employer for use at any disciplinary hearing.*

6. In misconduct cases, where practicable, different people should carry out the investigation and disciplinary hearing.

9. If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct and its possible consequences to enable the employee to prepare to answer the case at disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification.

11. The meeting should be held without unreasonable delay whilst allowing the employee reasonable time to prepare their case.

15. *To exercise the statutory right to be accompanied workers must make a reasonable request. What is reasonable will depend on the circumstances of each individual case.*

86. I received lengthy skeleton arguments running to twenty pages from Mr Ogilvy and to summarise the principal complaints which he raises are:

- That no investigation took place;
- There was a failure to call any relevant witnesses;
- That evidence potentially exculpating the Claimant was not included;
- That the disciplinary hearing should have been further adjourned as a result of his email of 10 December 2018;
- That the allegations in the disciplinary hearing invitation letter were inadequately particularised; and
- That there was a lack of evidence in relation to the alleged £800 withdrawal and there was no evidence from HSBC in that regard.

87. Mr Ogilvy referred me to a number of cases but save for one which I will refer to subsequently in relation to a Polkey deduction the cases concern matters which I consider has already been covered and I do not need to refer to individual authorities he referred me to.

88. In her submissions Ms Quigley referred to Shrestha v Genesis Housing Association [2015] EWCA Civ 94 and the very recent judgment of Justice Griffiths in Sunshine Hotel Ltd v Goddard EAT/0154/19. This refers to there not always needing to be a line of demarcation between an investigation and disciplinary hearing and in some instances, it may be possible for the investigation to form part of the disciplinary hearing when things are looked at in the round.

Conclusions

89. I now apply the law to the facts to determine the issues. If I do not repeat every single fact, it is in the interest of keeping these reasons to a manageable length.

90. The first issue was whether the Respondent has shown the reason why the Claimant was dismissed. I find they have. The Claimant was dismissed for gross misconduct, i.e. for alleged theft from Ms LS, the service user. It was not

suggested on behalf of the Claimant that the Respondent had any alternative, or ulterior, motive for her dismissal.

91. I now have to decide whether it was fair for the Respondent to dismiss the Claimant for that reason which includes considering whether they followed a fair procedure. I have to apply the band of reasonable responses.

92. First, I will go through the three stages in the case of BHS v Burchell.

93. Stage one: did the Respondent genuinely believe the Claimant was guilty of this misconduct? I find that they did.

94. Stage two: did the Respondent hold that belief on reasonable grounds? I find that they did. I reach this finding for the following reasons:

- The Claimant had admitted withdrawing large sums of money from Ms LS's HSBC account on 2, 3 and 6 March 2018 and no explanation was provided by the Claimant as to the purpose of such withdrawals. Further, the timing and amounts of the withdrawals invited suspicion regarding whether they were at the instigation of Ms LS. This suspicion was compounded by Ms LS advising Ms Mattock on 22 March 2018 that she had inadequate money in her HSBC account to pay her gas bill.

- Ms LS stated that she never used the HSBC account for cash withdrawals, only her Post Office account.

- HSBC subsequently reimbursed the money to Ms LS's account on the basis that it constituted unusual banking activity for that account as Ms LS had only previously used it to make purchases by phone or cheque, not to withdraw cash via an ATM.

- Ms LS's HSBC account was completely emptied in the three transactions.

- The total of £800 withdrawn from Ms LS's HSBC account was never seen by other care workers in her flat nor were any new purchases noted; and

- The absence of appropriate records and receipts.

95. Stage 3: did the Respondent carry out a reasonable investigation? Ms Quigley argued that in the round, looking at the totality of the evidence, there had been a sufficient, or at least reasonable, investigation.

96. I find that they did not. In her evidence Ms Underwood was extremely candid in that the Respondent's conduct of the matter had fallen far short of the required standards. First, I find that it was extraordinary that notwithstanding serious concerns having been raised by Ms LS to Ms Mattock on 22 March 2018 that it was not until late October 2018 that the Claimant was suspended from active duties with service users. Notwithstanding her suspension she continued to have some contact with service users and particularly at weekends when there was a shortage of staff.

97. I find that the investigation undertaken by the Respondent was outside the range of reasonable responses. I find that whilst Mr Mbatang undertook interviews with Ms LS on 18 September 2018 and the Claimant on 16 October 2018 that he was not appointed to undertake a full investigation, or if he was appointed, the investigation he undertook was inadequate and one no reasonable employer would have undertaken. I find that Mr Mbatang was reluctant to fully investigate the matter and ask relevant questions and this may partially be explained by his reluctance to find evidence that would incriminate the Claimant. In particular, he failed to proactively investigate the basis of the cash withdrawals made from Ms LS's Post Office and HSBS accounts. I find it particularly striking that when he did meet with Ms LS on 18 September 2018 that he did not ask her any specific questions regarding the sequence of three substantial withdrawals from her HSBC account in the period 2 to 6 March 2018. Any reasonable investigation would have focussed on these matters. His did not.

98. I also find that Ms Lodhia did not undertake any proper investigation. In any event it would have been inappropriate for her to do so given that she was appointed to conduct the disciplinary hearing.

99. Whilst I do consider that from the totality of the evidence, gathered from the police investigation and the safeguarding meetings conducted by RBKC, that the Respondent had sufficient evidence to provide reasonable grounds for suspicion of the Claimant's culpability, this was not an investigation it had itself undertaken. I do not accept that the Respondent could reasonably rely on the police interview and safeguarding meetings without any real investigation of its own.

100. The next question is whether dismissal was a fair sanction, i.e. was it fair to dismiss the Claimant for this reason. I find that it was. The misappropriation of substantial sums of money from a vulnerable service user's account is a serious offence amounting to gross misconduct.

Fair Procedure and the ACAS Code

101. I find that the Claimant knew the allegations against her.

102. I, do however, have serious concerns about the procedure applied to this case.

103. As already indicated the Respondent should have suspended the Claimant much earlier and almost certainly on the original concerns being reported to Ms Mattock by Ms LS on 22 March 2018. The Respondent's failure to properly address the matter and carry out investigations resulted in a very real risk that the matters had gone stale particularly in the case of the recollection of a vulnerable service user such as Ms LS.

104. I consider that the Respondent was deficient in not appointing an independent manager to investigate. I refer to the ACAS Code as follows:

> *In misconduct cases, where practicable, different people should carry out the investigation and disciplinary hearing.*

I find that this did not take place.

105. Mr Ogilvy referred to various specific matters within the Respondent's disciplinary policy which he claimed had been contravened. This included his assertion that a dismissal for misconduct should only be taken by a panel comprising of a Director and/or Head of Department who have not been involved in the investigation, plus a member of the HR department who will be there to provide procedural guidance. I find that the disciplinary policy is non contractual. I find that it was appropriate for Ms Lodhia to be appointed to conduct the disciplinary hearing.

106. The right to be accompanied arises under s.10 of the Employee Relations Act 1999. S.1(b) refers to a reasonable request to be accompanied. I am satisfied that the Respondent's decision to refuse Mr Mbatang to accompany the Clamant was reasonable given the very critical comments made by PC McMeekin at the recent safeguarding meeting on 30 November 2018 regarding his earlier involvement.

107. I do not, however, consider that it was appropriate for the Respondent to proceed with the disciplinary hearing on 12 December 2018 given that Mr Ogilvy had on the afternoon and evening of 11 December 2018 raised a series of criticisms regarding the Respondent's conduct of the matter and had asked for the provision of various documents. I consider that it would have been appropriate for the Respondent to have responded to this correspondence, even if it were primarily in the form of a rebuttal, and then rescheduled the disciplinary hearing for a later date. I also consider that the Respondent should have provided the Claimant with a further opportunity to nominate an alternative accompanying representative given their objection to Mr Mbatang.

108. Given that Ms Lodhia decided to proceed with the disciplinary hearing in absentia I consider it was beholden upon her to properly document the rationale for her decision. She palpably failed to do so. I find that her letter dated 12 December 2018 to the Claimant was wholly inadequate. It did no more than advise the Claimant that she was being dismissed for theft. The deficiency in the content of Ms Lodhia's letter was then compounded by the failure of the Respondent to actually send the letter to the Claimant. The position then became somewhat farcical in that a series of further letters were sent until the matter was finally confirmed to the Claimant by Ms Collingwood in her letter of 12 February 2019 which enclosed a copy of Ms Lodhia's letter of 12 December 2018.

<u>Polkey deduction</u>

109. I now need to consider what, if any, percentage reduction should be made to the compensatory award on the basis that if the Respondent had carried out a reasonable investigation the Claimant would have been dismissed in any event.

110. The principles in Polkey v AE Dayton Services Limited CA [1987] 1 All ER 984 have been consistently applied by the EAT in later cases, including Allied Distillers Ltd v Handley and ors EATS 0020/08; Cumbria County Council and anor v Bates EAT 0398/11 and London Borough of Hillingdon v Gormanley and ors EAT 0169/14. Tribunals must have regard to any material and reliable evidence that might assist it in fixing just and equitable compensation even if there are limits to the extent to which it can confidently predict what might have been.

111. Mr Ogilvy referred to a decision of the Scottish EAT in Miss Linda Stewart v Next Retail Ltd UKEATS/0011/11/BI which concerns the application of Polkey and at paragraph 4 contains the statement that Polkey deductions can only be made in cases where a dismissal is unfair on account of a flaw in the procedure. However, I find this decision unhelpful and inconsistent with the position as consistently adopted by Courts over the last 20 years. The original dichotomy between so called procedural and substantive deficiencies or unfairness as arising from the case of Steel Stockholders v Kirkwood EAT 1993 IRLR 515 has subsequently been addressed in a series of decisions which are to the effect that the distinction between substantive and procedural unfairness is unhelpful and often difficult to apply in practice

112. In O'Dea v ISC Chemicals Ltd 1996 ICR 222, CA, the Court of Appeal described the decision in Steel Stockholders as 'controversial' and held the procedural/substantive distinction made in that case to be unwarranted

113. And in Eclipse Blinds Ltd v Bill EAT 818/92 the EAT stressed that the task of the tribunal was to take into account all the circumstances rather than to isolate one factor

114. In O'Donoghue v Redcar and Cleveland Borough Council 2001 IRLR 615, CA, a claimant unsuccessfully contended before the Court of Appeal that it was not open to a tribunal — in the light of the King decision — to make a finding on the inevitability of her dismissal, since her dismissal had been found to be substantively unfair. The tribunal in that case had found that the claimant had been both unfairly dismissed and victimised, but that she would have been fairly dismissed in any event within six months because of her unacceptable attitude towards colleagues and the complaints that had arisen as a result of her behaviour. Accordingly, it limited her compensation to the period of six months during which her employment would have continued. The Court of Appeal rejected the employee's appeal, stating that: 'If the facts are such that an employment tribunal, while finding that an employee has been dismissed unfairly (whether substantively or procedurally), concludes that, but for the dismissal, the employee would have been bound soon thereafter to be dismissed (fairly) by reason of some course of conduct or characteristic attitude which the employer reasonably regards as unacceptable but which the employee cannot or will not moderate, then it is just and equitable that compensation for the unfair dismissal should be awarded on that basis. We do not read Polkey or King v Eaton Ltd as precluding such an analysis.'

115. More recent decisions of the appellate courts have moved away from a detailed discussion of the procedural/substantive issue and have shifted the focus onto whether tribunals come under an absolute duty to consider making a Polkey reduction whenever there is evidence to suggest that the employee might have been fairly dismissed see Software 2000 Ltd v Andrews and ors 2007 ICR 825, EAT. It is clear that the courts are increasingly reluctant to support the view that there is a clear dividing line between procedural and substantive unfairness, still less that such a line should be used to determine when it is and is not appropriate to make a Polkey reduction.

116. In undertaking this exercise, I am mindful of the guidance in cases such as Eversheds v De Belin [2011] ICR 1137 which held that Tribunals should not decline to undertake a Polkey exercise merely because it involves "speculation. The question is not whether the tribunal can predict with confidence all that would have occurred; rather it is whether it can make any assessment with sufficient confidence about what is likely to have happened, using its common sense, experience and sense of justice. It may not be able to complete the jigsaw but may have sufficient pieces for some conclusions to be drawn as to how the picture would have developed. For example, there may be insufficient evidence, or it may be too unreliable, to enable a tribunal to say with any precision whether an employee would, on the balance of probabilities, have been dismissed, and yet sufficient evidence for the tribunal to conclude that on any view there must have been some realistic chance that he would have been. Some assessment must be made of that risk when calculating the compensation even though it will be a difficult and to some extent speculative exercise.

117. I find that if the Respondent had undertaken a proper and timely investigation it was inevitable that the decision would have been that the Claimant should be dismissed for gross misconduct. I consider that there would have been no chance that the Claimant would have been given the benefit of the doubt had such further investigations been undertaken. I therefore find that there should be a 100% reduction in the compensatory award.

118. Further, I do not consider that there should be any notional extension of the Claimant's period of employment during which investigations should have been undertaken. This is partly on the basis that there was already a period of over a month for which the Claimant received payment after the disciplinary hearing scheduled for 11 December 2018 which she did not attend. In any event given my finding below on contributory conduct this becomes irrelevant.

Contributory conduct

119. Given my decision on Polkey it is not necessary for me to make a separate finding on contributory conduct regarding the compensatory award, but had I done so I would also have made a finding of 100% in accordance with s.123(6) of the ERA.

120. In Nelson v BBC (No.2) 1980 ICR 110, CA, the Court of Appeal said that three factors must be satisfied if the tribunal is to find contributory conduct:

- the relevant action must be culpable or blameworthy;
- it must have actually caused or contributed to the dismissal;
- it must be just and equitable to reduce the award by the proportion specified.

I find that these factors were all satisfied.

121. In order for a deduction to be made under S.123(6) ERA, a causal link between the employee's conduct and the dismissal must be shown. This means that the conduct must have taken place before the dismissal; the employer must have been aware of the conduct; and the employer must then have dismissed the employee at least partly in consequence of that conduct. I find that all of these factors applied.

122. If the tribunal does find contributory fault, it must be satisfied that the employee did actually commit the acts that contributed to the dismissal and should explain why this is so. In London Borough of Lewisham v James EAT 0581/03 the EAT stated that 'it is quite plain that S.123(6) is not satisfied by reference to a finding simply that an employer had reasonable belief in the conduct. The conduct which is to form the basis of a deduction for contributory fault, whatever it is, must be established, proved and identified by the tribunal.'

123. I find that there was overwhelming evidence that the Claimant had taken the money from Ms LS's HSBC account without her authorisation for the reasons set out earlier in this Decision but repeated as follows:

- The Claimant had admitted withdrawing large sums of money from Ms LS's HSBC account on 2, 3 and 6 March 2018 and no explanation was provided by the Claimant as to the purpose of such withdrawals. Further, the timing and amounts of the withdrawals invited suspicion regarding whether they were at the instigation of Ms LS. This suspicion was compounded by Ms LS advising Ms Maddocks on 22 March 2018 that she had inadequate money in her HSBC account to pay her gas bill.
- Ms LS stated that she never used the HSBC account for cash withdrawals, only her Post Office account.
- HSBC subsequently reimbursed the money to Ms LS's account on the basis that it constituted unusual banking activity for that account as Ms LS had only previously used it to make purchases by phone or cheque, not to withdraw cash via an ATM.
- Ms LS's HSBC account was completely emptied in the three transactions.

- The total of £800 withdrawn from Ms LS's HSBC account was never seen by other care workers in her flat nor were any new purchases noted.

124. An employee's failure to give the employer an explanation for his or her conduct can contribute to a dismissal. In Kwik Save Stores Ltd v Clerkin EAT 295/95 a tribunal accepted the claimant's contention that his dismissal for allegedly falsifying the clocking-off cards of employees was unfair because he had in fact only been carrying out what he had thought to be standard company procedure. However, the tribunal found that his failure to raise this defence to his actions at the disciplinary hearing contributed to his dismissal by 40 per cent.

125. Contributory fault may arise in respect of the manner in which an employee conducts himself during a disciplinary process. In Sidhu v Superdrug Stores plc EAT 0244/06, an employment tribunal made a 90 per cent reduction in the employee's compensatory award because he could have done far more to assist himself during the course of two disciplinary hearings by probing the evidence submitted by the employer to support the allegation of gross misconduct and by attempting to call witnesses at the disciplinary hearing. On appeal, the EAT cautioned that a finding of contributory conduct in such a case was only appropriate if the tribunal is sure that the employee has caused or contributed to his or her dismissal by some aspect of his or her conduct during the disciplinary process.

126. In this respect there are a number of factors I took into account to include:

- the comment made by PC McMeekin following his interview with the Claimant on 8 September 2018 that she was "arrogant" in her attitude and consistently answered "no comment";

- the giving of what in many incidences I consider having been conflicting and/or evasive responses;

- a failure to mention material matters during the course of either the police interview or the internal meeting with Mr Mbatang, to include the very surprising failure to mention that she had sought prior authorisation for each of the individual cash withdrawals from her coordinator;

- the complete failure by the Claimant to follow up after 10 December 2018 until attempting to return to work on 14 January 2019 shows a failure to properly engage with the process; and

- the failure to exercise a right of appeal once she had been properly informed of the decision to terminate her employment and the continuing availability of a right of appeal.

Basic award

127. In relation to the basic award I needed to consider what, if any, reduction should be made as a result of the Claimant's contributory conduct in accordance with s.122 (2) of the ERA. I consider that it is just and equitable that there should

be a reduction of 100%. I make this finding based on what I consider to be the overwhelming evidence that the Claimant's conduct breached the Respondent's procedures regarding the handling of vulnerable service users' finances, that the Claimant had failed to maintain appropriate records of cash withdrawals, that the Claimant had been evasive during the course of the interview with Pc McMeekin on 8 September 2018 as recorded by him and that by refusing to attend the disciplinary hearing either on 5 December 2018, but without Mr Mbatang as her accompanying representative, or on 11 December 2018 she deprived herself of the opportunity to provide an explanation of her conduct to Ms Lodhia.

Wrongful dismissal

128. For this claim unlike the unfair dismissal claim I need to consider the evidence for myself and decide whether the Claimant was guilty of gross misconduct. On the balance of probabilities, I found that she was in relation to the unauthorised withdrawals of money from Ms LS's HSBS account in the period 2-6 March 2018. I therefore find that the Claimant was dismissed for gross misconduct and she is not entitled to notice pay. I would also refer to, but I will not repeat, the various matters I listed in justifying a finding that there should be a 100% reduction in the compensatory award for contributory conduct.

Employment Judge Nicolle

Dated: **17 January 2020**

Sent to the parties on:

17 January 2020

For the Tribunal Office