EMPLOYMENT TRIBUNALS

Claimant: **Mr R Milczarek**

Respondent: **Hermes Parcelnet Limited**

Heard at: **Leeds** **On:** **06 March 2020**
Deliberations 07 March 2020

Before: **Employment Judge T R Smith**

Representation
Claimant: Ms Amin, of Counsel
Respondent: Ms Hale, Solicitor

RESERVED JUDGMENT

1. The Claimant's complaint of unfair dismissal is not well founded and is dismissed.

2. The Claimant's complaint of wrongful dismissal is not well founded and is dismissed.

REASONS

Evidence.

1. I had before me a bundle totalling 85 pages.

2. With the consent of Ms Hale there was also produced in evidence a statement of the Claimant's wife, Mrs Agata Jurczyk and a number of text messages. The former was marked A1 and the latter A2.

3. The Claimant and his wife both gave oral evidence and were cross examined.

4. I heard oral evidence from Mr James Barron, the Respondents depot manager and dismissing officer.

5. An interpreter was present thorough out the hearing. There was no suggestion at any time there were any difficulties with the interpretation. Breaks were offered to the interpreter and accepted throughout the proceedings.

The Issues.

6. What was the reason for the dismissal? The Respondent asserted that it was a reason relating to conduct which is a potentially fair reason under section 98 (2) of the Employment Rights Act 1996 ("ERA 96"). It was conceded that the Respondent had shown a potentially fair reason for dismissal namely conduct.

7. Did the Respondent hold that belief in the Claimant's misconduct on reasonable grounds? Did it act reasonably or unreasonably in treating that reason as a sufficient reason for dismissal having regard to the factors set out in section 98(4) ERA 96?

8. Was the decision to dismiss a fair sanction, that is, was it within a reasonable range of responses of a reasonable employer?

9. If the dismissal was unfair, did the Claimant contribute to the dismissal by culpable conduct? This required the Respondent to prove, on the balance of probabilities, that the Claimant actually committed the misconduct alleged? ("the Contribution issue")

10. Does the Respondent prove that if it had adopted a fair procedure the Claimant would have been fairly dismissed in any event, and/or to what extent and when? ("the Polkey issue")

11. Did the ACAS code of practice: disciplinary and grievance procedures 2015 apply?

12. If so were either party in breach?

13. If so, was it reasonable to make an adjustment under section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 ("section 207A").

14. Does the Respondent prove the Claimant was guilty of an act of gross misconduct?

15. I indicated at the start of proceedings, due to the likely time pressures that I would deal solely with whether the Claimant succeeded in some or all of his complaints. If he did, I would then consider the issue of remedy/compensation at a separate hearing.

The Legal Framework.

16. Unfair dismissal.

I applied section 98 (1), 98 (2) and 98 (4) of the ERA 96 which provides as follows: –

"98 (1) – in determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show:

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that either it is 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 helped.

98 (2) – a reason falls within this subsection if it…….

(b) relates to the conduct of the employee.

98 (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 the weather in the circumstances (including the size and the 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."

17. Given it was admitted the Respondent could establish a potentially fair reason for dismissal the only question for me was one of fairness or unfairness within the meaning of section 98 (4) ERA 96.

18. I had regard to the guidance given in **British Home Stores Ltd -v- Burchall 1978 IRLR 379.**

19. However, I reminded myself that **Burchell** was decided before the alteration of the burden of proof effected by section 6 of the Employment Act 1980.

20. In that case the first question raised by Mr Justice Arnold: *"did the employer had a genuine belief in the misconduct alleged?"* went to the reason for dismissal. The burden of showing a potentially fair reason rests with the employer. However, the second and third questions, the reasonable grounds for the belief based on a reasonable investigation, go to the question of reasonableness under section 98 (4) of the ERA 96 and there the burden is neutral.

21. I had regard to the guidance given at paragraphs 13 to 15 in the case of **Sheffield Health and Social Care NHS Foundation Trust -v- Crabtree UKEAT 0331/09/ZT**.

22. The approach to fairness and procedure is the standard of a reasonable employer at all three stages: - **Sainsbury's Supermarket-v- Hitt 2002 EWCA CIV 1588**.

23. I reminded myself that when considering the objective standard of a reasonable employer the test was the material which was available the employer at the time. However, the test goes further as it involves information which would have been available had a proper investigation being conducted and this point was emphasised by His Honour Judge Serota QC in the case of **London Waste Ltd -v-Scrivens UK EAT/0317/09**

24. I also applied the guidance given in the case of **Iceland Frozen Foods Ltd -v- James 1992 IRLR 439**: –

"The authorities establish that in law the correct approach for an employment Tribunal to adopt in answering the question posed by section 98 (4) is as follows……

(1) the starting point should always be the words of section 98 (4) themselves.

(2) in applying this section an Employment Tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the Employment Tribunal) consider the dismissal to be fair.

(3) in judging the reasonableness of the employer's conduct an Employment Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer.

(4) 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 on you, another quite reasonably take another.

(5) the approach of the Employment Tribunal, as an industrial jury, is to determine whether the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses in which a reasonable employer might have adopted stop if a dismissal falls within the band the dismissal is fair….. If the dismissal falls outside the band it is unfair."

25. In summary I have to ask myself: –

    25.1. Was there a genuine belief in the alleged misconduct?

    25.2. Were there reasonable grounds to sustain that belief?

    25.3. Was there a fair investigation and procedure?

    25.4. Was dismissal a reasonable sanction open to a reasonable employer?

<u>Contributory conduct.</u>

26. Section 123 (6) ERA 96 states that *"[W] here the Tribunal finds that the dismissal was to any extent caused all contributed to by any action of the complainant, it shall reduce the….. compensatory award by such proportion as it considers just and equitable having regard to that finding."*

27. The wording in relation to any deduction from the basic award is set out in section 122(2) and differs from that in section 123 (6) ERA 96.

28. A reduction for contributory conduct is appropriate according to the Court of Appeal in **Nelson-v- BBC (2) 1980 ICR 110** when three factors are satisfied namely: –

    28.1. The relevant action must be culpable or blameworthy

    28.2. It must have caused or contributed to the dismissal, and it must be just and equitable to reduce the award by proportion specified

    28.3. For a deduction to be made a causal link must exist between the employee's conduct and the dismissal. In other words, 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 conduct.

Polkey Reductions.

29. Under Section 123 (1) ERA 96 I must consider whether it would be *"just and equitable"* to make a reduction from any compensatory award.

30. The case of **Polkey -v- AE Dayton Services Ltd 1988 ICR 142** held that a Tribunal must consider whether the unfairly dismissed employee could have been dismissed fairly at a later date.

31. The **Polkey** principal applies not only to cases where there is a procedural unfairness but also to substantive unfairness, although in the latter case it may be more difficult to envisage what would have happened in the hypothetical situation of the unfairness not having occurred, see **King -v- Eaton Ltd (2) 1998 IRLR 686.**

32. A **Polkey** reduction may be on a percentage basis or limited to a specified time, see **O'Donoghue -v- Redcar and Cleveland Borough Council 2001 IRLR 615**.

33. The burden of proving that an employee would have been dismissed in any event is on the employer. Provided the employee can put forward an arguable case that he or she would have been retained were it not for the unfair procedure, the evidential burden shifts to the employer to show that the dismissal might have occurred even if a correct procedure had been followed, see **Britool Ltd -v- Roberts 1993 IRLR 481.**

34. I looked carefully at the guidance given in **Software 2000 Ltd -v- Andrews 2007 ICR 825** on the application of **Polkey**.

35. In summary the guidance directs that a Tribunal must assess how long the employee would be employed but for the dismissal. If the employer contends that the employee would or might have ceased to have been employed in any event had a fair procedure been adopted, the Tribunal must have regard to all relevant evidence, including any evidence from the employee (for example an intention to retire). There will be circumstances where the nature of the evidence is so unreliable that the Tribunal may reasonably take the view that the exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on the evidence can properly be made. The Tribunal must have regard to all material reliable evidence even if there are limits to the extent to which it can confidently predict what might have happened. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence. A finding that an employee would have continued in employment indefinitely on the same terms should only be made where the evidence to the contrary namely that the employment would be terminated earlier is so scant that it can effectively be ignored.

36. The proper approach when applying the **Polkey** principle is not to look at what the Respondent would have done if it had not made an error, rather to look at what would have happened if the correct procedure had been applied.

Gross misconduct.

37. Gross misconduct occurs when there is a fundamental breach of contract by the employment. The focus must be on the damage to the relationship between the parties and it must strike at the root of the contract of employment. If the contract of employment sets out examples of gross misconduct which the employer would consider sufficient to merit summary dismissal, even if that conduct may not necessarily amount to gross misconduct, it probably should be classed by the Tribunal as gross misconduct. Not every act of gross misconduct however, necessary merits dismissal, and the employer should first of all consider penalties other than dismissal and should not automatically assume that dismissal is the appropriate penalty **Brito-Babapulle -v- Ealing Hospitals NHS Trust [2013] IRLR 854.**

Trade Union and Labour relations (Consolidation) act 1992

38. Section 207A (2) of the Trade Union and Labour Relations (Consolidation) Act 1992 provides: –

"(2) if, in the case of proceedings to which this section applies, it appears to the employment Tribunal that-

(a) the Claimant to which the proceedings relate concerned the matter to which a relevant Code of Practice applies,
(b) the employer has failed to comply with that Code in relation to that matter, and
(c) that failure was unreasonable,

the employment Tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%".

Findings of Fact.

39. **Background**

39.1. The Claimant commenced employment with the Respondent on 20 April 2017, having previously provided services to the Respondent via an agency, since approximately 01 November 2016.

39.2. At all material times the Claimant was employed as a category C night driver.

39.3. The Respondent is a consumer delivery company handling both the collection and delivery of parcels.

39.4. It employs approximately 3500 staff in the United Kingdom has its own HR department.

39.5. At the depot at which the Claimant was based there were approximately 98 employees, supported by between 40 to 50 agency staff.

39.6. The Respondent has clearly encountered losses as is clear from its stop and search policy issued to the Claimant (65 to 69) as amongst the measures it takes to prevent theft including random searches of staff and the use of dummy parcels marked with invisible dye.

39.7. The Respondent has a disciplinary policy (56 to 64).

39.8. An example of gross misconduct is set out at page 57 in the following terms: – *"theft or fraud including the unauthorised borrowing or use of company cash property or assets".*

39.9. The policy sets out how an employee would appeal if they were subjected to a disciplinary penalty to which they disputed.

39.10. Under the policy the Respondent is required to give reasonable notice, not less than 24 hours, of the time and place of any disciplinary hearing (59).

39.11. The Claimant lives at home with his wife and three sons, two of whom speak and write excellent English. He therefore had assistance at home with any letters or documents he received from the Respondent that he did not fully understand.

39.12. If an employee travels to and from work by car the car is parked in the Respondent's compound.

39.13. Staff are free to move to and from the warehouse to the car park although must push a button to gain access to the car park and may be subject to a random stop and search when they do so.

39.14. The Respondent has a number of Polish staff. Not all have a perfect command of English. The Respondent therefore uses Polish staff who are bilingual to assist those who struggle with English. They are not court qualified interpreters.

39.15. Mr Barron, the determining officer, had undertaken training in conducting disciplinary hearings, and conducted approximately 7 whilst employed by the Respondent over the last 18 months, but in his career had conducted over 50.

The Events

40. On 10 May 2019 the Respondent's loss prevention team conducted a random search at approximately 5 am in the morning at the Coventry depot.

41. One of the employees searched was the Claimant.

42. As a result of that activity a sealed bottle of men's aftershave and ladies' mascara was found in the Claimant's bag.

43. Both were items that were regularly found in the Respondent's warehouse.

44. The Claimant's immediate explanation was that he received the aftershave from his wife which she brought for him as a gift and she had put in his rucksack. The Claimant said he could provide a receipt for the aftershave.

The Claimant said he found the mascara on the warehouse floor a month earlier, picked it up and planned to return it but forgot.

45. The loss prevention team produced a short report dated 10 May 2019 contained in an internal email (72 to 73). There was no suggestion before me that the author of that report had any grudge against the Claimant. Given the search occurred at approximately 5 am and the email was written at 09.51 I am satisfied it is a reasonably contemporaneous record of what occurred and in particular the explanation given by the Claimant.

46. The Respondent has a system for addressing unallocated items, such as an item found on the warehouse floor. They must be placed either in the unprocessed parcels area or handed in to a member of the management team. The Claimant was aware of this procedure and had in the past complied with it.

47. The Claimant was suspended on full pay. The Claimant asserted in his statement that he never received the letter of suspension (81) although before me then resiled from that position. I am satisfied the Claimant did know he was suspended given he worked full-time and after the incident did not turn up for work. This is consistent with him receiving the letter.

48. The Claimant received a text on 15 May 2019 to attend an investigative meeting held on the 16 May 2019. An interpreter was provided at the investigative meeting. The investigation was conducted by Mr Michael Clarke.

49. The meeting was recorded in writing (76 to 80). I find the Claimant was asked to check the notes, with the translator present. The Claimant was specifically asked whether he had any complaints about how the interview was conducted to which he made no complaint. He signed the notes as did the interpreter. I have concluded that, despite what the Claimant was later to assert, they are a reasonable record of the that meeting.

50. The Claimant accepted the mascara was the Respondent's property and again maintained he found it the previous month on the warehouse floor, usually handed such items in, but forgot about it. He was asked, in what was a very leading question, whether in the circumstances it looked like to the Respondents that he had stolen the item to which he accepted that assertion.

51. The aftershave, valued at £72, was shown to the Claimant. It was unopened in its packaging. His account was that the day before, which would be 09 May 2019, he was in Tesco with his wife and she bought it for him for £55 and he put it in his bag in the car. He said he didn't take his bag into the warehouse. He was asked if he had a receipt from Tesco and claimed that Tesco did not give receipts. I pause at this juncture to indicate that I do not accept that assertion that Tesco do not issue receipts.

52. It is proper I record the Claimant denied he had taken either item. He was asked if he could explain why items were in his bag. He said he'd forgotten about mascara and that his wife had bought him the aftershave.

53. By a letter dated 17 May 2019 (82) the Claimant was invited to a disciplinary hearing. Given the submissions made by Ms Amin on the letter is appropriate I record a number of salient features.

54. The letter invited the Claimant to a disciplinary meeting on Thursday 23 May. He was told of his right of representation. He was told if he could not obtain a representative alternative arrangements could be made provided another date was suggested within five working days.

55. The Respondent described the meeting as follows in the letter: –

"The purpose of the hearing will be to discuss your alleged poor conduct, as set out in the attached documents. More specifically it is alleged that on 10/5/19 and unopened 90 ml bottle of "Spice Bomb Viktor Rolf" spray worth £72 and a "Roller Lash Benefit Mascara" worth £22 were found in your vehicle during a search. I have attached all relevant policies for you to review".

56. The letter went on to indicate that the allegations potentially constituted gross misconduct offences and, depending upon the facts established, the outcome could be summary dismissal without notice.

57. The letter purported to enclose the disciplinary policy and *"associated documents to be referred to"*

58. The determining officer, Mr Barron said those documents were the email of 10 May, the notes of the investigative meeting on 16 May and an email from the investigating officer, also dated 16 May enclosing the investigation notes and providing a brief overview. The Claimant's case is that he did not receive those documents other than the disciplinary policy.

59. I have concluded that it is more likely than not that the Claimant did receive those documents. He was not a reliable narrator of events. I give two examples to support this conclusion. I have already indicated his error in relation to the receipt of the suspension letter. He also claimed there was no interpreter at the disciplinary hearing, although then again resiled from that position before me. The Claimant accepted he was supported by a colleague, Emilian Vasilie Muschei who also provided translation services.

60. It is highly regrettable that there are no notes of the disciplinary hearing of 23 May 2019. Mr Barron was adamant that notes were taken as that was his normal practice but said they could not be found. He had himself been subjected to internal proceedings because of their loss. Miss Amin is right that a reasonable employer should take notes of such proceedings. I am left to form a judgement based on the evidence of the Claimant and Mr Barron. Whilst I have been critical of the Claimant as an accurate historian of events, equally I did not find Mr Barron much better as he who often reverted to generalised statements that he would have done X or Y because that was what he always did.

61. What I have concluded, as it is consistent with the secondary evidence, is that Mr Barron did not come to a conclusion at that meeting but adjourned to give the Claimant a further chance to produce any evidence, particularly a receipt, as regards the aftershave found in his possession. I not accept the Claimant's evidence that the meeting was simply concluded because Mr Barron did not know what to do with the Claimant. I reached this conclusion because on the following day the unchallenged evidence from Mr Barron was that he received a telephone call stating that the Claimant had been unable to obtain a receipt for the aftershave. In addition, Mr Barron was an experienced determining manager.

62. The meeting was reconvened on 03 June 2019. Although Mr Barron claimed a letter would have been sent to the Claimant to advise him of the adjourned hearing date, I find it more likely that no such letter was written. I say this firstly because no such letter was produced and secondly because the Claimant produced certified translations of some texts (A2) which read in their entirety shows that he was being asked by a colleague on behalf on Mr Barron to come into a meeting on 03 June 2019. There will be no need for such texts if the letter had been written.

63. At the reconvened meeting notes were taken (84). A translator was provided. The notes are brief but are supportive of Mr Barron's recollection of the events of 23 May given they begin *"reconvened to give time to prove items are yours… call received to say no further evidence".*

64. Given the Claimant had not produced any further evidence, Mr Barron dismissed the Claimant for gross misconduct. He took into account the admission as regards the mascara and the Respondent's disciplinary policy and the evidence before him. He knew the Claimant had worked for the Respondent for over two years and had a clean record.

65. In answer to a question from myself Mr Barron said that, even just looking at the issue of the mascara, that in itself, absent the aftershave justified, in his mind, dismissal.

66. The Claimant contended he was not told at the meeting that he was dismissed. I do not accept that evidence given it is inconsistent with the notes of the disciplinary hearing and it is also inconsistent with the disciplinary outcome letter dated 06 June 2019 (85) which refers to the meeting and then says, *"the decision made was to summarily dismiss you without notice".*

67. The letter stated the Claimant had been given ample opportunity to put forward his account, and based on the evidence he was being dismissed without notice. He was advised of his right of appeal and the method of instituting such an appeal.

68. The Claimant did not appeal.

69. Whilst it is true the Claimant contended; he did not receive this letter this was not the first time the Claimant had contended he'd not received letters although there is no dispute the dismissal letter was properly addressed. Indeed, it bore the same address as the suspension letter which the Claimant had originally said had not received, but accepted before me he had.

70. The Claimant stated that he only found out he was dismissed when he got his P45 dated 25 June 2019. I do not accept the Claimant did not know he was dismissed. The notes of the meeting of 3 June referred to dismissal as does the dismissal letter. I find the Claimant has not told the truth in order to explain why he chose not to appeal.

Submissions

71. I mean no disrespect to either advocate, but given neither referred me to any law, merely how I should analyse the facts, I have not repeated those submissions in any detail but I have sought to address relevant submissions

in my conclusions. The mere fact that I may not have mentioned each and every submission does not mean I did not give it full consideration. Full details of the submissions placed before me are recorded on the notes of the hearing.

Conclusion and discussion.

72. I am satisfied on the evidence before me and given the very proper concession made by Ms Amin that the Respondent has established that the reason or principal reason for dismissal of the Claimant was that of conduct, a potentially fair reason.

73. The real issue between the parties is the section 98 (4) question.

74. I will address the specific attacks made upon the fairness of the dismissal by Ms Amin.

75. Firstly, she contended that under the Respondent's own stop and search policy the police should have been called. It is right to say that under the flowchart if an item on company property was found, the police would be called. The Respondent has not fully followed its policy but I find that caused no unfairness to the Claimant.

76. Secondly, she contended the Claimant did not have the notes of 10 May 2019 or the investigative notes of 16 May 2019. I reject that contention. Mr Barron clearly had the documentation and at no stage either at the start of the disciplinary hearing did the Claimant contend he had not received all the documentation although the disciplinary invite letter makes it clear it included more than just the disciplinary procedure. Further the Claimant did not complain at the adjourned disciplinary hearing that he had not received all the documentation.

77. Thirdly, she contended Mr Barron placed too much weight on the mascara in the Claimant's bag given the Claimant had said in the past he handed items in. I do not see that assists the Claimant given it shows he was aware of the procedure. I am satisfied that it was not unreasonable for Mr Barron to have serious concerns as to how company property remained in the Claimant's possession for almost one month. It was a factor he was entitled to take into account in his decision-making process.

78. Fourthly, she was critical that the letter of suspension did not set out the allegations the Claimant was to face. I accept that a letter of suspension should set out in detail the grounds but I find there was no unfairness as, prior to the disciplining meeting, the Claimant was fully aware of the allegations he had to face.

79. Fifthly, she criticised the Claimant was given little time to prepare for the investigatory meeting and contended this was a breach of the Respondent's disciplinary policy. There was no such breach as the minimum notice of 24 hours applies to the disciplinary and not an investigative meeting. In any event the Claimant did not seek an adjournment of the meeting.

80. Sixthly she was critical of the notes of 16 May (and I observe that whilst the Claimant said they were not accurate in his statement he did not say why)

but I find the notes to be reasonably accurate, and given they were signed by the Claimant, Mr Barron was entitled to accept that they fairly summarised the principal matters discussed, especially given the Claimant had an interpreter present. Whilst the Claimant said before me that he didn't understand the interpreter he did not raise this at the time.

81. Seventhly, I accept there should have been notes of the disciplinary meeting but I do not accept Ms Amin's contention that the disciplinary invite letter did not make it clear to the Claimant the charges he had to face, given the reference to "poor conduct". When the letter is looked at in its entirety it is quite clear nature of the allegations and the potential jeopardy the Claimant was facing.

82. Eighthly, I do not accept her submission that the Claimant left the disciplinary hearing not knowing what had happened, given as I have already explained I find the meeting was adjourned to give the Claimant an opportunity to produce evidence that the aftershave had been bought.

83. Ninthly, I accept the criticism made of the adjourned hearing in the sense there was no formal letter inviting the Claimant to the meeting. However, I do not find this was a breach of the ACAS code because the allegations, right of representation and documentation had already been provided and the meeting on 03 June 2019 was merely a continuation of the adjourned disciplinary hearing.

84. Whilst the notes of the adjourned meeting on 03 June 2019 are brief, I find they are consistent with the evidence of Mr Barron and the dismissal letter. I prefer his evidence that the Claimant did know he was dismissed and knew of his right of appeal. Even if I am wrong on that point the Claimant knew of his right of appeal because on his own evidence he been supplied with the Respondent's disciplinary process.

85. Having looked at those challenges both individually and cumulatively I have concluded the disciplinary process, whilst not being perfect, was reasonably fair.

86. However, even having regard to those specific charges I must look at the overall fairness of the process.

87. I am satisfied and at the time of dismissal Mr Barron reasonably believed following a reasonable investigation that the Claimant had in his possession property that did not belong to himself.

88. On the Claimant's own admission, he had mascara belonging to the Respondent and knew of the proper procedures if I found such items and failed to comply with them. I also find that the presence of this article was a factor Mr Barron was entitled to take into account when looking at the Claimant's explanation in relation to the aftershave.

89. Mr Barron was entitled to take into account the inconsistencies in the Claimant's account as regards the aftershave. At various times he said his wife bought the aftershave at Tesco's but Tesco's did not provide receipts. Mr Barron was entitled to regard that evidence as unreliable.

90. Whilst it is true the Claimant now said that the aftershave may not have been bought at Tesco and his wife could support that account, at no stage did he call her to give evidence at his disciplinary meeting or provide any evidence in support. I reject any criticism that the respondent should have called the claimant's wife, a none company employee.

91. Mr Barron was a careful determining officer hence why he adjourned to give the Claimant every opportunity to obtain a receipt or other evidence to support purchase such as credit card statement et cetera. Having regard to the Respondent's disciplinary policy I have concluded that Mr Barron was entitled to come to the decision that he did.

92. Turning to penalty it was not outside the band of reasonable responses of a reasonable employer, having regard to the particular industry in which the Respondent operated to dismiss the Claimant. Mr Barron was entitled to conclude the possession of the property found in the claimant's procession was fundamentally inconsistent with the continuing employment relationship.

93. If I was wrong in my conclusion as regards unfair dismissal, I would have concluded in any event the Claimant caused or contributed 100% to his dismissal by his blameworthy conduct. He had company property in his possession which he could not explain.

94. Turning to gross misconduct, reasonable belief is not sufficient. The Respondent has to show that there was actual gross misconduct and I am satisfied that in relation to the mascara the Respondents has established on the Claimant's own admission that he had his possession company property which he should not have had.

95. Again, if I am wrong in any of my primary findings, I would have reduced the Claimant's compensation by 15% under section 207A for a failure to appeal. I would not have imposed a full 25% reduction because that is for the most serious and gross case of a breach of the ACAS code and here there was partial compliance.

96. Having regard to my primary conclusions it is not necessary for me to reconvene this case to address remedy.

Employment Judge T R Smith
Date: 10th March 2020