EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr J Safa	**v**	**William Hill Organization Limited**

Heard at: Watford **On:** 13 to 14 January 2020

Before: Employment Judge Wyeth

Appearances:

For the Claimant: Mrs T Safa (Lay Representative, the Claimant's mother)
For the Respondent: Mr A Weiss (Counsel)

RESERVED JUDGMENT

1. By agreement, the correct name of the respondent is William Hill Organization Limited.

2. The claimant was fairly dismissed.

REASONS

The claims

1. By way of a claim form issued on 6 December 2018 the claimant brought a complaint of unfair dismissal. The respondent defends the claim.

The issues

2. The parties had agreed a list of issues in advance of the hearing. Following some limited refinement it was agreed that the issues for me to determine in relation to liability were as follows.

    2.1. Was the claimant dismissed for the potentially fair reason of misconduct (s98(2)(b) Employment Rights Act 1996)?

    2.2. If so does the respondent prove that it:

2.2.1. had formed a genuine belief that the claimant was guilty of misconduct;

2.2.2. had reasonable grounds for that belief;

2.2.3. had formed that belief based on a reasonable investigation in all the circumstances?

2.3. Was the dismissal of the claimant fair in all the circumstances and in particular was it within the band of reasonable responses available to the respondent?

2.4. Did the respondent follow a fair process when dismissing the claimant?

2.5. Did the respondent follow the ACAS Code?

2.6. If the claimant's dismissal was unfair, does the respondent prove on the balance of probabilities that the claimant committed blameworthy or culpable conduct that caused or contributed to his dismissal?

2.7. If so by what proportion would it be just and equitable to reduce any financial award (whether a basic award under section 119 of the Employment Rights Act 1996 or a compensatory award under section 123 of that Act)?

2.8. If the respondent failed to follow a fair procedure can the respondent show that following a fair procedure would have made no difference to the decision to dismiss? If so, by what proportion would it be just and equitable to reduce the compensatory award?

2.9. If the respondent failed to comply with the ACAS Code of Practice, what increase should be applied to any compensatory award made to the claimant?

3. Notwithstanding the above, the focus of this case was on the issue of whether or not the respondent held a reasonable belief in the claimant's misconduct.

4. It was also agreed that I would consider issues relevant to liability only at this stage (including matters of contributory conduct and whether any failure to follow a fair process would have made any difference to dismissal). Other issues relevant to remedy would be clarified after any liability had been established.

Evidence

5. Prior to the start of the hearing I was provided with a witness statement from the claimant consisting of six pages. For the respondent I received witness statements from Mr Jamie Norman, the disciplining officer (consisting of nine pages); and Mr George Vyras, the appeal officer

(consisting of 6 pages, the last of which contained his signature only). I also had before me an agreed bundle consisting of 296 pages. I read the statements and evidence to which I was referred.

6. At the outset of the hearing, Mr Weiss, on behalf of the respondent made an application to introduce CCTV footage apparently relating to the day in question to be viewed by the tribunal. This was the footage that Mr Norman says he had taken into account when reaching his decision to dismiss the claimant. I was told that there were three segments to this footage. It was agreed that the claimant had seen the first and second segments during the disciplinary process. The third segment showed the claimant's girlfriend present at the premises but it was accepted by the respondent that this third segment was not material to the decision to dismiss.

7. I expressed serious reservations about an application to introduce this type of evidence at such a late stage in the proceedings. It was far from clear to me why the claimant and the tribunal had not been put on notice some time in advance that the respondent wished for such footage to be viewed. Nor was it clear to me why it was necessary for the tribunal to see it. Furthermore, there was an obvious practical difficulty in that, because of the lateness of the application, the tribunal did not have the facility to screen the footage in a way that could be seen by all in attendance at this public hearing. I indicated to Mr Weiss that I was not prepared to consider the application until the relevant footage had been shown to the claimant and his views obtained in relation to the proposal. Accordingly, I directed that Mr Weiss show the claimant the relevant footage whilst I took time to read the statements and evidence and then revert back when returning thereafter. In that time I also made enquiries with my clerk to see if there was the facility within the building to have the footage played in an appropriate way. Unfortunately there was no such facility.

8. When the parties returned, Mr Weiss accepted on behalf of the respondent that it did not have the facility to show the footage to all those present and decided not to pursue the application any further. In any event, having heard from the claimant who had since had the opportunity to view it, there was broad agreement between the parties as to what could be seen from that footage. I address this in my findings of fact below. To that extent it was agreed by all that there was little to be gained by me viewing it.

9. I heard evidence from the respondent's witnesses first in the following order: Mr Norman and Mr Vyras. I then heard evidence from the claimant. Mr Norman's evidence was not concluded until mid-morning on day two. The claimant's evidence was completed by 2.30pm on day two (with a break for lunch). I then heard submissions from the claimant and respondent in that order. There was insufficient time for me to provide an extemporary judgment and reasons.

Findings of fact

10. I make the following findings of fact on the evidence before me.

11. The respondent is a well-known gaming and betting company owning and running licensed betting shops (or "offices" as the respondent puts it).

12. The claimant commenced employment with the respondent as a cashier/customer service assistant on 7 July 2016 based at the Sipson Road, West Drayton premises (hereinafter referred to as "the shop"). In January 2018 the claimant was promoted to Customer Experience Manager (shop manager) at the same premises.

13. Within the shop there are two self-service betting terminals ("SSBTs"). In short, these are touch screen machines that enable customers to place numerous bets on a whole variety of events themselves rather than having to approach the cashier each time. A customer will approach the cashier with a form of payment and ask the cashier to credit the SSBT with a certain sum of money. Upon payment of a particular amount, the cashier will record the transfer of that sum paid by the customer on their EPOS till system identified as "SSBT loaded credit". The cashier will then go to what is known as the 'back office terminal' (which is a black tablet device located behind the counter) and load on to the SSBT the sum that the customer has paid. This then allows the customer to use the SSBT and bet as many times as they choose up to the value of the credit loaded. As with ordinary over the counter transactions, tickets are issued by the SSBT to the customer recording each bet placed.

14. Accordingly, any sum loaded on to the SSBT through the back office terminal should show as a surplus at the end of the working day assuming the payment for it has been properly registered on the EPOS till. The customer has the choice at any time to print a voucher for the balance of any credit that has not been used for bets. Indeed, a customer could, in theory, print out a voucher almost immediately after paying the cashier to credit the machine, for the full amount credited if they changed their minds and decided they did not wish to bet at all.

15. A customer can cash in a winning bet or the credit voucher at any of the respondent's shops.

16. On 28 July 2018 the respondent carried out an age verification ("AV") visit at the shop. The respondent routinely operates random AV visits to ensure that staff are complying with their obligation to check identification of individuals who are below the legal age to gamble. The 'mystery shoppers' are all 18 years old or above (because the respondent is not permitted to use those under age for the exercise) but are selected because they look younger than they are.

17. For these purposes it is not necessary to detail the events of the AV visit other than to note that neither the claimant nor "H", his colleague at the time, requested ID from the mystery shopper until after the 'customer' had commenced gambling. The claimant says that he told H that he had seen the customer before and therefore did not consider it necessary to seek ID. It was only when the customer began behaving awkwardly and appearing nervous that H requested his ID. Both H and the claimant were later informed that this was an AV visit which they had failed. They were told

that this was a disciplinary matter and there would be a follow up meeting that they would each have to attend.

18. KM, a Business Performance Manager ("BPM"), was responsible for investigating the failed AV visit. She met to discuss the circumstances with the claimant on 14 August 2018. The notes are at pp45 to 54. The meeting commenced at 1.30pm and ended at 2.55pm with an adjournment at 2.15pm (although the length of the adjournment is not recorded). At the conclusion of the investigation meeting, KM informed the claimant that the matter would be passed to another BPM who would be in contact with him within seven days.

19. Accordingly, Mr Norman was approached to conduct a disciplinary meeting with the claimant in relation to the failed AV visit.

20. The claimant maintained in evidence that he told KM during that meeting that his line manager, BD, had allowed the claimant to enter the West Drayton betting shop and put bets on for his father when he was 17 years old. He says he raised this in an attempt to point out that a manager of 20 years (BD) did not think to question him as a young looking adult and perhaps the respondent should have a blanket policy of checking ID of all customers. According to the claimant's own evidence, KR laughed that off and remarked that she would bring her baby in to a shop at times. Notably this apparent exchange was not recorded in the minutes of that meeting despite the claimant signing them either on 14 or 18 August 2018 (there is a discrepancy in the dates on certain pages). I find on balance that the remark about BD was not made and certainly not in the context now relied upon by the claimant, given that it was not significant enough to find its way into the minutes and was not an omission that the claimant sought to challenge despite his decision to later surreptitiously record a meeting on 16 August 2018.

21. In any event, even if the assertion was made by the claimant, I am satisfied on the evidence that it had no bearing on what followed.

22. In the meantime, the respondent's Central Security Department, based in Leeds, had been alerted to the fact that, on 9 August 2018 at 8.32am, a credit of £500 had been loaded on to an SSBT at the shop without a transfer being processed on the respondent's EPOS till system. Indeed, no payment from a customer was recorded on EPOS at all and, as a consequence, the expected cash (or 'takings') figure in the EPOS till remained unchanged despite a credit of £500 being loaded on to the SSBT.

23. It was also apparent to the Central Security Department from the digital records that at 8.33am, only a minute after this £500 credit was made to the SSBT, a voucher had been printed from the SSBT for the 'return' of the amount of the £500 credited (a sum that had never been accounted for on EPOS). The Central Security Department has access to CCTV recordings within the shop. According to the footage obtained by that department (see below) the claimant could be seen to leave the counter area of the shop and go out on to the shop floor, print a voucher from the SSBT machine at this same time (albeit recorded as 08:14:37 on the CCTV system). He also

seemed to be adjusting the wires at the back of the SSBT machine in what looked to be an attempt to reboot it. I interpose at this point that the claimant subsequently maintained that he was having to do this because the system had crashed. Furthermore, the claimant accepted that he had printed out a ticket around that time but insisted this was to clear a random balance of circa 40p that had been left on the machine (presumably from the day before). According to the notes of the subsequent disciplinary meeting, the claimant threw that ticket away.

24. The EPOS till records also showed what were considered to be several unusual consecutive transactions all within the space of less than 10 minutes: 1) at 12:30:34 the claimant transferred £500 from the safe to the till; 2) at 12:32:20 the claimant transferred a further £500 from the safe to the till; 3) at 12:37:30 the claimant transferred £250 from the till back to the safe; and 4) at 12:38:02 the claimant made an SSBT payout from the till of £500 on ticket number 164d (that ticket number corresponded with the last four digits/characters of the ticket recorded as being printed out at 08:33:54 earlier that morning. Each of these four transactions were recorded as being carried out by "Safa.J.A".

25. The only member of staff present in the shop at the relevant time was the claimant.

26. As a result, at 4.10pm on 14 August 2018 (less than two hours after the AV meeting between the claimant and KR had ended) CR of the Customer Security Department based in Leeds, emailed the respondent's local Security Investigator, DS (whose role was to investigate at a local level the apparent anomaly that had been identified) to inform him of the discovery (p146). Within his email, CR included links to CCTV footage of the shop at the material times. I, again, interpose at this point that the fact that the CCTV footage had an approximate time lag of circa 20 minutes must have been obvious to all concerned from the outset. CR's email refers to the fact that the CCTV footage he considered to be material was timed at 8.13am, 8.14am and 12.18pm (see below) even though the relevant transactions prompting the investigation were recorded on the relevant technology as actually occurring at 8.32am, 8.33am and 12.38pm.

27. Also on 14 August 2018 (the same day as KR's visit), some four hours and 15 minutes after the meeting between the claimant and KR ended, DS attended the shop with the claimant's line manager, BD (who was said to be there to take notes). BD was, of course, the manager the claimant says he mentioned to KR as allowing underage betting at the earlier investigation meeting in to the AV incident. In so far as it may be relevant, the claimant accepted that certainly until this point he had always been on very good terms with BD. He would socialize with him outside of work to the extent that he considered they were friends. Furthermore, it had been known for some time that BD was due to leave the business within days of this meeting.

28. At this initial meeting, the claimant denied loading any amount on to the SSBT machine. He also mentioned that 'everything crashed'. He denied stealing anything. DS decided to suspend the claimant and informed him of

that decision at the conclusion of the meeting.

29. Immediately after the meeting on 14 August 2018 DS made contact by email with CR (the retail fraud analyst based in Leeds) in which DS asked CR to look into the claimant's explanation that the SSBT network went down and that the claimant was having technical issues with the terminals at that time. CR replied by email the following day to explain that any disabling of the systems happened on both SSBT terminals (not simply the one that had the credit added and from which the ticket was printed). He also pointed out that the circumstantial evidence against the claimant was compelling if not incontrovertible. He stated that the CCTV footage showed the claimant adding credit to the back office terminal and the claimant printing out a ticket from SSBT terminal 2 and the fact that there was no other person present in the shop at the time of any of this activity. CR also pointed out that the printing of the ticket happened outside the time of any crash. He added:

> "The long and the short of it is that the employee has attempted to cover his tracks in this instance by opening doors and reducing credit which simply does not exist but it would not affect the physical printing of the ticket or the payment of the ticket through EPoS later."

30. A further investigation meeting was held between the claimant and DS on 16 August 2018. BD was again present to take notes. As found already, the claimant decided to surreptitiously record this meeting and an agreed transcript of what was said appeared in the bundle at p83 onwards. The claimant took a rather combative approach at that meeting. He asked a series of questions implying that the suggestion that he had credited the SSBT inappropriately and printed a voucher to the value of £500 and then cashed in a voucher with the same reference number through the EPOS till for £500 was as a result of currently unexplained errors in the system or a conspiracy against him.

31. Following that second investigation meeting, by way of a letter of the same date, the claimant was invited to a disciplinary meeting with Jamie Norman. The purpose of the meeting was to consider the allegations of misconduct, namely the failure to follow company age verification and reporting procedures and the allegation of theft. The letter warned the claimant that he faced possible dismissal if the allegation of theft was upheld. Enclosed with the letter were notes of the investigation and supporting evidence including a security schedule and extracts from logs for the EPOS till and SSBT machine (including an investigation report at pp63 to 70).

32. The disciplinary meeting took place on 23 August 2018 with Mr Norman. The claimant was not accompanied despite being offered this opportunity. The claimant had prepared a "Final Statement" for that hearing dealing with the two allegations. For these purposes, I do not need to address in any detail the age verification allegation as I am satisfied on the evidence before me that the reason for the claimant's dismissal was because of the allegation of theft and not because of any failing regarding AV (although he was found to have acted inappropriately in relation to that allegation).

33. In his Final Statement (p108) the claimant set out the assertions he implied at his second investigation meeting. He criticised the respondent for

producing (or reproducing) logs in excel format without a screen shot from the main server as they could have been manipulated. He also alleged that DS (who he described as Head of Security) could not confirm that the network was secure or whether anyone else had access to the claimant's user ID. He made reference to the coincidence that the AV investigation took place just hours before DS attended the shop to investigate the second more serious allegation of theft, which he described as very strange. Indeed, he suggested someone had given the "nod" to DS to investigate him. The claimant suggested that it would have taken more than an hour to go through logs and CCTV footage if there were no network or system errors flag up for 9 August given that six days had passed by that point. Finally he suggested that he could not be accused of theft through personal gain if his tills were not down or he had not been gambling with company money.

34. The claimant expanded on some of these points at the meeting.

35. The claimant maintained that he only ever used the initials JS and not JAS as appeared on the spreadsheet sent to him (p65), suggesting he had been "set up". The claimant sought to maintain that a BPM could have accessed the till systems and made changes deliberately to frame him so that he would be dismissed. I find as fact that Mr Norman genuinely believed that suggestion (of conspiracy) to be far-fetched not least because that is exactly what he told the claimant in response at the time. I also accept Mr Norman's evidence that a BPM could reverse transactions recorded on EPOS but could not access and interfere with all the reports and logs that formed part of the Central Security Department's investigation report. Furthermore, on the basis of Mr Norman's evidence (which I accept), I also find as fact that if the claimant was right about being set up, it would require the conspirator knowing exactly what the claimant was doing at any particular time and having full access to all the supporting systems used by the security team, something that was highly improbable.

36. I add that the EPOS Transfers schedule on p6 of the report (p67) identified the relevant employee by their full name. By coincidence, another member of staff had the same initials as the claimant but it was evident from the same schedule (p67) that he was not identified as being involved in any transactions prior to 1pm on 9 August 2018. This is consistent with the fact that the claimant was working alone until 1pm when his colleague with the same initials started thereafter that day.

37. The claimant queried why it had taken six days between the alleged improper transaction and the day of his suspension to raise the issue. I do not consider there was anything improper or surprising about this time span, which included a weekend. I accept the evidence of Mr Norman that the speed with which the security team in Leeds could deal with an investigation of this kind would depend upon their workload and that six calendar days was not an unreasonable time to take to initiate the process.

38. The claimant was shown the CCTV footage by Mr Norman some of which he had not previously seen. As a consequence, Mr Norman adjourned the meeting briefly to allow the claimant to gather his thoughts about what could

be seen. The claimant confirmed he was happy to continue thereafter. According to the notes of the meeting, at one point the claimant alleges that the CCTV was not time stamped. Mr Norman explained to the claimant that the times were available to the respondent and that the CCTV times were 19 minutes behind real time. This is consistent with the detail specified in the email from CR to DS dated 14 August 2018 to which I have already referred.

39. Mr Norman specifically put to the claimant the fact that at 12.29pm (12.09pm on the CCTV), around nine minutes before the claimant was alleged to have processed an SSBT Payout of £500 from the till for the ticket (ending 164d), the claimant could be seen on the CCTV serving a customer collecting a payment (of £200 according to the EPOS till record). The claimant did not recall that transaction. Mr Norman also replayed the CCTV footage that he maintained showed the claimant immediately after that transaction with the customer transferring, in the space of one minute, two amounts of £500 each to the till from the Insert. Mr Norman asked the claimant if he had any explanation for that activity other than the fact that a BPM was conspiring against him. According to the note of the meeting the claimant responded by asking why no money was shown as missing.

40. I accept Mr Norman's evidence that he found it implausible that a conspirator would have been able to manipulate the data and records held by the security team to match the claimant's movements on the CCTV footage for the relevant times.

41. I find on the evidence before me that none of the assertions made by the claimant at that meeting (including in his final statement) were sustainable challenges to the respondent's position for reasons in addition to those already set out.

42. The respondent's systems were set up to flag up unusual or suspicious transactions of the kind that led to the investigation in to the claimant. As such, there would not have been days of logs and CCTV footage to search through as the relevant timings were pinpointed narrowly. Furthermore, the claimant's argument that DS must have been given "the nod" (as he put it) to attend the shop at 7.10pm just a few hours after the conclusion of the AV meeting with KR at 2.55pm because of something he said to her, has no foundation. It is wholly implausible that someone acting malevolently could have put together the material that CR (of the Leeds security team) sent to DS at 4.10pm that same day (p146) including web-links to the relevant CCTV footage, EPOS till records and SSBT logs within the space of 1 hour and 15 minutes after the earlier meeting finished, given the amount of manipulation and fabrication that would have been required.

43. As for the details on the excel spreadsheet, in evidence before me there were screen shots of the EPOS till server (albeit not available to the claimant at the time as these were only produced much later on 8 November 2018) that supported the information (p169). Furthermore, the movements of the claimant on the CCTV footage of the shop produced by the respondent for 9 August 2018 were consistent with the times of the relevant activities recorded for the EPOS till, back office terminal and SSBT.

44. I also reject any suggestion by the claimant (during his evidence before me) that the CCTV relied upon by the respondent must have been taken from days other than 9 August 2018 for reasons set out above. That would have required someone to find CCTV footage from other dates that could be used to replicate transactions recorded for 9 August 2018 (whether those entries were falsely added by a conspirator as the claimant alleges or not). Furthermore, it would have required dates and times of any such CCTV footage to have been completely altered so as to show an alleged fabricated date of 9 August 2018. Additionally it would have required the conspirator to change the time of all the CCTV footage relied upon to 19 minutes earlier than the actual or rather 'real' time. That in itself would make no sense because if the stated time had been fabricated, the fabricator would have used the real time and not 19 minutes behind real time. All of this was so improbable that it led Mr Norman to conclude that it was far-fetched.

45. I also reject the suggestion by the claimant (both at his disciplinary and before me in evidence) that nothing inappropriate could have occurred because the till balance showed no deficit. That was an inevitability given that the apparent credit of £500 added to the SSBT from the back office terminal was never entered on to the EPOS till so as to correctly reconcile the back office terminal transaction with the till records. When cashing up and reconciling the actual amount in the till with the recorded balance, there would be no surplus or deficit because if £500 was taken from the till and pocketed inappropriately, that would be accounted for by the SSBT payout transaction that took place at 12.38pm according to the records. If money had gone into the till to correspond with the credit being added to the SSBT at 8.32am but no such transaction had been recorded on the EPOS till system then the amount in the till would have had £500 more in it by way of a surplus. Alternatively, if the sum of £500 had not been taken from the till despite the recorded SSBT payout at 12.38pm then, again, there would have been a surplus over and above the recorded till balance of £500. In the circumstances, on the basis of what transactions had been recorded, the fact that there was no surplus of £500 did indicate that £500 was not properly accounted for and had gone missing.

46. Having heard what the claimant had to say, Mr Norman adjourned the meeting for 45 minutes to reach a decision.

47. The meeting reconvened at 2.30pm. Mr Norman informed the claimant that he rejected the claimant's assertion that the transactions had been fabricated. He conveyed to the claimant that he had concluded that the claimant had taken or facilitated the theft of £500 by loading a credit on to the SSBT machine which had not been paid for (and was unaccounted for on the EPOS till), only to print out a ticket for that sum and pay out that amount some four hours later for personal gain. He concluded this was gross misconduct that, in the circumstances, justified the claimant's summary dismissal. Accordingly the claimant's employment was terminated immediately.

48. The claimant exercised his right of appeal by way of a letter dated 31

August 2018 which was heard by George Vyras, one of the respondent's area managers. I am able to properly determine this case without needing to set out the detail of the appeal. In essence, the appeal was a repeat of the challenges the claimant had previously made regarding the process and evidence (although there was also an allegation that the respondent had predetermined the decision to dismiss him because a work colleague had been asked to carry out all his shifts). That said, there is one aspect that requires some expansion. At the appeal meeting on 22 September 2018, the claimant made a new suggestion that there was a vendetta against him by a member of the security team (a security analyst known as 'CM') based in Leeds who the claimant had never met but who the claimant says had doctored logs to make it look like the claimant had committed the misconduct because CM had been rude to the claimant over the phone on two occasions about which the claimant had complained to CM's manager.

49. As part of the appeal process, Mr Vyras looked into this allegation. He noted that the email initiating concerns about transactions apparently linked to the claimant was sent by a different security analyst, CR, rather than CM. In any event, Mr Vyras made contact with CM by telephone on 1 October 2018 to investigate the claimant's claims. CM denied knowing or being spoken to about the claimant or that he had added the claimant's initials to any EPOS reports. CM also denied having access to SSBT reports. As such, Mr Vyras concluded that the allegation about CM was also far-fetched and without any merit.

50. Mr Vyras confirmed to the claimant that he had been dismissed because of the allegation of theft rather than the AV visit. Furthermore, he was satisfied that the evidence relied upon to reach the decision to dismiss the claimant was genuine and complete and that the suggestion that such data had been altered was not credible. Accordingly he rejected the claimant's appeal.

51. Finally, having been taken to a transcript of one of the calls between the claimant and CM to which the claimant referred in his appeal (pp35-36), it is apparent that any altercation between them was minimal. I find that it is highly unlikely that a dispute of that kind would have resulted in the profoundly conspiratorial pattern of behaviour alleged by the claimant.

The law

52. The law relating to unfair dismissal is predominantly contained in Part X ERA 1996. The respondent must first demonstrate that the claimant has been dismissed for one of the potentially fair reasons set out in s98 (in this case, misconduct). The tribunal must then consider whether the dismissal was generally fair and, more specifically, whether the employer acted reasonably or unreasonably in treating that reason as sufficient for dismissal. The burden of proving whether or not a dismissal was reasonable is a neutral one.

53. In accordance with the seminal case of British Home Stores Limited v Burchell [1980] ICR 303, the respondent is not required to have conclusive

direct proof of the claimant's misconduct, only a genuine belief on reasonable grounds after carrying out as much investigation into the matter as is reasonable in the circumstances.

54. When deciding the issue of reasonableness, the tribunal must apply the band of reasonable responses test. Consequently it cannot substitute its own view for that of the employer but must instead ask the question as to whether no reasonable employer would have dismissed in those circumstances. Only then will a tribunal conclude that a dismissal fell outside the band of reasonable responses.

55. Furthermore, the band of reasonable responses test also applies to the extent of any investigation required to be conducted by the respondent in accordance with the third limb of the Burchell test. Again, the tribunal cannot substitute its own view as to what it would have done to investigate the matter but must instead ask itself whether what was done in terms of the investigation fell within what a reasonable employer would have done in those circumstances (J Sainsbury plc v Hitt [2003] ICR 111, CA).

56. The Court of Appeal decision in Newbound v Thames Water Utilities Limited [2015] IRLR 734 serves as a reminder to tribunals and parties that the band of reasonable responses is not an infinite one. It does have boundaries and it is right that the tribunal properly identifies those boundaries.

57. The ACAS Code of Practice on Disciplinary and Grievance Procedures sets out the basic requirements of fairness that will be applicable in most conduct cases and is to be taken into account by a tribunal when determining the reasonableness of the dismissal in accordance with section 98(4).

58. If compensation is to be awarded then the tribunal must order the respondent to pay a basic award (calculated on a standard formula) and a compensatory award. In accordance with s123(1) ERA the compensatory award is to be such amount as the tribunal considers just and equitable. Both awards may be subject to reductions for certain reasons. Section 122(2) ERA provides that the basic award may be reduced where the claimant's conduct before dismissal renders it just and equitable to do so. Under s123(6) ERA, the tribunal must likewise consider whether the claimant contributed to their dismissal in some way and if so reduce any compensatory award accordingly. For a reduction to be made for this reason, the relevant action by the claimant (proven on the balance of probabilities) must be culpable or blameworthy; it must have actually caused or contributed to the dismissal; and it must be just and equitable to reduce the award by some proportion. Furthermore, the compensatory award may be reduced where it is evident that the claimant might have been dismissed fairly regardless of any actual unfair dismissal (the Polkey principle).

Applying the law to the facts

59. I am satisfied that the claimant was dismissed for misconduct, namely theft.

For the reasons set out in my findings of fact, Mr Norman, the disciplining officer, had an honest belief on reasonable grounds following reasonable investigation that the claimant had a) loaded a credit of £500 on to the SSBT terminal which had not been accounted for; b) printed out a ticket for that same amount; c) cashed it four hours later, resulting in a loss of £500 from the till (irrespective of the fact that no such loss would have showed in the till's closing balance); and taken that amount or facilitated the taking of that amount belonging to the respondent.

60. There is nothing to suggest or support the claimant's theory that the data records and CCTV footage relied upon by the Central Security Department's investigation analyst, CR, and sent to DS on 14 August 2018 were fabricated or not genuine in any way. Mr Norman and Mr Vyras were entitled to reject as far-fetched and implausible the claimant's assertions that the data and CCTV footage was made up or contrived. Indeed, I consider the claimant's case both at the disciplinary stage and before this tribunal to be implausible. As such, it was reasonable for them, and Mr Norman in particular, to proceed on the basis that the data was genuine. Such an approach did not fall outside of the band of reasonable responses of a reasonable employer. Nor did such an approach render the procedure followed in any way unfair. It simply amounted to a rejection of the explanation being advanced by the claimant in the face of compelling evidence against him. This was an entirely legitimate exercise of judgment and did not amount to the actions of an employer acting with a closed mind. In any event, prior to dismissal the claimant did not specifically name any particular individual who he believed to be behind a campaign to have him dismissed and when he did eventually name CM (the security analyst based in Leeds), Mr Vyras pursued that line of enquiry only to conclude that it was baseless.

61. I am satisfied that the procedure followed was fair in all the circumstances and complied with the spirit of the ACAS Code.

62. As a Customer Experience Manager (i.e. shop manager), the claimant was in a significant position of trust with the respondent. As well as managing others, he worked alone handling large amounts of cash. There can be no doubt that the misconduct found to have occurred was sufficiently serious to justify summary dismissal in all the circumstances, irrespective of the claimant's length of service or past disciplinary record. It was indeed gross misconduct. Dismissal in this case cannot be said to fall outside the band of reasonable responses of a reasonable employer.

63. Even if the dismissal was found to have been unfair in some way (which I have rejected) the evidence before me upon which my findings of fact are based leads me to the conclusion that the claimant was responsible for inappropriately crediting the SSBT with the sum of £500, printing a ticket for that amount and processing the paying out a sum for £500 on that same ticket (ending 164d) – a sum that should never have been paid out. No other member of staff was present in the shop at the relevant times. Therefore, it could only have been the claimant who was responsible for those transactions – transactions that were deceptive and wholly improper. As such, I am bound to conclude that I would have reduced the claimant's

compensation (both basic and compensatory award) by 100 per cent to reflect the fact that, on the balance of probabilities, he was fully responsible for blameworthy and culpable conduct that resulted in his dismissal.

64. For all the above reasons, the claimant was fairly dismissed.

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Employment Judge Wyeth

Date: 9 April 2020.

Judgment sent to the parties on

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For the Tribunal office