EMPLOYMENT TRIBUNALS

Claimant: Miss T Laverick

Respondent: EE Ltd

RESERVED JUDGMENT

Heard at: North Shields **On: 27th and 28th January 2020**

Before: Employment Judge Sweeney

Representation:

For the claimant: Mr J Barker, solicitor
For the respondent: Ms A Rumble, counsel

The Judgment of the Tribunal is as follows:

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

2. **The compensatory award is limited to an award for losses from 11 January 2019 to 01 February 2019 to reflect the fact that the Claimant would have been fairly dismissed had the Respondent acted reasonably and followed a fair procedure.**

3. **The Claimant contributed towards her own dismissal. It would not be just and equitable to further reduce the compensatory award under section 123(6) Employment Rights Act 1996.**

4. **The basic award is reduced by 20% in accordance with section 122(2) ERA 1996.**

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

REASONS

The Claimant's claims

1. By a Claim Form presented on 08 April 2019, the Claimant brought claims of unfair dismissal and disability discrimination. The claim of discrimination contrary to section 15 Equality Act 2010 was dismissed upon withdrawal on 15 October 2019. The remaining claim of failure to make reasonable adjustments contrary to section 20 Equality Act 2010 was struck out following a public preliminary hearing because it was not presented within the relevant statutory time limit and the Tribunal concluded that it would not be just and equitable to extend time.

2. That left the claim of unfair dismissal which was the subject of the hearing on 27th and 28th January.

The Hearing

3. The claimant was represented by Mr Jonathan Barker, solicitor and the Respondent by counsel, Ms Amy Rumble. The parties had prepared an agreed bundle running to 226 pages.

4. The issues are:

   (1) Has the Respondent ('R') shown that the Claimant ('C') was dismissed for a potentially fair reason (conduct)?

   (2) Did R act reasonably in all the circumstances of the case in treating that conduct as a sufficient reason to dismiss C, having regard to equity and the substantial merits of the case?

      a. Was the investigation fair and reasonable?

      b. Was C's dismissal within the band of reasonable responses?

      c. Did R adopt a fair process? To the extent any procedural error took place, was that corrected at the appeal stage?

   (3) If it is found that C's dismissal was procedurally unfair, should any Polkey reductions be made on any compensatory award due under any unfair dismissal finding, and if so, by what percentage? (or what date would C have been dismissed in any event?)

   (4) Did C contribute to her dismissal? If so, by what percentage should the compensatory/basic award be reduced?

5. The Respondent called three witnesses:

(1) Mr Chris Bayat, Operations Manager (investigating manager),
(2) Ms Victoria Chapman, Operations Manager (dismissing manager),
(3) Mr Jordan Lewis, Senior Channel Manager, (appeals manager).

6. The Claimant gave evidence on her own behalf.

Findings of facts

7. Having considered all the evidence before me (written and oral) and the submissions made by the representatives on behalf of the parties, I find the following facts.

8. The Claimant was employed by the Respondent from 04 November 2013 until 10 January 2019, latterly as a Team Leader at the Doxford Contact Centre.

9. As a Team Leader, a large part of her responsibilities was to manage a team of call handlers to whom she was expected to provide guidance on achieving sales in accordance with the Respondent's policies and procedures. The Claimant's line manager, during the period relevant to these proceedings, was Vicky Eccleston ('VE').

10. In about late October 2018, an Operations Manager based at the Respondent's Methyr site in Wales had identified that the Claimant's team in Doxford had a higher number of what are referred to as "add-lines". That is the phrase used by the Respondent to describe the selling of additional products to an existing customer. This is also referred to as 'up-selling'. The circumstances where a sales adviser/call-handler might sell an 'add line' would generally arise in one of two ways: either, the call-handler would call an existing customer asking if the customer might be interested in another or additional product from the Respondent; or the customer would contact the Respondent with a query, following which the call-handler would introduce the notion of the customer buying the additional product. Either way, it was a case of the call-handler initiating the sale as opposed to the customer making contact in order to obtain the particular deal.

11. Having identified the higher number of 'add line' sales from the Claimant's team, the Methyr manager decided to listen to the calls to see what if any valuable tips could be learned for his/her own team. This practice of listening in to calls for the purpose of learning is routine within the Respondent.

12. However, in the course of listening to calls the Methyr manager identified what he/she believed to be some irregularities or errors on the part of the call handler and contacted Mr Bayat, in the belief that he was the Claimant's line manager. What the Methyr manager had identified was that the package which was being 'up-sold' apparently did not exist. Mr Bayat passed the Methyr manager on to VE as she was the Claimant's line manager.

13. Around the same time, another Team Leader, Mr McCann, had approached VE to report to her an entirely different matter of concern which had been drawn to his attention regarding the Claimant. Mr McCann had learned that the Claimant had asked a sales adviser to borrow her ID for the purposes of lending it to her daughter to gain access to an 18th birthday party which was being held at a local pub.

14. Mr Bayat was subsequently asked to conduct an investigation into these matters along with a third matter relating to the Claimant's alleged failure to inform her manager of her absence from work on 28th and 30th October 2018.

15. The Claimant was interviewed by Mr Bayat on 05 November 2018. At the end of the meeting Mr Bayat suspended the Claimant pending a disciplinary investigation. He interviewed some members of the Claimant's sales team (Shannon Miller, Chloe Wilson, Natalie Letchford, Ciara Youll and Sophie Atkinson) and a Team Leader, Louise Mann.

16. In the course of his investigation, Mr Bayat found 21 occasions in October 2018 in which the Claimant had manually authorised the sale of a 'second line' to existing customers enabling them to receive a Huawei T3 Tablet with a SIM card plan of 5 GB of data per month (I shall refer to this as 'the T3 Deal'). That T3 Deal did not exist on the Respondent's price book of available offers. It was an invalid offer.

The T3 Deal

17. In so far as this was concerned, the Claimant said that she had advised her team to use a "workaround", which she had manually authorised.

18. The agent would attempt to sell a particular deal, namely a T3 Tablet with a monthly allowance of 2 GB of data at a price of £11.90 a month. When the customer agreed that they were interested, the call-handler would then have to process the transaction internally. The agent would access the Respondent's system, and enter a code. The call-handler would then expect to see on the screen the plans available for a T3 Tablet which would have included a 2GB per month at a price of £11.90 a month.

19. However, it appears that when entering the code something went wrong. It was a case of 'computer says no'. The computer was not recognising this plan as a valid offer on that particular device.

20. It is not uncommon for there to be failures of this kind. When there are, the business will often issue a communication to employees to help them work around the problem. This is where the phrase "workaround" comes in. There will often be recognisable 'workarounds' (or temporary solutions) to problems such as this. Where no formal 'workaround' has been communicated, team Leaders are expected to work around the problem by suggesting alternatives, liaise with

the Respondent's 'validations' team and discuss with their own line manager before advising their sales staff on the appropriate 'workaround'.

21. There was no documented procedure which said that a Team Leader was required to check with the operations manager before implementing a 'workaround' but, in circumstances where there was no formally communicated workaround, the Respondent could and did expect the Team Leader to discuss it with the operations manager. I conclude that the Claimant would have been and was aware of this expectation.

22. No formal 'workaround' was communicated to deal with the problem surrounding the price plan for the T3 Tablet with a 2GB a month data allowance.

23. On 15 October 2019, a colleague with whom the Claimant was on good terms (Louise Mann) texted her to say, in essence, that there was a problem within the Claimant's team. Ms Mann made a particular reference to one member of the Claimant's team (Shannon) but on a more general point refers to what she noted as '11 pure dodgy net add'. The Claimant was clearly made aware that there was an issue with a member of her team but also a wider concern being expressed by her peer, Ms Mann, regarding the validity of the T3 deal. The text exchange is at **pages 125-126**.

24. During the interview with Mr Bayat on 05 November 2019, the Claimant said that she was aware of a problem with the T3 Table and price plan. On page **105** she says she approved the internal processing of the transaction at a particular price with 5GB of data SIM Only but that she instructed the agents to explain to the customer that they were getting a 2GB a month plan. This meant that the customer would get one thing (a T3 Tablet on a 2GB a month plan) but the internal documentation would show that the customer got something else, namely a 5GB a month SIM Only deal.

25. The Claimant said that she highlighted this in an email to someone called 'Kay'.

26. The Claimant said that she intended to wait until the end of the month before changing the internal documentation to reflect what the customer actually got. She said that she did not instruct the agents to tell the customer that they were getting 5GB a month data.

27. After the agent has agreed the sale with the customer a text is sent.

28. The customer was sent a T3 Tablet. The internal records, however, would not reflect this. All that they would show would be that the customer had signed up for a SIM Only deal. Without digging into each particular transaction, someone looking at the basic information would not know that the customer had actually received a T3 Tablet.

29. The Claimant said that when this problem had been brought to her attention she advised her team to use a particular 'workaround'. The 'workaround' was to manually create a 5GB per month plan'. The Claimant said that the customer would be none-the-wiser. All that would happen was that the Respondent's internal processes would show a 5GB a month plan but the customer would receive 2GB a month. The Claimant would then rectify the internal records.

30. Essentially, this meant that she had approved the sale of the T3 Tablet with a 2GB data plan per month price.

Borrowing a form of identification from an employee

31. The Claimant accepted, when interviewed by Mr Bayat, that she had asked Chloe Wilson if she could borrow her provisional driving licence for use by her daughter. She said that she had never asked anyone before. In fact, the Claimant had also asked another colleague, Sophie Atkinson, who was an agent in another team.

32. Mr Bayat then prepared a report at pages **93-101**. This was sent to Victoria Chapman. It formed the basis of disciplinary allegations against the Claimant.

33. There were two allegations:

    (1) That the Claimant had directed her team to mis-sell additional line products in relation to a tablet and data plan;

    (2) That the Claimant had acted unprofessionally by obtaining from a member of her team a driving licence to give to her 17 year old daughter to enable her to attend an 18th birthday party

Disciplinary hearing: 20 December 2018

34. Ms Chapman chaired a disciplinary hearing on 20 December 2018, at which the Claimant was accompanied by a trade union representative, Mr Gladden.

35. After the hearing, Ms Chapman spoke to VE. The note of the meeting with VE is at **page 152-157**.

36. In respect of the I.D. allegation, Ms Laverick accepted that she had asked two employees, Chloe and Sophie. However, she said that it had come up in conversation; that Chloe had offered; that her daughter was going to her friend's 18th party and required the I.D. to gain access; that in fact her daughter did not use the I.D. Therefore, the issue for Ms Chapman was to consider whether the I.D. was offered, or whether the Claimant used her position of authority directly or indirectly as a means of acquiring the I.D. from a more junior employee and whether this was an act of misconduct and how it impacted on the employment relationship.

37. As regards the T3 Deal, the issue was what the Claimant had instructed her team to do as a 'workaround', if she did instruct them to process an invalid deal whether she did so knowing that to be the case and whether this was done for any improper purpose.

38. Regarding the use of I.D, Ms Chapman arrived at the following conclusions:

    a. that Ms Laverick had asked two more junior employees, Chloe and Sophie for their I.D for her daughter's use;
    b. That she initially said this had happened only once (by reference to Chloe);
    c. That it was unprofessional of the Claimant to ask them given her position of authority over them;
    d. by saying to Mr Bayat that she had only asked once (from Chloe), the Claimant had been attempting to mislead Mr Bayat;

39. The above led Ms Chapman to conclude that the Claimant's behaviour in this regard was highly unprofessional and, together with what she found to be an attempt to mislead Mr Bayat, called into question her honesty, integrity and ability to conduct herself properly in a position of responsibility.

40. Regarding the selling of the T3 Deal, Ms Chapman arrived at the following conclusions:

    a. That Ms Laverick and VE had an open relationship and that, had she been considering raising the 'workaround' with anyone, it would have been natural for the Claimant to have raised this with VE;
    b. That she did not raise the issue with her Operations Manager in circumstances when she knew she should have done so;
    c. That the person identified by the Claimant ('Kay') as being someone she had emailed regarding the error, did not exist;
    d. That the Claimant had changed her account or explanation regarding Kay;
    e. That the Claimant had been texted by a colleague, Louise Mann, who alerted her to the inappropriateness of the 'workaround' adopted by the Claimant;
    f. That the Claimant had continued to approve the deals after the contact from Louise Mann;
    g. That the Claimant was aware that by offering a higher rate this would boost sales figures;
    h. That had it not been for the deals under investigation, the Claimant would have missed her target and that by approving these particular deals she exceeded her target.

41. The above findings in particular led Ms Chapman to conclude that Ms Laverick had instructed her team to process the deal as alleged (i.e. as an invalid deal) and that her actions were deliberate for the purposes of boosting sales performance. The entirety of the matters relied on by Ms Chapman are set out in her witness statement in paragraphs 22 – 24.

42. In respect of each of the allegations, Ms Chapman concluded that they amounted to gross misconduct. She decided to terminate Ms Laverick's employment without notice.

Appeal against dismissal: 27 February 2019

43. The Claimant appealed the decision to terminate her employment. She set out five grounds of appeal (**pages 169-171**). The appeal was heard by Mr Jordan Lewis, Senior Channel Manager.

44. Mr Lewis spoke separately to Ms Eccleston, Mr Bayat and Ms Chapman on 06 March 2019. A summary of what they said is found in paragraph 13 of Mr Lewis's witness statement.

45. Having considered all the material, Mr Lewis rejected Ms Laverick's appeal.

Relevant law

Unfair dismissal

46. It is for the employer to show the principal reason for dismissal and that it is a reason falling within section 98(2) or that it is for some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. The reference to the 'reason' or 'principal reason' in section 98(1)(a) and s98(4) is not a reference to the category of reasons in section 98(2)(a)-(d) or for that matter in section 98(1)(b). It is a reference to the actual reason for dismissal (**Robinson v Combat Stress** UKEAT/0310/14 unreported). The categorisation of that reason (i.e. within which of subsection 98(2)(a)-(d) it falls) is a matter of legal analysis: **Wilson v Post Office** [2000] IRLR 834, CA.

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

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

"where an employer has a number of reasons which together form a composite reason for dismissal, the tribunal's task is to have regard to the whole of those reasons in assessing fairness. Where dismissal is for a number of events which have taken place separately, each of which is to the discredit of the employee in

the eyes of the employer, then to ask if that dismissal would have occurred if only some of those incidents had been established to the employer's satisfaction, rather than all involves close evaluation of the employer's reasoning. Was it actually that once satisfied of one event, the second merely leant emphasis to what had already been decided? There may be many situations in which, having regard to the whole of the reason the employer actually had for dismissal, it is nonetheless fair to dismiss.

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

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

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

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

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

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

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

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

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

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

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

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

Fair procedures

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

Polkey

56. What is known as 'the Polkey principle' (**Polkey v AD Dayton Services** [1988] I.C.R. 142,HL) is an example of the application of section 123(1). Under this section the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer. A tribunal may reduce the compensatory award where the unfairly dismissed employee could have been dismissed fairly at a later stage or if a proper and fair procedure had been

followed. Thus the 'Polkey' exercise is predictive in the sense that the Tribunal should consider whether the particular employer could have dismissed fairly and if so the chances whether it would have done so. The tribunal is not deciding the matter on balance. It is not to ask what it would have done if it were the employer. It is assessing the chances of what the actual employer would have done: **Hill v Governing Body of Great Tey Primary School** [2013] I.C.R. 691, EAT.

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

Contributory conduct

58. If a dismissal is found to be unfair, under section 123(6) ERA where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it must reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding even in cases where the parties do not raise it as an issue (**Swallow Security Services Ltd v Millicent** [2009] ALL ER (D) 299, EAT). The relevant conduct must be culpable or blameworthy and (for the purposes of considering a reduction of the compensatory award) must have actually caused or contributed to the dismissal: **Nelson v BBC (No2)** [1980] I.C.R. 110, CA. For the purposes of the compensatory award there must be a causal connection between the conduct and the dismissal. The conduct must be to some extent culpable or blameworthy (**Nelson v BBC (No.2)** [1980] I.C.R. 110, CA). Langstaff J offered tribunals some guidance in the case of **Steen v ASP Packaging** [2014] I.C.R. 56, EAT, namely that the following questions should be asked: (1) what was the conduct in question? (2) was it blameworthy? (3) did it cause or contribute to the dismissal? (for the purposes of the compensatory award) (4) to what extent should the award be reduced?

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

60. Unlike the position under section 98(4) ERA where the Tribunal must confine its consideration of the facts to those found by the employer at the time of the dismissal, the position is different when the Tribunal comes to consider whether, and if so to what extent, the employee might be said to have contributed to the dismissal. In this regard, the Tribunal is bound to come to its own view on the

evidence before it. Decisions on contributory fault are for the Tribunal to make, if a decision is held to be unfair. It is the claimant's conduct that is in issue and not that of any others. The conduct must be established by the evidence.

Submissions

61. Mr Barker made oral submissions to supplement his written submissions which I have read. What follows is a summary of his oral submissions. He accepted that the reason for dismissal related to conduct and was potentially fair. However, he made a number of submissions on the question of reasonableness. He contended that the Respondent's failure to talk to all of the Claimant's team was unreasonable. He submitted that there were three aspects to the 'workaround':

    a. Whether the Claimant should have authorised the workaround and how it was disseminated to the team;
    b. Why some of her team were not adhering to it;
    c. After she received the text from Louise Mann, whether this should or could have justified a change in the Claimant's behaviour;

62. Mr Barker submitted that of the 10 people in the Claimant's team, the investigating officer, Mr Bayat, spoke only to 4 of them. He failed to go further to see what other members of the team understood their instructions to be. This was unreasonable given the seriousness of the allegation against the Claimant which was tantamount to fraud. Mr Barker also submitted that Mr Bayat should have spoken to other team leaders to find out what they had done to work around the problem.

63. As regards Ms Eccleston, the failure to provide the Claimant with notes of the interview with Ms Eccleston (which were made after the disciplinary hearing with Ms Chapman) was unreasonable and that it was conceded by Mr Lewis that these notes should have been disclosed to the Claimant during her disciplinary hearing.

64. Mr Barker submitted that absent a reasonable investigation there could be no proper finding that the Claimant had done what she had been accused of in relation to the handsets. There was, he said, insufficient evidence to lead to a finding of misconduct.

65. In respect of the text from Louise Mann, Mr Barker said that whilst the Claimant had clearly received this, that was a long way from being directed by her line manager that she should change how she worked around the problem. Mr Barker also submitted that there was no evidence to show any financial detriment to the respondent.

66. In respect of the I.D. issue, Mr Barker submitted that this did not merit summary dismissal. At its highest it merited a warning. In terms of the procedure, Mr Barker submitted that there were further investigations which were not disclosed and

that it was vital that the Claimant had a chance to comment on those statements particularly given that she and her line manager, Ms Eccleston, had different views.

67. In terms of the appeal, Mr Barker submitted that Mr Lewis had received large amount of material from Ms Eccleston all of which is a considerable amount of material to justify the Respondent's actions, to justify that Ms Eccleston was not 'slacking on the job' from her point of view.

68. Mr Barker submitted that the Claimant had not contributed to her own dismissal and that there should be no reduction to reflect her conduct.

69. For the Respondent, Ms Rumble also supplemented written submissions. She submitted that the investigating officer spoke to the relevant members of the team; that he was not required to go on a 'fishing expedition'. The Claimant could have, but did not identify anyone to whom he should have spoken. Mr Bayat's investigation was reasonable because those to whom he spoke were those who carried out the transactions in question. Ms Rumble submitted that the Respondent acted reasonably in seeking to understand what had been going on and how the workaround was being implemented.

70. She submitted that it was not a case where the Respondent had to investigate whether a formal workaround had been put in place. The Claimant accepted that the transactions/incidents happened. That narrowed the investigation, Ms Rumble submitted. She referred to the different aspects as found by the Respondent:

    a. That the Claimant added the particular workaround with no steer from her operations manager, which the Respondent would reasonably have expected her to do – even if she was not obliged to consult the operations manager;
    b. The Claimant told her agents how to implement it. Whilst the Claimant says she told them how to do it correctly, the Respondent concluded that she was responsible for ensuring that it was done correctly and the agents clearly did not;
    c. The text from Louise Mann identified that the workaround was incorrect and that the Claimant should do another one;
    d. The Claimant acknowledged this in a text message to Louise Mann; that she accepted something was wrong.

71. Ms Rumble submitted that the Respondent had clear evidence that the Claimant was fully aware that agents were not properly selling the product; of the Claimant's role in not ensuring that they do so; that there was clear evidence of, at the very least, gross negligence in not checking; and clear evidence that the Claimant approved 6 transactions after the Louise Mann text.

72. In relation to the information gathered following the discussions with Ms Ecclestone, this did not impact on the fairness of the decision to dismiss as it did not go to the allegations themselves but to the mindset of the Claimant regarding issues such as support. She submitted that there was no procedural failure such as to render the dismissal unfair but that if there was, the same outcome would have been reached albeit with a short delay of up to about a week to allow for time to provide the claimant with the notes of discussion with Ms Eccleston. Ms Rumble further submitted that, in the event the tribunal might find the Claimant to have been unfairly dismissed, she clearly contributed to her dismissal by her culpable and blameworthy conduct.

Conclusions – application of law to the facts

Reason for dismissal

73. I must first of all determine what the actual reason for dismissal was. It is not in dispute, and I find, that the reason the Claimant was dismissed was:

    a. That she had acted unprofessionally by obtaining I.D. from a member of her team for the purpose of giving it to her daughter to access licenced premises with an age restriction of 18;
    b. That she had directed her team to mis-sell additional line products in relation to a tablet and data plan ('the T3 deal');

74. It was accepted – and in any event I so find – that the reason for dismissal related to conduct.

Reasonableness of decision to dismiss – section 98(4) ERA 1996

Did the Respondent have a genuine belief in the Claimant's guilt?

75. I conclude that Ms Chapman (and at the appeal stage, Mr Lewis) genuinely believed that the Claimant had committed those acts. Again, there was no dispute about this.

Reasonable grounds for the belief?

76. I conclude that the Respondent had reasonable grounds for its belief that the Clamant had acted unprofessionally by obtaining the I.D. for her daughter's use and she had directed her team to mis-sell additional line products.

77. As regards the I.D. the Claimant accepted that she had asked for the I.D. Ms Chapman concluded that Ms Laverick had not been open with Mr Bayat in not revealing that she had asked a second member of her team to borrow her I.D.

78. As regards the alleged mis-selling, the Respondent was entitled to rely on, in particular, the following:

a. That the Claimant had initially said that she had mentioned the workaround to someone called 'Kay' but that she subsequently changed her position on this;
b. That the Claimant had not mentioned her workaround to her operations manager,
c. That no-one called 'Kay' could be identified;
d. That Louise Mann, a peer and someone who was on good terms with the Claimant, had clearly alerted the Claimant to her own concerns about the validity of the Claimant's workaround but that the Claimant took no steps to change things and continued to approve transactions;
e. That members of her team had sold products in excess of the package which was available;
f. That members of her team (Chloe Wilson and Natalie Latchford) had said that they had been told by the Claimant to sell the deal to customers as a 5GB deal (as opposed to a 2GB deal).

79. I must remind myself that it is not for me to substitute my view of the facts for those of Ms Chapman or Mr Lewis for that matter. Ms Chapman inferred from her conclusions that the Claimant's actions were deliberate and motivated by a desire to improperly improve her performance.

80. Having given careful consideration to all the evidence before Ms Chapman I am unable to say that this conclusion was not open to her. She genuinely believed that the Claimant had acted as set out in paragraph 73 above and she had reasonable grounds for so believing. That is not to say that Ms Laverick had in fact acted dishonestly so as to improperly improve her performance.

Were the Respondent's grounds formed following a reasonable investigation

81. Mr Barker made some valid points in submission. However, it is not a case of asking what should have been done by way of investigation but whether the investigation which was in fact undertaken was sufficient to enable the Respondent to sustain a genuine belief in the grounds for which it dismissed the Claimant.

82. Mr Barker criticised the failure to speak to other line managers. However, I am not sure what this would have achieved. There was no suggestion that other line managers had initiated a workaround similar to the Claimant's. There was no dispute that there was an error within the system regarding the T3. I have asked what speaking to other line managers might have achieved. I am unable to conclude that it would have assisted the Claimant's case by doing this, and no-one in particular was identified by the Claimant as being a person with whom the Respondent should have spoken.

83. The Respondent had spoken to those who had undertaken the transactions. It also had the text message from Louise Mann (**page 125**) which was made

available to the Claimant and in respect of which she was able to and did offer her explanation. I agree with Mr Barker that the Respondent could have spoken to more members of her team. However, in my assessment of the evidence the Respondent did not act unreasonably in speaking to those who had carried out the particular transactions in question. It was not unreasonable to focus the investigation on those agents who had been involved in the dubious transactions to ascertain what they had to say about them. The Claimant's position in response to what came from those interviews was that she did not tell them to mis-sell. Her position was she did not tell anyone to mis-sell. What could be achieved by widening the investigation after that so as to ask other members of the team what they had been told by the Claimant? The best outcome for the Claimant would have been statements to say that they had not been directed by the Claimant as alleged. That would not change what the others had said, which was that they had been directed in a particular way. Ms Chapman had sufficient grounds, based on what had been obtained from the investigation as a whole to form her belief.

Procedural fairness

84. This was the most difficult aspect of the case. Again, Mr Barker made some forceful points. In particular, the failure to provide the Claimant with the notes of the meeting between Ms Chapman and Ms Eccleston (**pages 152-157**). There was also the meetings between Mr Lewis and Ms Eccleston and (**pages 186-195**).

85. Mr Lewis accepted that the notes of the meeting between Ms Chapman and Ms Eccleston ought to have been provided to the Claimant. He is right to make this concession. It is a fundamental part of a fair process that material gathered during the course of an investigation or inquiry should be provided to an employee facing the prospect of dismissal.

86. Ms Chapman said that the discussion with Ms Ecclestone came about because of what the Claimant had said to her (Ms Chapman) on 20 December 2018 about not being supported. Ms Chapman spoke to Ms Ecclestone because she wanted to understand what Ms Ecclestone had to say about this.

87. Ms Chapman acted with the best of intentions and was in no way seeking to act unfairly. On the contrary she genuinely wanted to investigate the Claimant's points, not to try and undermine what she said but simply because the Claimant had raised them.

88. The unfairness arose, not from any improper desire on the part of Ms Chapman, but from the failure to revert to the Claimant. In this case, both the dismissing officer and the appeal officer undertook their own interviews/discussions beyond those undertaken by the investigating officer, Mr Bayat. There is nothing untoward in that. It is not unusual for an employee to raise something in a hearing which leads to the disciplinary panel conducting further investigations.

89. However, had Mr Bayat undertaken the investigation with Ms Eccleston in advance of the disciplinary hearing he would have been expected to disclose this to the Claimant so that she would have an opportunity to address any points before a decision is made by the disciplinary panel. There is no reason to take any other approach just because the interview with Ms Ecclestone arises after the completion of Mr Bayat's investigation report.

90. The failure to allow the Claimant the opportunity to address what Ms Ecclestone said was unfair. It was a procedural defect which was not cured on appeal. Indeed, it was compounded on appeal. Mr Lewis also spoke to Ms Eccleston (and also Mr Bayat and Ms Chapman) without disclosing the notes of the interview to the Claimant and depriving her of the opportunity to address the content. The Claimant's point was that she was under pressure at work and felt unsupported. The implication of this was that this might explain why she did not pick up on what her agents had been doing.

91. I recognise that in Ms Ecclestone's meeting with Ms Chapman she is largely supportive of the Claimant and complimentary of her. I also see that she has in the main addressed the points about support. However, there are two important aspects of that meeting in respect of which the Claimant would reasonably have had something to say. Firstly there is ther reference to the Claimant raising concerns regarding commissions and secondly there is the reference on **page 157** regarding Louise Mann having apparently spoken to Ms Ecclestone about 'dodgy deals' (which is a reference to the T3 deals, the subject of the disciplinary allegation against the Claimant).

92. On balance, I conclude that by arriving at her decision to terminate the Claimant's employment without first affording her the opportunity to address the content of Ms Ecclestone's interview was outside the band of reasonable responses open to a reasonable employer. On that basis I find the Claimant's dismissal to be unfair.

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

Polkey – compensatory award

94. I must consider now whether the Respondent could have fairly dismissed had it acted as a reasonable employer would have by following a fair procedure – in particular by providing the Claimant with the notes of interview of Ms Ecclestone - and what are the chances that it would have done?

95. I find that the Respondent could and would have fairly dismissed the Claimant had it acted reasonably and followed a fair procedure.

96. The fundamental problem which the Claimant faced was in particular:

a. What she said about having alerted 'Kay' to her workaround but then changing her position on that; and
b. The text from Louise Mann indicating that a peer of the Claimant believed the deals to be 'dodgy', alerting the Claimant to this fact yet without resulting in the Claimant changing the workaround

97. The fact that Ms Ecclestone appears also to have been alerted to the invalidity of the deals by Ms Mann would not have assisted her in any argument that Ms Ecclestone had not considered the matter to be serious, as Ms Ecclestone learned of it just before matters escalated following the involvement of the Methyr manager (**page 157**).

98. Nothing that Ms Ecclestone said in her interview and nothing that the Claimant has subsequently said in the course of these proceedings go to address the two points in paragraph 96 above. It was clear from Ms Chapman's evidence that these were key points in leading her to conclude that the Claimant had acted deliberately and committed an act of gross misconduct.

99. I have asked myself whether, had the Claimant been provided with Ms Ecclestone's interview notes and been afforded an opportunity to comment on it, would this or might it have made any difference to the ultimate sanction? I conclude that it would not. Ms Chapman took into account that the Claimant had experienced significant stressful life events outside work. Her assessment that she had been given adequate support at work was not challenged in the proceedings and in any event, it is clear that Ms Chapman genuinely assessed the level of support provided to the Claimant and her conclusions on that appear to be unassailable.

100. Standing back and looking at the evidence as a whole I conclude that the Claimant would have been fairly dismissed had the Respondent followed a fair procedure. However, the date of termination would have been delayed by a period of three weeks. The Claimant would have to have been provided with the notes of the meeting with Ms Ecclestone, given time to consider them and then make arrangements for a further meeting with Ms Chapman. That would have taken about two weeks. It would then have taken no more than a week for Ms Chapman to conclude her deliberations and deliver an outcome letter to the Claimant.

101. Therefore, the compensatory award is limited to losses from 11 January 2019 to 01 February 2019.

Contributory conduct – compensatory award

102. I conclude that the Claimant did contribute to her own dismissal in that:

a. She did ask her colleagues for their I.D. to pass on to her daughter and that in light of the team dynamics (a mature manager and a younger, more junior employee) exerting indirect pressure on the more junior employee, this can be described as blameworthy;
b. She did not exercise the sort of control or apply sufficient rigour in the management of her team to ascertain how the T3 deal was being processed

103. I bear in mind that, when considering the issue of contribution, it is for the Respondent to prove on the balance of probabilities that the Claimant did what she was accused of doing. That is easy with regards to the I.D. However, as regards the T3 deal the position is very different. I did not hear from the employees who said they were directed to mis-sell. I bear in mind that the allegation on contribution is broken down into different levels, the highest of which is that the Claimant was dishonest and acted improperly to boost her performance. I have already observed that when considering whether the Claimant was unfairly dismissed, it is not my function to ask whether she was in fact guilty of the matters alleged against her.

104. However, the position is different in a wrongful dismissal case or where the employer argues that the Claimant caused or contributed to the dismissal by her conduct. It must, in this case prove the conduct. The Respondent has not proved to my satisfaction that Ms Laverick acted dishonestly or that she was motivated to inflate her own performance. It has proved to my satisfaction that she was negligent in the management of her team albeit not grossly negligent. Both her actions relating to the obtaining of the I.D. and the management of her team contributed to her dismissal. However, they were by no means the major contribution. The major contribution was the conclusion by Ms Chapman (which she was reasonably entitled to reach) that the Claimant had acted deliberately improperly.

105. I have then gone on to consider whether, in light of my conclusions, it would be just and equitable to reduce the Claimant's compensatory award further, in light of my findings. I conclude that it would not be just and equitable to reduce the compensatory award further in light of my conclusions that the Claimant would have been unfairly dismissed in any event after a period of three weeks.

106. I remind myself that when considering the extent to which the compensatory award should be reduced for contributory conduct under section 123(6) ERA, the tribunal is entitled to take into account the amount by which the compensatory award has already been reduced on just and equitable grounds under section 123(1) (by way of a Polkey reduction). This may also entitle the tribunal to reduce the basic award by a greater percentage than the compensatory award: **Rao v Civil Aviation Authority** [1994] I.C.R. 495, CA.

Conduct - Basic Award

107. In terms of the basic award, a different test applies under section 122(2). In light of my findings on the Claimant's pre-dismissal conduct, it is just and equitable to reduce the basic award by 20%.

108. I have not been able to arrive at any findings in respect of mitigation of losses as I heard no evidence or submissions on that. If necessary, that issue can be addressed at a remedies hearing. In light of my conclusions, it may be that the parties are able to come to an agreement on remedy. The parties must inform the Tribunal within 21 days of receipt of this reserved judgment whether they will be able to resolve all matters of remedy or whether they require a hearing to be listed.

Signed: 28 February 2020

Employment Judge Sweeney