Case No: 2503656/2019

EMPLOYMENT TRIBUNALS

Claimant: **Miss V Mullen**

Respondent: **Heron Foods Limited**

Heard at: **Newcastle (by video link)** **On:** **Tuesday 1 September 2020**

Before: **Employment Judge S Shore**

Representation:

Claimant: **Ms Boyack, Lay Representative**
Respondent: **Ms. Firth, Counsel**

REASONS

Background

1. I heard the claimant's claim of unfair dismissal on 1 September 2020 by video link. When the decision was delivered to the parties in person, neither asked for written reasons. The claimant then sent an email to the Tribunal on 9 September asking for written reasons, as is her right.

2. By a claim presented on 24 October 2019, the claimant made a claim of unfair dismissal, following a period of early conciliation that had begun on 28 August 2019 and ended on 26 September 2019.

3. The respondent is a large food retailer with 250 stores and a workforce of 4,300. The claimant was employed as deputy manager at the respondent's Southwick store by the respondent from 19 July 2004 until her summary on 8 July 2019.

4. She was dismissed following an incident on 27 June 2019, when a loss prevention manager employed by the respondent undertook a random out of hours search at the store where the claimant worked. That search resulted in disciplinary charges against the claimant for:

    5.1. Failing to scan an item when self-serving at the checkout;

    5.2. Using the store manager's discount card, rather than her own, and;

    5.3. Paying for an item of shopping with cash from her pocket.

5. At a disciplinary hearing on 8 July 2019, she was summarily dismissed. Her dismissal was confirmed by a letter dated 9 July 2019. The claimant appealed

and attended an appeal hearing on 12 July 2019 when the dismissal was upheld. The claimant was notified of the decision by a letter dated 22 August 2019.

6. The claim was initially listed for a final hearing in person that was to have taken place on 21 February 2020, but that hearing was converted to a preliminary hearing before Employment Judge Nicol. He relisted the final hearing as an in person hearing for 1 September 2020 and made case management orders. He also made a list of the issues to be determined by the Tribunal

7. Because of the Covid-19 pandemic the final hearing was relisted to take place as a video hearing on 1 September 2020.

Issues

8. I discussed the issues with the representatives at the start of the hearing and the following matters were agreed:

    5.1. Did the respondent follow a reasonable procedure?

    5.2. Did the respondent carry out an appropriate investigation?

    5.3. Did the respondent form a reasonable belief on reasonable grounds that the claimant committed a disciplinary offence?

    5.4. If so, did the claimant's conduct amount to gross misconduct?

    5.5. And/or, was the sanction applied by the respondent within the band of reasonable responses open to it having regard, amongst other things, to the circumstances and its treatment of other employees in similar circumstances?

    5.6. Was the dismissal unfair?

    5.7. If it was, what is the appropriate remedy?

9. Ms Firth had produced her own list of issues, which included:

    9.1. Did the claimant contribute to her own dismissal by her conduct?

    9.2. If the respondent used an unfair procedure, what percentage chance was there that a fair procedure would have produced a fair dismissal? (this is known as the Polkey principle).

10. As I found that the claimant had not been unfairly dismissed, I did not consider the points at paragraphs 9.1. and 9.2. above.

Housekeeping

10. The hearing was conducted by video on the CVP platform. There were a few problems with frozen screens, poor audio quality and connectivity, but these did not prevent the hearing progressing. I am grateful to the representatives, the claimant and the respondent's witnesses for their patience and good humour in the light of the technological glitches that they had to endure.

11. At the start of the hearing, I introduced myself and the participants to one another. Everyone confirmed that they could see and hear everyone else. Ms Boyack confirmed that the claimant's claim was one of unfair dismissal.

12. I confirmed with the claimant that her claim was for unfair dismissal only before discussing the issues with the parties, as set out above.

13. The parties had prepared an agreed bundle of 191 pages. If I refer to any pages from the bundle, the page number will be in square brackets, for example [76]. I had been sent some high-resolution pages of some of the documents in the bundle. I used the high-resolution versions. The respondent had also submitted a video file that was approximately 30 seconds long that was from a camera in the store which looked down on the claimant's till and showed the period when she scanned in and paid for items for herself.

14. The claimant had prepared a witness statement dated 30 April 2020. The respondent produced witness statements from Russell Stuart Carter, Area Manager for the respondent and the dismissing officer, and Stuart Christopher Wakefield, Senior Area Manager and appeals officer.

15. I explained to the claimant and her representative that the Tribunal has an overriding objective to deal with cases fairly and justly and that this meant that there were five matters that I had to consider at all times. I set out what these were. I advised the parties that I regarded the first of the five matters; the requirement to ensure that the parties are on an equal footing as particularly important, as the claimant was not professionally represented (although Ms Boyack did a very good job). I tried to ensure that I explained the procedure that we would follow and tried to make clear to the claimant and her representative what would be required of them at the various stages of the hearing.

Hearing and Evidence

16. I have not recorded every piece of evidence, discussion and submission in this decision. I made a full note of the hearing. I have only recorded in this decision, the matters that I consider relevant to my determination of the issues in the case.

17. Russell Carter's evidence in chief was contained in a statement dated 29 August 2020 that consisted of 64 paragraphs. He was the dismissing officer. The main points of his evidence were:

    13.1. He has overall responsibility for 16 of the respondent's stores and has extensive experience of handling and chairing disciplinary hearings.

    13.2. The respondent has a disciplinary procedure in its staff handbook [78-84]. The procedure has a non-exhaustive list of prohibited conduct that the respondent expressly regards as gross misconduct, which include "theft" and "flagrant failure to follow the Company's procedures and regulations".

    13.3. The respondent can experience stock loss through waste and theft. Theft can be external or internal. Loss prevention measures are taken.

13.4. The respondent gives its employees the benefit of a staff discount scheme, which has a set of rules in the Staff Discount Policy [70]. Every member of staff is given their own staff discount card. The Policy states that the card must not be shared with colleagues. If the employee does not have their card, no staff discount is given. Staff are forbidden from serving themselves, their family or their friends. Misuse of the staff discount system is regarded as gross misconduct.

13.5. The respondent also has a set of Store Operation Rules in its staff handbook [71-77]. One of the Rules is that staff are forbidden from carrying personal cash on the sales area. Another Rule is that staff have to have a receipt for all purchases [74]. The purpose of these two Rules is to avoid unnecessary accusations: if staff can only handle money from the till when in store, actions are simplified.

13.6. The respondent reserves the right to conduct personal searches of staff in or out of store and out of hours.

13.7. The claimant was employed as Deputy Manager at the respondent's Southwick store ("the Store"). The Store was one of the premises under Mr Carter's control. He knew the claimant and says he had a good working relationship with her. He says that the claimant had a copy of all the policies, procedures and rules that are outlined above. She had also signed a document on 23 January 2018 to acknowledge that she had read and understood the staff discount policy.

13.8. Mr Carter had chaired previous disciplinary meetings of the claimant. On 18 March 2010, he had issued the claimant with a first written warning for unacceptable performance with regard to the staff shopping procedure [85]. She had allowed staff to scan their own shopping with her supervision.

13.9. On 16 April 2015, he had issued the claimant with a letter of concern for poor performance and poor conduct [86]. She had failed to carry out two fire alarm tests.

13.10. On 21 October 2015, he had issued the claimant with a first written warning for poor store management [99] for failing to complete the store operations manual.

13.11. On 23 February 2017, he issued the claimant with a letter of concern [100] for failing to follow the cash management procedure correctly. All warnings and letters of concern had expired at the time of the disciplinary process that led to the claimant's dismissal.

13.12. Mr Carter says that the claimant had managerial responsibilities and extensive experience and knowledge of the respondent's rules and security policies.

13.13. On 27 June 2019, Tracey Ridley, a Loss Prevention Advisor, undertook a random out of hours search of the Store. She

identified a number of potential breaches of policy committed by the claimant:

13.13.1. She had carried her own cash in her pocket on the shop floor;

13.13.2. She had then self-served;

13.13.3. Whilst self-serving, she had failed to scan a bottle of Lenor fabric conditioner, and;

13.13.4. She had used a colleague's staff discount card when paying for her shopping.

13.14. Ms Ridley had carried out an initial investigation. The claimant was suspended, as is the respondent's usual practice in matters of alleged theft. Ms Ridley decided that the matter should proceed to a disciplinary hearing and, at that point, Mr Carter was appointed to chair the hearing.

13.15. Julie Ottaway, an HR Advisor acting on Mr Carter's behalf, invited the claimant to a disciplinary hearing by a letter dated 1 July 2019 [117]. The hearing was to be held on 4 July 2019. The disciplinary allegations were:

13.15.1. Breach of Staff Discount Policy, namely: self-serving on 27 June 2019 and using a colleague's staff discount card;

13.15.2. Breach of Store Operation Rules, namely: carrying cash in her pocket on the shop floor, and;

13.15.3. Theft, namely: whilst self-serving on 27 June 2019, failing to put a bottle of Lenor through the till.

13.16. The letter confirmed that if proven, her conduct would be considered as gross misconduct. It also contained the following documents:

13.16.1. A copy of the investigation notes with the claimant dated 27 June 2019 [105-106];

13.16.2. A copy of the investigation notes with the claimant dated 28 June 2019 [102-104];

13.16.3. A copy of the investigation notes with Chris Hutchinson (Store Manager, whose staff discount card the claimant had used) dated 28 June 2019 [112-114];

13.16.4. A copy of the suspension letter dated 28 June 2019 [115-116];

13.16.5. A copy of till receipt 504477 dated 27 June 2019 [101];

13.16.6. A copy of the Staff Discount Policy;

13.16.7. A copy of the Store Operations General Procedures and Store Rules [71-77];

13.16.8. A copy of the Security Policy [66-69], and;

13.16.9. A copy of the Disciplinary Policy/Procedure [78-84].

13.17. The letter stated that claimant could be accompanied by a work colleague or trade union representative.

13.18. Mr Carter had sight of the documents listed above and the CCTV footage of the till transaction conducted by the claimant.

13.19. The claimant attended the disciplinary hearing on 4 July 2019 alone. Mr Carter was accompanied by a notetaker; Clare Guy. A copy of the minutes was signed by the claimant [119-122]. The record is accurate but not a verbatim transcript. The key points from the hearing were:

13.19.1. The claimant confirmed that she had received all the documents and was happy to proceed;

13.19.2. She admitted that her conduct was in breach of the respondent's policies and procedures, of which she was aware;

13.19.3. She admitted that the CCTV footage showed that she had not attempted to scan the bottle of Lenor;

13.19.4. She said "it was just a silly mistake" and "looks wrong but I didn't mean to do it" [122];

13.19.5. Mr Carter considered the position and found that the claimant had stolen the unscanned item, had used her manager's discount card against policy, had served herself against policy and had carried cash at work. He concluded that the clamant had committed gross misconduct;

13.19.6. He then considered the sanction. He started form the position that the staff handbook states that theft and flagrant failure to follow Company procedures and regulations are to be considered as gross misconduct;

13.19.7. The policy was clear that discount cards were not to be shared and that staff could not self-serve. Abuse of the staff discount scheme was regarded as gross misconduct.

13.19.8. The Rules stated that cash should not be carried and that staff should have receipts for purchases.

The claimant had been issued with all the relevant policies.

13.19.9. In her investigation interview when she had been shown the CCTV [109], the claimant had said "looks bad…genuine mistake... yes, straight into the bag. In defence, got Chris and cameras...just not intention [to steal] at all…" He found that she had acknowledged the fact of the theft, but denied dishonesty. He did not find the denial to be compelling;

13.19.10. She had said that she had never seen anyone else use another colleague's card [109]. She admitted coming onto the shop floor with a £5 note in her pocket [121];

13.19.11. He found that trust and confidence in the claimant had been destroyed. He considered that the Store Manager had given his card to the claimant and allowed her to self-serve. A separate investigation was carried out into the manager's conduct and he was disciplined;

13.19.12. He considered the claimant's length of service, but found that her experience should have made her more aware of the trust placed in her, especially having received a warning and letter of concern for similar procedural matters in the past, and;

13.19.13. He concluded that summary dismissal was the appropriate sanction.

13.20. He advised the claimant of the decision to dismiss her at the hearing and confirmed that dismissal in a letter dated 9 July 2020 [126-127]. He says that the letter is an accurate reflection of the process he had followed.

13.21. Mr Carter is aware that the claimant appealed his decision, but was not aware of the details of the appeal at the time, other than his decision was upheld. He is aware that the claimant says that her dismissal is unfair as the Store Manager, Chris Hutchinson, committed a breach of his terms and conditions of employment and remains in employment.

13.22. Mr Carter dealt with Mr Hutchinson's disciplinary hearing on 4 July 2020, so can explain what happened in that process. The disciplinary charge against Mr Hutchinson was. A breach of Staff Discount Policy [160]. He had allowed the claimant to use his staff discount card on 27 June and had permitted her to self-serve.

13.23. The Store Manager had not been suspended as he was accused of a breach of policy/procedure. At the disciplinary hearing [157-158], Mr Carter found that the Store Manager had

committed the alleged offences. He felt a first written warning was an appropriate sanction in the circumstances. He confirmed his decision by a letter dated 4 July 2020 [167-168].

13.24. Mr Carter notes that the claimant says that her dismissal was as a result of a previous Employment Tribunal claim that she had brought against the respondent. He denies that this is true. His decision to dismiss was entirely as a result of her misconduct on 27 June 2019. At the time, he was unaware that the claimant had previously brought a claim against the respondent.

18. In answer to cross-examination questions from Ms Boyack, Mr Carter confirmed that the initial investigations into the claimant and the Store Manager had been conducted by Ms Ridley. He had conducted both disciplinary hearings. He had not written the suspension letter dated 28 June 2019 [115-116], so could not explain its wording. He did not know when it had been handed to the claimant, but presumed it had been after Ms Ridley's investigation meeting with the claimant on 28 June 2019.

19. He had called the Store Manager's disciplinary hearing as he saw it. He accepted that it appeared on the CCTV to show the Store Manager on his mobile phone and accepted that this was a breach of policy. However, the store was closed and the discount card was the priority.

20. Ms Boyack put it to the witness that the CCTV footage showed the time to be 5:53pm, so the store was still open (closing time was 6:00pm). Mr Carter agreed, but said that he still regarded the sanction imposed on the manager as fair. Mr Hutchinson had breached the discount card policy and had allowed the claimant to self-serve.

21. It was put to Mr Carter that the Store Manager had also allowed the claimant to carry money in the store. He asked to review the notes of Mr Hutchinson's disciplinary meeting [162-164], which I allowed him to do. He said that he questioned the Store Manager about using his mobile phone [163]. When Mr Hutchinson had been interviewed about the claimant's misconduct [114], he had said that the claimant had not told him that she had money in her pocket at the start of the shift.

22. Ms Boyack suggested that if the Store Manager had not allowed the claimant to self-serve and use his card, she would still be employed today. Mr Carter said that he didn't judge on that. Mr Hutchinson had received censure commensurate with the offences he had committed. The claimant had been accused of theft. That was the difference. She had "made the decision not to scan the Lenor."

23. Mr Carter acknowledged that the record of the meeting had been incorrect by stating that the claimant had failed to scan Daz, but said she had failed to scan Lenor. It may have been a lapse by him, or it may have been mis-recorded by the notetaker. It was put to him that it was unfair for him to "have lapses like that", but the claimant was not. Mr Carter replied that they were not the same; the claimant had seriously breached company policy.

24. He was asked if the Store Manager's breach was not serious and replied by saying that he had been disciplined and had received a commensurate sanction. He was not aware of how long Mr Hutchinson's disciplinary had

lasted, but looked at the minutes [162-163] and said that it had started at 11:35am [162] and had reconvened at 11:52 [163]. There were only two exchanges after the meeting had been reconvened. He was asked if the meeting had been long enough and replied that there is no set time for such a meeting.

25. He said that it had been fair to sack the claimant.

43. In answer to re-examination questions, Mr Carter said that the claimant could have refused to put her own shopping through the till. The lapses of the Store Manager had all been general misconduct. The claimant's lapses had been gross misconduct. The sanction imposed on the Store Manager was in line with those given to previous managers for the same thing. The claimant herself had had a disciplinary in 2015 for which she was given the same sanction as the Store Manager in this incident.

44. I asked Mr Carter to look at the CCTV, which he did. I asked why he had concluded that the claimant had committed an act of dishonesty. His response was that the claimant had put the Lenor straight into the carrier bag. In his opinion, that was theft. He confirmed that the claimant's previous disciplinary record had no influence on the outcome of this disciplinary.

45. Ms Firth asked for leave to ask further re-examination questions about the claimant's previous Employment Tribunal claim against the respondent, which I granted. In answer to those questions, Mr Carter said that he was aware that something had gone on. He asked about it afterwards, but wasn't told the outcome or result.

46. Stuart Wakefield's evidence in chief was contained in a statement dated September 2020 that consisted of 19 paragraphs. He was the appeal officer. The main points of his evidence were:

    46.1. He is responsible for the overall management of the 16 stores in his area. He has extensive experience of dealing with appeals and chairing appeal hearings;

    46.2. He had no knowledge of the claimant or the background to her dismissal before hearing her appeal. He was provided with the claimant's appeal letter dated 12 July 2019 [128-129];

    46.3. He conducted the appeal meeting on 7 August 2019. The claimant attended alone. Charlotte O'Neill, the respondent's Senior HR Business Partner attended as minute-taker. The minutes of the hearing were signed as a true record by all three attendees [132-139];

    46.4. Mr Wakefield considered that the claimant had raised four grounds of appeal in her letter:

        46.4.1. She had been treated unfairly because Mr Hutchinson was in charge of the shift on 27 June and if he had followed procedures, she would not have been dismissed;

46.4.2. Tracey Ridley should not have held an investigation meeting with her on 27 June 2019;

46.4.3. The claimant said that a colleague, Michael Blair had taken cash from the respondent and had not been managed in the same way that she had, and;

46.4.4. The claimant had a contract of employment with the respondent, but had not signed it.

46.5. He listened to the claimant's explanation of her appeal and decided to carry out further investigations. He had been given an 'appeal pack' before the hearing. He did not consider it until after the hearing. It contained all the documents listed as having been sent to the claimant (at paragraphs 13.16.1. to 13.16.9. above) plus the disciplinary hearing notes [119-122] and outcome letter [126-127];

46.6. He asked Ms O'Neill about any action taken against Chris Hutchinson and Michael Blair and she advised him of the outcomes of the disciplinary proceedings against both: Mr Hutchinson had received a first written warning for breach of policy and rules. Mr Blair had been accused of theft, but following an investigation, it had been found that there was insufficient evidence to prove the allegation. He was issued with a letter of concern as to money-handling;

46.7. Mr Wakefield then reviewed the CCTV footage. He regarded it as being very clear in showing that the claimant had made no attempt to scan the bottle of Lenor and had put it straight in the bag;

46.8. Once he had completed his further investigations, he wrote to the claimant on 22 August 2019 with his appeal outcome [140-142]. He found nothing to support the claimant's appeal, so dismissed it.

47. In answer to a supplementary question, Mr Wakefield said he was not aware of any previous Tribunal claim by the claimant.

48. In answer to cross-examination questions from Ms Boyack, Mr Wakefield said he was not the Senior Area Manager for the area in which the Store was situated; he was responsible for stores in the Liverpool area. He had not had a copy of the Store Manager's disciplinary hearing notes [or outcome], but had been supplied with a copy of his investigation interview dated 28 June 2019 [112-114].

49. The claimant, Victoria Mullen's, evidence in chief was contained in a statement dated 30 April 2020 that consisted of 13 paragraphs. The main points of her evidence were:

49.1. She had 15 years' service with the respondent, 9 of which had been as Duty Manager. She feels that she had a good working relationship with her colleagues and worked to the best of her ability. Her role was varied and included working on the

checkout, cashing up the tills and handling thousands of pounds;

49.2. On 27 June 2019, she had started her shift on time. It was a hot day, so she had not worn a coat. [When she arrived], Mr Hutchinson was stood at the back of the shop. She informed him that she had some loose change and a £5 note on her person. She says that her colleagues and the Store Manager "had done this many times in the past.";

49.3. On her lunch break, she left the store and bought her lunch. On her return, she purchased a packet of crisps from the store;

49.4. Before closing, she purchased a box of Daz soap powder (£2.99) and a bottle of Lenor (£1.00). A customer needed serving, so she "logged on to the check out, tended to the customer whom was still at the check-out as Chris Hutchinson brought the items to my check out, placing them on the runner belt;

49.5. She says that as only she and Mr Hutchinson were in the store, and she was already logged on, he allowed her to serve herself as he observed. He was in close proximity watching and observing throughout;

49.6. Ms Mullen and Mr Hutchinson were chatting a she began to can the items. Seconds after finishing, he stepped forward and handed her his discount card. She was unsure if hers was working, as she was already logged in. There had been issues with this previously;

49.7. When the store closed, she put Mr Hutchinson's shopping through for him and collected her shopping, which she had put away. When she left the Store, Ms Ridley asked to see her and Mr Hutchinson's shopping. She handed over her shopping and receipt, as she had nothing to hide. Ms Ridley then noticed the discrepancy between the till receipt and the items in her bag. There was no mention of the £1.00 bottle of Lenor on the receipt;

49.8. She and Ms Ridley went to the office to check the CCTV, which showed that she had not scanned the Lenor. She says that this was a genuine error on her behalf and apologised to Ms Ridley. She told Ms Ridley that she would pay for the Lenor immediately;

49.9. Ms Mullen denies that she is a person "showing the capacity to develop into a potential thief". Mr Carter had chaired Mr Hutchinson's disciplinary hearing on 4 July 2019 before chairing her meeting on 8 July;

49.10. Having served the respondent since 2004 and being in apposition of trust, she would not have destroyed hr career by committing a deliberate act of theft of an item worth £1.00.

50. In answer to supplementary questions from Ms Boyack, the claimant said she had reported Michael Blair for stealing. Ms Ridley had decided there was a lack of evidence. He is no longer with the company. The claimant had the keys to the safe and had had many opportunities to steal, if she had been inclined to do so.

51. In answer to cross-examination questions, the claimant confirmed that she had received and understood all the policy documents that have been mentioned previously. She confirmed that whilst her copy of her contract of employment had not been signed, she had returned a signed copy to the respondent.

52. The claimant confirmed that she knew the processes and that it was not acceptable [to the respondent] to break them, even if watched by a senior manager and understood that it was wrong. She accepted that because she handled cash and had access to the safe, her role required trust. She spent some of her working time on the tills. She estimated it was about 9 hours a week. She confirmed that she knew the job “inside out and backwards”.

53. Ms Mullen was then asked about the CCTV footage. It had audio, although I struggled to make it out. She confirmed that there was a beep when something scanned through the till and that if there was no beep, then an item had not scanned. It was put to the claimant that the process was second nature to her. She said that she and the Store Manager were talking and laughing at the time. She was distracted and her head was down.

54. Ms Firth suggested that the work environment was not quiet. The claimant said that they were not allowed to chat to customers. They were not allowed to talk to customers in case they made a mistake.

55. Turning to the disciplinary allegations, the claimant said that she understood what the three allegations in the letter of 1 July 2019 [117-118] were. She had offered to pay Ms Ridley for the Lenor because she [the claimant] knew that it was a mistake, not on the receipt. She had not let the claimant do that. She agreed that the absence of the Lenor form the receipt had been discovered in a random search and that they had had a discussion that was recorded on a Retail Investigation Form [102]. It was put to the claimant that no offer of payment was recorded on the Retail Investigation Form. She said that she could be seen offering to pay on the CCTV. I had not been shown any such CCTV footage.

56. It was put to the claimant that the failure to scan the Lenor had been a mistake. Her response was that Mr Hutchinson knew she had £5.00. He had given her his card. He was on the phone.

57. Ms Mullen confirmed that she had signed all the meeting records in her case as being true.

58. She accepted that she had cash in her pocket when she was working. She accepted that the receipt [101] was for a total of £2.79. This was made up of the cost of a reusable bag (£0.10) and the cost of the Daz (£2.99) less the 10% staff discount applied (£0.30). It was also agreed that if he claimant had scanned in and paid for the Lenor, it would have cost £0.90 (£1.00 less a 10% discount). That would have been a total of £3.69.

59. Ms Mullen was then taken to the investigation interview on 28 June 2019 [108] in which she had been asked why she had cash in her pocket. Her response had been "Only had this on, told Chris when I came in. I showed Chris my money. I showed Chris £5." In answer to the quotation that was put to her, the claimant said that it was a hot day and that she had not had a coat. She had a £5 note that she had showed Chris ad she also rattled her coat to show that she also had some change. She had told Mr Hutchinson and MS Ridley that she had change. She had pulled the change out when she had offered to pay Ms Ridley for the Lenor.

60. She said she hadn't mentioned the change in the 28 June interview because she was distressed and upset. The claimant was then taken to Mr Hutchinson's interview on 28 June [114] where he was asked if she had told him that she had cash in her pocket. His response had been "No, she said she had [a] £5 note when she came in." He was then asked if the claimant had shown him the money. His response had been "No, this was before started shift (sic)". The claimant said that Mr Hutchinson had said no then had said that she'd had £5. In fact, Mr Hutchinson had been asked how the claimant had paid for her shopping and he had replied "With £5."

61. The claimant was insistent that she had told Mr Hutchinson that she had had change. He must have known she had it because she paid for her shopping.

62. Normally, Mr Hutchinson would serve staff who wanted shop. She had two items and he had said "Serve yourself." She usually paid with cash and confirmed that she had paid for her lunch and earlier shopping in the Store with cash.

63. She was taken to her investigation [110] where she had been asked to talk Ms Didley through her coming to work with £5.00. Her response had been "Yes had coppers and £5, showed Chris £5. Not sure of change." Her reaction was that 'coppers' is 'change'. We then had an exchange about the meaning of 'coppers. Ms Firth suggested it meant copper coins of low value. Ms Mullen argued that it was interchangeable with 'change'.

64. Ms Firth tried to delve into how much money the claimant would have had when she was scanning the Daz and carrier bag through her till, but I am afraid that on reviewing the exchanges whilst writing up these reasons, I cannot make any findings of how much money the claimant would have had at that time, because there is no definitive evidence of how much she had started with. She says that she started with £5.00 plus £3.00 plus some coins. That would have been enough to pay for her lunch (£3.30) and the Lenor, Daz and Bag (£3.69). The respondent says that she had only the £5 note, which I calculate would not even have covered the cost of the Daz and bag (£2.79), if she spent £3.30 on her lunch.

65. I do not think I can make a finding on this issue that assist me in deciding whether the claimant was unfairly dismissed, other than to make a finding on the effect of the evidence on the credibility of the claimant.

66. The claimant was asked to look at the CCTV footage again. She said she had change in her pocket; enough to buy the items. Tracey said she couldn't pay. The Store Manager had watched her. She was on CCTV. She

denied that she did not have enough money to pay for the Lenor, but denied this. She had enough. That's why she's made the offer of payment to Ms Ridley. It was put to the claimant that she had served herself and had used the discount card. She said that Mr Hutchinson had told her to serve herself (but did not answer the point about the discount card). It was put to her that she picked up two items and just put them through. Her response was that Chris admitted telling her to serve herself. He said he was facing away, but a screen grab showed his feet pointing at the till. We then had a discussion about what meaning could be implied into a still of one of Mr Hutchinson's feet pointing towards the till. I indicted to both parties that I could not make a finding that Mr Hutchinson was observing the claimant at the till from the screen grab.

67. The claimant accepted that when Mr Carter had suggested that she was "bang to rights" on the issues of self-serving and using the Store Manager's discount card, she had replied "Yes 100%". She also admitted that she had asked Mr Hutchinson for his card. Staff could not use their own card to get discount when they are logged on a till. She knew she had breached policy, but Mr Hutchinson had allowed the breach.

68. The agreed that Mr Hutchinson had been looking at his phone rather than looking at her and was still on his phone when he had walked towards her. He was talking to her and on the phone. He had said he was waiting for a text. It was put to the claimant that she knew that Mr Hutchinson was not concentrating on her. She agreed, but said that he kept glancing up. Ms Firth returned to the issue of the bleep from the till. She was asked if she could hear the bleep when the Daz was scanned. Her reply was "You can also hear laughing and joking. I don't know if you can hear the till beep." She admitted she had not attempted to scan the Lenor, but denied knowing she had not scanned it until she was outside and had been stopped by Ms Ridley.

69. The claimant suggested that Mr Hutchinson had been waiting for a text from Ms Ridley, who had not visited the store in months. Ms Firth suggested that this was the first time that such an allegation had been made and asked the claimant if she though Mr Hutchinson and Ms Ridley had been in cahoots. The claimant accepted that there is no proof that they were. Mr Hutchinson had only been disciplined for allowing her to self-serve and giving her his discount card; there had been nothing about his phone use. We had further exchanges in which Ms Firth suggested that the claimant had acted dishonestly and she denied it.

70. The claimant acknowledged that her first written warning on 18 March 2010 [85] had been for a breach of policy only and that this was the same as the sanction that Chris Hutchinson had received. She agreed, but said that the difference was that he was the manager of the store telling her to do those things and he wasn't disciplined for his use of a mobile phone on the shop floor.

71. She accepted that there was not enough evidence to proceed with a disciplinary against Michael Blair. I commented that the Letter of Concern to Mr Blair dated 5 February 2019 spoke for itself.

Submissions

Respondent

72. I suggested Ms Firth go first, as she had produced a lengthy skeleton argument, which I read thoroughly, and the claimant was not represented by a lawyer, so Ms Boyack may have found it easier to respond than "make the running". Her submissions were:

The Law

73. The Tribunal would be familiar with the test for unfair dismissal in a misconduct case.

73. It is for R to show the principal reason for dismissal and that such reason was *"fair"* within the meaning of s98(1)(1) and 98(2) ERA. Conduct is a potentially fair reason.

74. If the Tribunal is satisfied that the dismissal was for a potentially fair reason, it will then consider the reasonableness of the decision to dismiss. S98(4) specifies:

> *"(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as sufficient reason for dismissing the employee;*
>
> *(b) shall be determined in accordance with equity and the substantial merits of the case."*

75. At the fairness stage:

    75.1. The burden of proof is neutral.[1]

    75.2. The function of the Tribunal is to determine whether *at the time the decision was taken to dismiss*:

        75.2.1. The employer genuinely believed that the conduct complained of had taken place.

        75.2.2. That the employer had a reasonable suspicion amounting to a belief which was based upon reasonable grounds.

        75.2.3. The decision was made after a reasonable investigation.[2]

    75.3. The band of reasonable responses test applies to all three strands of the ***Burchell*** test.[3]

---

[1] ***Boys and Girls Welfare Society v McDonald*** [1996] IRLR 129 EAT.

[2] See ***BHS v Burchell*** [1980] ICR 303, EAT, ***Foley v Post Office*** and ***HSBC Bank plc v Madden*** (2000) ICR 1283, CA.

[3] See, for example, ***Iceland Frozen Foods v Jones*** [1983] ICR 17.

75.4. The test is objective and the ET must be careful not to step into the shoes of the employer.[4]

75.5. Where there are multiple instances of misconduct, the correct approach is as follows:

"The question is not whether the individual acts of misconduct found by the appeal panel individually, or indeed cumulatively, amounted to gross misconduct. Rather, it is whether the conduct in its totality amounted to a sufficient reason for dismissal under section 98(4) ERA*".*[5]

75.6. With regard to gross misconduct, in ***Sandwell & West Birmingham Hospitals NHS Trust v Westwood*** **UKEAT/0032/09** the EAT explained:

"In our judgment the question as to what is gross misconduct must be a mixed question of law and fact and that will be so when the question falls to be considered in the context of the reasonableness of the sanction in unfair dismissal or in the context of breach of contract. What then is the direction as to law that the employer should give itself and the employment tribunal apply when considering the employer's decision making?

Gross misconduct justifying dismissal must amount to a repudiation of the contract of employment by the employee […] So the conduct must be a deliberate and wilful contradiction of the contractual terms.

Alternatively, it must amount to very considerable negligence, historically summarised as 'gross negligence'*."*

75.7. IDS Employment Law Handbooks at 6.183 state:

"It is generally accepted that theft and fraud amount to serious misconduct justifying summary dismissal at common law."

75.8. Indeed, dismissals for theft of even a very small amount of money have been held to be within the band of reasonable responses. For example, in ***Gamestec Leisure Ltd v Magee*** EAT/0419/02 it was fair to dismiss a service engineer who had unsupervised access to fruit machines for taking £3 from one of the employer's machines.

75.9. In ***British Leyland UK v Swift*** [1981] IRLR 91, where the employee had stolen a tax disc from a company vehicle and fraudulently used it on his own, the Court of Appeal held:

75.9.1. The Tribunal had erred in finding that a reasonable employer would have imposed a lesser penalty. That is not the test:

"The correct test is: Was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair.

---

[5] ***Governing Body of Beardwood Humanities College v Ham*** UKEAT/0379/13).

But if a reasonable employer might reasonably have dismissed him, then the dismissal was fair."

75.9.2. The Tribunal had also fallen into error by focussing on the mitigating factors (18 years' service and a good work record) whilst ignoring the serious breakdown in trust and confidence.

75.9.3. It was appropriate for the employer to take into account the fact that the employee had not come clean when the allegation was put to him but persisted in a lying explanation.

75.10. Arguments that inconsistent treatment renders a decision to dismiss unfair need to be scrutinised with "particular care".[6]

"The danger of the argument is that a tribunal may be led away from a proper consideration of the issues raised by s98(4) of the ERA".

The Facts

76. It is submitted that it is plain that the reason for dismissal was obviously C's misconduct, which was discovered as a result of a random bag check.

77. The dismissing officer Russell Carter had no knowledge of any Tribunal claim against R by C, and any assertion that the decision was influenced by that is therefore unsustainable **[WS Carter §63]**.

78. The investigation was reasonable:

79. Having discovered the misconduct through a random out of hours bag search conducted by Tracey Ridley, C was interviewed that day by Ms Ridley immediately **[102 – 106]**. She was shown the till receipt which did not have the Lenor on it and given the opportunity to provide an explanation for that and her decision to serve herself.

80. The CCTV was obtained and shown to C, as was the receipt **[101]**.

81. The following day, C was interviewed again and given a further opportunity to explain her actions **[107]**.

82. Chris Hutchinson – Store Manager (**"Chris"**) was interviewed the same day **[112]**.

83. C confirmed at various points **[107; 109; 120]** that she had read and understood the Store Operations Policy at **[71]**; the Security Policy at **[66]** and the Disciplinary Policy at **[78]** and was shown relevant highlighted sections prior to offering an explanation for her behaviour. The following sections are relevant:

83.1. *"The card must not be shared with other colleagues. If you purchase goods and don't have your card present – no discount will be given.*

[6] ***Hadjioannou v Coral Casinos Ltd*** [1981] IRLR 352

83.2. *"You are not permitted to serve yourself"*

83.3. *"Misuse of colleague discount is regarded as gross misconduct"*.

83.4. *"Money – Sales Assistants must not carry personal cash on the sales area"*

83.5. *"searches may be conducted on a random basis or not, if we are concerned about a particular store or employee"*

83.6. **Disciplinary [81]:** Gross misconduct is defined as *"major breach of duty or conduct that damages the trust and confidence in the employee/employer relationship beyond repair or brings Heron Foods into disrepute"*. It includes:

83.7. *"Theft"*.

83.8. *"Flagrant failure to follow the Company's procedures"*.

84. She had also signed to confirm she had read and understood the Staff Discount Policy briefing on 23 January 2018 **[65]**.

85. C's defence to the allegation of theft was:

86. On 27 June 2016 she said *"I thought I scanned both"* **[105]**.

87. On 28 June 2016:

87.1. *"I 100% thought I scanned both items. […] Was talking to Chris and didn't realise not scanned Lenor, attention* [sic] *was not to pinch anything my mind was oblivious"*.

88. When shown the CCTV and highlighted that the Lenor was nowhere near the scanner, she said *"don't know why […] Looks bad genuine mistake […] yes straight into bag. In defence got Chris and cameras just not intention at all. Co. 15 years would never pinch at all that's what more upsetting"* **[108 – 109]**

89. On 8 July 2019 she said she was *"chatting away to Chris"* **[120]**.

90. When it was put to her that she was *"bang to rights"* on this allegation she replied *"yes"* **[120]**.

91. *"In defence manager standing there shop of cameras not going to pinch it was lapse, which is my wrongdoing"* **[121]**.

92. Chris's version of events was that *"seen her scan bag and one of items then I turned away"* as he was waiting for a text on his phone **[113]**.

93. C's defence to the allegation of self-serving and using Chris's store discount card was:

94. On 28 June 2016, she said:

"Chris carried 2 items over he was stood there, thought put both on not big shop and Chris was standing there at till", but she didn't ask Chris to serve her **[108]**.

95. Chris gave her his store discount card. She couldn't remember if she asked him for it, but she *"must have"*. She couldn't use her card as she was logged on it **[108; 109]**. She had 2 cards but one could not log on, and she was unaware she had a new card in the drawer **[109]**.

96. Using others' store discount cards was not common practice **[109]**.

97. On 8 July 2019 she said *"Chris told us to do it* [serve herself]*"* by bringing her items to the till and standing in front of her **[120]**.

98. She used his discount card because she was logged on with hers, although she was *"not sure"* if it wouldn't work whilst she was logged on **[120]**.

99. When it was put to her that she was *"bang to rights"* on this allegation she replied *"yes 100%"* **[120]**.

100. Chris's version of events was that C said her card was not working and asked to use his so he gave it to her. C *"must have been"* using her own card to serve customers during the day, but she has 2 and came in earlier on 28 June and asked for new card which was in a drawer **[112 – 113]**.

101. C's defence to the allegation of carrying cash was:

102. On 28 June 2016: that she showed Chris £5 when she arrived at work that day **[108]**. She paid for the Daz with the change she had from her lunch **[110]**.

103. She later said she had *"coppers and £5, showed Chris £5 not sure of change"*.

104. She said she had £3 and loose coins after buying her lunch. It was put to her that her lunch *totalled* £3.30 leaving £1.70 from £5, and that her shop with the Lenor would have been £3.79 (more than she had left). She said *"loose change had enough had money in hand showed Chris £5 as a note. Still got this in pocket off yesterday"* **[110]**.

105. On 8 July 2019 she said she showed Chris £5 at the start of the day but not the loose change she had. She should have put it in an envelope as per policy **[120]**.

106. She said when she bought the Daz *"had loose change + £5 in pocket and bank card* [in her jacket] *as well […] had about £1.50 and change from £5 note in pocket […] had enough money on us"*.[7]

107. Chris's version of events was that C *"said she had £5 note when came in* […] *before started shift"*. C paid for the Daz with cash but he *"didn't see what it was"*.

[7] It is noted that C's lunch on her case came to £2.90, leaving £2.10 from £5, plus £1.50 totals £3.60 (less than the £3.79 required to buy the Daz, Lenor and bag).

108. The dismissing officer Russell Carter dismissed C for the misconduct. His belief in C's guilt on the balance of probabilities **[WS Carter §39]** was plainly genuine and based on reasonable grounds.

109. Having reviewed the CCTV, considered Chris's interview notes and heard C's explanation he reasonably concluded that C had made no attempt to scan the Lenor and accordingly had stolen it (by intentionally taking it without paying).

110. C had admitted breaches of company policy in relation to the remainder of the allegations.

111. It is submitted that Russell Carter reasonably concluded that C's conduct constituted gross misconduct:

112. Having concluded that C had committed theft, this fitted squarely into R's definition of gross misconduct **[WS Carter §6]**.

113. Having concluded that C had breached procedure, he went on to decide that this was *"flagrant"* which is gross misconduct under R's disciplinary procedure **[WS Carter §6]**. This was reasonable because C breached procedures of which she was aware and knew the sanction for **[WS Carter §25; §35; §53]**. Breach of colleague discount is also gross misconduct under the policy.

114. His rationale for this was that:

    114.1. C in particular – as Duty Manager, second in command and longstanding employee – was in a position of trust handling money and stock **[WS Carter §7; §25]**. It is submitted she breached that trust.

    114.2. Given the potential for abuse in the retail environment, procedures are crucial to avoid: abuse; mixing of customer and employee money; and unnecessary accusations **[WS Carter §9 – 11]**.

    114.3. He then – it is submitted reasonably – went on to conclude that summary dismissal was appropriate. His thought process is set out at **[WS Carter §40 – 54]**:

    114.4. C was on notice her actions could amount to gross misconduct resulting in dismissal.

    114.5. She was aware of the policies she breached and using someone else's discount card was not common practice.

    114.6. He was not persuaded by C's assertion that she did not intend to take the Lenor without scanning it. It is therefore submitted that this constituted an attempt to cover up the theft.

    114.7. He considered C's assertion that Chris had provided his store discount card but did not consider it sufficient mitigation. Furthermore, Chris's First Written Warning was comparable to C's Letter of Concern in 2010 for a similar policy breach **[85]**.

114.8. He considered C's managerial position and length of service and reasonably concluded that this exacerbated the severity of the misconduct.

114.9. His trust in C was destroyed and therefore a demotion or final written warning which would enable her to remain within the business was entirely inappropriate.

114.10. As a low-margin retailer, R reasonably takes theft – even of low value items – extremely seriously.

114.11. It is submitted that the theft alone would have reasonably justified dismissal. Taking the offences in their totality dismissal is clearly within the range of reasonable responses, particularly in the retail context.

115. C's case did not change at appeal.

116. Focussing on the most significant grounds of appeal, Christopher Wakefield's decision to dismiss the same **[140]** was a reasonable one based on necessary further investigation into Chris and Michael Blair's treatment. He:

116.1. Reviewed the evidence regarding the Lenor, and reasonably concluded that C committed theft, the dishonesty element being proven by her failure to even attempt to scan it. The fact Chris had permitted her to serve herself, and was present as she did so did not absolve her of responsibility for the same.

116.2. Reasonably concluded that C had not received a harsher sanction than Chris, who had received a written warning for a single admitted breach of company policy **[167]**.

116.3. Reasonably concluded that C had not received a harsher sanction than Michael Blair, who was suspected of theft. That allegation was not pursued due to lack of evidence, but he received a Letter of Concern for swapping money between tills without authorisation **[181 – 191]**.

116.4. Furthermore, C's conduct – theft – could be distinguished from Chris and Michael Blair's **[WS Wakefield §17]**.

117. It is submitted R's procedure was textbook and certainly within the band of reasonableness:

117.1. It promptly conducted an investigation which included interviewing C on 2 occasions to allow her to respond to the allegations **[102; 107]** as well as obtaining the CCTV and interviewing Chris **[112]**.

117.2. C was suspended following the investigation.

117.3. She was promptly invited to a disciplinary hearing, informed of the allegations against her in writing, advised they would be considered gross misconduct if proven and that she may be

summarily dismissed. She was also given copies of all relevant documentation and given an opportunity to provide further documentation and advised she could bring a companion (which she chose not to do) **[117]**.

117.4. The disciplinary was chaired by Russell Carter – Area Manager, who had no previous involvement with the allegations. Here, C had a further opportunity to explain her actions.

117.5. C was informed of the decision immediately orally following the disciplinary hearing **[122]** and this was confirmed in writing **[126]**.

117.6. C was given a right of appeal, which she exercised:

117.7. She was promptly invited to a hearing and told she could bring a companion (which she chose not to do) **[131]**.

117.8. When asked if she felt she had had a fair appeal hearing she replied *"yes definitely"* **[139]**.

117.9. The appeal was chaired by Stuart Wakefield – Senior Area Manager, who had no previous involvement with the allegations. He carried out further investigation into C's grounds of appeal before upholding the appeal and informing C of the same by letter **[140]**.

Claimant

118. On behalf of the claimant. Ms Boyack submitted that there was a point of consistency between the claimant and others. Both Mr Carter and Ms Ridley had picked up on the fact that Mr Hutchinson had his mobile phone with him.

119. It had been a genuine lapse by the claimant.

120. I thanked both representatives for their submissions and advised the parties that I would consider my decision and deliver it with extempore reasons, which I did. I found that the claim of unfair dismissal failed and gave reasons.

121. Ms Firth made an application that the claimant pay the respondent's costs, which I refused on the basis that the claimant's case was never one that had no reasonable prospect of success, although it was not very strong for the reasons I had outlined. Neither party asked for written reasons, but the claimant now seeks them.

Decision

122. I start with a general comment on the task that I had in this hearing. As I explained to the parties, it is not the function of a Tribunal in an unfair dismissal case where conduct is the reason for dismissal to rehear a disciplinary hearing or appeal. It is the task of the Tribunal to find the reason for dismissal and then to determine if the respondent was reasonable or unreasonable in treating is as sufficient reason to justify dismissal.

123. Under section 98(1)(a) of the Employment Rights Act 1996 it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal. Under section 98(1)(b) the employer must show that the reason falls within subsection (2) or is some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. A reason may come within section 98(2)(b) if it relates to the conduct of the employee. At this stage, the burden in showing the reason is on the respondent.

124. In considering whether or not the employer has made out a reason related to conduct, in the case of alleged misconduct, the tribunal must have regard to the test in **British Home Stores v Burchell [1980] ICR 303**, and in particular the employer must show that the employer believed that the employee was guilty of the conduct. This goes to the respondent's reason. Further, the tribunal must assess (the burden here being neutral) whether the respondent had reasonable grounds on which to sustain that belief, and whether at the stage when the respondent formed that belief on those grounds it had carried out as much investigation into the matter as was reasonable in all the circumstances. This goes to the question of the reasonableness of the dismissal as confirmed by the EAT in **Sheffield Health and Social Care NHS Foundation Trust v Crabtree EAT/0331/09**.

125. In considering the fairness of the dismissal, the tribunal must have regard to the case of **Iceland Frozen Foods v Jones [1982] IRLR 439** and have in mind the approach summarised in that case. The starting point should be the wording of section 98(4) of the Employment Rights Act 1996. Applying that section, the tribunal must consider the reasonableness of the employer's conduct, not simply whether the tribunal consider the dismissal to be fair. The burden is neutral. In judging the reasonableness of the employer's conduct, the tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer. In many, though not all, cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably take another view. The function of the tribunal is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within that band, the dismissal is fair. If the dismissal falls outside that band, it is unfair.

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

Findings of Agreed Facts

127. I make the following findings of fact on matters that were not in dispute (by which I mean that the evidence of the claimant and respondent was the same, or that the evidence of one party was unchallenged by the other):

    127.1. The claimant, Victoria Mullen, was employed by the respondent, Heron Foods Limited from 19 July 2004 to 8 July 2019, when she was dismissed.

127.2. The claimant's job meant that she had the trust of her employer. She had been provided with a contract of employment and a set of policies that have never been challenged as being applicable to the claimant's employment. I find that she knew about them and regarded herself as being bound by them

127.3. On 27 June 2019, the claimant attended work. She had some money in her pocket. She used some of the money to buy lunch.

127.4. Near the end of the working day, she had served a customer and wanted to buy some items for herself. Her Store Manager watched her serve herself and handed over his staff discount Card for the clamant to use, as she would not have been able to use her own card.

127.5. She scanned in a packet of Daz and a carrier bag. She made no attempt to scan a bottle of Lenor with a retail value of £1.00. She simply placed the Lenor in the carrier bag

127.6. On leaving work, the claimant and her manager were stopped by Tracey Ridley, a loss prevention officer. The claimant handed over her carrier bag which had the Daz, the Lenor and a receipt showing that only the bag and Daz had been paid for.

127.7. She was interviewed and said that the failure to pay for the Lenor was a mistake

127.8. Ms Ridley did not accept this and the claimant was required to attend a disciplinary meeting at which she was dismissed for gross misconduct by Mr Carter.

127.9. She appealed her dismissal, but the dismissal was upheld by Stuart Wakefield.

Findings on Disputed Facts

128. I find that it was reasonable for Mr Carter and Mr Wakefield to conclude that the claimant had self-served and used Mr Hutchinson's discount card, had carried cash on the shop floor and had stolen from the company by failing to put the bottle of Lenor through the till because:

128.1. I find that she had admitted self-serving and using Mr Hutchinson's card. He had watched her do both and had freely handed over his card, but I do not find that this exonerates the claimant. She had been disciplined previously for doing exactly what Mr Hutchinson had done and admitted that both acts were breaches of the respondent's procedures.

128.2. I find the claimant's evidence about what money she had with her on the day in question to be vague and inconsistent.

128.3. Mr Hutchinson was disciplined and received the same sanction that the claimant had when she had allowed staff to breach regulations. She had been the manager of the staff in her control in just the same way as Mr Hutchinson had for her.

128.4. I find that she had cash in her pocket whilst on the shop floor in breach of the respondent's policy because she admitted as much. Her evidence was evasive on the subject and the cross-examination exchanges tended to focus on how much money she had (I assume with a view to proving that she couldn't have afforded to buy the Lenor in any event), but it is incontrovertible that she had money on the shop floor. I do not find that she was given permission by Mr Hutchinson to have the money, as I do not find that he had the authority to waive the respondent's policies and I find the claimant's evidence on this to be inconsistent and vague.

128.5. If the claimant had faced just these two charges, then I do not think that dismissal would have been an appropriate sanction, but the additional finding of theft was the matter that took the claimant's case over the precipice.

128.6. It is not for this Tribunal to find whether or not the claimant is a thief. It is for me to decide in the first instance what the reason for dismissal was. Ms Mullen suggested that her dismissal was in retaliation for an earlier claim she had made against the company. She never mentioned this in the investigation or disciplinary process and I find that she brought no more evidence than her assertion that there was a link. I dismiss the possibility of that link.

128.7. It is indicative of the understandable wish of the claimant to win this claim that she brought up the possibility of Mr Hutchinson and Ms Ridley being in cahoots to arrange her dismissal. This was right at the end of cross-examination and was entirely new. Even the claimant admitted she had no proof. I therefore reject her suggestion of any collusion on the part of the managers of the respondent.

128.8. I therefore have no hesitation in finding that the reason for the claimant's dismissal was conduct.

128.9. I find that it was reasonable for Mr Carter and Mr Wakefield to come to the conclusion on the balance of probabilities that the claimant had stolen the bottle of Lenor. She had 15 years' experience in the store and scanning items of shopping must have been like second nature. She admitted as much. The CCTV footage shows absolutely no attempt by the claimant to scan the bottle of Lenor. She says it was an innocent mistake or lapse, but I find it was reasonable for the respondent to conclude that it was dishonest.

128.10. Her offer to pay for the Lenor is irrelevant. She would have done that whether or not she had deliberately taken the item. I find that the claimant's only evidence in support of her claim of innocence that was before the respondent was her assertion that she had made a mistake. It may be that she did, but I do not find it unreasonable for the respondent to have come to a contrary decision.

128.11. I agree with Ms Firth's submissions on the law and the evidence made in her skeleton argument, which I have reproduced in part above.

129. I have some empathy for the claimant. She had 15 years of service and was dismissed for theft of a single item of low value, but in the circumstances of the case and taking into account equity, I find that the respondent clearly set out its expectations and rules and that the offence was one that a reasonable employer could have dealt with by the sanction of summary dismissal.

130. I find no fault in the investigation or the procedure used by the respondent. Both Mr Carter and Mr Wakefield struck me as truthful and diligent. Mr Wakefield went out of his way to check the facts of the matters raised by the claimant.

Applying Findings of Fact to the Issues

131. I make the following decision on the issues in the light of my findings of fact:

131.1. The claimant was an employee of the respondent;

131.2. The claimant had the right to claim unfair dismissal because of her period of continuous service;

131.3. The claimant had not lost the right to claim for any jurisdictional or other matter;

131.4. The respondent dismissed the claimant;

131.5. I find that the respondent has shown that the reason for dismissal was the claimant's conduct;

131.6. The reason for dismissal was potentially fair;

131.7. The decision to dismiss was within a band of reasonable responses, for all the disciplinary offences taken together and for the allegation of theft on its own.

131.8. I find that the respondent followed the three-stage test in **British Home Stores Limited v Burchell [1978] IRLR 379**;

131.9. The respondent clearly believed the claimant to be guilty of the misconduct;

131.10. It had reasonable grounds for believing that the claimant was guilty of that misconduct for the reasons I have set out above;

131.11. At the stage at which it formed that belief on those grounds, the respondent had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. I also find that the claimant's attempt to compare her treatment to that of former collages did not engage any the principles of inconsistency in cases such as **Hadjioannou v Coral Casinos Ltd EAT [1981] IRLR 352**, and;

131.12. The dismissal was fair in accordance with section 98(4) of the Employment Rights Act 1996.

132. I did not consider the issues in relation to contributory fault, **Polkey** or remedy. The claimant's claim of unfair dismissal fails.

Employment Judge Shore

Date 21 September 2020