



EMPLOYMENT TRIBUNALS

Claimant: Mrs A Roberts

Respondent: Post Office Ltd

Heard at: Liverpool

On: 25 November 2020
and 21 December 2020

Before: Employment Judge Liz Ord

Representation

Claimant: Mr G Price (Counsel)

Respondent: Mr A McPhail (Counsel)

RESERVED LIABILITY JUDGMENT

The judgment of the Tribunal is that:

1. The claimant was unfairly dismissed.
2. The parties will be notified of a date for the remedy hearing.

REASONS

Introduction

1. By a claim form presented on 12/5/20 the claimant complained of unfair dismissal in relation to the termination of her employment with the respondent without notice on 27/2/20. The reason for her dismissal related to her removal of £2,000 from the Fullhurst post office branch in Leicester on 24.01.2020. The claimant maintains that this was done accidentally and she reported it herself to the branch promptly and

ensured its speedy return.

2. By a response form and Grounds of Resistance dated 15/6/20, the respondent resists the complaint on the basis that the claimant purposefully removed the £2,000 from the branch without good reason, which it viewed as tantamount to theft, thereby justifying summary dismissal for gross misconduct.

Issues

3. The issues to be determined were agreed as follows:
 - 1) What was the sole or principal reason for dismissal? The Respondent asserts that it was a reason related to conduct and/or “some other substantial reason” (namely a breakdown of trust and confidence), either of which is a potentially fair reason for dismissal under s.98(2) of the Employment Rights Act 1996.
 - 2) Did the Respondent hold a genuine belief in the Claimant’s misconduct and/or the loss of trust and confidence on reasonable grounds and following as reasonable an investigation as was warranted in the circumstances?
 - 3) Was the decision to dismiss a fair sanction, that is, was it within the range of reasonable responses open to a reasonable employer when faced with these facts?
 - 4) Did the Respondent adopt a fair procedure?
 - 5) If it did not use a fair procedure, would the Claimant have been fairly dismissed in any event and/or to what extent and when?
 - 6) If the dismissal was unfair, did the Claimant contribute to the dismissal by culpable conduct?

Evidence and Procedure

4. On the first day of the hearing (25 November 2020), an agreed 127 paged bundle of documents was before me and an 8 paged amended meeting note recording a disciplinary hearing on 19 February 2020. On the second day of the hearing (21 December 2020), an agreed updated 179 paged bundle of documents was before me, which contained all documents within the earlier bundle together with additional documents.
5. I read a witness statement from the claimant and a statement from each of the respondent’s witnesses, namely Liesl Jackson (disciplinary officer) and Tracy Wilkes (appeal officer). I heard oral evidence from all three.
6. The Tribunal will first make its findings of fact. A summary of the relevant law will be set out. To conclude, the factual findings will be applied to the relevant law in order to determine the issues in the case.

Findings of Fact.

Undisputed background facts prior to the events of 24.01.2020

7. The claimant worked for the respondent under a temporary contract as a counter clerk in the Wrexham post office branch from October 2008 to January 2010. In March 2010 she took up permanent employment with the respondent. Her contract of employment records the “date of continuous employment” with the respondent as being 4 March 2020.
8. From March 2010 the claimant worked at the Holywell Crown Branch and then from May 2010 to Oct 2018 at Chester Crown Branch where she held a management post. This was a position of trust and amongst other things entailed her holding keys to the main safe and having access to secure post office areas. When it was announced in October 2018 that the Chester branch was closing the claimant sought alternative employment with the respondent and from June 2019 she worked as a counter clerk at the Oswestry post office branch. Thereafter, on 5 August 2019 she commenced a new role with the respondent as a Training and Onboarding Advisor and was subject to a probationary period of six months. Her salary was £2,255 gross per month.
9. The job involved travelling to post offices nationwide to train new incoming postmasters, although the claimant had understood that travel distances would be more local and largely confined to the north west of the country which would be commutable from her home in Wrexham. Her contract records her normal hours of work as being 35 hours per week. However, the claimant’s unchallenged evidence is that she often worked in excess of 50 hours per week, and was required to travel long distances. Sometimes she would stay away overnight and, as a mother and grandmother, she would miss her home and family. This was causing the claimant stress and she raised it with her managers, although she continued to be sent to post offices around the country.
10. The claimant felt unsupported and unaccepted in her new position. She believed there was discontent within the training team due to a feeling of experienced members being pushed out and replaced by less experienced staff, such as herself. There were problems with her training, such as delays in getting access to training materials, not having a mentor and difficult shadowing experiences.
11. On several occasions when the claimant carried out initial post office set-ups she found shortcomings with the facilities, security and procedures, which caused anger to the incoming postmasters she was training and resulted in pressure on her. She complained about this to management; for example, to the Area Manager about Ronald Road post office and to the Regional Branch Support Manager about the Widnes post office and thereafter to the Regional Sales Manager. However, the problems continued.
12. In October 2019 the claimant’s line manager changed to Michael Shields (MS). She made known her discontent to him but with respect to the travelling he told her she” *would need to get used to it.*” She was given a schedule for the next 12 weeks including Exeter, 228 miles away, and South Wales where she had to stay away overnight the week before

Christmas.

13. During the week commencing 20 January 2020 the claimant was sent to the Fullhurst Avenue post office branch located in an area of Leicester, to train a new postmaster, Mr Jyhotendra (hereinafter referred to as Jay). The outgoing postmaster Vijay Joshi (hereinafter referred to as Vijay) was reluctant to give up the post office job but was doing so for family reasons. Vijay still wanted to be involved with the branch and was keen to assist with Jay's training. Consequently, he was present for significant periods during the training week.
14. The Fullhurst Avenue branch consisted of a post office counter operating alongside a retail convenience store within a small building.
15. The arrangement was that Jay's wife, Mrs Jyhotendra, was to work the retail side and Jay the post office counter. The claimant did some training with Mrs Jyhotendra as well as Jay but her English was poor and the claimant found this training difficult. Vijay assisted with the post office training but the claimant was concerned about some of Vijay's work habits, which she felt did not conform to post office rules, and she worried he would pass them on to Jay. Jay was finding it difficult to learn the new procedures and the claimant says she worked 14 hours training him and his wife on the Monday and Tuesday of that week. She found this all very stressful.
16. On that Monday and Tuesday an experienced colleague, Julian Carthledge, attended the branch to assist with training. The claimant's perception of him however was that, with her being new to the job, he tried to undermine her in front of Jay and Vijay and this added to the pressure she was under. She telephoned another trainer, Paul Humber, to tell him how she felt and he suggested calling her manager. That morning the claimant suffered what she describes as a panic attack due to the stress she was experiencing, although by lunch time she was able to compose herself enough to continue work.
17. That day, Ezra Nadasen (EN), the Business Support Manager, arrived at the branch to talk to the claimant and she took the opportunity to tell him about the various problems she was encountering at the branch and with her new job in general, including being away from her family. She says he made a comment to the effect of "*Go and be with your family*", which she found puzzling and made her feel uneasy.

The events of Friday 24.01.2020

18. It is not disputed that on the morning of Friday 24.01.2020 the claimant was training and mentoring Jay, which included cash control at the till. She had warned Jay earlier that week not to keep large amounts in the till (it being post office policy not to keep in excess of £500 in the till). She also spent time that day alone in the secure room. Sometime that morning the claimant removed £2,000 of post office cash and left the building with it to go home. There were no witnesses to the taking of the

money. The claimant called the post office from a motorway service station on her way home to say she had the money, which she explained she had accidentally left in her pocket, and said she would send it back by secure delivery.

19. How the money got into her pocket and why it remained there for so long are disputed. The claimant said she put the money into her pocket in front of Jay when they were at the till together. Immediately thereafter, events at the branch caused her to forget about it until she noticed it at the service station. The respondent said that nobody saw her put the money into her pocket and she probably took it from the secure room when she was alone and put it into her handbag. If it were in her pocket, she must have felt it before she reached the service station.
20. The claimant's version of events is that during that morning she was instructing Jay on the till, and telling him not to keep excess money in it when a tall, suspicious-looking customer came into the branch and peered into the till. She had concerns about the security at the branch, particularly as it was located in "*a not very nice area of Leicester*" as she described it. She panicked and put two bundles of £20 notes, amounting to £2,000, into her dress pocket out of sight. She had seen this man earlier in the week and she was suspicious of him because he appeared shifty and she felt he could pose a security risk.
21. At her disciplinary interview she put it like this "*I panicked due to the really tall man. I had just told Jay to remove the cash as he had too much money, so I wasn't going to put the money back.*"
22. At the time the claimant was wearing what she described as one of her "usual work dresses", being a plain utility dress with two large pockets at waist height. She used these pockets to hold her phones, notepad, pencils and other work paraphernalia. Her evidence was that she had been instructed not to take a handbag on site whilst training and she never did so. She did not have her handbag on site that day. She always locked it in the boot of her car for security reasons, so her pockets were used instead.
23. Against this, there was evidence recorded in an e-mail of 29.01.2020 from EN to his line manager Phillipa Newey of a conversation he had had with Vijay. This read "*Adele rang the office later on Friday evening before 17.30 and spoke to Vijay advising him that she had found £2k of the offices money in her handbag.*"
24. Whilst there was a biddy safe below the till, the claimant's evidence to the disciplinary proceedings was that she had never used one before and didn't think to put the money there. She intended to deposit it in the safe later, but then an incident occurred with the ATM and she was distracted dealing with it and forgot about the money.
25. The problem related to the loading the ATM. The security company arrived with cash for the ATM but Jay was unable to open it because

he kept entering the wrong PIN. The claimant needed to telephone the head office security, Grapevine, for advice but they were unable to do anything until the following week. In desperation she called Vijay, who came to the branch and entered the correct PIN. Jay's wife and daughter were in and out of the branch and this added to the pressure the claimant was under.

26. When asked during the disciplinary proceedings whether she physically felt the money when retrieving the phone to make the calls, she said no and explained that she had the phone in her hand throughout this time and did not need to keep retrieving it from her pocket.
27. The claimant's evidence to the disciplinary proceedings was that thereafter she balanced the main safe alone in the secure room, and that it was normal practice for her to be in secure rooms alone during Branch Transfer Audits such as this one. I accept this evidence.
28. At around lunchtime the claimant told Jay and Vijay that she would be leaving early at 14.00 for home as she knew the traffic on the M6 northbound would be bad, being Friday afternoon. She also wanted to see her husband before he started his night shift. After lunch, Paul Humber telephoned to ask if he needed to come to the branch to take over training on the Saturday and the claimant told him no because Vijay was going to be there to supervise Jay.
29. At about 14.00 the claimant got into her car and set off for home with the cash still in her pocket. After driving for about an hour she stopped at a service station to refuel and call her husband. Her evidence is that it was only then that she realised she still had the £2,000 cash in her pocket.
30. At 14.53 she tried to call Jay to tell him she had this money on her but there was no answer. At 14.54 she called Vijay who did answer. She told him that she had £2,000 from the branch and that she would return it by special delivery the following day, being Saturday. When she arrived home, she telephoned Jay again at 17.00 to apologise, but he did not answer. Straight after that at 17.02, she called Vijay again.
31. On Saturday morning 25.01.20 the claimant sent the money back to the branch by secure delivery and e-mailed Jay to tell him this. Jay e-mailed back to thank her for sending it. He telephoned the claimant on Monday 28.02.2020 to confirm that it had arrived safely at the branch.
32. The claimant did not report the incident to her line manager, MS, or to anyone else in management. EN found out about it from Vijay on 28.01.2020 when EN visited the branch in response to a telephone call from the claimant saying Jay was thinking about resigning. EN e-mailed his line manager Phillipa Newey on Wednesday 29.01.2020 to tell her about the money.
33. In the e-mail from EN of 29.01.2020, EN reported Vijay as saying about the claimant "*She had been working in the secure room reconciling the*

REM and other work and the money had somehow ended up in her handbag.”

34. The claimant confirmed to MS on the Wednesday 29.01.2020 that she had taken the money home.

35. MS interviewed both Jay and Vijay by telephone on 5 February 2020. The answers to the questions asked were not written down word for word but in narrative form, as interpreted by MS as follows:

MS to Jay: *“Do you recall Adele taking excess cash from the counter position, which she intended to put in the safe?”* Answer: *“Nothing witnessed at the counter position, Mr Jyhotendra stated he felt this money had gone from the main safe, he didn’t witness this though as he was busy working on the counter with his wife.”*

MS to Vijay: *“Did you witness anything around the £2,000 going missing?”* Answer: *“Didn’t see anything.”*

36. MS interviewed Jay face to face on 7.02.2020 and asked: *“When we spoke on Weds 05.02 you told me that you felt the money had gone missing from the secure room (where the main safe is) and not the counter position, why is this?”* Jay answered *“I don’t remember seeing her take anything off the counter and he stated he believed the money had gone from the secure room.”*

37. An investigatory fact-finding exercise was then undertaken by MS. This started with the claimant being invited by letter dated 30.01.20 to an investigation meeting on 3.02.20 to answer four allegations namely:

- 1) Leaving Fullhurst Avenue branch with £2,000 and subsequently taking this home;
- 2) Leaving the branch early on Friday 24.01.20;
- 3) Advising Paul Humber (Trainer) that he did not need to attend the branch on Saturday 25.01.20;
- 4) Advising the branch to account for the £2,000 in their cash declaration, even though they did not have the money.

38. The meeting took place in the presence of the claimant, MS, and a note taker. Amongst the questions asked by MS of the claimant were:

“Did you think about taking money back?” AR (the claimant) answered *“Yes, I did, but I didn’t want to get stuck in traffic. Traffic was bad on Friday, I wanted to get home. Knew I could send it back special delivery covered £2,000.”*

“Was it your intention to take the £2,000?” AR (the claimant) answered *“No. If I was going to take money I wouldn’t take £2,000 and lose my job.”* MS continued *“I have to ask the question.”* This would appear to imply some doubt in his mind as to whether it was intentional.

“So how long do you think you were on the phone? How long was money

in pocket for?” To which the claimant gave one answer “Good half an hour to one hour.”

39. MS asked if there was anything else the claimant wanted to make him aware of and she said she was shocked by the e-mail from EN and denied having a bag in the secure room, adding that Vijay was not there until the end.
40. Additional comments made by the claimant to the interview notes on 4.2.20 included *“The reason I wanted to get home so much was that I had not seen Andy since 4.30am Wednesday before he left for work. And on the Friday he was starting nights so I wanted to try and see him before he left for work.”*
41. After the meeting the notes were shared with the claimant and she was able to make comments on them.
42. On 5 February 2020 MS interviewed both Jay and Vijay by telephone. He followed this up with on-site interviews of Jay and Vijay at the branch on 7.02.2020. MS also undertook telephone interviews of Paul Humber on 6.02.2020, and EN on 10.2.2020 to confirm some points around EN's e-mail of 29.1.2020.
43. With respect to Vijay he asked *“In your discussion with Ezra on 28.01.2020 when he visited the branch you state that money was in Adele's handbag, how do you know this please?”* Vijay answered *“Adele told me during her discussion with me on the 24.01.20 by phone about finding the money, and that it was with her after leaving the branch on 24.01.”*
44. The meeting also records *“During the meeting stated that he didn't believe Adele had taken the money intentionally, he'd stated this to me during my initial discussion with him on 05.02.2020.”* The following is included in a footnote *“Mr Joshi mentioned during my meeting with him that he felt that Adele got flustered quick and didn't deal well with pressure.”*
45. MS telephoned EN on 10.2.2020 to confirm some points around EN's e-mail of 29.1.2020. EN reported Vijay as saying that the claimant had *“..left the branch with £2,000 on her last day in branch.”* There is no mention of any handbag.
46. On 10.2.2020 MS sent the claimant a letter informing her that the four allegations required further action under the conduct code and that she would hear from Liesl Jackson (LJ) with respect to the next stage. By letter dated 13.02.2020 LJ invited the claimant to a formal disciplinary meeting for gross misconduct to answer two of the four allegations, two of them having been dropped. The letter alleged that she:

“Removed the sum of £2,000 from Fullhurst Avenue which we are considering as a potential theft from the branch and Post Office Ltd.

Advising the branch to account for the £2,000 in their cash declaration on the 24th January 2020, which we are considering as potential falsification of accounts.”

47. She was provided with the evidence supporting the allegations along with a copy of the respondent's conduct code, and given an opportunity to submit any other documentary evidence she wished to. She was warned that *“..should the allegation(s) be found to be proven, it may result in the termination of your employment without notice in accordance with the Conduct Code.”*
48. The claimant attended the disciplinary hearing conducted by LR on 19.02.2020, accompanied by a trade union representative, Neil Barry, from the CWU. The only other person present was a note-taker. At the meeting both allegations were discussed. The meeting notes were shared with the claimant and she was invited to make any comments on them and to confirm their contents subject to any amendments, which she did.
49. The claimant's responses to questions were consistent with her previous interview about how the money came to be in her pocket and her stopping on the M6, finding it in her pocket and calling Jay and Vijay. She referred to *“...all the stress [she] had in branch.”* LJ questioned the claimant about how she could not have felt the money in her pocket and the claimant replied *“Did I feel it – no – I had too much in my pocket – 2 phones, pens, pencils everything from the branch when I had been working. I'm wearing the same dress to show you.”* LJ questioned her about Vijay's comment that she'd said it was in her handbag and the claimant denied saying this.
50. The fit and design of the utility dress the claimant was wearing was considered. The issue was whether it was so loose fitting with such large pockets that it was possible she might not have felt the money in it. The claimant of her own volition wore this same utility dress to the interview. When asked by LJ whether she felt the money in her pocket, the claimant answered *“..no, I had too much in my pocket – 2 phones, pens, pencils, everything from the branch when I had been working. I'm wearing the same dress to show you.”* LJ asked her whether she felt the money when fastening the seat belt and the claimant answered no.
51. The meeting notes were shared with the claimant and she was invited to make any comments on them and confirm them subject to any amendments, which she did.
52. By e-mail of 21.2.2020 LJ asked a specific question of the claimant, namely, *“Have you ever been spoken to in relation to cash handling previously or been involved in a similar situation in the past with Post Office Ltd? The claimant answered by e-mail on 25.02.2020 “With regards to your question I think the post office once used the conduct code for a loss instead of the losses & gains procedure, but all these*

warnings were revoked when the post office realised their error. Apart from that incident I am not aware of being formally spoken to with regards to Cash Handling."

53. Jay was not interviewed at the disciplinary stage of the investigation.
54. On 25.02.2020 LJ completed a Conduct Summary Report which records the evidence she relied on consisting of the above mentioned fact finding evidence, investigatory meeting notes and the disciplinary meeting notes. It records that *"No evidence could be provided from any cctv confirming or denying Adele's comments regarding the cash. Where this was taken and how this arrived in her pocket. This was aimed at the public entering the premises."*
55. LJ records her decision in the Report as *"Without reasonable explanations and any evidence to the contrary, I reasonably believe that Adele has purposefully taken the money and therefore will be dismissed."* The Report does not record any conclusion on the other allegation relating to the accounts. The decision to dismiss was delivered to the claimant in a face to face meeting on 27.02.2020 and she was given a dismissal letter and a copy of the Report. The dismissal letter set out the same two allegations as previously and said that the claimant was summarily dismissed with effect from 27.02.2020. It informed her of her right of appeal.
56. The claimant appealed immediately and she was invited to an appeal meeting on 12.03.2020 with Tracy Wilkes (TW), Head of HR Change and Integration. She was offered the opportunity of submitting any additional documentation and of raising any matters which she believed might not have been taken into account. The meeting took place with TW, the claimant, the claimant's trade union representative, and a note taker. Both allegations were discussed. On 18.03.2020 the claimant was sent the meeting notes and given an opportunity to make any amendments, which she did.
57. On 20.03.2020 TW formally interviewed MS about the claimant's appeal. MS told TW he was aware of claimant's issues with Vijay and that there were a number of people in the branch in a small space and this made the claimant feel uncomfortable with so many people watching and listening to what she was saying.
58. On 24.02.2020 TW formally discussed the dismissal with the claimant. During this interview the claimant again wore the utility dress and stood up and put her hands in her pockets to demonstrate how big they were relative to the bulge of notes in her pocket. The claimant also confirmed that she had the cash plus two mobile phones in one pocket and one notebook and pens in her other pocket. Relative to the ATM incident, she stated that she only took the phone out of her pocket initially to make the calls and kept it in her hand throughout the event.
59. When asked by TW why she didn't put the bundles of money in the safe,

the claimant answered that she would have to walk into the public area to reach the safe and she just wanted to make sure the money was out of sight and felt that her pockets were the safest place. When questioned about why she did not put the money in the bidy safe the claimant answered that she had not used one before.

60. The appeal hearing notes record the claimant working 57 hours during the week commencing 20.01.2020.

61. The notes also record Vijay's evidence relating to the accounting allegation having changed during the investigation process.

62. On 26.03.2020 TW had a very short conversation with Jay about the incident, the pertinent parts of which are:

TW: *"Do you recall having a conversation with Adele about how much money was in the till?"* Jay: *"No."*

TW: *"Was Adele working in the safe room on her own on that Friday?"* Jay: *"Yes."*

TW: *"In your opinion do you think the money that Adele left the premises with was from the till or the safe room?"* Jay *"I can't say where it came from. It was all new to me."*

63. On 6.04.2020 TW sent a Conduct Appeal Outcome letter to the claimant in which she upheld the allegation of potential theft, but overturned the cash accounting allegation. The letter confirmed that the decision to dismiss stood and this was final. The dismissal was on the basis of *Removal of £2,000 in cash from Fullhurst Avenue Post Office – Potential Theft*. An Appeal Summary Report was enclosed.

64. At no time did the disciplinary officer LJ or the appeal officer TW visit the branch premises or view the CCTV footage. MS viewed the footage and said it was not clear, did not cover the counter and was aimed at customers and the entrance to the post office.

65. Prior to this incident the claimant had a clean disciplinary record.

66. Both Jay and Vijay made it clear to the investigation that they did not believe the claimant would take the money intentionally.

Legal Framework

67. S94(1) of the Employment Rights Act 1996 – An employee has the right not to be unfairly dismissed by his employer.

68. Section 98 of ERA provides, so far as is relevant:

- (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show-
 - (a) the reason (or, if more than one, the principal reason) for the dismissal and
 - (b) that is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
- (2) A reason falls within this subsection if it...(b) relates to the conduct of the employee...

- (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)-
 - (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
 - (b) shall be determined in accordance with equity and the substantial merits of the case.

69. The reason for dismissal is the set of facts known to the employer, or the set of beliefs held by him, that causes him to dismiss the employee: *Abernethy v, Mott, Hay and Anderson* [1974] ICR 323, CA.

70. In a conduct case, once a potentially fair reason for dismissal is established, the key question for the Tribunal is whether the employer acted reasonably or unreasonably in treating the reason as a sufficient reason to dismiss the employee. The focus is upon the employer's reasons for dismissal and the employer's conduct of matters. This involves considering a "band of reasonable responses", whereby the Tribunal must not decide the case on the basis of what it would have done had it been the employer, but rather on the basis of whether the employer acted in a reasonable way given the reason for dismissal. Dismissal can be a reasonable step even if not dismissing would also be a reasonable step.

71. Of note is the passage from the judgment of Elias LJ in *Salford Royal NHS Foundation Trust v. Roldan* [2010] EWCA Civ 522:

13. Section 98(4) focuses on the need for an employer to act reasonably in all the circumstances. In *A v B* [2003] IRLR 405 the EAT (Elias J presiding) held that the relevant circumstances include the gravity of the charge and their potential effect upon the employee. So it is particularly important that employers take seriously their responsibilities to conduct a fair investigation where, as on the facts of that case, the employee's reputation or ability to work in his or her chosen field of employment is potentially apposite. In *A v B* the EAT said this:

"Serious allegations of criminal misbehaviour, at least where disputed, must always be the subject of the most careful investigation, always bearing in mind that the investigation is usually being conducted by

laymen and not lawyers. Of course, even in the most serious of cases, it is unrealistic and quite inappropriate to require the safeguards of a criminal trial, but a careful and conscientious investigation of the facts is necessary and the investigator charged with carrying out the inquiries should focus no less on any potential evidence that may exculpate or at least point towards the innocence of the employee as he should on the evidence directed towards proving the charges against him."

72. The respondent's counsel referred to three authorities. The first is *British Home Stores v Burchell* [1980] ICR 303, which sets out well established tests on reasonableness. The second, *HSBC Bank Plc (formerly Midland Bank Plc) v Madden; Foley v Post Office* [2000] ICR 1283, confirms the tests to apply to conduct dismissals. It is brought to the Tribunal's attention due to what the respondent's counsel submits are similarities to the case now before the Tribunal for determination. One of the sets of facts in this combined case relates to the suspicion of misappropriation from a bank and fraudulent use of customers' debit cards by an employee, resulting in the employee's dismissal for gross misconduct. The third case is *Taylor v OCS Group Ltd* [2006] IRLR 613, which in essence says that the Tribunal should have reference to the ACAS Code of Practice on Discipline and Grievance Procedures (2015), and take account of the whole process including any appeal.
73. Applying these cases, the Tribunal, in determining whether the dismissal is unfair, has to decide:
- 1) Whether the employer entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at the time. It must genuinely believe that the employee was guilty of misconduct. The employer must establish the fact of its belief in the employee's misconduct.
 - 2) If genuine belief is established, it must be demonstrated that the employer based its belief on reasonable grounds. This involves a consideration of the information available to the employer at the time of the dismissal and the appeal decisions. The Tribunal must evaluate whether the view that there was misconduct is a view within the band of reasonable responses.
 - 3) The employer, at the stage at which it formed that belief on those grounds must have carried out as much investigation into the matter as was reasonable in all the circumstances of the case. Again, this is a question of whether the investigation fell within a band of reasonable responses. The nature of the allegations, the position of the claimant, and the size and resources of the employer are all relevant.
 - 4) The employer must also follow a reasonable procedure and take the procedural steps necessary in the circumstances of the case to justify the course of action. The employer's own procedures are relevant here, as is the ACAS Code of Practice on Disciplinary and Grievance Procedures (2015).

74. All the above requirements need to be met for the dismissal to fall within the band of reasonable responses. If the dismissal falls within the band, it is fair. If it falls outside the band, it is unfair.
75. The burden of proof is upon the employer to establish a genuine belief in the misconduct relied upon which led it to believe the dismissal fell within the potentially fair reason of “conduct” under the Act. The burden of proof relating to the issue of the reasonableness of the belief, the reasonableness of the investigation and the reasonableness of the procedure is a neutral one.
76. If the Tribunal concludes that the dismissal is unfair procedurally, it must go on to consider what chances there would have been of the employer dismissing the employee in any event, and it may make a consequential reduction in the compensatory award accordingly. This is the *Polkey* principle, from the House of Lords’ decision in *Polkey v AE Dayton Services Ltd* [1998] ICR 142, HL. It is essentially an assessment of what would have happened had the respondent followed correct procedures.
77. The Tribunal must then go on to consider whether there was an unreasonable failure by one or other of the parties to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures (2015) and, if so to make an adjustment of 25% up or down to the compensatory award under s.207A of the Trade Union and Labour Relations Act 1992.
78. Furthermore, the Tribunal must take account of whether there was any contributory fault on the part of the claimant.
79. Whilst the Tribunal was briefly addressed on these latter three matters in closing submissions, decisions on these points will be held over to the remedy hearing.

Conclusions

Whether the respondent held a genuine belief that the claimant was guilty of gross misconduct so as to amount to the reason for dismissal

80. Whilst there were flaws and omissions in the investigation (as discussed below), there is nothing in the evidence that points to the investigating officers being disingenuous in their findings at any stage. Therefore, it would appear from the evidence, that the respondent entertained a reasonable suspicion, resulting in a belief, that the claimant was potentially guilty of theft.
81. Consequently, I find that the respondent held a genuine belief that the claimant was guilty of purposefully taking the money, which is phrased by the respondent as “potential theft”.
82. In closing submissions both the claimant’s and the respondent’s counsel agreed that the reason for dismissal was conduct, and I accept on the

facts of the case that this is a dismissal on grounds related to conduct.

Whether the respondent's belief was held on reasonable grounds following a reasonable investigation

The investigation

83. A very serious allegation had been levelled at the claimant, namely that she had potentially committed an act of theft. Carrying with it the grave sanction of gross misconduct and summary dismissal, this warranted a most careful and thorough investigation. This is especially so of a large, resourceful organisation such as the Post Office, dealing with a long-serving employee in a position of trust. However, this did not take place.
84. The investigatory problems started with the claimant's line manager, MS, not gathering sufficient information at the fact-finding stage, and reporting only brief details to the disciplinary officer, LJ. She herself compounded the problem by failing to carry out an in-depth investigation, which she should have done for an allegation of "potential theft". The thread of omissions ran through to appeal and failed to be cured by the time of the respondent's final decision.
85. Both the disciplinary officer LJ and the appeal officer TW were inexperienced in these roles and had never previously carried them out. LJ in cross examination confirmed that she had not undertaken any specific training for the role. Consequently, they failed in several respects to conduct an adequate investigation in the serious circumstances of this case.
86. The claimant was not asked about her financial circumstances. If the question had been asked the investigation would have discovered that she was financially comfortable, living with a husband who worked, owning their own property and cars, and having savings. That information should have caused them to question why the claimant would want to take the money. No account was taken of this.
87. Neither did the investigation consider how likely it would be that this particular employee would commit an act of theft against her employer, and nor did it balance this against the deterrent of the consequential sanctions she could face. This was a long-standing employee of good character with an unblemished disciplinary record, who had held several cash handling positions of trust throughout her employment.
88. The claimant would be risking the severe consequences of summary dismissal and potentially prosecution for a relatively modest amount of cash which she did not need. If caught, it would end her career, one that she loved, and possibly leave her with a criminal record. It is difficult to comprehend why she would do this. Yet it appears from the investigation reports that the respondent failed to properly consider and give appropriate weight to the claimant's established good character. Nor is it clear whether the investigation took proper account of Vijay's and Jay's

evidence that they did not believe that the claimant had taken the money intentionally.

89. Few enquiries were made of the claimant's personal wellbeing and whether there were any aspects in that respect which might have caused or contributed to the incident. Being the claimant's line manager, MS would have had pastoral responsibilities towards her and it was incumbent on him to fully enquire into all relevant circumstances.
90. The investigating/disciplinary officers did not enquire sufficiently into the claimant's work-life balance or any potential impacts of work on her mental health. It should have been apparent that the claimant, being a middle-aged mother and grandmother, who had regularly been working long hours and travelling long distances staying away from her family, might have suffered some adverse effects. Her circumstances were not properly taken into account, nor any resulting impacts, particularly bearing in mind she was an older employee.
91. The claimant was new to the job, yet little regard was had to how she had been coping and how this might have impacted on her psychologically. Scant regard was given to the significant stress and frustration the claimant had recently been under at work, evidenced by the number of times she had called management bemoaning the chaotic and unpleasant circumstances she often found herself in.
92. She was a worrier and could get readily flustered, as evidenced by Vijay's remarks to MS. MS should have understood from his experience of managing her that the claimant was prone to stress when under pressure. He should have fully conveyed this to the disciplinary officers, not least because stress can potentially impact on memory and lead to forgetfulness. Whilst MS, in answering questions about the claimant from TW on job experience, work hours and training, reported that she could get flustered and frustrated, his answers were brief and at times ambiguous.
93. MS's fact-finding discussions with Jay and Vijay were disproportionately brief and cursory, given that they were the only two witnesses and their evidence was of crucial importance.
94. Then there was the question of the CCTV. Whilst MS looked at the CCTV footage of the branch on the day, he omitted to pass it on to the investigation. He simply dismissed it as unclear and of no importance as it did not cover the counter position, and there is no evidence that he tried to analyse it in any depth. Given the gravity of the theft allegation, all evidence of any potential relevance should have been passed on and it should not have been his call to decide on whether to include it. Even if unclear, the footage may have helped with matters such as branch layout and timings of incidents, including the questions around the "rough-looking" customer and the ATM issues. Regardless of the quality of the recording, the CCTV footage should have been put in evidence.

95. As it happened, the CCTV footage was never seen by the disciplinary or appeal officers who made the decisions, and it was never shown to the claimant. The claimant herself expected the CCTV to be put in evidence, and commented as such at the disciplinary hearing. She expected to be able to rely on it to support the credibility of her version of events.
96. Visiting the site itself and understanding its interior layout was also crucial to this investigation, yet neither the disciplinary officer nor the appeal officer visited the branch. Whilst MS visited the branch, he did not provide the investigation with any report on its physical aspects or otherwise. The layout of the branch was crucial to understand with respect to the location of the till and what customers might have been able to see behind the till, as well as the security arrangements. It was also important to understand how this working environment might have impacted on the claimant.
97. The basis upon which the disciplinary officer reached her decision to dismiss is flawed. She did not formally interview MS or make any records of conversations with him. She failed to interview Jay at all. This was despite Jay's evidence being instrumental to her decision and directly conflicting with that of the claimant. Consequently, she could not have formed a robust view about his credibility as she only considered MS's brief accounts of conversations with him.
98. LJ's findings in her conduct report record "*Vijay and Jay state that the money had gone from the secure room.*" However, the evidence before her was only that Jay thought this and Vijay said he didn't see anything.
99. Jay provided no reasonable explanation for saying he thought the money came from the secure room. He did not see it come from there. The fact the claimant was working there alone certainly does not prove this. As should have been known to LJ, it was not unusual for the claimant to work in secure rooms alone, as these were where she undertook certain aspects of her work.
100. Nonetheless, Jay's evidence of not having a conversation about too much cash in the till and thinking it came from the secure room, influenced LJ's decision.
101. LJ also took account of Vijay's comment about the claimant indicating to him that she found the money in her handbag. Little regard appears to have been had to the fact it was second-hand evidence, having come from EN's interpretation of what Vijay had said to him. When MS interviewed Vijay there was no mention of any handbag and he said that he didn't see anything. Consequently, his evidence was equivocal and it would not be reasonable to give much weight to it.
102. A significant factor in LJ upholding the decision of "potential theft" was that she could not see how the claimant would not have realised or have remembered sooner that she had £2,000 in her dress pocket. She did not believe that the claimant would not have noticed it when

strapping into her seat belt in the car or checking for phones when leaving branch.

103. In reaching this conclusion she took account of how obvious £1,000 of £20 notes felt to her after putting this amount of cash into her jeans pocket and walking around with it. That was a significant error as, although it was only half the amount of money the claimant had taken, it was in an entirely different garment and in completely different circumstances. The feel of the money would have been quite different to LJ in a tighter garment than to the claimant in her utility dress. The two situations were not comparable. This seriously infected LJ's decision.
104. LJ. also considered it unbelievable that the claimant could be so intimidated by a customer as to put the money in her pocket when she had 10 years' experience at the Post Office. Yet she took no account of the fact that this training job was significantly different to working in a Crown Post Office which is bigger and more secure with more colleagues on hand to give support. No account was taken of the claimant's inexperience and short time in this current training job or of her being stressed in a new working environment, feeling unsupported, and under scrutiny.
105. However, on the basis of her flawed considerations, LJ did not find the claimant's version of events credible. Rather she found that the claimant had intentionally taken the cash from the branch with a view to stealing it, and then got "cold feet" and returned it. For the reasons given above, this conclusion was not properly thought through.
106. The problem was not cured at appeal stage. TW believed that the claimant's experience of cash handling and position of trust would have prevented her putting cash into her pocket. However, TW took no account of the stress the claimant was under and the differences between the claimant's training role and her previous positions. Although MS informed TW about the claimant feeling uncomfortable with Vijay and so many people watching and listening to her, no questions were asked about how this might have impacted on her state of mind.
107. The Conduct Appeal Report appears to accept that the money was in the claimant's pocket and makes comments that Vijay's statement about the handbag was not an eye witness account and therefore was not reliable. However, it also says that it was possible that the claimant did have her handbag on her at the branch although there was little to base this on. There were no clear findings on this.
108. TW also found it unbelievable that Jay would not recall the conversation at the till and the claimant taking the money and that he would not have reminded her of the cash in her pocket. Again, the considerations set out above were not taken into account. Also, by this stage, Jay's evidence had become inconsistent. In his interview with MS he told MS that he believed the money had come from the secure room,

whilst in his interview with TW, he said he didn't know where it had come from.

109. TW believed that the claimant would have felt the cash in her pockets and that they would have gaped and been noticeable to others. The claimant had worn the utility dress to the interview, which suggests that she was confident this would demonstrate that the size of the pockets and its loose fit were supportive of her case. There were inconsistencies in what each of LJ and TW thought about the dress, with one considering it to be loose and the other more close-fitting.
110. At no stage does it appear that the investigation fully considered that many eyes had been on the claimant that day when she had been handling large amounts of cash and had been alone in the secure room. The claimant was experienced in cash accounting and would have been well aware of post office financial routines and the need for reconciliation and balancing of the books that night. It would have been clear to her that she would be a prime suspect if cash went missing and it would have been foolhardy of her to purposefully remove money.
111. Whilst the claimant admitted in hind sight that she should have informed MS immediately about the removal of the cash, she had nonetheless been open and transparent with the post masters about it and was not trying to hide the fact it had happened. This does not appear to have been given proper weight.
112. On the basis of the above, there were significant flaws and omissions at the appeal stage.
113. Taking account of the whole process including the appeal, the respondent did not follow as reasonable an investigation as was warranted in the circumstances. There were significant gaps in the information before the relevant decision makers and pertinent considerations were not taken into account. Consequently, it did not fall within the band of reasonable responses.

Reasonable grounds

114. The respondent based its decision to dismiss on the findings of the investigation, which was significantly flawed, as outlined above. If a more thorough investigation had taken place, the respondent may well have come to a different conclusion.
115. The investigating officers did not consider in any depth what factors other than intention may have led to this act. Little consideration was given to the likelihood of it all being an innocent oversight, a bout of forgetfulness, despite the fact that the claimant undeniably telephoned Jay and Vijay to tell them she had the money less than an hour after leaving the branch. This strongly points to a lack of intention in taking

the money.

116. It would have been apparent to any reasonable employer that this was a case of a woman who was struggling in her working environment, was not properly supported and had underlying mental health issues in the form of anxiety and stress connected to her working conditions. The respondent should have given this due consideration, but failed to do so.
117. No proper consideration was given to whether the claimant realistically had a motive for taking the money. It was simply decided that the reason the claimant informed the branch was because she got “cold feet”. Yet there was little to base this on.
118. Obvious questions were not asked and therefore evidence, which may have been influential, was not obtained. For instance, no consideration was given to what the claimant’s motive might have been for stealing from her employer of over 10 years standing, or why she would telephone the postmasters to report that she had the money less than an hour after leaving the branch. The taking of the money was never itself an issue. What needed more careful probing was whether this was an accident or an intentional act of theft.
119. Furthermore, it appears that Jay’s evidence was not properly tested, yet it played a significant part in the decision-making process. Jay was new to the post master’s position and had been struggling that week learning the ropes. His motive for not confirming the claimant’s version of events might well have been his own worry about being criticised for not keeping cash under control within the till and being thought incompetent. Also, on the basis of Jay’s answers to questions it appears that he had been reluctant to get involved in this investigation as he said very little and was not particularly forthcoming. This may be because he had not wanted his capability in cash control questioned. This possibility does not appear to have been considered.
120. For these reasons, the respondent’s belief that the claimant had committed an act of “potential theft” was not based on reasonable grounds and characterising the claimant’s conduct as “gross misconduct” was not reasonable.

Fair sanction within range of reasonable responses

121. As the respondent failed to base its decision on reasonable grounds, without considering pertinent information, the sanction of summary dismissal was not within the range of reasonable responses. Nor was it fair having regard to equity and the substantial merits of the case.

Procedure

122. The ACAS Code of Practice provides guidance on sanctions ranging from warnings through to dismissal, which should be considered when deciding on appropriate action. There is little evidence that the

respondent addressed its mind to mitigating factors when reaching its decisions and no evidence that it had the ACAS Code of Practice in mind in this respect. This was the claimant's first instance of misconduct and she had a clean disciplinary record. There is no evidence that the respondent gave credit to the claimant for owning up to the removal of the money within an hour of taking it, when considering sanctions.

Other issues

123. The questions of whether the claimant would have been dismissed in any event, whether she contributed to her dismissal by culpable conduct, and whether any adjustments should be made for not following the ACAS code of practice will be left over to the remedy hearing.

Employment Judge Liz Ord

Date: 31 January 2021

JUDGMENT SENT TO THE PARTIES ON

2 February 2021

FOR THE TRIBUNAL OFFICE

Notes

1. The hearing code "V" in the heading to this judgment indicates that the hearing took place on a remote video platform. Neither party objected to the format of the hearing.