



EMPLOYMENT TRIBUNALS

Claimant: Mr A Phillips

Respondent: Young & Co.'s Brewery, P.L.C.

Heard at: In Chambers

On: Monday 8, Tuesday 9
and Wednesday 10 February
2021

Before: Employment Judge Matthews

Representation:

Claimant: Mr J Gifford Head of Counsel

Respondent: Mr R Hignett of Counsel

RESERVED JUDGMENT

1. Mr Phillips was unfairly dismissed.
2. It is just and equitable to reduce any basic award and any compensatory award made to Mr Phillips by 50% by reference to sections 122(2) and 123(6) of the Employment Rights Act 1996.
3. The case will be listed for a hearing on remedy with a time allowance of three hours. Separate directions will be given for that hearing.

REASONS

INTRODUCTION

1. Mr Andrew Phillips claims that he was unfairly dismissed by the Respondent Company. The Company says that Mr Phillips was fairly dismissed for misconduct.

2. On the Company's side the Tribunal heard evidence from Mr Stuart Kemp (Head of Retail Audit), Mr Carl Inman (latterly IT Knowledge Support with the Company but, at all material times, a Retail Auditor/StockLink Ambassador), Mr Jon Falarczyk (Operations Manager), Mr Tom Bowen (Operations Manager) and Mr Mark Loughborough (Operations Director). Each produced a written statement. The Tribunal heard from Mr Phillips, who also produced a written statement. There was an "electronic" bundle of documentation in PDF format totalling 525 pages. The numbering of the physical bundle differed from that of the PDF format. All references in this Judgment are to pages in the physical bundle unless otherwise specified.
3. In deciding this case, it is not necessary for the Tribunal to make findings in relation to every disputed fact. Where it is necessary, the Tribunal's findings are on the balance of probability taking account of the evidence as a whole. The events with which the Tribunal is concerned are now over two years old and, naturally, memory becomes less reliable. Where possible, the Tribunal has relied on the contemporaneous documentation. In the event, it is probably fair to say there was little material factual dispute.
4. The hearing was a remote hearing using the Common Video Platform consented to by the parties. A face-to-face hearing was not held because of the constraints placed on such hearings by precautions against the spread of Covid-19. The Tribunal is satisfied that, in this case, the overriding objective of dealing with cases fairly and justly could be met in this way.
5. The hearing ended at 1615 on the third day allocated to it. Judgment was, therefore, reserved. During the course of the hearing, it was agreed that this Judgment would decide liability including any "*Polkey*" consideration, contribution (if any) and any uplift in respect of any unreasonable failure to comply with a relevant ACAS Code of Practice. Remedy, if applicable, was to be decided at a further hearing. Mr Phillips does not seek a reinstatement or re-engagement order.

FACTS

6. The Company is well known. It is a pub retail company, headquartered in Wandsworth, London SW18. It operates around 200 pubs. At the time it filed its Response in these proceedings it reported 4,788 employees, of whom 31 worked at The Northcote, Battersea, London SW11, the pub which Mr Phillips ran as its General Manager.

7. Mr Phillips started work for Geronimo Inns Limited on 5 January 2015. Mr Phillips' contract of employment transferred to the Company on 3 April 2017 (Mr Loughborough WS 55). Mr Phillips was summarily dismissed for gross misconduct with effect from 21 December 2018. On appeal, although the dismissal was not overturned, the charge found against Mr Phillips was reduced to misconduct and Mr Phillips was paid a month's notice pay.
8. As the General Manager of The Northcote, Mr Phillips had (see 101) "*overall day to day responsibility for running the managed house*" "*and leading its team of staff.*" In his oral evidence Mr Bowen described Mr Phillips' role at The Northcote as that of "*mini managing director*". Mr Phillips reported to an Operations Manager, Mr Falarczyk. Mr Falarczyk had responsibility for thirteen pubs and was one of six Operations Managers reporting to Mr Loughborough, himself one of three Directors of Retail Operations.
9. It is commonly understood that pub businesses have a preoccupation with stock and cash controls. The Company's witnesses and Mr Phillips agreed this to be true in the Company's case. Wet and dry stock and cash are all vulnerable to theft. Stock can be stolen, either by removal or consumption on the spot. Cash can also be stolen, usually accompanied by an attempt to cover this up. An obvious example is not recording a sale and pocketing the purchase price.
10. Pubs have long used stock taking as a means of monitoring and controlling stock and cash. In very simple terms, the difference between opening stock plus purchases at cost and closing stock at cost plus sales represents the gross profit or loss of the business before other overheads and adjustments. It is a relatively easy exercise to identify variances between actual sales and theoretical sales based on the movement of stock.
11. Identifying sales variances is one thing but getting to the root cause is another. The licensed trade has developed a number of techniques to achieve this. One is line checking. This control is of particular significance in this case because it played a central part in Mr Phillips' dismissal. Line checking is stock taking in detail. It drills down to each product line. So, for example, the number of bottles of a particular spirit in stock at the start of a shift are known. At the end of the shift the bottles are counted. Any consumption should be represented by recorded sales. Any shortfall is likely to be attributable to the staff operating on that shift. Whilst there may be several staff on the shift, it is possible over time to narrow responsibility for recurrent shortfalls to

particular staff by comparing different shift make-ups. In this way wastage (for example, through spillage or over-pouring) and theft can be addressed.

12. Mr Phillips entered into a Manager's Contract with Geronimo Inns Limited on 1 April 2016 (85-99). No point has been taken that this did not apply to Mr Philips' employment by the Company. It included this (89):

"3.3" "You will be responsible for controlling levels of stocks and must complete or arrange completion of line and stock checks regularly and in line with our policy."

13. The Company had a policy entitled "*Young's Business Risk Management Policies and Procedures*" (the "BRMPP"). The August 2017 update of this is at 100-124. Mr Phillips agreed that it applied to his running of The Northcote. It included this:

(100) "This document has been put together with the express purpose of informing General Managers and their senior staff of their accountabilities and responsibilities with regard to the financial management of risk to the business." "This will go some way to prevent incidents happening through lack of clear policy" "Disciplinary action will be taken if losses are incurred by the business which after investigation can be attributed to negligence or failure on behalf of management to comply with the business risk management policies and procedures...."

(103) "Section - SALES

Risk - Sales are not rung into the till or are systematically under-rung.

Mitigating Control: Manager's Responsibility and Accountability - Any sales not rung or under-rung through the tills will cause stock deficits. The Manager will conduct or oversee a full stock every week of food and liquor, highlighting any deficits. The OM is sent the weekly Managers Stock Results to check category variances. The OM reviews the liquor stock report to investigate and question the GM/HM about unusual stock movements."

(116) "Section - STOCK

Risk - Liquor stock takes are not performed

Mitigating Control: Manager's Responsibility and Accountability - Managers perform full liquor stocks every week and compare to theoretical margin." "Issues arising from any stock take are followed-up with daily line checks on the specific items."

(117-118) "Section - STOCK

Risk - RAT" [Retail Audit Team - see below] "stock take reports are not reviewed

Mitigating Control: Manager's Responsibility and Accountability -" "An action plan and stock take result are emailed / telephoned to the OM within 48 hours of the stock take. Managers must respond to this report within 5 days. Any breaches of company policy to be reported to the OM immediately." "OM will specify and document any action to be taken by the Manager during the weekly or monthly P&L review."

(117) "Section - STOCK

Risk - Overstatement / understatement of stock held in pubs.

Mitigating Control: Manager's Responsibility and Accountability -" "Regular line checks are completed; where variances occur, the Manager to investigate the cause and report this to the OM."

14. The Company had a non-contractual disciplinary policy for its "Managed House Managers" (47-49). It was accepted that this applied to Mr Phillips. It can be referred to for its full content. The scheme of it was that "misconduct" would be dealt with by Stage 1 and 2 written warnings or a final written warning, depending on what was involved. Dismissal was reserved for cases where there was no improvement in conduct or performance or cases of gross misconduct. The policy includes the following examples of what could amount to gross misconduct (49):

"Negligence which causes unacceptable loss, damage or injury, including cash or stock losses"....

"Unreasonable refusal to carry out specific duties related to the job or to follow reasonable instructions"

15. The Company has a standing Retail Audit Team ("RAT"). At the relevant times this had between five and eight members and was headed by Mr Kemp. The team's job is to audit wet and dry stock

and cash to ensure that General Managers are recording this aspect of their businesses accurately. The role is not confined to stock taking but includes support on controls.

16. Mr Kemp had introduced a system of colour coding when producing audit reports. Various colours were used including those in a “traffic light” system of red, amber and green. On the face of it, this appears to be a simple and easily understandable system to highlight to readers where results were acceptable (green), borderline (amber) or a cause for concern (red). In addition, very occasionally and when there was a serious cause for concern, a black colour coding was used. It seems that red was not unusual, being found in 20-30% of reports. Black only occurred in some 1% of audits (Mr Kemp WS 51). Whilst a sensible system, it was imprecise. Nothing was written down. In particular there were no parameters as to what would result in a particular colour coding. Again, as Mr Kemp explained, there was a sensible explanation for this. A degree of judgment was required from the RAT auditor. Small variances could be indicative of a serious problem whereas large ones were not.
17. On 7 June 2018 the Company’s new StockLink system was installed at The Northcote (Mr Inman WS 8). This system gave access to real time and historic data about transactions and stock movements and was introduced as an improvement over the previous system. General Managers are expected to use a Daily Operations Report generated by Stocklink to monitor their businesses, including variances.
18. On 9 August 2018 Mr Marco Bagni, a member of the RAT, conducted a stock take at The Northcote. The result was a “red report”. Mr Kemp says this was (WS 9) *“because of stock losses resulting from out of date packaged goods, unrecorded mineral wastage and cash losses.”* Mr Kemp describes this as reflecting (WS 7) *“serious concerns with controls in the business.”*
19. Whether or not Mr Phillips saw that report at the time, it was certainly available to him on the Company’s systems and it would have been standard and expected practice for him to have looked at it.
20. The Northcote was refurbished between 20 August and 3 September 2018 and was closed from 27 August to 3 September.
21. On 28 August 2018 Mr Inman received an email from Ms Kasia Kowalczyk, one of the Company’s Cashiers (129a). The “Subject” read *“northcote – Andrew needs a one to one session with you”*

and the text was “Disaster”. Ms Kowalczyk was responsible for a weekly bank reconciliation for The Northcote and was often unable to complete this fully. Mr Phillips had also, on an almost weekly basis, been asking Ms Kowalczyk for help in investigating safe and till shortages. Ms Kowalczyk had offered Mr Phillips and his team training but the offer had not been taken up, so Ms Kowalczyk was turning to Mr Inman.

22. Mr Falarczyk was a frequent visitor to The Northcote, both as Operations Manager and socially. On 13 September 2018 Mr Falarczyk sent Mr Phillips an email after an evening visit and Mr Phillips replied on 14 September (129c-d). Mr Falarczyk was critical of the service he had observed. Mr Phillips apologised explaining that he was recruiting more staff.
23. On either 20 or 21 September 2018 (which, is not material) Mr Inman went to The Northcote to train Mr Phillips and his senior team. Before the training Mr Inman sent copies of Powerpoint slides to The Northcote (129e-129z(viii)).
24. Mr Phillips, Mr Jamie Wells (Deputy Manager), Mr Beau Robinson (Assistant Manager) and Ms Alice Larrinaga (Assistant Manager) attended the training. During the Tribunal hearing a point was taken that this training was about cash, rather than stock. That the focus was on cash is unsurprising given that was the area that Ms Kowalczyk had reported needing attention. However, it is clear from the slides that stock was covered and those attending could have asked for more help on the subject if it was needed. In any event, Mr Phillips’ evidence was that Mr Inman’s training proved very helpful on the cash front.
25. Mr Inman sent an e-mail dated 21 September 2018 to Mr Falarczyk, reporting on his visit (130-131). Mr Inman commented that “*Things have become really messy*”.
26. On 25 September 2018 Mr Falarczyk met Mr Phillips at The Northcote. Mr Falarczyk says that he went through the points Mr Inman had raised with Mr Phillips. Mr Falarczyk says that Mr Phillips confirmed that he felt more confident about stock and cash control following Mr Inman’s training.
27. On 16 October 2018, nearly ten weeks after Mr Bagni’s audit, Mr Kemp carried out an audit at The Northcote (133-157). It resulted in a red colour coding.
28. In paragraphs 14-17, 19, 20, 22, 27 and 28 of his statement Mr Kemp details advice and recommendations he gave Mr Phillips at

the end of his audit visit. Overall Mr Kemp comments (WS 29 and 30):

“When considering what colour to score the audit I took account that the audit conducted in August had received a “Red” score. There were similar issues arising from that audit and my own that continued and it appeared to me that little or no investigation had been conducted by the Claimant to resolve these.

The scale of the losses and variances was exceptional. Every pub is different however as a general marker, a loss of £2,000 is classed as unacceptable unless explained. The overall stock loss for this audit amounted to £2,970.94 and the percentage yield results on many products was generally below expectation. In addition, my concerns were multi-faceted with issues around stock variances, inappropriate deposit holdings, suspected theft of stock and/or cash and concerns with security of stock.”

29. Mr Kemp says that he believes he left a copy of the audit report with Mr Phillips, as was Mr Kemp’s usual practice. The BRMPP seems to assume that a General Manager will be aware of the content of an audit report from feedback on the day of the audit and because the General Manager will have access to it on the Company’s systems. Both of these are reasonable propositions.

30. The next day, 17 October 2018, Mr Kemp sent an email to Mr Falarczyk on the subject (132). It can be referred to for its full content but it included:

“Completed the audit at Northcote yesterday, unfortunately not the desired result-

Some deficits were expected, however the main losses came as a surprise – large variances have been accepted on managers stocks without any investigation” “It should be noted that during this stock period the site was closed for refurbishment and would have some additional wastage” “With the losses in all categories and on most individual lines it implies that rather than theft for personnel consumption it indicates theft for cash (skimming tills and staff taking the cash)”.... “As this is a RED audit a response will be required within 10 days”

31. Although Mr Kemp did not copy this email to Mr Phillips, much of the email was drawn word for word from the audit report itself

(see 134). Even if Mr Kemp had not left a copy of the audit report with Mr Phillips, Mr Phillips had access to it through the Company's systems and it was the sort of report he should have looked at. One of the repeated recommendations in the audit report was to make daily line checks (see 135 and 136, for example).

32. The BRMPP seems to contemplate a response to the audit report in the form of an action plan from Mr Phillips within five days, rather than the ten mentioned by Mr Kemp in his e-mail to Mr Falarczyk. In any event, it is not in dispute that Mr Phillips did not produce an action plan, nor did Mr Kemp or Mr Falarczyk chase him to do so.
33. The form of the audit report, itself, calls for comments from the appropriate Operations Manager, in this case Mr Falarczyk (see 134-140 - column for "OP'S MANAGER COMMENTS"). There are no such comments. Mr Falarczyk's explanation for this was that it was common for comments not to be made and, in any event, he managed through personal contact either in meetings or on the telephone.
34. Mr Falarczyk's job was to manage General Managers, of whom Mr Phillips was one. If Mr Phillips' failings, as identified by Mr Kemp, were putting Mr Phillips' job on the line, it could reasonably be expected and good management practice required, that Mr Falarczyk would say so. Further, the BRMPP expressly required Mr Falarczyk to "*specify and document any action to be taken by the Manager during the weekly or monthly P&L review*". There is no evidence that Mr Falarczyk documented anything in this respect or that he warned Mr Phillips that his job was on the line.
35. Mr Phillips' evidence, which he volunteered as appearing "naïve", was that he did not realise that his job was on the line until the "investigatory" interview which he later had with Mr Falarczyk on 10 December 2018. The Tribunal accepts that evidence, which is corroborated by all the circumstances. Mr Phillips probably should have paid more attention to what Mr Kemp was telling him and, given the industry preoccupation with stock and cash, Mr Phillips should probably have realised that he might be heading into danger. Nevertheless, there is no question that a contributory factor to Mr Phillips' late realisation that his job was on the line was Mr Falarczyk's management failure to highlight the importance of the stock issues as perceived by the Company.
36. Mr Falarczyk did, however, take some action. On 23 October 2018 Mr Falarczyk met Mr Phillips at The Northcote and went

through the 17 October audit report with him. Mr Phillips explanation was that he had been preoccupied with the refurbishment. There can be little doubt that Mr Falarczyk's message would have been that Mr Phillips had to do better. What Mr Falarczyk did not do was to say to Mr Phillips, in terms, that if this aspect of performance did not improve, Mr Phillips was in danger of losing his job.

37. Another action Mr Falarczyk took in response to the audit of 16 October 2018, was to contact Mr Inman and ask him to visit The Northcote to provide support. Mr Inman's evidence is that he did so on or around 30 October 2018 (WS 45). On that date Mr Inman sent an email to Mr Falarczyk, copied to Mr Loughborough amongst others, reporting on his findings (158-159). Mr Inman recorded *"As previously discussed, the issues at The Northcote are still ongoing, and are getting worse rather than better. Despite my efforts and spending a full day training the team, the pub is still declaring rubbish."* Mr Inman set out findings and figures to support this statement and ended *"I really don't know how best to support them going forwards. I feel I have done the best that I can, but if you have any further suggestions, I will of course support you and the team."*

38. In paragraph 56 of his witness statement Mr Inman says that he *"explained to the Claimant that unless significant improvements were made that his Manager, Mr Falarczyk, may consider evoking disciplinary action."* Although the Tribunal does not have to make a definitive finding on the point, it seems unlikely that Mr Inman would have delivered that message without mentioning in his email to Mr Falarczyk that he had done so.

39. On the same day Mr Falarczyk received Mr Inman's email of 30 October 2018, Mr Falarczyk sent an email to Mr Phillips (159a). Mr Falarczyk repeated many of Mr Inman's comments and concluded with this, on the subject of cash:

"This situation is just ridiculous and I don't understand how we can support you further as your site is just a mess when it comes to this and I need to know why you aren't getting this done correctly and what the hell is going on within the business to allow this to continue this way.

Please come back to me immediately on this."

40. It seems there was no response.

41. Mr Falarczyk had further routine meetings with Mr Phillips on 8 and 20 November 2018.
42. Mr Kemp was due to visit The Northcote for another audit on 4 December 2018, some seven weeks after the 16 October audit. During the evening of 3 December, Mr Phillips telephoned Mr Falarczyk to warn him that the results of the audit were not going to be good. This is, perhaps, the first sign that Mr Phillips was waking up to his predicament as far as stock control was concerned.
43. Mr Kemp duly arrived to conduct the audit on 4 December 2018, Mr Phillips was there and Mr Falarczyk arrived during the audit. The report, colour coded black, is at 161-190, including some photographs of poor practice in the cellar. Mr Kemp noted that, since his last visit on 18 October 2018, only one line check had been performed and that was on 21 November. The overall stock loss was £2,872.34 and there were additional cash deficits.
44. Mr Kemp's evidence was that he drew the following summary conclusions (WS 47 and 49):

"It appeared to me that the Claimant's overall control of the business was decreasing as I had found concerns in more areas on this visit than I had previously. Action had not been taken to investigate or resolve issues with stock and cash losses as I had recommended in October and therefore deficits were continuing on the same categories in addition to others."

"I was also concerned that if this lack of control continued over the Christmas period the results would be unimaginable. I had no confidence that the Claimant had been taking action or would take action to resolve these continuing concerns and I believed that there would be reputational risk from letting these issues continue."

45. On 6 December Mr Kemp sent an e-mail to Mr Falarczyk, copied to Mr Phillips and Mr Loughborough, amongst others, reporting on the audit (160). The headline was:

*"As discussed please find the result from Tuesdays audit at the Northcote. Unfortunately this result, combined with the previous result and ineffective actions has resulted in **A BLACK** rated audit. I feel existing procedures and work loads will not prevent further losses."*

"I have rebooked a visit on 3rd January to help with end of period – I do appreciate it is a busy time of year but a return of this action plan is expected within 10 days."

46. Mr Falarczyk already had a routine meeting scheduled with Mr Phillips on 6 December 2018 at The Northcote. There appears to have been a discussion of Mr Kemp's report.

47. Mr Falarczyk says (WS 36):

"I then arranged to meet with the Claimant on 10th December 2018 to conduct an investigation meeting."

48. Mr Falarczyk's note of that meeting is at 191-192. It should be referred to for its full content. What follows is a summary.

49. Mr Falarczyk opened the meeting by asking what Mr Phillips had done since the audit. (The Tribunal assumes this is a reference to the 4 December 2018 audit). Amongst other things, Mr Phillips explained that he had conducted further full audits on 5 and 10 (that day) December 2018 and had followed up with line checks on key lines. Wine and spirits were within yield. Mr Falarczyk asked Mr Phillips why he had not done anything after the 18 October audit. Mr Phillips replied that he had thought he was solving the problem, by getting rid of people who he believed were stealing and moving the spirits' store. Mr Phillips had intended to do line checks but other issues, such as kitchen staffing had distracted him. The following extract gives the overall picture:

"JF - Spoke about my astonishment of not knowing the issues was that bad

AP – Was focussing my attention on a couple of lines was going after the people I caught were stealing hence thinking the problem was solved and would then do a check and see oh no there is another one. Every day there was another fire to put out, seemed to be something coming up all the time. Recruiting has been a huge focus, might get to 6pm at night and haven't finalised stock attention gone elsewhere and already taken the sales."

50. It appears that it was at this stage that Mr Falarczyk prepared the undated note at 195 explaining his thought processes (WS 45). It included this:

"Upon further investigation I found that site were declaring weekly stocks however not carrying out any line checks or

such in between these and Andrew has not been able to present me any evidence of tangible actions taken to improve the results other than discussions around team members who no longer work for the Northcote as they were either found stealing or suspected of stealing.”

51. Mr Falarczyk’s overall conclusion seems to have been this:

“Looking through the reports there just hasn’t been enough control over stock and cash within the business.”

52. This conclusion is unsurprising save that, during the investigatory meeting, Mr Phillips had explained that since the 4 December audit he had conducted two further full stock takes, was doing line checks on key lines and wines and spirits were within yield. When asked about this during the Tribunal hearing, Mr Falarczyk was open that he based his decision to convene a disciplinary hearing on events up to and including the 4 December 2018 audit and not anything that happened thereafter.

53. On 13 December 2018 Mr Falarczyk sent the letter at 196-197 to Mr Phillips. Mr Phillips was to attend a disciplinary hearing to be conducted by Mr Bowen on 17 December 2018. Mr Falarczyk wrote:

“The purpose of the interview is to consider whether to take disciplinary action against you, under the Company’s disciplinary procedure, following a “black” Stock Audit result on 4th December 2018, which resulted in a lost at cost of -£2872.34 over 49 days and a cash loss of -£930 throughout Period 8 and 9, This allegation may be considered to amount to negligence resulting in an unacceptable loss to the Company.

In addition the meeting will also consider your alleged failure to comply with the Company’s Business Risk Management Policy which may be considered as an unreasonable refusal to follow a reasonable management instruction.”

“You should be aware that your dismissal from the company is among the range of outcomes which may result from this meeting.”

54. On 14 December 2018 Mr Phillips, who by then seems to have clearly got the message about the Company’s expectations as far as stock and cash control were concerned, sent Mr Kemp an action plan and copied it to Mr Falarczyk (202-204). Mr Phillips must have seen Mr Kemp’s email of 6 December to Mr Falarczyk

because, on the face of it, Mr Phillips now addressed all the specific points Mr Kemp had raised in that email. In addition, Mr Phillips addressed many additional actions recommended by Mr Kemp in the audit report itself. These included:

“Action Plan:

*Draught: I have been doing extra manager stocktakes and line checks over the last 10 days. Line check this morning gives us a 102% yield.” [Target 99-110% - Mr Inman WS 19]
“We will continue to do line checks to investigate any variances.”*

“Keg Ale:” “Todays line check shows a slight yield on Camden.”

“Packages: We will do line checks on products when any variances turn up.”

“Wines: Line checks to be completed daily on any variances from managers stocktake,”

“Spirits:” “daily line checks have been completed”

“Voids/refunds: every morning senior manager goes through transactions and investigates – does line checks on unusual products”

55. Reference to the bundle at 239-243 shows that, after 4 December 2018, Mr Phillips frequently accessed stock reports. There is nothing unusual about that. However, reference to pages 340-452 shows a series of *“Wet Result Reports”* for the Northcote between 4 and 19 December 2018. There was an evidential dispute about what these demonstrate. Mr Phillips says that they show he was making daily line checks. Mr Loughborough’s evidence was that they show Mr Phillips accessing the data but not following it up with line checks. This appears to boil down to an argument about whether or not physical closing stock was counted to compare with opening stock. The reports show that sometimes this happened and sometimes it did not. Mr Phillips’ explanation for this is that he focussed on key lines of stock. What the reports do show is that, after 4 December 2018, in line with the action plan Mr Phillips sent to Mr Kemp and Mr Falarczyk on 14 December, Mr Phillips carried out line checks in a way he had failed to do before that time.

56. In preparation for the disciplinary hearing, Mr Falarczyk provided Mr Bowen with the 4 December 2018 audit and photographs

(161-190), an overview of stock counts at The Northcote between 16 October 2018 and 4 December 2018 (193) (so, from the 16 October audit through until the December 4 audit), the notes of Mr Falarczyk's meeting with Mr Phillips on 10 December 2018 (191-192), Mr Falarczyk's undated statement (195) and a copy of the BRMPP. Mr Bowen was not provided with any analytical information about stock take or line checks after 4 December 2018 or with the action plan Mr Phillips had sent to Messrs Kemp and Falarczyk on 14 December 2018. Mr Bowen did, however, have the note Mr Falarczyk had made of the meeting with Mr Phillips on 10 December, which included mention of the action Mr Phillips had taken after 4 December. Mr Bowen raised this with Mr Phillips during the disciplinary hearing. However, like Mr Falarczyk, in his oral evidence Mr Bowen was open that he based his decision on what had happened up to and including 4 December 2018.

57. The disciplinary hearing took place as scheduled on 17 December 2018. Mr Phillips was accompanied by a fellow General Manager, Mr Martin O'Meara. Mr Bowen had Mr Chris Welch (HR) in attendance as note taker. Mr Welch's note is at 209-222. Mr Welch's handwriting is mostly clear. In any event, Mr Bowen gives a full account of what happened at the hearing in his statement and this was not challenged in any material way.
58. The notes of the hearing reflect a thorough discussion of the position. Mr Bowen had some unexceptional main lines of enquiry. There was a discussion about the steps Mr Phillips had taken between the two audits on 16 October and 4 December 2018 to address the stock and cash losses. Mr Phillips explained the practical steps he had taken, such as moving stock to more secure areas and so on. Mr Phillips said that these measures had resulted in an improvement in stock deficit reflected in stock take results by 26 November 2018. Mr Bowen looked back in time to get a fuller picture. Noting the closure for refurbishment, Mr Bowen saw that The Northcote had an amber audit on 10 April 2018, a green audit on 7 June 2018 followed by the red audit on 9 August 2018. As Mr Bowen says, it appeared to him that controls within the business had deteriorated over time (WS 14).
59. Mr Phillips explained that, after the red audit on 16 October 2018, he had realised he needed to pay more attention to stock controls and had taken further security steps. Mr Bowen looked at the stock controls that were available to Mr Phillips through the Company's IT systems. Mr Phillips owned to the fact that he had not reviewed variances as he would normally because of other work pressures. In view of the stock losses, Mr Bowen challenged

Mr Phillips about this, asking why Mr Phillips had not made time. Mr Phillips' response was that he thought that shedding staff who were stealing would resolve the stock losses.

60. Mr Bowen considered line checks as important, noting that Mr Phillips had only carried out one between the 16 October and 4 December 2018 audits (on 21 November). Mr Phillips questioned the effect of line checks. Mr Welch's note reads "*Line check – tick box exercise – wont catch any one.*" (212). In questioning the effect of line checks, Mr Phillips committed an error that was to play a significant part in sealing his fate. Mr Bowen describes his reaction (WS 22):

"This astounded me as I knew that daily line checks were a fundamental tool in investigating not only what products were going missing but also when this was happening, be it on certain days or particular shifts. This then helps you identify who may be responsible for the losses quicker, day by day, rather than waiting for the result of an end of week stock."

61. Mr Bowen went on to discuss Mr Phillips' team. The discussion then moved back to stock controls and Mr Bowen says this (WS 27 and 28):

"I asked the Claimant if there were any further actions he had implemented to control his stock. The Claimant told me that he had looked through several reports on StockLink but was "not finding much". The Claimant continued that he was trying different techniques every day to try and catch the perpetrators. It surprised me that the Claimant was thinking of new techniques to try but still had not used line checks.

I asked the Claimant how he considered the state of the business from 4th December 2018 to date. The Claimant had completed three stock counts himself and had completed a line check that morning on spirits which showed that he only had a £7 deficit on that category. The Claimant said that he was still suspicious of employees and continuing losses."

62. The discussion turned to the reasons for stock and cash losses, including other aspects of the business that had diverted Mr Phillips' attention from them.
63. Mr Bowen ended the meeting explaining that he would need to look into some further matters and consider his decision.

64. Throughout the meeting Mr Phillips had referred to notes that can be seen in the bundle at 205-208. These were not handed to Mr Bowen but give some idea of how Mr Phillips saw his position. One of the notes refers to *“3 full stock takes and 16 line checks in the last 12 days”*. It is not clear that Mr Phillips got the detail of that note across to Mr Bowen, although Mr Bowen did know that Mr Phillips had completed a line check on spirits on the morning of the disciplinary hearing. Mr Phillips’ note also contains details about what he saw as a lack of management input from Mr Falarczyk. Reference to Mr Welch’s notes shows that this was covered in the hearing.
65. Mr Bowen next completed a *“Decision Consideration Form”* (223-225). The form can be referred to for its full content. Mr Bowen noted that Mr Phillips had a clear disciplinary record. Under the first heading *“Consideration in decision”*, relating to the first disciplinary charge against Mr Phillips (negligence), Mr Bowen noted his concerns. It is clear that, as mentioned above, he was dealing only with the period up to 4 December 2018. The first bullet point dealt with the lack of line checks as evidencing weak day to day stock control. The following four bullet points developed the conclusion that Mr Phillips had exercised no real stock management in the period between the 16 October and 4 December 2018 audits. This theme continued under the *“Consideration in decision”* sections relating to the second and third disciplinary charges (failure to follow the BRMPP and Mr Falarczyk’s concerns over Mr Phillips’ stock control). (Note: It is not clear why Mr Bowen broke the disciplinary charges down into three sections, but nothing turns on this.) At this stage Mr Phillips records his *“Decision immediately following the disciplinary hearing (if any)”* as *“Dismissal for unacceptable loss to the business and refusal to carry out reasonable management instruction with regards to following the business risk policy.”*
66. Mr Bowen subsequently spoke to Messrs Kemp and Inman. This merely confirmed Mr Bowen’s initial view. Mr Kemp does not seem to have mentioned Mr Phillips’ action plan of 14 December 2018 to Mr Bowen. Mr Bowen notes under the heading *“Could a lesser sanction be appropriate? If not, why not?”* *“The big question is do I feel that the business is at risk of further loss. Weighing up all the evidence and discussing with Andrew I would say there is a high probability that this could happen again.”* This led to the final conclusion *“Dismissal – for unacceptable loss to the business and refusal to carry out reasonable management instruction with regards to business risk policy.”*

67. The difficulty with that conclusion, however, is that by Mr Bowen's own admission, it took no account of the stock and line checking Mr Phillips had been carrying out since 4 December 2018 nor of the action plan Mr Phillips had sent Mr Kemp and Mr Falarczyk on 14 December 2018, which was focussed on line checks. Indeed, Mr Bowen had not seen that action plan.
68. On 21 December 2018 Mr Bowen wrote to Mr Phillips, dismissing him summarily for gross misconduct (234-237). The letter can be referred to for its full content. The letter summarised Mr Bowen's conclusions as explored above. Whilst it was about the lack of stock control generally, Mr Bowen's views on Mr Phillips' failure to use line checking as a tool were clearly an important part of the decision.
69. As he had been invited to do, and with the benefit of an extension of time allowed by Mr Loughborough, Mr Phillips appealed against his dismissal in a letter to Mr Loughborough dated 4 January 2019 (251-257). Mr Phillips had the benefit of legal advice in producing this lengthy letter of appeal. The letter can be referred to for its full content. Mr Phillips did not deny that there had been stock losses at The Northcote, of which he had been aware. Mr Phillips pointed out, however, that, in his view Mr Falarczyk had not done anything to flag the outcome of the 16 October 2018 audit as a "serious issue". Notwithstanding, Mr Phillips knew "the situation was not perfect" and had taken what he considered to be "appropriate and proportionate measures". Mr Phillips continued:

"The audit on 4th December 2018 in fact showed a slightly lower loss than the October audit, but notwithstanding that, the company's communications to me were very different after the December audit, and I acted very differently as a result. It having been communicated to me clearly and instantly that serious action was need, I went straight into action and performed 22 line checks and 4 manager stocktakes over a period of 20 days between 5th and 21st December."

70. By way of note the Tribunal records that, in his oral evidence to the Tribunal, Mr Phillips corrected the position. Mr Phillips had completed 11 line checks and 3 stocktakes in 20 days. The exact numbers, however, are not material in context.
71. Mr Phillips went on to put his case that no reasonable employer would have gone beyond a first written warning in the circumstances.

72. Mr Loughborough heard Mr Phillips' appeal on 15 January 2019. Mr Welch took a note (260-266). Mr Phillips was accompanied by another General Manager, Mr John O'Grady.
73. Mr Welch's note, again, is full and legible. As with Mr Bowen, Mr Loughborough's account of the meeting was not challenged in any material respect. Mr Loughborough's evidence on this is in paragraphs 8-29 of his witness statement, which can be referred to. Most of it is unexceptional.
74. Mr Loughborough asked Mr Phillips what his preferred outcome from the meeting was (260). It appears that Mr Phillips did not want his job back. He felt it would be difficult to go back to The Northcote reporting to Mr Falarczyk. What Mr Phillips wanted was to clear his name of the charge of gross misconduct so that his prospects in the job market would not be adversely affected.
75. The subject of line checks came up and Mr Phillips told Mr Loughborough that they were of "*limited value*" (261). Mr Loughborough asked Mr Phillips, if it was the case that Mr Phillips believed line checks were of limited value, why he had performed 20 line checks following the 4 December audit. Mr Phillips replied that he didn't see line checks as "*strong*" but something he "*needed to do*". From this it is clear that Mr Loughborough was taking into account the actions Mr Phillips had taken since the 4 December 2018 audit to comply with line checking requirements. However, it seems that Mr Loughborough did not see the action plan Mr Phillips had sent to Messrs Kemp and Falarczyk on 14 December, nor did Mr Phillips draw Mr Loughborough's attention to it.
76. At this point Mr Loughborough diverted onto a subject that had not come up before. This was a balance of customers' deposits reported by Mr Kemp at the 16 October 2018 audit. Mr Kemp had discovered £960.10 of customers' deposits that had been held by the Company for too long. It appeared that Mr Phillips had still taken no action about that (261-262).
77. At the end of Mr Welch's note is a section headed "*Consideration*". The Tribunal understands from Mr Loughborough's oral evidence that this is a record of a discussion he had with Mr Welch. It reads:

"- negligent –

didn't control stock

4 years unblemished

Maybe bar vet low previously. But 3 yrs delivered budget, controlled KPIs.

Feels like isolated period of negligence.

Is negligent – no use of line checks without any reasonable alternative.

Whether GMC – prob not – thinking more misconduct.

- Serious concerns of unredeemed deposits. from w/c.”

78. Mr Loughborough explains his thought processes in considering his decision at paragraphs 30-84 of his statement. Mr Loughborough took account of the poor performance of The Northcote up to December 2018. From an analysis of this Mr Loughborough concluded (WS 32) *“This highlighted to me that there was a lack of control overall within the business for which the Claimant was ultimately responsible.”* Mr Loughborough emphasises Mr Phillips’ failure to perform line checks in several places.

79. The underlying key to Mr Loughborough’s decision may have been this (WS 68):

“I noted that although the Claimant purported to have achieved budgeted net house profit in the past two years this was due to him having a stable and experienced team. When required to manage the profitability of the business alongside a refurbishment and recruitment, the Claimant became unstuck. These are key areas of the role I would have expected him to manage given his level of experience.”

80. At paragraphs 71 and 73 of his witness statement Mr Loughborough continues:

“71. I considered the option to reinstate the Claimant and give him a lesser disciplinary sanction. However, I had no trust or confidence in the Claimant to be able to properly control a business given the evidence before me. I believed that it was probable that the risk of future losses would remain high under the Claimant’s management.”

“73. It appeared to me that the Claimant had demonstrated a lack of willingness or diligence to take preventative action. The business was at serious risk and there had been no significant change in the results. I could not allow this to continue any further. The Respondent had given the

Claimant half of the financial year to prove to us that he could take action but none had been taken.”

81. Mr Loughborough’ conclusion was to uphold the decision to dismiss but to reduce the charge of gross misconduct to misconduct and pay a month’s pay in lieu of notice. Mr Loughborough had, separately, given Mr Phillips an extension of time to vacate Mr Phillips’ accommodation at The Northcote.
82. On 21 January 2019 Mr Loughborough wrote to Mr Phillips confirming his decision (267-269). Mr Loughborough mentioned the issue of customer deposits, which clearly figured in his decision. Apart from that the letter focussed on the stock issues in which line checking figured significantly. In that respect Mr Loughborough note that Mr Phillips had completed 22 line checks after the 4 December 2018 audit. Mr Loughborough, however, saw that as evidence that Mr Phillips understood their significance but had chosen not to do them previously. Mr Loughborough concluded:

“Having taken into consideration your unblemished length of service prior to this I have decided to reduce the disciplinary sanction from Gross Misconduct to misconduct. Your dismissal remains however you will be paid in lieu of your one month’s notice period, less statutory deductions.”

83. When asked about the change from gross misconduct to misconduct, Mr Loughborough’s evidence was that this was a device to enable the Company to pay Mr Phillips notice pay. That, however, is not what Mr Welch’s note records. What that note reflects is a substantive consideration of whether or not Mr Phillips’ actions were gross misconduct or misconduct. In the event, Mr Loughborough categorised it as misconduct.

APPLICABLE LAW

84. Section 94 of the Employment Rights Act 1996 (the “ERA”) provides an employee with a right not to be unfairly dismissed by his employer. Section 98 of the ERA sets out provisions for determining the fairness or otherwise of a dismissal. So far as it is relevant it provides:

“98 General

(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 it 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.”

85. The test for a fair conduct dismissal is well established. In a case where an employee is dismissed because the employer suspects or believes that he or she has committed an act of misconduct, in determining whether that dismissal is unfair an employment tribunal has to decide whether the employer who dismissed the employee on the ground of the misconduct in question entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. This involves three elements. First, the fact of that belief must be established, that is that the employer did believe it. Second, the employer must have had in his mind reasonable grounds upon which to sustain that belief. Third, the employer at the stage at which he formed that belief on those grounds, must have carried out as much investigation as was reasonable in all the circumstances. The first of these elements goes to the reason for dismissal, which it is for the employer to show. Otherwise, the burden of proof is neutral.

86. Added to this test is the requirement that the sanction imposed by the employer is within the band of reasonable responses.

87. Implicit in all this is that it is not for the tribunal to substitute its view for that of an employer provided that the employer's view falls within the band of responses which a reasonable employer might adopt.

88. Sections 122(2) and 123(6) of the ERA respectively provide:

"122" "(2) Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly."

"123" "(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."

89. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, so far as it is relevant, provides:

"207A Effect of failure to comply with Code: adjustment of awards

(1) This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule A2." [The Schedule includes unfair dismissal.]

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

(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,

(b) the employer has failed to comply with that Code in relation to that matter, and

(c) that failure was unreasonable,

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

90. It is not in dispute that the ACAS Code of Practice 1 Code of Practice on Disciplinary and Grievance Procedures (2015) applies to Mr Phillips' dismissal. Mr Bowen, in particular, did not seem to know much about this Code and the Company may wish to brief those of its employees who handle disciplinary action more fully on the subject.
91. The Tribunal was referred to *BHS v Burchell* [1978] IRLR 379 and *J Sainsbury plc v Hitt* [2003] ICR 111.

CONCLUSIONS

92. The reason for the dismissal

93. It is for the Company to show a permissible reason for the dismissal and it puts forward "conduct" under subsection 98(2)(b) of the ERA. The detailed reasons for the dismissal are set out in Mr Bowen's letter of dismissal dated 21 December 2018 and Mr Loughborough's letter of 21 January 2019 confirming that decision. These are weighty and considered letters and should be referred to for their full content. In essence, however, Mr Bowen's finding was that the stock losses revealed by the 16 October and 4 December 2018 audits showed that there had been no real stock management in that period and that amounted to negligence. Mr Bowen developed that by reference to the BRMPP. Although Mr Bowen wasn't specific, he appears to have been referring to Mr Phillips' failure to conduct sufficient line checks and Mr Bowen decided this was a failure to follow a reasonable management instruction. In terms, Mr Loughborough agreed with Mr Bowen's findings but modified Mr Bowen's decision, referring to Mr Phillips' "*unblemished length of service*" as the differential factor.
94. There had been suggestions that Mr Falarczyk had wanted Mr Phillips out of the business for other reasons. This argument was effectively abandoned, rightly in the Tribunal's view.
95. The Tribunal, therefore, has no difficulty in concluding that the reason for Mr Phillips' dismissal was related to conduct, which is a potentially fair reason for dismissal under the ERA.
96. Did Mr Bowen and Mr Loughborough believe that Mr Phillips was guilty of the conduct in question?
97. There is no evidence on which the Tribunal could conclude that Messrs Bowen and Loughborough did not believe that Mr Phillips was guilty of the misconduct in question.

98. Did Mr Bowen and Mr Loughborough have reasonable grounds for sustaining that belief?

99. The question is, was it within the band of reasonableness for them to conclude on the evidence before them that Mr Phillips had committed the misconduct alleged?

100. In the Tribunal's view this question can also be answered in short. On the evidence before them it was well within the band of reasonableness for both Mr Bowen and Mr Loughborough to believe that Mr Phillips had neglected his stock management and failed to comply with the BRMPP in doing so (particularly on the issue of line checks).

101. Had the Company, at the stage at which Mr Bowen and Mr Loughborough formed their respective belief in the misconduct in question, carried out as much investigation as was reasonable in all the circumstances?

102. It is often easy to pick holes in an investigatory process and this case is no exception. At first sight, what happened can be seen as Mr Falarczyk bouncing the unsuspecting Mr Phillips into a meeting that turned out to be a disciplinary investigation. On a closer look, however, there were circumstances that support the investigation as reasonable in context. First, the evidence of what had happened was well documented in the two audits and a number of intervening events such as Mr Inman's commentaries. Second, Mr Phillips knew most of this and was fully aware by this stage that his stock control was an issue. What was news to Mr Phillips was that matters had become so serious that his job was on the line. That is not for consideration in the context of the reasonableness or otherwise of the investigation. Although an observer may have a different view on how Mr Falarczyk might have handled matters, in the Tribunal's finding, applying the relevant test, the investigation was reasonable in the circumstances.

103. Was the sanction imposed by the employer within the band of reasonable responses?

104. Mr Bowen made the initial decision to dismiss Mr Phillips. In doing so, it was incumbent on Mr Bowen to take account of mitigating factors. Mr Bowen seems to have taken account of many of the mitigating circumstances, such as the efforts Mr Phillips had made to tackle the issue of stock losses and the pressures Mr Phillips had been under in terms of staff changes and recruitment.

105. Mr Phillips had drawn Mr Bowen's attention to Mr Phillip's view that management input from Mr Falarczyk had been lacking. Mr Bowen, however, does not seem to have engaged much, if at all, with the obvious shortcomings in Mr Falarczyk's management of Mr Phillips (although he did address the issue of a possible ulterior motive). More surprisingly, Mr Bowen attached no weight to Mr Phillips' flurry of stock taking and line checks after 4 December 2018. The management shortcomings and the flurry of stock taking activity after 4 December 2018 point in one direction. That direction was that Mr Phillips had not understood that his job was on the line if he failed to address the stock losses as a priority and this had not, as should have happened, been pointed out to him by Mr Falarczyk. Further, once the penny had dropped, Mr Phillips spared no effort to put matters right by stock taking and line checking. Reference to Mr Bowen's "*Decision Consideration Form*" shows that he was, quite properly, directing himself to "*The big question*" "*do I feel that the business is at risk of further loss.*" To that the answer was "*Weighing up all the evidence and discussing with Andrew I would say there is a high probability that this could happen again.*" The difficulty with that conclusion is that Mr Bowen appears to have taken little, if any, account of Mr Falarczyk's failure to raise the stock loss issue up Mr Phillips' agenda until it was too late. More importantly, Mr Bowen failed to take account of the evidence that Mr Phillips was prepared to address the issue, as the Company wished him to, by doing stock takes and line checks.
106. The test the Tribunal must apply to this is not what it would have done in the circumstances but was the sanction within the band of reasonable responses. The Tribunal is very conscious that it must not substitute its own view for that of an employer if the employer's view is within the band of reasonable responses. Taking account of the size and administrative resources of the Company and of all the circumstances, the Tribunal's finding is that the decision to dismiss was outside the band of reasonable responses. An employer acting within that band, taking account of Mr Falarczyk's mismanagement and, more importantly, Mr Phillips' willingness to mend his ways as demonstrated after 4 December 2018, would have concluded that this was an obvious case for a warning.
107. Mr Loughborough heard Mr Phillips' appeal. It is not clear from the Company's disciplinary policy if this was a rehearing or a hearing to address appeal points only. It looks as though it was a rehearing and it appears that Mr Loughborough had the power to decide any outcome he wished.

108. In Mr Loughborough's case it is clear that he did consider the stock and line checks that Mr Phillips had carried out after 4 December 2018. This figured in the appeal outcome letter. However, Mr Loughborough turned it back on Mr Phillips by concluding that this suggested that Mr Phillips had understood the importance of line checks but had chosen not to conduct them. It is crystal clear that Mr Loughborough must have known that was not the case because Mr Phillips' appeal letter had clearly explained that he had changed his behaviour as soon as the tone of the Company's communications to him changed. Further, Mr Phillips had explained to Mr Loughborough during the appeal hearing that he thought line checks were of "*limited value*" even though he had been doing them since 4 December. Mr Loughborough was, essentially, finding a way of avoiding the inconvenient fact that Mr Phillips was carrying out stock and line checks by putting an unsustainable interpretation on it. Thus, in his treatment of the evidence that Mr Phillips was prepared to change his ways, Mr Loughborough did not cure the defect in Mr Bowen's decision making in this respect. As with Mr Bowen, Mr Loughborough does not seem to have much touched on Mr Falarczyk's management failings and the contribution they had made to Mr Phillips' failure to understand his job was on the line.

109. In considering Mr Loughborough's decision there are, also, two additional factors. First, Mr Loughborough relied, at least in part, on a new charge, that of a failure to deal adequately with customers' deposits. This was almost certainly not determinative and the Tribunal places no great weight on it, especially as Mr Loughborough was entitled to see it as further evidence of a lack of financial control. However, it was not a charge that Mr Phillips had faced until the appeal hearing. Second, having reduced the charge to misconduct, it would appear that neither Mr Loughborough, nor his HR officer, Mr Welch, spotted that dismissal was, therefore, no longer open to them on the face of the Company's disciplinary policy. The sanctions that remained open were the various stages of warning. The Tribunal does not see this as necessarily fatal to the fairness of the dismissal in isolation. The Company's disciplinary policy was non contractual and the Tribunal is concerned with what is reasonable. However, Mr Phillips was entitled to a reasonable expectation that the Company would operate its own disciplinary procedures and it did not do so.

110. The factors mentioned in the preceding two paragraphs, lead the Tribunal to conclude that Mr Loughborough's decision to uphold the dismissal was outside the reasonable band of responses.

111. The dismissal was, therefore, unfair.
112. This is not a case in which “*Polkey*” issues arise. The imposition of a sanction outside the reasonable band of responses is a substantive matter and not one that could have been cured by a procedural change.
113. The Tribunal is required to consider the issues of contribution as set out in sections 122(2) and 123(6) of the ERA. By his own admission, Mr Phillips had failed to adhere to contractually based standards of stock checking. Mr Phillips had been in the trade for several years and he was well aware of its preoccupation with stock checks. Mr Phillips’ failure to carry out the required procedures may have had an explanation, but it contributed substantially to his dismissal. It is just and equitable to reduce both any basic and compensatory awards by 50% in that respect.
114. The Tribunal sees no basis for concluding that it would be just and equitable to make any uplift of compensation for failure to comply with any provision of the applicable ACAS Code.

Employment Judge Matthews
18 February 2021