



EMPLOYMENT TRIBUNALS

Claimant: Ms D McElvaney-Bryson

Respondent: Iceland Foods Limited

Heard at: London South Employment Tribunal (by CVP)

On: 15-17 March 2021

Before: Employment Judge Ferguson

Members: Ms T Bryant
Ms S Khawaja

Representation

Claimant: In person

Respondent: Mr R Hignett (counsel)

JUDGMENT

It is the unanimous judgment of the Tribunal that:

1. The Respondent discriminated against the Claimant by failing to comply with a duty to make reasonable adjustments in that:
 - a. The Respondent failed to ensure that the Claimant understood the purpose of the disciplinary hearing on 6 August 2018 and the right to be accompanied.
 - b. The Respondent failed to adjourn the disciplinary hearing to enable the Claimant to consider the matter and arrange for someone to accompany her.
2. The Claimant was unfairly dismissed.
3. The Claimant was wrongfully dismissed.
4. The Claimant's basic and compensatory awards for unfair dismissal shall be reduced by 30% for contributory fault.

5. The Claimant's compensatory award for unfair dismissal shall be increased pursuant to s.207A of the Trade Union and Labour Relations (Consolidation) Act 1992 because the Respondent unreasonably failed to comply with the ACAS Code of Practice on disciplinary and grievance procedures. The percentage increase will be determined at the remedy hearing.
6. A remedy hearing will take place at 10am on **8 June 2021** by CVP.

REASONS

INTRODUCTION

1. By a claim form presented on 2 November 2018, following a period of early conciliation from 9 to 30 August 2018, the Claimant brought complaints of unfair dismissal, wrongful dismissal and disability discrimination (failure to make reasonable adjustments).
2. The Claimant's level of literacy is extremely low. In her own words, she cannot read or write. She has, since leaving the Respondent's employment, been formally diagnosed with Dyslexia. An expert report dated 6 March 2021 concludes that this specific learning difficulty has been a factor in "the [lack of] development of literacy and language related skills".
3. The Claimant said that she has been assisted in the conduct of the proceedings by her daughter, her niece, and in the early stages by a friend called Ms Anderson. There have been two preliminary hearings. The issues were agreed at the first preliminary hearing, on 15 May 2019, at which the Claimant was represented by Ms Anderson. At the hearing before us the Claimant was not represented, but she had the assistance of a colleague, Ms Wright. We made the following adjustments to accommodate the Claimant's inability to read or write:
 - 3.1. All documents referred to during the hearing were read out to the Claimant.
 - 3.2. The Claimant was given time to prepare questions to ask the Respondent's witnesses, with the assistance of Ms Wright.
 - 3.3. The Tribunal ensured that all relevant matters were put to the Respondent's witnesses. By agreement the Respondent's witnesses gave their evidence first. During the Claimant's evidence she made a number of new assertions that had not been put to the Respondent's witnesses. With the agreement of both parties the Respondent's witnesses were both recalled to enable them to respond to the new matters.
 - 3.4. The Claimant was allowed to make an audio recording of the Respondent's closing submissions, and was then given time to listen to the recording with Ms Wright and prepare her own submissions. The Tribunal required the

Claimant to show that the recording was deleted after she had made her submissions.

4. Both parties agreed that the issues identified at the preliminary hearing on 15 May 2019 were correct. They are as follows:

Unfair dismissal

- 4.1. What was the reason for the Claimant's dismissal? The Respondent contends that the reason was misconduct.
- 4.2. Did the Respondent hold a belief in the Claimant's misconduct on reasonable grounds after conducting an investigation that was in all the circumstances reasonable?
- 4.3. Was the decision to dismiss the Claimant a fair sanction that was within the range of responses available to a reasonable employer?
- 4.4. Did the Respondent follow a procedure that was fair and complied with its own written procedures and the requirements of the ACAS Code of Practice on Discipline and Grievances?
- 4.5. If not what is the percentage chance that the Claimant would have been dismissed if a fair procedure had been followed?
- 4.6. If the ACAS procedure was not followed would it be just and equitable to increase any award made to the Claimant and if so by how much?
- 4.7. Did the Claimant contribute to her own dismissal and to what extent?

Wrongful dismissal

- 4.8. Did the Claimant do something so serious that the Respondent was entitled to treat it as gross misconduct and dismiss her without giving her notice or paying her in lieu of her notice period?

Failure to make reasonable adjustments

- 4.9. Was the Claimant at the material time a disabled person under s.6 Equality Act? The Claimant relies on her dyslexia and her depression. The Claimant says that by reason of her dyslexia she is not able to read and write.
- 4.10. Did the Respondent know that she was a disabled person or ought it to have known?
- 4.11. Did the Respondent apply to the Claimant the provision, criterion or practice ("PCP") of taking at face value her decision not to be accompanied at her disciplinary hearing?
- 4.12. If so did that PCP place the Claimant at a substantial disadvantage compared with people who are not disabled?

- 4.13. What step or steps would it have been reasonable for the Respondent to take to avoid that disadvantage?
- 4.14. Did the Respondent fail to take that step or steps?
5. It was agreed that, with exception of the issues outlined above, remedy would be dealt with if necessary after the Tribunal's decision on liability.
6. On behalf of the Respondent we heard evidence from Jay Sinclair and Matthew Reeve. We also heard evidence from the Claimant.

FACTS

7. The Claimant commenced employment with the Respondent as a sales assistant/ cashier at its West Norwood branch on 28 May 2012.
8. The Respondent accepts that it was aware the Claimant could not read or write from mid-2017 at the latest.
9. The Respondent has a staff purchase policy as follows:

“The following rules must be observed if you work in stores and wish to purchase goods:

- Items for consumption at break times should be purchased at the time of the break. The receipt must be signed by a manager (or delegated authority) prior to consumption.
- Other goods may only be purchased at the end of your shift, or the end of the trading day. Again, all receipts must be signed by a manager (or delegated authority)
- Once the goods have been purchased, they must be removed from the store immediately, or kept in an area authorised by a manager (or delegated authority)
- Colleagues are not permitted to serve themselves, family or friends with the exception of self—service checkouts, whereby all receipts must be signed by a manager (or delegated authority)”

10. It also has a rule that cashiers are not allowed to keep any cash or payment cards on them when working on the tills.

11. The Respondent's disciplinary policy lists examples of gross misconduct including:

“Theft, or attempted theft, of company property or monies.”

and

“Deliberate failure to comply with colleague purchase and/or discount procedure.”

12. Jay Sinclair took over as the store manager in West Norwood in 2016. He was the Claimant's line manager. From 2017 at the latest he allowed the Claimant to purchase water to keep with her at the till during her shift because she said

she suffered from a dry mouth. It is not in dispute that she would buy a pack of six bottles of water approximately twice a week. She would do this before the start of her shift.

13. The Respondent says that in hot weather it provided water for staff free of charge. The Claimant said she was not aware of this. Mr Sinclair said in his oral evidence that he reminded the Claimant “practically every shift” about the free water.
14. On Monday 30 July 2018 the Claimant was due to work from 12pm to 4pm. Just before the start of her shift she attempted to buy a six-pack of water, using the till operated by her colleague, Joanne. She tried to pay with her “Iceland Bonus Card”, which can be pre-loaded with funds and then used for payment in the store. On this occasion she did not have enough funds on the card to cover the cost of the water (89p) and she had no cash on her. She asked Joanne to process the transaction anyway, and to add 20p to her bonus card in order to round up what she owed the till to £1 (after deduction of a 9p staff discount).
15. The Claimant said in her evidence to the Tribunal that she intended to pay the £1 back at the end of her shift when she was able to get cash back. She could not do this at the time of the transaction because there was a minimum £5 limit for cash back, so she would have ended up with cash on her during her shift, which was not allowed.
16. Shortly after the Claimant commenced her shift, Mr Sinclair came towards the tills. The Claimant had dropped £1 from her till on the floor while emptying a bag of coins. She then picked up the £1 and gave it to Mr Sinclair, saying it was for Joanne’s till. Shortly after this Joanne told Mr Sinclair about the transaction for the water, and that the Claimant had used money from her till to cover the cost.
17. Mr Sinclair conducted a formal interview with Joanne, who said that the Claimant tried to pay with her bonus card but there was not enough money on it. The Claimant then asked Joanne to process the transaction anyway and said she would pay it back later when she got cash back. Joanne said the Claimant told her that Nas, the supervisor on duty, was fully aware of this and she would give Nas the £1 owed to Joanne’s till.
18. Mr Sinclair also interviewed Nas, who said he had not spoken to the Claimant at all, except to say good morning at the start of her shift.
19. Mr Sinclair held an investigation meeting with the Claimant. The Claimant acknowledged that she had asked Joanne to process the transaction without paying and that she then gave Mr Sinclair £1 from her own till to put in Joanne’s till, so that it would balance. She accepted she did not explain this to Mr Sinclair when she gave him the £1. She said that she always intended to pay the money back when she was able to get cash back at the end of her shift. She also claimed that other people do this, but did not give any names and said “it was a long time ago”. She said “I cannot believe I have made this big mistake”.

20. As to whether she told Joanne it had been agreed with Nas, the notes of the meeting suggest that she initially accepted she told Joanne that Nas had authorised her to do this, but she also told Mr Sinclair that she did not seek authorisation. After receiving the notes the Claimant disputed the part suggesting that she told Joanne that she had authorisation from Nas.
21. At the end of the Claimant's investigation meeting she was suspended. The notes record Mr Sinclair saying that letters will be issued to the Claimant's home address.
22. Mr Sinclair's evidence in his witness statement was that the Claimant "wanted to have the disciplinary process concluded as soon as possible". The Claimant denies that she ever said this. In Mr Sinclair's oral evidence he said that there was a discussion after the end of the investigation meeting which is not recorded in the notes. He said that the Claimant was very upset, she said she was embarrassed, that she did not want any letters sent to her home because she did not want her family to find out, and she wanted the whole thing over with as soon as possible. He says the Claimant asked to leave out of the back door. The Claimant strongly disputes that account. She said it was his suggestion that she leave out of the back, but she refused. She denies asking for letters not to be sent to her, or asking for the process to be completed quickly.
23. The Claimant's suspension was confirmed in a letter addressed to her at home, dated 31 July 2018. It said that the reason for her suspension was "the alleged gross misconduct for taking a product without making payment and then taking cash from the till to complete the transaction". It is not clear exactly when this letter was received. The Claimant estimated it was on or around Saturday 4 August.
24. Sometime between 30 July and 3 August Mr Sinclair telephoned Matthew Reeve, the store manager at the Clapham Common branch, to ask him to chair the disciplinary meeting. Mr Sinclair said the hearing needed to take place as soon as possible. They both gave evidence that Mr Sinclair said this this was at the Claimant's request. A note on the Respondent's HR records states that there was "short notice meeting request" and includes the following note which Mr Reeve said he wrote: "Store Manager, Jay Sinclair, spoke with colleague, who asked for the disciplinary to be completed as soon as possible. Jay called and asked me if I could do it, which was fine". The disciplinary hearing was arranged for Monday 6 August 2018.
25. It is not in dispute that Mr Sinclair did not tell Mr Reeve that the Claimant could not read or write. Mr Sinclair said he put a note on the HR system to that effect, but Mr Reeve did not have access to that. It also appears from the HR record in the bundle that the employee from HR dealing with the matter was not aware because a note on 6 August 2018 states: "Letter for hearing scheduled on 06/08/2018 not sent due to late notification. Spoke with hearing manager who confirmed that he would give colleague time to read through investigation report."
26. On Friday 3 August Mr Sinclair telephoned the Claimant to inform her a disciplinary hearing would take place on Monday 6 August. The Claimant asked

him to confirm the details in a text message. Mr Sinclair texted her with the name of the disciplinary manager, Mr Reeve, and confirmation of the date, time and venue.

27. The Claimant says she also asked Mr Sinclair during the phone conversation whether she could bring someone with her to the meeting and that he said no, there was no need, it was just a chat. In Mr Sinclair's oral evidence he denied this but accepted he said if she wanted to bring someone external this would be a decision for the disciplinary manager. The Claimant's evidence was that she did not understand it was a serious meeting or that she could be dismissed. She also believed she was not allowed to bring anyone with her.

28. An invitation letter was prepared, dated 6 August 2018. It reads, so far as relevant:

"Dear Desrene

I am writing to confirm that you were suspended without prejudice on full pay from your position as Sales Assistant on 30/07/2018 by Jay Sinclair, Store Manager. The reason for your suspension is alleged gross misconduct for;

- Theft or attempted theft of Company, employee or customer property or monies
- Deliberate failure to comply with employee purchase and/or discount procedure

A disciplinary hearing has been arranged for 06/08/2018 at 12:00 at Iceland Foods, Clapham Store...

The disciplinary hearing has been arranged to consider the following alleged circumstances which are that;

- You took goods from the shop floor without making payment
- You took money from your till to make payment for a purchase

A copy of the investigation report is attached for your attention.

The hearing will be conducted by Matthew Reeve, Store Manager and Marta Ciecko, Apprentice Store Manager will also be present as the Company Representative. You are entitled to be accompanied by a work colleague or trade union representative at this hearing.

If after considering the evidence, the disciplinary allegations are found to be proven, formal action may be taken which could be up to and including summary dismissal.

If you require any reasonable adjustments to enable you to attend the hearing please contact Matthew Reeve, Store Manager so that appropriate arrangements can be made.

Please confirm your attendance at this hearing at least 24 hours before the scheduled start time by emailing..."

29. The investigation report, prepared by Mr Sinclair, summarised the investigation meetings with the Claimant, Joanne and Nas. It also stated that Mr Sinclair had viewed CCTV showing the Claimant picking up the dropped £1 coin. The summary reads:

"Having considered the findings of my investigation, I would observe that Desrene Bryson has taken goods from the shopfloor without having the means to pay for them and has lied about gaining authorisation from the Supervisor. She has also stolen money from the till to pay for these goods. I therefore believe that there is a case to answer to for gross misconduct.

I therefore believe that there is a disciplinary case to answer by Desrene Mcelvaney Bryson in relation to the allegation 'Allegation 1: taken a 6 pack of water from the shopfloor without authorisation and Allegation 2: then stolen £1 from her till in order to pay for these goods on the 30/07/2018' which constitutes Gross Misconduct."

30. It is not in dispute that neither the letter nor the investigation report were sent to the Claimant.

31. Mr Reeve said that in preparation for the disciplinary hearing he had the invitation letter and the investigation report. He said he had access to, but did not read, the notes of the investigation meetings.

32. The Claimant attended the meeting on 6 August. She was not accompanied. Mr Reeve asked the Claimant, as part of the standard script, "Can I confirm that you do not wish to be accompanied?" She said yes.

33. At the start of the meeting Mr Reeve proposed to give the Claimant time to read the invitation letter, but she told him she could not read or write. Mr Reeve's evidence was that he then read out the invitation letter to Claimant. In his oral evidence he said that he also read out the investigation report. The Claimant denies that either document was read out to her. On the balance of probabilities we find that he did read out the invitation letter. At one stage in her evidence the Claimant described feeling shocked when Mr Reeve told her she was accused of theft. Mr Reeve did not say in his witness statement that he read out the investigation report and we consider it unlikely that he did.

34. Mr Reeve said in his oral evidence that having asked the Claimant to confirm she did not want to be represented, and read out the invitation letter which said there was a right to be accompanied, there was no reason for him to repeat the question. He said employees sometimes choose to attend on their own and it was not something he would "continually dwell on". If they say they are okay to continue, there was "no reason to go back and explore again and again".

35. It is not in dispute that Mr Reeve did not check with the Claimant at the start of the hearing that she had requested it take place as soon as possible, and without her having been notified of the allegations in advance.

36. During the disciplinary hearing the Claimant reiterated that she always intended to pay for the water. She accepted she had not asked for authorisation, and that she did not explain the situation to Mr Sinclair when she gave him the £1. She said she did not think it was a problem at the time, but she understood when Mr Sinclair called her into the office. She said her understanding was that if money is replaced the same day it is not an issue. She referred to the practice of staff giving £1 coins to customers for shopping trolleys. She said again that it had been a mistake. She apologised and said it was not intentional. She said it would not happen again and she would learn from her mistake.
37. When asked at the disciplinary hearing if she knew about the free water in hot weather, she first said "I did not know this". The notes record her saying "Nas told the week before that is water in staff room so you can have it". Mr Reeve then asked her whether it was fair to say she had knowledge that the company provide water, and the Claimant said "no". In her evidence to the Tribunal the Claimant denied saying in the disciplinary hearing that Nas told her about the free water. She said she had not seen this passage of the disciplinary hearing minutes before it was read out to her during her evidence to the Tribunal.
38. A note at the end of the minutes states that Mr Reeve accepted the Claimant would be unable to read and sign the notes because of her difficulties reading and writing, "however I can confirm they are accurate".
39. Mr Reeve adjourned to consider his decision. The meeting resumed and he informed the Claimant she would be summarily dismissed. He upheld both charges – "Deliberate failure to comply with the employee purchase and/or discount procedure" and "Theft or attempted theft of company, employee or customer property or monies". The Claimant was told that she would receive an outcome letter and that she had the right to appeal within five working days of receipt of the letter.
40. A letter confirming the Claimant's dismissal and the reasons for it was sent on 13 August 2018. It states:

"Dear Desrene

I am writing to confirm the outcome of the disciplinary hearing held on 06/08/2018 at the Iceland Foods, Clapham Store at which Marta Ciecko, Apprentice Store Manager was present as Company Representative. I note that you declined representation at the hearing.

The disciplinary hearing was arranged in relation to the following allegation(s):

That on 30/07/2018 you committed an act of theft or attempted theft from the Company in that you took £1 from the till, in order to pay for the 6 pack water you had previously taken, in the West Norwood store deemed as Gross Misconduct.

After careful consideration of all the facts available to me, my decision is to summarily dismiss you with effect from 06/08/2018, for Gross Misconduct. In reaching my decision I considered the following:

- It is my belief, that your intention initially when you took the water, was to pay for it, using your Bonus card. You stated during the disciplinary hearing that you were not allowed to have cash or cards on you. However, you did have your Bonus card with you, which could and can be used to make purchases and other transactions.
- You had an insufficient balance to pay for the water, however you still by choice proceeded with the transaction regardless, and took it upon yourself to manage the transaction through. I considered that Joanne was aware of your intentions, and went along with your request.
- At no point, at this time, did you escalate the matter or seek advice the management present in the store that day. Water is available to staff throughout the day at on charge.
- In order to pay for the water you had taken, you chose to use a £1 coin, which had dropped from a coin bag, on till 2, in order to complete and pay for the transaction on till 1.
- You clearly understood by way of explanation to me that goods that are not paid for would be considered theft.
- You were able to explain why Iceland has policies and procedures, and why it is important to comply with them, specifically around staff purchases, and cash management however you blatantly disregarded them to your own end.
- I considered all options as an alternative to dismissal however that as you stated that you 'simply didn't see a problem' with your actions I was not convinced that by issuing you with an alternative sanction, it would have changed your future behaviour.

As this is a summary dismissal you are not entitled to receive any pay in lieu of notice. You will however, receive any outstanding holiday pay owing to you and your P45 will be forwarded to your home address.

A full set of minutes were taken during the hearing. You have already received a copy of these and have signed to confirm as such.

If you wish to appeal against this decision, you must provide the full reasons for your appeal by emailing [...], within five working days of receipt of this letter. Full details of the appeal procedure are contained within the Disciplinary Policy which can be found on Knowledge Base."

41. In his oral evidence Mr Reeve confirmed that he concluded the Claimant was guilty of both a breach of the purchase procedure and theft. When this was explored with him in questions from the Tribunal he effectively said there was no difference, in his view, between the breach of this procedure and theft. He was asked whether he reached a conclusion about whether the Claimant intended to reimburse the till at the end of her shift, and he answered that it concerned him because that was not normal procedure. He said he “deemed” it to be theft because whatever the intentions, the policies are there to be complied with.
42. In her oral evidence the Claimant denied receiving the dismissal letter. We find on the balance of probabilities that she did receive it. She said at one stage that she went to the CAB (later she said Age UK) and she was told the date for appealing had passed. This would suggest that she showed the advisor the outcome letter. We also note that the Claimant had never said before, in her claim form or witness statement, or at either of the two preliminary hearings, that she had not received the dismissal letter.
43. The Claimant said she did not appeal because although Mr Reeve told her the name of the person she could appeal to during the disciplinary hearing, she forgot their name after she left. She also said she suffered a mental breakdown after her dismissal.
44. Mr Sinclair submitted a supplementary witness statement refuting various historical allegations contained in the Claimant’s witness statement. He describes the Claimant as being “very vocal with any issues she had”, and said that “this showed in her everyday behaviour”. He said she would argue with managers, and was never afraid to voice her disagreements with customers or colleagues.

THE LAW

Unfair dismissal

45. Pursuant to section 98 of the Employment Rights Act 1996 (“ERA”) it is for the employer to show the reason for the dismissal and that it is one of a number of potentially fair reasons or “some other substantial reason”. A reason relating to the conduct of an employee is a fair reason within section 98(2). According to section 98(4) the determination of the question whether the dismissal is fair or unfair “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 “shall be determined in accordance with equity and the substantial merits of the case.”
46. In misconduct cases the Tribunal should apply a three stage test, set out in British Home Stores Ltd v Burchell [1980] ICR 303, to the question of reasonableness. An employer will have acted reasonably in this context if:-
 - 46.1. It had a genuine belief in the employee’s guilt;
 - 46.2. based on reasonable grounds

46.3. and following a reasonable investigation.

47. The Tribunal must then consider whether it was reasonable for the employer to treat the misconduct as a sufficient reason for dismissal. In respect of each aspect of the employer's conduct the Tribunal must not substitute its view for that of the employer but must instead ask itself whether the employer's actions fell within a range of reasonable responses (Iceland Frozen Foods Ltd v Jones [1982] IRLR 439).

48. Sections 122-123 ERA provide, so far as relevant:

122 Basic award: reductions

...

(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 Compensatory award

...

(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.

49. Pursuant to section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULR(C)A"), if it appears to the Tribunal that the employer has failed to comply with the ACAS Code of Practice on disciplinary and grievance procedures it 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%.

50. The ACAS Code of Practice provides, so far as relevant:

Inform the employee of the problem

9. If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification.

10. The notification should also give details of the time and venue for the disciplinary meeting and advise the employee of their right to be accompanied at the meeting. Hold a meeting with the employee to discuss the problem.

11. The meeting should be held without unreasonable delay whilst allowing the employee reasonable time to prepare their case.

12. Employers and employees (and their companions) should make every effort to attend the meeting. At the meeting the employer should explain the complaint against the employee and go through the evidence that has been gathered. The employee should be allowed to set out their case and answer any allegations that have been made. The employee should also be given a reasonable opportunity to ask questions, present evidence and call relevant witnesses. They should also be given an opportunity to raise points about any information provided by witnesses. Where an employer or employee intends to call relevant witnesses they should give advance notice that they intend to do this.

Allow the employee to be accompanied at the meeting

13. Workers have a statutory right to be accompanied by a companion where the disciplinary meeting could result in:

- a formal warning being issued; or
- the taking of some other disciplinary action
- the confirmation of a warning or some other disciplinary action (appeal hearings)

Failure to make reasonable adjustments

51. Pursuant to section 20 of the Equality Act 2010 (“EQA”), where an employer has a provision, criterion or practice (“PCP”) that puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, it has a duty to take such steps as it is reasonable to have to take to avoid the disadvantage. The duty does not apply if the employer does not know, and could not reasonably be expected to know that the disabled person has a disability and is likely to be placed at the disadvantage referred to (paragraph 20 of Schedule 8 EQA).

52. Section 21 provides that an employer discriminates against a disabled person if it fails to comply with a section 20 duty in relation to that person.

CONCLUSIONS

Factual disputes

53. We agree with the Respondent’s submission that the Claimant’s evidence was problematic because she made a number of assertions that were not in her claim form or her witness statement. In fact her witness statement says nothing at all about the incident which led to her dismissal; it contains only historical allegations about her treatment by Mr Sinclair and others, which are mostly not relevant to her claim. Both documents, the claim form and witness statement, were prepared on her behalf, she said by her niece and/or her daughter. It was clear that the Claimant did not properly understand the purpose of the witness statement. We approach her evidence with appropriate caution, but we have also taken into account her limited understanding of the Tribunal process, the fact that she is unrepresented, and her inability to read or write. As noted above,

where new matters were raised in her evidence we allowed the Respondent to recall its witnesses so that they could respond.

54. There is a dispute about whether it was commonplace for staff in the West Norwood branch to take small value items and pay for them at the end of their shift. On balance we do not accept that this happened, or if it did it was not with the knowledge and acceptance of management. The only mention of this during the disciplinary process was the Claimant saying in the investigation meeting “other people do this”, but when pressed she did not give any name and said it was a long time ago. The Claimant has not challenged this part of the notes (but notably has challenged other parts). She did not say anything about it in her witness statement. We take into account that the Claimant’s colleague Joanne reported it as a matter of concern, so it cannot have been commonplace or accepted from her point of view. It is also relevant that the Claimant accepted she had made a mistake in both the investigation and disciplinary meetings. We therefore conclude that while it might have happened once before, it was not commonplace and it was not condoned. It is not in dispute, however, that it was commonplace for £1 coins to be loaned to customers for trolleys.
55. The position as to the practice of signing receipts is less clear. It is not in dispute that the Claimant did not get her receipt signed on the day in question, and this was not said to be a breach of procedure in the investigation report or in the dismissal outcome letter. The Claimant’s evidence was that receipts would be signed only if you left the store, whereas Mr Sinclair said the opposite, that receipts would have to be signed *unless* you were leaving the store. Neither account is entirely consistent with the staff purchase policy. We find that there was some lack of clarity about what the rules were on this, and that the Claimant did not believe she had to get her receipt signed for her water.
56. There is also a dispute about whether the Claimant knew about free water being provided for staff in hot weather. Although there is a reference in the disciplinary hearing notes to the Claimant saying Nas told her the week before, she also twice denied in that meeting that she knew about the free water. We consider it would be very odd for the Claimant to continue buying water at her own expense twice a week if she knew free water was provided. On balance we consider it more likely that the Claimant did not know there was free water available to her. Both she and Mr Sinclair said that she would hardly ever go “in the back”, which is where the water was kept, so it is quite possible that she would not know. We found Mr Sinclair’s oral evidence, that he reminded the Claimant of the free water “practically every shift” was not credible. As the Claimant said, why would she continue buying water if it was available for free?
57. On the issue of why the disciplinary hearing was rushed through, we do not accept in full Mr Sinclair’s account of the conversation that he says took place after the investigation meeting. He did not mention this conversation in his witness statement and it is not recorded in the notes. We consider it very unlikely that if the Claimant made such significant requests – that no letters be sent to her home, and that the process be conducted as quickly as possible – that he would not make a note of this. We accept that she was probably upset and that she might have said something about wanting it over and done with, but that simply reflected her distress. Mr Sinclair should have realised that it was not in her best interests to rush the process, and her comments were not

a reliable basis to deviate from the normal procedure. The suggestion that she said she did not want letters sent to her home is inconsistent with both the notes themselves, which say letters will be sent to her home, and the fact that the suspension letter was sent the next day. Mr Sinclair's explanation, that he could not stop that letter going out, was not credible. We find that the Claimant was upset and said something about wanting the matter over and done with, and Mr Sinclair chose to treat that as an opportunity to rush through the disciplinary process because in his view the Claimant was a difficult employee, as he explained in his supplementary witness statement.

58. As to the telephone conversation on 3 August, we infer from Mr Sinclair's oral evidence that the Claimant asked him about being accompanied to the disciplinary meeting, possibly by someone external. He told her that she would need to ask the disciplinary manager if she wanted someone external, but did not provide the Claimant with Mr Reeve's contact details. We do not find that he expressly told the Claimant that she was not allowed to be accompanied by anyone, but we do find he gave her the impression she did not need to be accompanied, and he certainly did not encourage her to take someone along. Nor did he inform her that she had a right to be accompanied. Our findings about this conversation are consistent with the text message Mr Sinclair sent to the Claimant, which simply confirmed Mr Reeve's name, the venue and the date of the meeting. The Claimant was not given anything in writing prior to the meeting confirming the charges she was facing, the fact that it may be gross misconduct and she may be dismissed, or that she was entitled to be accompanied.

EQA: Failure to make reasonable adjustments

59. The Respondent accepted that the Claimant is dyslexic, that that constitutes a disability under the EQA, and that it had constructive knowledge of that fact at the material time.

60. As to the remaining issues:

Did the Respondent apply to the Claimant the provision, criterion or practice ('PCP') of taking at face value her decision not to be accompanied at her disciplinary hearing?

61. As Mr Hignett pointed out, this is not really framed as a PCP because it refers to the Claimant's individual case. We consider it should be read, and the Respondent must have understood it to mean, "taking at face value employees' wishes not to be accompanied at disciplinary hearings".

62. We accept there was such a PCP. Mr Reeve said on more than one occasion during his evidence that he would not continually ask an employee about this. Once they had said they did not wish to be accompanied that was the end of it.

If so did that PCP place the Claimant at a substantial disadvantage compared with people who are not disabled?

63. The Respondent conceded that the Claimant was at a substantial disadvantage by not being accompanied because she could not engage with the documents.

It must follow that the PCP placed her at a substantial disadvantage, because we have found that the Claimant had asked Mr Sinclair if she could bring someone to the meeting, and she clearly would have been accompanied if she had realised the seriousness of the meeting and that she had a right to be accompanied.

What step or steps would it have been reasonable for the Respondent to take to avoid that disadvantage?

64. The Respondent says the only step that it is logical to consider is the Respondent requiring the Claimant to be accompanied notwithstanding she said she did not want to be. It is correct that the Claimant is not complaining here (as opposed to in the unfair dismissal complaint) about the Respondent's decision to rush through the disciplinary process, or not send her documents in advance, or any other aspect of the procedure. Her specific complaint is that she needed someone to accompany her because she could not read or write. The Respondent says it cannot be reasonable to insist that an employee is accompanied. It is a right, but it is equally the employee's right to choose not to be accompanied.

65. We consider that analysis is overly simplistic. The circumstances at the start of the Claimant's disciplinary hearing were that she had not been given any formal invitation or documents prior to the hearing, and she told Mr Reeve at the outset that she could not read or write. That was the first he knew of her disability. It was not enough to simply ask her the standard question from the script "Can I confirm that you do not wish to be accompanied?", and to rely on her answering "yes" in those circumstances. There was at least serious doubt about whether the Claimant understood what the meeting was for and what the possible outcome was, and Mr Reeve was aware, or should have been aware, that she had not been notified of the right to be accompanied. We accept it may not have been reasonable to insist on the Claimant being accompanied, but we do consider it would have been reasonable to discuss the issue with her in more detail and, given her disability, encourage her to bring someone to the hearing. This might have included allowing her to bring an external companion, and adjourning the meeting to allow her to consider the issue and find someone to help her.

66. We consider the Respondent had a duty to make the following adjustments:

66.1. Ensuring that the Claimant understood the purpose of the disciplinary hearing on 6 August 2018 and the right to be accompanied.

66.2. Adjourning the disciplinary hearing to enable the Claimant to consider the matter and arrange for someone to accompany her.

Did the Respondent fail to take that step or steps?

67. It is not in dispute that the Respondent did not take those steps.

68. We therefore find that the Respondent did not comply with its duty to make reasonable adjustments.

Unfair dismissal

Did Mr Reeve have a genuine belief that the Claimant committed the misconduct in question?

69. Mr Reeve's evidence was that he found both a breach of the purchase procedure and theft. We accept that that was his genuine assessment. The Claimant has not put forward any ulterior motive on Mr Reeve's part and there is nothing in the evidence to suggest that what he wrote in the dismissal letter did not represent his genuine view.

Were there reasonable grounds for that belief?

70. We accept that there were reasonable grounds to conclude the Claimant was guilty of "deliberate failure to comply with the employee purchase procedure". Although she had special permission to buy water before her shift for keeping with her at the till, she did not have permission to do this without paying for it at the time. We have already found that it was not commonplace for staff to do this. She effectively borrowed £1 from her own till for the duration of her shift, which was not in accordance with the policy or otherwise authorised. We consider there were reasonable grounds to conclude she did so deliberately, knowing that it was an irregularity.

71. As to theft, we accept that an employer may not necessarily apply the strict criminal law definition of theft, but we consider that the term theft necessarily involves an element dishonesty in any context. We find that Mr Reeve did not have reasonable grounds to conclude that the Claimant was dishonest. He expressly accepted in the dismissal letter that the Claimant was intending to pay for the water when she took it. That is obvious, because why would she ask Joanne to process the transaction at all if she was not intending to pay for it? He did not suggest that something changed thereafter and the Claimant later decided or intended not to pay for it. The Respondent says there are three factors pointing to dishonesty:

71.1. The first is that the Claimant used money from her till to balance Joanne's till. We do not accept that this was evidence of any intention not to pay. What the Claimant had done meant that one till was going to be down by £1 for the duration of her shift. It made sense for her own till to be the one that was down so that it was her responsibility and she could correct it more easily later. She has always said that she intended to pay it back when she got cash back at the end of her shift, and the Respondent never made any finding that that was not true.

71.2. The second factor was that the Claimant did not attempt to tell anyone what she had done. We do not consider this to be strong evidence of dishonesty. The Claimant was completely open with Joanne about her intentions. It is true that she did not seek authorisation from a manager or volunteer to tell Mr Sinclair what she had done, but she answered honestly when asked about it. Given her admission that it was a "mistake", and that she must have realised it was a breach of procedure, it is unsurprising that she was hoping to resolve the issue without involving management.

- 71.3. The final factor was the suggestion that she had duped Joanne by saying she had authorisation from Nas. This is a red herring in the context of the unfair dismissal complaint because Mr Reeve did not rely on this and in fact he accepted the Claimant's revised account, which was that she told Joanne she would give the £1 to Nas, not that she had his permission.
72. In those circumstances we do not consider it was reasonable to equate breach of the procedure with theft. Mr Reeve had to be satisfied that there was an element of dishonesty in order to conclude it was theft. He did not expressly make such a finding and nor were there reasonable grounds for it.

Was the sanction of dismissal reasonable?

73. Given our findings above we must consider whether dismissal fell within the range of reasonable responses for a finding that Claimant deliberately failed to comply with the employee purchase procedure. The Respondent relies on the fact that this is listed as an example of gross misconduct in its disciplinary policy. That is not conclusive, however, and the Respondent must still consider the seriousness of the breach. It was relevant to consider that the Claimant had permission to buy water at the start of her shift, and had done so twice a week for a long time. It is also relevant that employees were not allowed to have any cash with them at the till. The difficulty on the day in question was that the Claimant did not have enough money on her bonus card. Because she did not have any cash on her, there was no way of her paying for the water at the time. We have already found she did not know about the free water for staff. Although we have not accepted that it was commonplace for staff to effectively borrow money from the till, we also do not accept that till money was treated as strictly as the Respondent suggests. The fact that £1 coins were regularly lent to customers for trolleys suggests that there was a level of acceptance that the tills might not balance at all times throughout the day. This is also supported by the fact that Joanne agreed to process the transaction knowing that the Claimant was intending to pay for it later; it was only when the Claimant moved the £1 from her own till that Joanne raised a concern.
74. We accept that in the retail industry employers are entitled to take a strict approach to policies regarding till money and stock, but this does not extend to automatic dismissal of an employee of 6 years' service for any breach, however minor. The amount in question was extremely small and it was not disputed that the Claimant intended to pay it back. She had tried to pay for it, explained what she intended to do when she could not, and there is no suggestion that she hid the water or otherwise tried to conceal the purchased.
75. We also do not consider it was reasonable for Mr Reeve to conclude that the Claimant would not change her behaviour in future. She said several times that it was a mistake, she apologised and said she understood it was a breach of the procedure. She said it would not happen again.
76. In those circumstances we find that dismissal fell outside the range of reasonable responses.
77. We therefore conclude that the Claimant's dismissal was unfair.

Procedural issues

78. It is not necessary for us to consider the reasonableness of the investigation and we note that the Claimant makes no complaint about it.
79. We do address procedural fairness though, for completeness and because it is relevant to remedy.
80. The Respondent accepts that holding a disciplinary hearing in circumstances where the Claimant had not been given advance notification of the allegations or provided with the investigation documents would “ordinarily” breach the Respondent’s policy and ACAS Code, and would therefore be unfair. He invited us to find that it was done at the Claimant’s request, but we have already found that the Respondent should not have taken what the Claimant said to Mr Sinclair as a reason to dispense with the normal safeguards and rights for employees. The Claimant did not waive her right to be given reasonable notice of the allegations and time to prepare. Far from deciding to expedite the process, the Respondent should have realised that the Claimant’s inability to read or write meant that additional care needed to be taken that she understood the allegations and the process, and was able to put forward her case. The Respondent accepts that Mr Reeve should have checked with the Claimant on the day that it was her request to have the disciplinary hearing held more quickly than usual. We agree with that, but find that it does not properly reflect the extent of the unfairness to the Claimant.
81. We consider that the Respondent unreasonably failed to comply with the ACAS Code in the following respects:
- 81.1. It did not notify the Claimant in writing of the alleged misconduct and its possible consequences (para 9). In particular the Claimant did not know until the hearing itself that she was accused of theft or attempted theft.
- 81.2. It did not provide copies of any written investigation evidence, i.e. the investigation report and interview notes, which were given to Mr Reeve (para 9).
- 81.3. It did not notify the Claimant of the right to be accompanied (para 10).
- 81.4. It did not allow reasonable time for the Claimant to prepare her case (para 11).
- 81.5. It effectively denied the Claimant the right to be accompanied at the hearing (para 13), by (a) failing to inform her of the right, whether in writing or otherwise, (b) Mr Sinclair effectively dissuading her from being accompanied and (c) Mr Reeve taking at face value her answer to the question whether she wished to be accompanied at the start of the hearing, notwithstanding the circumstances and her inability to read or write.
82. Those matters created real unfairness to the Claimant because she was unprepared to defend herself, particularly as regards an allegation of theft, and, as we have found, there were no reasonable grounds to conclude she was guilty of theft. The Claimant’s dismissal was procedurally unfair.

Remedy for unfair dismissal

Section 207A TULR(C)A adjustment

83. We consider it is just and equitable to increase the Claimant's compensatory award in view of the Respondent's unreasonable failure to comply with the ACAS Code. We leave the issue of the percentage increase to the remedy hearing.
84. The Respondent says the Claimant unreasonably failed to comply with the ACAS Code herself by failing to appeal. Given the Respondent's knowledge of her limited understanding and inability to read or write, it was not sufficient to inform her of the right to appeal at a meeting where she was not accompanied and could not make any notes, and then to send a letter which also mentioned the right to appeal. In the circumstances the Respondent should have ensured that the Claimant understood the letter by contacting her by phone or text. The Claimant accepts that she knew of her right to appeal, and perhaps she could have been more proactive in finding out how to do so, but we do not consider there was an unreasonable failure to comply with the Code such that an adjustment should be made to her compensation.

Contributory fault

85. We accept that what the Claimant did was blameworthy, in that she knew she did not have permission effectively to borrow money from her till for the duration of her shift. She could have asked for permission, or at least told Mr Sinclair what she had done. We consider it is just and equitable to reduce the Claimant's basic and compensatory awards by 30%.

Wrongful dismissal

86. The evidence before us is virtually the same as that before Mr Reeve. The only significant difference is that Mr Reeve did not rely on the suggestion that the Claimant had duped Joanne by saying she had permission from Nas, and we are not bound to take the same approach. Joanne has not been called as a witness for the Respondent. We consider that the notes of her interview are not a sufficient basis to find that the Claimant misled her about having permission from Nas. The Claimant denied saying this and was quick to correct the part of her interview notes which suggested otherwise. It is not in dispute that Claimant attempted to pay with her bonus card, and it was only when she realised she did not have sufficient funds that she decided to take the approach that she did. That makes it unlikely she would have said she had permission to process the transaction without paying. We therefore conclude, consistent with our findings above, that the Claimant was not dishonest and was not guilty of theft or attempted theft of company property or money.
87. We have found that the Claimant breached the staff purchase policy by processing a transaction for water and not paying for it at the time. She did so knowing that it was an irregularity and she did not have permission. We note that "deliberate failure to comply with colleague purchase...procedure" is listed as an example of gross misconduct in the Respondent's disciplinary procedure,

but that does not mean that any such failure necessarily constitutes a repudiatory breach of contract. We do not consider that the Claimant's conduct was so serious as to constitute a repudiatory breach. The amount of money in issue was extremely small and she intended to pay it back at the end of her shift. Variations in the tills during the day were not unheard of, and in those circumstances this was not such a serious breach of the procedure that it constituted a repudiatory breach of contract entitling the Respondent to dismiss the Claimant without notice.

Directions for the remedy hearing

88. After our judgment had been given on the final day of the hearing the Claimant confirmed that she was claiming loss of earnings from the date of dismissal to 1 June 2019. During that period, from six weeks after her dismissal, she was in receipt of Universal Credit.
89. By **21 April 2021** the Claimant must send the Respondent all documents in her possession relevant to her efforts to find employment between the date of her dismissal and 1 June 2019.
90. The Respondent must send any documents it wishes to rely on at the remedy hearing to the Claimant by **12 May 2021**.
91. The Respondent must produce a bundle for the remedy hearing. It must provide a hard and electronic copy to the Claimant at least seven days before the hearing. It must send an electronic copy to the Tribunal three days before the hearing.

Employment Judge Ferguson

Date: 23 March 2021