



# EMPLOYMENT TRIBUNALS

## Claimant

## Respondent

Ms C Foxen

v

BUPA Occupational Health  
Ltd t/a BUPA Dental Care

Heard at: London Central  
On: 25 – 27 November 2020

Before: Employment Judge Hodgson

## Representation

For the Claimant: in person  
For the Respondent: Ms C Musgrave

## JUDGMENT

1. The claim of unfair dismissal fails and is dismissed.
2. The claim of wrongful dismissal fails and is dismissed.

## REASONS

### Introduction

- 1.1 The claimant alleged that her dismissal was both wrongful and unfair.
- 1.2 This hearing proceeded as a video hearing using CVP. At the outset of the hearing, I confirmed with both parties that they were content to proceed, and both confirmed they were. It was not practicable to hold an in-person hearing, given the current limitation on the number of in person hearings which can be accommodated. Both parties, the witnesses, and the tribunal had access to hard copies of the bundle, and hard copies of

the statements. I was satisfied that, in this case, it was just and equitable to proceed by video hearing.

### **The Issues**

- 2.1 At the commencement of the hearing, the issues were clarified. The claimant alleges she was unfairly dismissed. The respondent alleged the reason for dismissal was the claimant's conduct. The claimant denied any misconduct, and in any event alleged that the dismissal was procedurally unfair.
- 2.2 There is a claim of failure to pay notice. The respondent alleged the claimant's actions amounted to gross misconduct and that it was entitled to dismiss. The claimant alleged she was not in breach of contract.

### **Evidence**

- 3.1 I heard from the claimant.
- 3.2 The respondent called three witnesses: Mr Matthew Snudden; Ms Kate Moore; and Ms Marie Archer.
- 3.3 The respondent filed a chronology and a draft list of issues.

### **Applications**

- 4.1 There were no applications that I need to record.

### **The Facts**

#### **Background**

- 5.1 On 15 July 2015, the respondent employed the claimant. The respondent is involved in providing private healthcare. On 16 February 2018, the claimant became the registered practice manager at BUPA Dental Care, Chelsea. She was summarily dismissed on 16 December 2019. The claimant had general management responsibility. She was also responsible for motivating her team. She did not have any specific authorisation to design, improve or authorise incentive schemes which involved the payment of any form of bonus.
- 5.2 At the time of her dismissal, the claimant was not subject to any formal warnings. There were no issues with her work, and it appears that she had been a well-respected and productive employee.

#### **Relevant events**

- 5.3 Prior to October 2019, the claimant formed the view that she was required to put in place incentive programmes. The extent of this requirement is unclear. The claimant was not given delegated authority at any time.

- 5.4 On 17 October 2019, during a meeting with her colleagues at the Chelsea practice centre, the claimant, without authority, instigated an incentive scheme which covered, amongst others, the receptionist. It is said the minutes were typed and placed outside the office. No document has been produced to the tribunal. The parameters of the claimant's incentive scheme remain unclear. In her statement the claimant gives this alleged detail "first team member to sell 4 cases of product to receive £100 cash reward."
- 5.5 At the time that her incentive programme was initiated, there was no formal incentive programme covering receptionists. The claimant did not agree the scheme with her manager, Ms Reilly.
- 5.6 The claimant did not seek authorisation for the "cash reward." She did not agree with any senior manager from where the payment would be made.
- 5.7 On 22 October 2020, the claimant alleges she had a conversation with her direct manager, Ms N Reilly. The need to gain Ms Reilly's authority to approve the incentive scheme is not in issue. It is the claimant's case that, in some manner, Ms Reilly authorised the incentive scheme. At paragraph 9 of her statement she says:
- On 25th October 2019 at the Area 4 Managers meeting I informed the Area Support/ Interim Area Manager (N Reilly) of the incentive which had been agreed at the practice meeting, I detailed the following. In all Area meetings I attend there was no note taker.**
- a. **The details of the incentive – first team member to sell 4 cases of product to receive £100.00 cash reward**
- b. **No Management participation within the incentive**
- 5.8 At paragraph 10 she goes on to say the incentive was "met by no challenges." The claimant's evidence on this has been unclear and at times inconsistent. Before me, she has referred to there being "deemed acceptance." Her evidence falls short of stating that the scheme was explained in detail. Her evidence does not say that she sought or gained agreement from her manager for payment of £100 out of petty cash. In evidence, she indicated that Ms Reilly stated that the incentive plan was "a good idea."
- 5.9 It was part of Ms Reilly's role to authorise unusual payments. The claimant does not assert that the claimant had the authority to authorise either the scheme or the payment. She did not dispute the evidence of Miss Archer that any authorisation would normally be evidenced by email in order to ensure an audit trail. The claimant did not send any email to Ms Reilly confirming the nature of the incentive plan. Ms Reilly sent no email to the claimant.

- 5.10 During November 2019, the receptionist (Ms A Pirouzi) informed the claimant that she had met the incentive target. The claimant satisfied herself that this was correct.
- 5.11 On 21 November 2019, the claimant spoke to Ms Ferradosa, lead nurse, the claimant authorised payment of £100 out of petty cash to the receptionist. She instructed Ms Ferradosa to input the transaction onto the ICMS (the income and cash management system for banking) as an "Invisalign incentive"<sup>1</sup> for Ms Pirouzi. The money was put in an envelope and placed in the secure safe. There has been some dispute before me as to whether the claimant authorised payment to the receptionist. At all material times during her employment, including the investigation, the disciplinary, and the appeal, the claimant accepted that she had authorised payment of the money. To the extent the claimant has sought before the tribunal to resile from that admission, I reject her evidence. It is clear that the claimant authorised payment, and directed the payment should be made out of petty cash. It was the claimant who directed how it should be accounted for.
- 5.12 On 22 November 2019, Ms S Mikulevicute, a treatment coordinator on the claimant's team, wrote to Ms Reilly stating the claimant had authorised an incentive payment to the receptionist and directed it be put through as petty cash. Part of her letter also complained about unfair, and preferential treatment of the receptionist, when she herself had received no such bonus for a period of six years.
- 5.13 On 23 November 2019 Ms Reilly sent an email to the claimant requesting information. That email has not been included in the bundle, but is referred to in the claimant's witness statement. I have no further detail of it.
- 5.14 On 25 November 2019, Ms Ferradosa wrote to Ms Reilly saying:
- I feel it is my responsibility to let you know what exactly happened regarding the £100 incentive cash I was told to give to a colleague. Today my manager has advised that she is being investigated for potential bribery and asked if information regarding this incentive could be deleted, which has made me feel uncomfortable. I would like you to know that I had no say in this was just acting following my manager's orders.**
- 5.15 The claimant alleges on 25 November 2019 that she had a team meeting to discuss how the incentive would "be realised." She alleges that she agreed to review the incentive with the team. She alleges Ms Pirouzi "insisted she did not want the incentive to come between members of the team" and that she agreed to return it.
- 5.16 The claimant alleges that she was concerned that a £100 discrepancy had arisen in the cash float. She wished to ensure that the banking balanced, as she feared there would be a breach of the cash handling policy, which would lead to an allegation of gross misconduct. In order to avoid this,

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<sup>1</sup> Invisalign is a trade name for a form of discreet dental braces.

she put £100 of her own money into the petty cash and directed it be banked. She alleges that she escalated the matter to Ms Reilly and that Ms Pirouzi agreed she would return the money the following day. I find there was no attempt made by the claimant to escalate the matter in accordance with the respondent's policy. I have referred to the policy below.

- 5.17 Ms Pirouzi returned the money the following day. The claimant does not say what happened to the money, but it would appear that she must have reimbursed herself.
- 5.18 On 26 November, Ms Reilly suspended the claimant by formal letter. She gave as her reason "that you have breached our cash handling policy on Thursday, 21 November 2019, and following this event incited team members to delete evidence of this activity."
- 5.19 An investigation was undertaken by Mr Matthew Snudden, head of dental laboratories. As part of his investigation he spoke to Ms Reilly by phone to ascertain whether she had authorised the incentive scheme. She stated she had not. He confirmed the conversation by email on 29 November 2019, and Ms Reilly confirmed the accuracy of his record by email of 2 December 2019. He met with the claimant on 29 November 2019 to interview her. He interviewed some, but not all of the claimant's team. He did not see the team meeting notes of 17 October 2019. It is unclear why. They did not form part of his report. The claimant could have brought them to his attention or referred to them at the disciplinary hearing if she had chosen to. Their absence did not materially affect his report.
- 5.20 He produced a detailed report, which recorded his findings. He indicated there appeared to be a breach of the cash handling policy in that the maximum amount that can be authorised is £50 and exceptions will only be allowed with authority from both the area manager and the general ledger manager. He noted that salary payments, including incentive bonuses, should only be made via payroll. Any payment should be accompanied by a petty cash receipt countersigned by the claimant. He also recorded there was evidence that the claimant had incited other team members to delete evidence of the transaction.
- 5.21 By letter of 9 December 2019, the claimant was invited to a disciplinary hearing the purposes was recorded as follows:

**The purpose of this hearing is to discuss your alleged gross misconduct, namely that you have :**

- **Not playing by the rules and acted unethically using £100 Petty Cash as a cash in hand incentive for an employee on Thursday, 21 November 2019 , without appropriate authorization. The outcome of which has resulted in a breach of Cash Handling Policy which outlines that,**

**The maximum amount which may be claimed in respect of any one receipt through the Petty Cash system is £50. Exceptions to this are only to be made with authorisation from both the Area Manager and General Ledger Manager**

**Salary payments should only be paid via payroll, this includes bonus and or incentive payments which are subject to payroll taxes.**

**A Petty Cash spend should be accompanied by a receipt which you as the Practice Manager should sign and provide the cash to the claimant and mark the receipt as paid.**

- **Disregarded Bupa's Bonus and Incentive Scheme using £100 Petty Cash to incentivise a team member outside of ordinary practice and in the absence of clear performance criteria.**
- **Following the use of £100 Petty Cash to incentivise a team member you have incited other team members to delete evidence of this activity, the outcome of which has resulted in a breach of the Bupa Code and Values and falls below the line of behavior expected of a Bupa People Leader.**

- 5.22 The claimant was sent the disciplinary investigation pack and copies of the relevant statements. She was invited to submit any evidence she wished to. She was informed that she may be dismissed. She was informed of the right to bring a colleague or union representative.
- 5.23 At the claimant's request, the disciplinary hearing was adjourned on 11 December 2019.
- 5.24 The disciplinary hearing proceeded on 16 December 2019. The claimant was represented. The notes were taken by Ms B Stiles, who played no part in the decision. The notes were not reviewed or signed on the day of the hearing and were not sent to the claimant, until the appeal hearing.
- 5.25 The disciplinary was undertaken by Ms Kate Moore, area support manager – orthodontics North. Ms Moore concluded that the allegations against the claimant should be upheld. She reached a number of conclusions. The claimant had breached the BUPA cash handling policy by using £100 petty cash to incentivise a team member, without appropriate authorisation. This was a transaction outside the ordinary salary payment process and was made without payroll authorisation. The claimant had failed to sign and mark the associated receipt for petty cash. The claimant had knowledge and understanding of the policy. The claimant had breached the BUPA bonus and incentive scheme rules by offering an incentive outside the ordinary annual process, without confirming contractual eligibility. Despite allegedly agreeing criteria on 17 October 2019, the claimant had failed to seek appropriate authorisation to implement the process outside the ordinary annual contractual entitlement. Further, the criteria claimed to have been used were neither clear at the time nor made clear thereafter. The claimant's conduct amounted to inappropriate management and thereafter the claimant had instructed a team member to cover up the breach once concerns were

raised. The claimant's putting £100 of her own money into petty cash had been an effort to balance the banking from the previous week, and the claimant had failed to escalate the breach to the operations audit manager in accordance with the policy. The claimant had failed to demonstrate compliance with the BUPA code and key BUPA values, in particular by describing the events as a misunderstanding, claiming negligence, and seeking to displace accountability. She rejected the claimant's assertion that the incentive had been discussed or agreed on 17 October 2019, or that it been authorised by the area manager.

- 5.26 Ms Moore dismissed the claimant; the claimant was given a right of appeal.
- 5.27 The claimant exercised her right of appeal. The claimant's appeal form refers to four matters, but they are recorded in a confusing matter, they lack coherrence, and are difficult to understand.
- 5.28 The appeal came before Ms Mary Archer who is currently area manager for London and Surrey and has been since 16 December 2019. She was appointed to this position after the material events and had not been previously involved. It is apparent that Ms Archer considered the four points raised by the claimant; she clarified them as far as she could, and she dealt with them in her appeal letter of 27 January 2020.
- 5.29 At the commencement of the appeal hearing on 17 January 2020, it was noted that the claimant had not received the disciplinary notes. They were provided to the claimant and she was given an opportunity to adjourn to read them. The claimant chose not to adjourn. That offer to adjourn was repeated later in the hearing. Thereafter, the claimant was given an opportunity to write in with any further observations. The claimant did not dispute the veracity of the disciplinary notes either at the appeal, or at any time thereafter.
- 5.30 Ms Archer considered the four points raised and clarified them with the claimant at the appeal hearing. Her letter refusing the appeal details her understanding of the four points relied on. The claimant has not suggested that Ms Archer misunderstood the nature of the appeal points.
- 5.31 Ms Archer concluded that the appeal should not be allowed. She rejected the claimant's allegation that she had been treated unfairly because the cash handling policy did not specifically refer to bonuses, albeit it referred to salaries. She noted that the cash handling policy only allowed cash payments of £50 in any event and there had been a failure to seek authorisation from both the area manager and the general ledger manager as required.
- 5.32 She rejected the claimant's allegation she had been wrongly accused of theft. She noted the allegation was not one of theft but reiterated the cash handling policy had been breached when the claimant authorised, without authority herself, the use of £100 from petty cash. Further, the evidence

indicated she had then asked the team member to delete or remove the relevant entry.

- 5.33 The claimant questioned the bonus and incentive schemes, and the fact that none applied to receptionists. Ms Archer did not see this as a legitimate ground of appeal. She noted that there were local schemes, but they were authorised and the employees were rewarded with vouchers and not cash payments.
- 5.34 The final point concerned the claimant's allegation that she had been unreasonably questioned having had no previous disciplinary record or warnings. Ms Archer reviewed the evidence and concluded the claimant had not established, as she alleged, that she had sought authority from her area manager for the incentive scheme. Further, she had not gained authority from either the area manager, or the general ledger manager, the payment of £100. She did not find any questioning to be unreasonable.
- 5.35 In the circumstances, she found the claimant's previous unblemished record was not, in itself, sufficient to prevent dismissal. It is clear that Ms Archer remained concerned by the failure to gain authority followed by the inciting of members of the team to cover up the original payment. She concluded that the appeal should be dismissed.

#### The policies

- 5.36 There is a cash handling policy. The claimant accepts that she has good knowledge of it and that she signed the policy on 3 May 2019. The policy provides that all practice managers must sign it and must adhere to it. Section 5 provides that all cash discrepancies must be logged and reported to the area manager. The area manager must then report the matter to the regional operational auditor. Section 7 deals with petty cash. There is a limit on a single transaction of £50. Any sum above that must be reimbursed to the staff by expense claim or via an invoice. It is not to be used to pay salaries. There may be exceptions, but only when authorised by both the area manager and the general ledger manager. Section 7.2 sets out the need for any cash spend to be fully described and receipted. The person making the claim must ensure that a receipt is obtained. The receipt must be logged and a description must be given.
- 5.37 The policy refers to banking, but I do not need to give the detail of that.
- 5.38 Section 1 of the policy confirms that any failure to comply with the procedure or negligent failure to complete a procedure may result in disciplinary action, including termination of employment.
- 5.39 At the material time the respondent had incentive schemes which did not cover receptionists, but I need give no detail. Following the material events, a further incentive scheme has been instigated, which does allow



payments to receptionist. The claimant was not responsible for that scheme.

The claimant's contract

5.40 The claimant contract provides, at section 21, that the respondent is entitled to dismiss without notice or payment in lieu of notice for any serious breach of the claimant's obligations as an employee.

The law

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

6.2 **Abernethy v Mott Hay and Anderson** [1974] IRLR 213, [1974] ICR 323 describes a reason as follows:

**A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee.**

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

6.4 In considering the fairness of the dismissal, the tribunal must have regard to the case of **Iceland Frozen Foods v Jones** [1982] IRLR 439 and have in mind the approach summarised in that case. The starting point should be the wording of section 98(4) of the Employment Rights Act 1996. Applying that section, the tribunal must consider the reasonableness of the employer's conduct, not simply whether the tribunal consider the dismissal to be fair. The burden is neutral. In judging the reasonableness of the employer's conduct, the tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer. In many, though not all, cases there is a band of reasonable responses to the

employee's conduct within which one employer might reasonably take one view and another quite reasonably take another view. The function of the tribunal is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within that band, the dismissal is fair. If the dismissal falls outside that band, it is unfair.

- 6.5 The band of reasonable responses test applies to the investigation. If the investigation was one that was open to a reasonable employer acting reasonably, that will suffice (see **Sainsbury's Supermarkets Ltd v Hitt** [2003] IRLR 23.)
- 6.6 Under section 207 Trade Union and Labour Relations (Consolidation) Act 1992 breach of any relevant code may be used as evidence of unfairness and should be taken into account by the tribunal. The relevant code is the ACAS code of practice 1: Disciplinary and grievance Procedures 2015. ( the ACAS code).

#### Breach of contract by employee

- 6.7 If the employee is in repudiatory breach of contract, the employer may affirm the contract or the employer may accept the breach and treat the contract as terminated. In the latter case, the employee will be summarily dismissed. If the employee's breach is repudiatory and it is accepted by the respondent the employee will have no right to payment for his or her notice period.
- 6.8 In order to amount to a repudiatory breach, the employee's behaviour must disclose a deliberate intention to disregard the essential requirements of the contract **Laws v London Chronicle (Indicator Newspapers) Ltd** 1959 1WLR 698, CA.
- 6.9 The degree of misconduct necessary in order for the employee's behaviour to amount to a repudiatory breach is a question of fact for the court or tribunal to decide. In **Briscoe v Lubrizol Ltd** 2002 IRLR 607 the Court of Appeal approved the test set out in **Neary and another v Dean of Westminster** 1999 IRLR 288, ECJ where the special Commissioner asserted that the conduct "must so undermine the trust and confidence which is inherent in the particular contract of employment that the [employer] should no longer be required to retain the [employee] in his employment." There are no hard and fast rules. Many factors may be relevant. It may be appropriate to consider the nature of employment and the employee's past conduct. It may be relevant to consider the terms of the employee's contract and whether certain matters are set out as justifying summary dismissal. General circumstances, including provocation, may be relevant. It may be appropriate to consider whether there has been a deliberate refusal to obey a lawful and reasonable instruction. Clearly, dishonesty, serious negligence, and willful disobedience may justify summary dismissal, but these are examples of

the potential circumstances, and each case must be considered on its facts.

### **Conclusions**

- 7.1 It is for the respondent to establish its reason for dismissal. The reason is a set of facts known to the employer, or it may be of beliefs held by the employer, which causes the employer to dismiss the employee. The entirety of the matrix of fact and belief may constitute the reason. In considering the reason, I must consider the belief of the person who dismisses. There is no suggestion in this case that the person who was dismissed was influenced by the motive of another.
- 7.2 The claimant was dismissed by Ms Moore. There are a number of key facts and beliefs which formed the basis of the reason for the dismissal. I should summarise them. She believed the claimant knew that there was no incentive scheme for any receptionist and that such a scheme would require authorisation. She believed the claimant understood the cash handling policy prevented payment out of petty cash of more than £50 per item, without the approval of both the area manager and the general ledger manager. She did not accept the claimant had sought authorisation, at any time, for the incentive scheme, or had obtained authorisation for payment of any bonus from petty cash. She believed that the claimant had directed a colleague, Ms Ferradosa, to alter the records by deleting information, instead of reporting the matter, as required by the cash handling policy. She believed the claimant had used her own money to balance the cash when banking. She believed the claimant had authorised payment of £100 from petty cash to Ms Pirouzi. She believed the claimant had not applied any existing incentive scheme.
- 7.3 The claimant has not sought to allege that Ms Moore did not hold any of those beliefs. It is clear that Ms Moore did believe that the conduct as described above occurred. I accept that the respondent has discharged the burden of establishing a reason. As that reason concerned the unauthorised conduct of the claimant, the reason related to the claimant's conduct.
- 7.4 It is necessary to consider, the burden being neutral, whether the respondent had reasonable grounds to sustain that belief, and whether at the stage when the respondent formed that belief on those grounds, it had carried out as much investigation into the matter as was reasonable in all the circumstances.
- 7.5 I should consider each of the relevant facts and beliefs relied on.
- 7.6 The claimant did not suggest that she believed there was an incentive scheme covering the receptionist. She accepted at all times that she had instigated and implemented a scheme. No further investigation was necessary.

- 7.7 The claimant implicitly accepted that she needed authorisation, and appeared to argue that she had received it. The claimant did not suggest that she did not understand the cash handling policy or her obligations under it. There was no need for further investigation of these matters.
- 7.8 There was dispute as to whether she received authorisation. The claimant did not suggest any further line of enquiry. The only argument advanced by the claimant was that authorisation had been given by her manager, Ms Reilly, on 22 October 2019. The claimant did not allege that there was any written confirmation. The claimant failed to give any detail, either at the investigation stage or at the disciplinary stage. She failed to give detail of the actual incentive scheme implemented. She did not explain what discussion she had with Ms Reilly, or when. She did not confirm what had been agreed with Ms Reilly. In short, the claimant gave no proper detail or account.
- 7.9 Mr Snuddon had identified that Ms Reilly was the person said to have given authority. He telephoned her and was told that no authority had been given. I do not accept the claimant's contention that this is not an interview. The form of interview is not relevant. The question was simple; the answer unequivocal. There was nothing further for Ms Moore to investigate. There was no suggestion that there was any contemporaneous documentation, or oral evidence, which would confirm that there had been authorisation. Ms Moore was entitled to take account of the claimant's failure to produce any supporting written documentation. In the absence of any evidence contradicting Ms Reilly's denial, there was no further reasonable line of enquiry. The investigation was sufficient to support Ms Moore's belief that no authorisation had been given.
- 7.10 The claimant told Ms Moore that she had authorised the payment of the £100. Whilst I note the claimant has resiled from that position before me, Ms Moore was entitled to accept the claimant's admission on face value.
- 7.11 Ms Moore had evidence that the claimant had sought to hide the claimant's authorising of the £100 cash payment. The investigation had identified the email from Ms Mikuleviciute which complained about the claimant authorising payment. The investigation identified the email from Ms Ferradosa of 25 November which stated that the claimant had referred to being investigated for potential bribery and that the claimant asked Ms Ferradosa to delete the relevant information. In addition, the claimant admitted that she had put £100 of her own cash into the petty cash tin in order to ensure there was no cash discrepancy. Relevant interviews had been undertaken at the investigation stage. The only further line of enquiry was to ask for the claimant's explanation. The claimant identified no further lines of legitimate enquiry. Ms Moore was entitled to view the claimant's explanation with scepticism. There was a clear obligation to report the discrepancy. The claimant had failed to report the discrepancy. Instead she had taken action which would potentially have covered up, and reversed, the process that she had authorised. There was no good reason for the claimant doing so. Ms Moore was entitled to reach a

conclusion based on the evidence before her. She was entitled to take the view that the claimant had not established any legitimate explanation and that no further enquiry was required.

- 7.12 The claimant accepted that she had not applied any existing scheme. She implicitly accepted that authority was needed, as she claimed to have received it from her line manager.
- 7.13 It follows that Ms Moore had reasonable grounds to sustain all her key beliefs and at the time when she formed those beliefs the investigation that had been undertaken was one which within the band of reasonable investigations open to a reasonable employer.
- 7.14 It is necessary to consider whether the dismissal was within the band of reasonable responses. In considering that, it is appropriate to take account of the claimant's length of service and her previous good conduct. However, it is also necessary to weigh in the balance the nature of the misconduct, and any explanation for it. In reaching the decision, it is reasonable for the employer to have regard to the totality of the conduct in question.
- 7.15 It is not for me to substitute my view. I must ask whether this respondent's response was outside the band of reasonable responses. The claimant's incentive scheme was unclear. Nevertheless, it is clear it was discussed to some extent with the team, albeit there is some evidence that the team were not clear about the parameters. However, there was ample evidence that the claimant had failed to seek authority from her general manager for her scheme, or even explain the nature of the scheme. At all times it remained unclear why the claimant chose to use petty cash. It is unclear why the claimant failed to realise that the payment could be interpreted as salary, and was therefore taxable. It is difficult to understand how an experienced manager would not have, at the least, checked to see if the bonus should be paid as salary. The claimant knew if it were salary, it should never be paid from petty cash. It is surprising that she did not seek to clarify the position. Nevertheless, it may be possible, having regard to the fact that the claimant did not appear to be seeking any personal gain, to believe that she had made some form of naïve but honest mistake. It is clear the cash handling policy was breached, but it is arguable that not all breaches would render a dismissal within the band a reasonable responses. However, I consider the fact that the claimant did not appear to be transparent about the discussion she had with Ms Reilly and the fact that she then appeared to take action which could, at the least, be interpreted as a deliberate attempt to cover up her original actions in authorising payment at petty cash are both relevant to the respondent's consideration. In particular, there was clear evidence that the claimant attempted to obscure the fact of the decision and the initial authorisation of payment out of petty cash. The evidence came from her colleagues email and from the fact the claimant had put in her own money to ensure that the money paid into the bank was not short by £100. It is possible that her action was the panicked response of

someone who had realised she had made a mistake. But the mistake was not a potential error at the point of banking, as the claimant has sought to argue before me, it was the initial wrongful authorising of the payment. It could also be interpreted as an act of dishonesty. Moreover, it was a clear breach of policy.

- 7.16 The claimant then sought to maintain her position. She sought to argue that she had obtained authority, but that argument was not sustainable. She did not accept that she had sought to hide her mistake. Had she accepted her error and had she indicated she would not repeat the mistake, the respondent may have been persuaded there was no attempt at personal gain and no deliberate dishonesty; however, the claimant did not take this approach and the respondent was entitled to take all the circumstances into account. In all those circumstances, I cannot say that it is outside the range reason responses to dismiss.
- 7.17 The claimant makes a number of procedural challenges and I should consider them.
- 7.18 She complained she was not allowed a companion at the investigation. That is neither a breach of the respondent's policy, nor the ACAS code.
- 7.19 She alleges that a note taker was not present physically. There is no reason why the notetaker needs to be present in person, albeit this would generally be better. I cannot see it as a breach of procedure which creates unfairness.
- 7.20 The claimant complains that she was not given notes of either the investigation or disciplinary until after the relevant hearing. There is no requirement in the respondent's policy to give the notes at the hearing, and I do not see it as a breach of the ACAS code of practice. The purpose of producing a signed notes is to allow the employee an opportunity to review them and dispute them. Ultimately, the claimant had that opportunity and raised no specific dispute.
- 7.21 The claimant says that the grounds for dismissal were uncertain. That argument is unsustainable. The allegations she faced were set out clearly in the letter inviting her to the disciplinary hearing. It is clear that paragraph 9 of the ACAS code of practice was complied with (which requires the employee to be informed adequately of the alleged misconduct). Moreover, the letter terminating her employment considered carefully the allegations as identified in the invitation to the disciplinary hearing; it came to relevant conclusions and explained them. I do not accept the grounds for dismissal were uncertain.
- 7.22 Before me, the claimant appeared to indicate that Ms Archer was not independent. I reject that argument. Whilst she may have become area manager for London Surrey, at the material time she was not involved and I am satisfied that she was independent.

- 7.23 The claimant complains that not all her team were interviewed. That was not a complaint that she pursued at any stage of the disciplinary process. A respondent is required to undertake a reasonable investigation. It is open to an employee, at any stage of the proceedings, to ask that individuals be interviewed. Whether a failure to interview any specific individual will lead to a finding of unfairness will depend on the nature of the potential evidence they could give. If such a failure is to be pursued as an allegation of unreasonableness, the claimant should make some effort to both identify which specific individuals were not interviewed, and explain why their potential evidence would have made any difference. The claimant has failed to do give the explanation. It is clear to me that the key relevant individuals were interviewed.
- 7.24 It is alleged that Ms Reilly was not interviewed, as the discussion was over the telephone. I do not agree. Ms Reilly was asked to confirm whether there had been any agreement for the incentive scheme as devised by the claimant. This was a simple, single issue. The interview was adequate.
- 7.25 The claimant alleges that there was a failure to agree the appeal notes. I do not consider any failure to send them earlier led to any unfairness. Ms Archer set out her conclusions clearly and adequately in the appeal outcome. It was open to the claimant, before the tribunal, to dispute any aspect of Ms Archer's findings. There was no direct dispute. Even if the notes had never been sent, absence of the notes did not materially affect the claimant's ability either to present her case to the employer, or to present her case to the tribunal. In any event, the claimant has not sought to suggest that any part of the appeal note is materially inaccurate. The claimant says the appeal hearing note is unsigned. That does not materially affect the fairness of the procedure or the decision. A tribunal should be careful to consider any alleged procedural difficulty in context, and should consider whether, in context, it led to unfairness.
- 7.26 The claimant does not specifically allege that the appeal was in itself unfair. The respondent does not allege that the appeal rectified any unfairness in either the investigation or the disciplinary. It is possible that an unfair appeal process could render an otherwise fair dismissal unfair. However, there is no basis in this case are saying that the appeal process was unfair. The claimant's appeal was unclear. It is apparent that Ms Archer took time to identify what were the specific four points the claimant was raising. She explored those with the claimant during the appeal meeting. She set out, in detail, her response. This was not a rehearing of the disciplinary decision. She was reviewing the specific points of appeal raised by the claimant. She did so accurately, reasonably, and diligently. She explained in detail the reason for her decision. She was entitled to reach the conclusion that the decision to dismiss had been fair.
- 7.27 Finally, I turn to the wrongful dismissal claim. I have to decide if the claimant was in breach of contract.

- 7.28 I am satisfied that the claimant understood the cash handling procedure. She had signed it. She told me in the hearing that she had a good knowledge of it. For an unrelated matter, she had been reminded in September 2019 that she could not authorise more than £50. She authorised payment of £100. In order to do so she knew she needed the approval of her line manager and the general ledger manager. Her evidence fell short of stating that she had specific authority from either. Before me, she referred to explaining the incentive scheme and receiving no objection from her line manager, which she interpreted as “deemed” authorisation. This falls far short of the authorisation as envisaged by the policy. I am satisfied that she authorised payment of the £100. Moreover, she then went on, when she realised there was a potential breach, to take action which was not authorised by the policy. At the very least, she sought to obscure the position by putting her own money into the petty cash when banking it. Section 5 of the cash handling policy is clear, the discrepancy should have been reported to the area manager and then escalated. She was aware that breach of this policy may lead to dismissal. I am satisfied that her action was a breach of contract.
- 7.29 I have regard to the policy itself which indicates that breach may lead to termination of employment and I have regard to her contract which allows for termination without notice. It is not every breach of contract which will allow the employer to terminate the contract. However, breaches of the cash handling policy are likely to be seen as fundamental. There is no requirement for there to be dishonesty. I accept that the claimant was not seeking any fiduciary gain for herself. It appears that her action may have been naïve and misguided.
- 7.30 I should also take into account her response after the event. Had she accepted, at any point, that her conduct was inappropriate, it may have influenced my view as to the seriousness of the breach. However, it appears the claimant, at best, sought to mislead the investigation about the agreement she had with her manager. It also appears that she deliberately sought to cover her action, particularly by paying her own money into the bank. In those circumstances, I have reached the view that the breach was fundamental and the respondent was entitled to treat it as such and terminate her employment.
- 7.31 It follows that the claims of unfair dismissal and wrongful dismissal fail.

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Employment Judge Hodgson  
Dated: 22 December 2020

Sent to the parties on:  
20/08/2021

For the Tribunal Office