EMPLOYMENT TRIBUNALS

Claimant: **Mrs M Jalloh**

Respondent: **Tesco Stores Limited**

Heard at: **London South Employment Tribunal by CVP**

On: **28 and 30 June 2021**

Before: **Employment Judge Braganza**

Representation:
Claimant: **Mr Rowan, FRU representative Respondent:**
Miss Wheeler, Counsel

JUDGMENT

It is the judgment of the Tribunal that:

1) The Claimant's claim for unfair dismissal succeeds.

2) The Claimant contributed to her dismissal and the compensation due to her is to be reduced by 10% in accordance with sections 122(2) and 123(6) of the Employment Rights Act 1996.

3) A remedy hearing will be held at **10am** on **8 October 2021** by CVP with a time estimate of 1 day. The parties are to write to the Tribunal promptly, if the remedy hearing is no longer needed.

REASONS

1. By a claim form presented to the Employment Tribunal on 2 August 2019 the Claimant claimed unfair dismissal. At the time of her dismissal she was employed

as a Combined Service Desk Assistant and had been employed by the Respondent from 27 November 2001 to 8 May 2019.

2. The Respondent contested the claim. It relied on the Claimant having been fairly dismissed for gross misconduct.

The Hearing

3. The hearing was conducted remotely via video using the Cloud Video Platform (CVP), as a result of the COVID-19 pandemic. All parties were able to see and hear each other clearly and were able to participate fully in the proceedings. I was satisfied that the open justice principle was secured and that no party was prejudiced by the fact that the hearing was heard remotely.

4. The Tribunal was presented with a bundle of 263 pages and an additional bundle of 49 pages, which included the witness statements. The Claimant also provided an updated schedule of loss and a skeleton argument.

5. The Claimant gave evidence on her own behalf. Within the additional bundle, she provided witness statements from two further witnesses. Mr Rowan confirmed that he would not be relying on those statements as the witnesses were not attending. In those circumstances I did not consider their content.

6. The Respondent gave evidence through Mr Peebles, Lead Trade Manager and the disciplining officer, and Mr Chatwal, Store Manager, who dealt with the Claimant's appeal.

7. The Claimant relied on a second witness statement, which was included in the additional bundle. Prior to the hearing, the Respondent had objected to the Claimant relying on this second statement and applied for its inclusion into the evidence to be refused.

8. In response, on 9 October 2020 Employment Judge Ferguson directed that in the absence of any prior application from the Claimant and further order from the Tribunal, it would be a matter for the Employment Judge at the final hearing to determine whether the Claimant could rely on the new witness statement. It was noted that there was sufficient time for the Respondent to produce additional witness evidence, if it considered it necessary to do so before the final hearing. It would be open to the Respondent to make an application for its costs of doing so if it considered the threshold was met.

9. At the hearing, Miss Wheeler confirmed that the Respondent no longer objected to the second statement being admitted and relied on the statement to invite the Tribunal to find that the Claimant was not a credible witness. The Tribunal admitted the statement.

10. At the end of the evidence, the parties' representatives made oral submissions. Having considered all the evidence and the submissions, I gave judgment with my summary reasons. These reasons are provided at the Respondent's request.

11. I am grateful to Miss Wheeler and Mr Rowan for their assistance and to all those attending for accommodating an unplanned, second day of the hearing so soon after the first.

The Issues

12. The following issues arise:

    a. What was the reason for the dismissal? The Claimant contended it was for redundancy reasons. The Respondent relied on conduct.

    b. Was the reason a potentially fair reason within section 98 of the Employment Rights Act 1996 (ERA)?

    c. Applying the test in *British Home Stores v Burchell* [1980] ICR 303:

        i. Did the Respondent have a genuine belief that the Claimant had committed the misconduct?
        ii. Did the Respondent have reasonable grounds for that belief? iii. At the time the Respondent held that belief, had it carried out a reasonable investigation?

    d. Was dismissal within the range of reasonable responses and was it fair or unfair in all the circumstances, having regard to the size and administrative resources of the Respondent?

    e. If the dismissal was unfair, should the compensation awarded to the Claimant be reduced on the basis that had a fair procedure been adopted, she would nevertheless have been dismissed (the *Polkey* reduction)?

    f. If the dismissal was unfair, should the compensation awarded to the Claimant be reduced on the basis of the Claimant's contributory fault?

13. Although the Polkey and contributory conduct issues concerned remedy and would only arise if the Claimant's claim for unfair dismissal succeeded, I agreed with the parties that I would consider them at this stage and invited them to deal with them in evidence and submissions.

The Law

14. The test for determining the fairness of a dismissal is set out in section 98 ERA:

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

15. Under s98(2)(b) a potentially fair reason is one that relates to the conduct of the employee.

16. Section 98(4) provides as follows:
"(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."

17. The employer bears the burden of proving the reason for dismissal whereas the burden of proving the fairness of the dismissal is neutral.

18. It is established law that the guidelines contained in *British Home Stores Ltd v Burchell* [1980] ICR 303, endorsed in *Foley v Post Office* [2000] ICR 1283 apply to conduct dismissals. An employer must (i) establish the fact of its belief in the employee's misconduct. There must (ii) be reasonable grounds to sustain that belief and (iii) after a reasonable investigation. A conclusion reached by the employer on a balance of probabilities is enough. It is also established law that the *Burchell* guidelines are not necessarily determinative of the issues posed by section 98(4) and also that the guidelines can be supplemented by the additional criteria that dismissal as a sanction must also be within the range of reasonable responses, also with a neutral burden of proof, *Boys and Girls Welfare Society v McDonald* [1997] ICR 693, EAT.

19. It is for the Employment Tribunal to decide whether, in the particular circumstances, the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted, *Iceland Frozen Foods Ltd v Jones* [1982] IRLR 439. The band of reasonable responses applies to both the procedural and substantive aspects of the dismissal, *Sainsburys Supermarket Ltd v Hitt* [2003] IRLR 23 CA. A Tribunal must confine its consideration of the facts to those found by the employer at the time of the dismissal. It must adopt an objective standard and must not substitute its own view for that of the employer.

20. In *Polkey v AE Dayton Services Ltd* [1987] IRLR 503, HL, it was held that in considering whether an employee would still have been dismissed even if a fair procedure had been followed, there is no need for an all or nothing decision. If the Tribunal thinks there is a doubt whether or not the employee would have been dismissed, this element can be reflected by reducing the amount of compensation by a percentage representing the chance the employee would still have lost his or her employment. In *Software 2000 Ltd v Andrews* [2007] IRLR 568 the EAT set out the principles that in assessing compensation the task of the tribunal is to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice. The Tribunal must have regard to all the evidence when making that assessment, including any evidence from the employee. The evidence may be so unreliable that the Tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on the evidence can properly be made. The Tribunal should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been, and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence.

21. The Tribunal may reduce the basic or compensatory awards for contributory conduct under s122(2) and s123(6) ERA. Section 122(2) provides: “Where the tribunal considers that any conduct of the complaint 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”. Section 123(6) provides: “Where the tribunal finds the dismissal was to any extent caused or contributed to by any action of the claimant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.”

Findings of fact

22. I made the following findings of fact on the balance of probabilities.

23. The Claimant commenced employment with Tesco Stores Limited on 27 November 2001 at its Catford branch. She was summarily dismissed on 8 May 2019, at which time she had been employed as a Customer Service Desk Assistant.

24. The Respondent, Tesco Stores, has over 3,400 stores in the UK and employs around 300,000 staff. It also operates distribution centres throughout the UK.

25. Throughout her employment, and as accepted by the Respondent, the Claimant provided what is described by Mr Rowan as “impeccable service”.

She had an unblemished record with no disciplinary action taken against her. The appraisals I have been provided with are very positive. There was some initial disciplinary process that was initiated against the Claimant in 2018 but that did not result in any disciplinary action.

26. On 27 March 2019 the Claimant was invited to attend an investigatory meeting concerning the misuse of her Clubcard. The Respondent's HUB security team had referred the possible misuse by the Claimant of her Clubcard for an investigation on 25 March 2019. The investigation pack included a number of stills of CCTV footage, which show the Claimant with different colleagues at her desk. Mr Peebles, the disciplinary officer, only had pages 7,8,9 and 10 of the HUB investigation pack as the other pages were not passed to the investigating manager.

27. The investigatory meeting was conducted by Miss Anita Osei, General Assistant, who referred the matter to a disciplinary hearing. At this stage there were two sets of allegations against the Clamant: (1) that the Claimant had asked colleagues to add Clubcard points to her Clubcard while she was working, as opposed to when she was off work. That occurred on 26 February 2019 and 5 March 2019 and two different colleagues scanned her card for her. The value of the points amounted to £4.25 and 26 points, each point representing a penny. (2) The second allegation concerned an incident on 8 March 2019 when the Claimant allowed a customer to use her Clubcard discount, for the customer's benefit, while the Claimant was working. The Claimant gave her phone with her card app to her line manager, Ms Fraser, who scanned her phone so that the customer benefitted from the Clubcard's discount.

28. The terms and conditions for use of the Clubcard are set out at page [33] of the bundle onwards. The Respondent's policy permits an employee use of the Clubcard and a second card for use by a family member. A family member is defined as including any relative, partner, civil partner, spousal carer over 18 and living permanently at the employee's address [35].

29. At page [41] restrictions on the use of the Clubcard detail that the "Clubcard can only be used by the person named on the card. Purchases must be for personal use. Items bought can be shared with friends or may be a gift." Under the section headed "Breaches" it sets out that any abuse of the card is taken "very seriously" and that an employee in breach of the terms "depending on the circumstances …may be liable to disciplinary action which could include summary dismissal."

30. The policy provides that in respect of disciplinary action [44], the Respondent adopts an informal approach and believes that "talking to each other honestly and respectfully is the best way of resolving the vast majority of problems at work therefore, in many situations, your manager will discuss any areas of concern: Informally and regularly, identifying where there are opportunities for you to improve and learn. To support you in identifying the most appropriate

solution to help. To explain the improvement needed and how this will be measured." It goes on to set out when matters will be investigated and result in further disciplinary action. At page [47] paragraph 9 sets out that possible outcomes for disciplinary action may include a first written warning, second final written warning and, if there is no improvement, dismissal. It states "If the offence is a serious gross misconduct issue" the offender "may be dismissed for a first offence."

31. As to the appeal process [48], the policy sets out that the outcome will depend on factors, including "the severity of the issue(s)", whether there have been "previous warnings", "how much relevant training" the individual received, their "attitude, conduct or honesty during the disciplinary hearing". "In any situation, the disciplinary manager may decide to offer where appropriate coaching; training and adjustment to working times/work environment."
32. Page [48] sets out what is described as a "non-exhaustive list of serious breaches of Tesco rules/ standards that are likely to constitute gross misconduct". These include "Using Clubcard points or vouchers intended for someone else".

33. There is a "Colleague Shopping Procedures Brief" [52] which was signed by the Claimant on 8 March 2019. That sets out that "During your shift. You must not have cash, credit cards, colleague clubcards or personal belongings with you whilst working… You must not shop during working hours… Checkout and Counter colleagues must not serve family/friends and must not prepare goods for their own purchases."

34. At page [53] an unsigned and undated document headed "Non-Negotiables" refers to "Clubcard Points/ Privilege Card. Re-entry of clubcard points must ONLY be done by a Manager. If the customer does not have a clubcard cashiers MUST NOT use their own card."

35. On 4 May 2019 the Claimant attended an investigatory meeting. The purpose of the meeting is set out in a letter to the Claimant dated 3 May 2019 [150]. It was to "discuss allegations of Misuse/ abuse of Tesco Clubcard". There is no further detail in the letter. The meeting was conducted by General Assistant, Ms Osei.

36. The investigation pack refers to the following as "key issues" [153]: "Adding points to your discount card whilst on tills on two occasions (First occasion). Second occasion allowing a customer to use your colleague club card whilst you were on tills."

37. The Respondent accepts that when it came to the appeal, only the second of the allegations resulted in the decision to dismiss.

38. The concern as to the first allegation was that the Claimant had had her points transferred on to her card from two of her previous receipts while she was on the employee side of the customer service desk rather than on the customer

side. The concern as to the second allegation was that she had permitted a customer use of her Clubcard. I find, and there is no dispute, that on the first two occasions, the points were added by the Claimant's colleagues on her request. On the second occasion her manager scanned the Claimant's card through the Claimant's phone for the customer's use. I also find, and again there is no dispute, that at no time whether for the investigation, disciplinary or appeal meeting did the Respondent make any enquiries of the Claimant's colleagues as to the circumstances surrounding their assisting the Claimant or the Claimant's conduct at the time.

39. The outcome of that investigation meeting is set out at page [157]. The Claimant was sent to a disciplinary hearing for breaching company policy. It is important to set out how the investigating officer considered the circumstances of the allegations and the Claimant's conduct at this first meeting.
40. There was no dispute as to the accuracy of the notes of the meetings and I accept their content. The Claimant admitted at the outset that she had been wrong. She apologised and gave the assurance that this would not happen again. [161] She also raised that just as a colleague had assisted her, she had assisted other colleagues in the past with their discounts [162-163].

41. On the second allegation of 8 March 2019 the Claimant replied that the customer was a family member and that she did not think she had done anything wrong at the time. Again, she apologised and assured Ms Osei that it would never happen again [164-165]. She explained that she only had a "basic knowledge" of the terms and conditions of the Clubcard and understood that she was required to be present when the card is being used [165]. Ms Osei explained the terms to her and the Claimant confirmed that she did not know them at the time. At the end of the meeting Ms Osei assured the Claimant that she accepted that the Claimant had made "*a genuine mistake*" because she did not realise that what she was doing at the time was wrong. Ms Osei concluded that she would have to refer the matter to a disciplinary meeting because the policy was breached in error [166]. Ms Osie explained that this did not mean a disciplinary meeting would have "*very severe outcomes*" but that there were "*several outcomes*" [166].

42. Mr Peebles conducted the disciplinary meeting on 8 May 2019. Mr Peebles only had part of the CCTV images. At the meeting, the Claimant repeatedly accepted that what she did was wrong, and explained that she did not realise this at the time, apologised and said that she would not do it again. The CCTV showed that two colleagues had scanned her points onto her card while she was working. Her line manager, Ms Fraser, had scanned her card for the customer purchase. No enquiry was made of the other two colleagues who first scanned the Claimant's card or, more importantly, of the Claimant's line manager, Ms Fraser, to establish her input into providing the context for how the matter came about. That was an obvious line of enquiry to have followed up, particularly when the Claimant faced the prospect of summary dismissal after 17½ years' service.

43. At the same time that the Claimant faced disciplinary action in respect of the second allegation, her line manager, Ms Fraser, was also subjected to disciplinary action concerning the same transaction. It is accepted that the outcome for Ms Fraser was a warning, which was to remain on her file for 52 weeks. There is, however, no other evidence explaining what occurred as regards Ms Fraser's involvement and the reasons for that disciplinary outcome. Ms Fraser was more senior to the Claimant, she was her line manager at the time of the transaction in question and the person who carried out the scanning for the customer. Her input would have been central to assessing the gravity and the circumstances of the Claimant's conduct.

44. Mr Peebles decided that taking everything into account, he would dismiss the Claimant for both sets of allegations: her colleagues scanning her card to enter previous purchases and for allowing a friend's daughter to use her Clubcard. The value of the discount was about £3.50. Both Mr Peebles and Mr Chatwal gave evidence that in their opinion regardless of whether the value were a penny or substantial sums, that was of no relevance to their overall decision.

45. At the disciplinary hearing the Claimant accepted that she should have gone round the other side of her desk in respect of the first allegation before asking her colleagues to scan her cards [183]. She also explained that on the second allegation whilst she had previously said that the customer was a relative, she was a daughter of a friend of hers [184-185]. She did not physically live with her but stayed over and at the time was meeting the Claimant at work [186].She also explained why she had referred to her as family and repeated that she was sorry and that it would never happen again [186].

46. At the end of the meeting Mr Peebles dismissed the Claimant. He decided that the breach of policy was gross misconduct and that whilst he considered the Claimant's apology and show of remorse, the severity of the incident warranted her dismissal [191].

47. The dismissal was confirmed by letter of 8 May 2019 [193] for "1. Allowing other colleagues to add on clubcard points onto your colleague clubcard during your working shift on 2 occasions and 2. Allowing a friend's daughter to use your colleague clubcard on 8/3/19 in breach of the terms and conditions of colleague clubcard." There was no other detail or reasons provided within this letter. The letter did not set out what factors were taken into account.

48. The Claimant appealed the decision on the grounds that the decision was too harsh a sanction and her version of events had not been properly considered [194]. She set out that she had no intention of committing gross misconduct. She was not trying to conceal her activities from her colleagues and was aware of the CCTV cameras. Had she known the detail of the policy, she would not have done this in the presence of her line manager. She relied on other more appropriate sanctions, such as suspending her, issuing her with a final written warning and confiscating her Clubcard for a period of time. She relied on her length of service and exemplary record not having been considered and that

she had been denied the chance to demonstrate that she had learned her lesson and would not repeat the conduct in question.

49. Mr Chatwal conducted the Claimant's appeal at a meeting on 4 June 2019. The notes of this meeting are at [213]. The Claimant was represented at the appeal by a union representative, Mr Peter Chalkin. The Claimant explained the circumstances of the first allegation and that she had been at the desk with a colleague. She had previously purchased petrol and had not had her card with her at that time and asked Sandra to scan her card against the receipt. The Claimant said that had she known this was wrong she would not have done this [215]. On the second occasion she said another colleague had applied the points for her [215]. Mr Chatwal asked her about doing this behind the desk [217] and she said she did not think at the time this was wrong.

50. The Claimant's representative, Mr Chalkin, specifically raised that one of the colleagues who did the transaction was a team leader and asked why they did not stop her at the time [217]. Mr Chatwal replied that everyone would be dealt with separately [217].

51. The Claimant explained that in respect of the second allegation she opened her phone and gave it to Ms Fraser, who then scanned it for her [219]. She explained why she had initially said that the customer was family rather than her friend's daughter [219]. Again, she apologised and repeated that had she known what she did was wrong she would not have done this [219]. There was some exchange as to whether she had done this before [220-221 and 226] but this did not lead to any separate allegation or form part of the reasons for dismissal.

52. Mr Chatwal highlighted to the Claimant that it was her responsibility to read the terms and conditions [221]. He referred to the Colleague Shopping Procedures Brief that she signed on 8 March 2019 to which the Claimant admitted that most of the time she signed without reading. Her line manager, Ms Fraser, had explained what it was, given her the letter to sign, which she signed and returned [225]. It is noteworthy that Mr Chatwal's point must equally apply, if not more so, to the Claimant's manager and the colleagues who assisted the Claimant in scanning her card for her.

53. At the end of the appeal meeting Mr Chatwal gave his decision [229], which was confirmed in his notes [212]. He decided that for the first allegation there could have been a lesser sanction but that the decision to dismiss was upheld on the second allegation as the terms for the use of the Clubcard were clear and the Claimant could only use the card for personal use [228-229]. Mr Chatwal recognised that the Claimant had shown remorse [212].

54. By letter of 7 June 2019 Mr Chatwal confirmed his decision to the Claimant. In similar fashion to the dismissal letter, there is no other detail at all within this letter as to the reasons for the decision or the factors taken into account.

Conclusions

55. I deal first with the second statement provided by the Claimant for the purposes of these proceedings. Within the statement, the Claimant set out for the first time that her line manager spoke to her before the investigatory meeting. The Claimant said that she told her that she (Ms Fraser) had been given a warning for her part in the same transaction giving rise to the second allegation brought against the Claimant and instructed her to say that they served a customer, namely the Claimant's friend's daughter and not a colleague's sister, as was the case. The Respondent relies heavily on this statement as undermining the Claimant's credibility. The Claimant explained in her statement and her evidence why she felt pressurised to follow her manager's instruction. I accept her account. I accept that she relied on Ms Fraser, as her manager, to allow her flexibility with her working arrangements, including time off when needed to attend appointments for her son, who has special needs. I also accept her explanation that she did not raise this before because she did not want to get her line manager into any trouble. The Claimant also set out in her second statement that she received a text message from Ms Fraser telling her she had received a warning, to stay on her file for 52 weeks, from the Respondent. I accept the Claimant's account that she was told by Ms Fraser what to say because of the detail she has given in her second statement and the plausibility of her account. In any event however, it is important to highlight that I am only concerned with the Respondent's decision on the basis of what was known to the relevant decision makers at the time. This information was not known to them.

56. I find that the reason that the Claimant was dismissed was for her conduct. I reject the Claimant's assertion that it was due to a need for redundancies to be made. In March 2019 the Respondent was presented with evidence of potential misconduct by its HUB security team. From the outset, the Claimant admitted to the misconduct, albeit that she said that she did not know this was misconduct at the time. The matter was investigated and led to the dismissal. The Claimant gave evidence of staff cuts but there is no evidence before me to support the Claimant's assertion that the Claimant's dismissal was for any reason other than conduct. I accept the evidence of Mr Peebles and Mr Chatwal in this regard.

57. Applying the test in *Burchell*, I accept that the Respondent had a genuine belief that the Claimant had committed gross misconduct. I find that Mr Peebles, the disciplining officer, had a genuine belief that the Claimant had committed the misconduct in question in respect of both sets of allegations. I also accept that Mr Chatwal had a genuine belief that the Claimant had committed misconduct in respect of the second allegation.

58. Both Mr Peebles and Mr Chatwal were provided with certain CCTV stills of the transactions taking place. The Claimant did not want to see the CCTV footage and accepted that she was wrong to have remained behind the desk when her points were scanned on to her card on the first set of allegations and that she

should not have given her card to her manager to scan for the benefit of a customer, she said was her friend's daughter. The Claimant apologised for her conduct. Mr Peebles expressly recorded that she showed remorse, as did Mr Chatwal. In those circumstances, particularly given the Claimant's admission, both had reasonable grounds to find that she had committed the misconduct.

59. In considering whether the Respondent conducted a reasonable investigation, I find that, aside from the issue as to its failing to make any enquiries of the Claimant's line manager, to which I refer below, the Respondent carried out a reasonable investigation. As set out, as soon as the Claimant was asked about the allegations, she admitted to her misconduct, apologised and assured the Respondent that she would not do this again.

60. I find that the dismissal was unfair in that no reasonable employer would have dismissed the Claimant in all the circumstances, having regard to the particular size and administrative resources of this Respondent. No reasonable employer would have ended the Claimant's unblemished career of 17½ years of loyal service, involving varying levels of considerable responsibility, for this misconduct, when the same conduct involved her line manager and for which the line manager received only a warning.

61. I find that failing to make any enquiries of the colleagues who scanned the card for the Claimant on the two occasions of the first allegation and, crucially, as this was the allegation relied on in dismissing the Claimant's appeal, not speaking to her line manager about the incident in which the line manager proactively carried out the transaction, was a very serious and unfair failing.

62. The Respondent's criticism of the Claimant that she was expected to know the full terms and conditions of the Clubcard must also apply to Ms Fraser, as the manager in a more senior position to the Claimant. She approved the Claimant's conduct when she served the customer, took the Claimant's phone, scanned it for her and carried out the transaction. Ms Fraser was investigated and disciplined but no enquiry was made of the circumstances of that for the purposes of how they might pertain to the Claimant. She received a much lesser disciplinary sanction. It is wholly unclear, and the Respondent was unable to assist me on this, as to the basis on which the Claimant's manager, in her more senior role with greater responsibility and as the person who carried out the scanning of the card, escaped with a far more lenient sanction than the Claimant.

63. It is hard to reconcile how the Claimant was disciplined for not knowing or being familiar with the Respondent's rules whilst her line manager carried out the transaction and only received a warning. As set out, I was not provided with any evidence explaining the discrepancy in treatment between each employee. In evidence, Mr Peebles and Mr Chatwal took the stance that each case is to be considered individually, which echoed the reply that the Claimant was given when she raised her concerns about the inconsistency of treatment in her appeal. That does not answer that the colleagues involved in all of the

transactions will have had information directly relevant to the Claimant's conduct, as they took part in it. That information may, in turn, have been of value in assessing the context of the conduct and certainly how those staff understood and applied Clubcard policy more generally. It may have emerged that staff were not as familiar with the terms as expected, or that the practice amongst staff, including managers, varied from the written terms. It may have emerged that further training and clarification was needed from the Respondent. All of those factors may have informed the relevant sanction for the Claimant.

64. The Respondent's failing in this regard is compounded by the Claimant's repeated expression of remorse from the outset, her reassurances that she would not commit this misconduct again and her explanation that she misunderstood the rules. In addition, she had been employed by the Respondent for 17½ years with no previous disciplinary action. In all the circumstances I find that the failure to consider what the other colleagues and, specifically, her line manager, had to say about the incidents in question, rendered the dismissal outside the range of responses.

65. No reasonable employer would have dismissed the Claimant having regard to the relevant circumstances. These included the Claimant's long and impeccable service of 17½ years with no previous disciplinary record. At the outset, and within the investigatory meeting, the Clamant apologised and said she would not do this again and the investigating officer, Miss Osei, explained that she would have to refer the matter on, albeit she accepted it was a "*genuine mistake*". As set out, there was no inquiry of the colleagues and line manager who seemingly approved the Claimant's conduct and took part in it at the time. The Claimant's attitude throughout was of serious concern to keep her job and one of cooperation in going forward. She repeatedly explained that she should have done things differently and would do so in the future and asked for an opportunity to make that out. Over her long service she had been given significant responsibilities, including the handling of cash and there was no reason to doubt that she had learned her lessons for the future. In addition, I do not accept the view taken by Mr Peebles and Mr Chatwal in their evidence that the value of the transactions is of no consequence. This was clearly a material factor. It cannot be right that an employee who misuses a Clubcard to benefit from a few pennies is to be treated the same as one who benefits by several hundreds of pounds. In addition, as regards the first allegation, which was not pursued on appeal, the misconduct complained of was that the Claimant did not ask her colleague to scan her card while she was on a break or when she was positioned on the other side of the customer desk. I have no evidence as to what happened to the colleagues who participated in this. On the Respondent's policy they also should have been aware that they could not scan the card while the Claimant was standing next to them. Finally, as regards the second allegation, the essence of the misconduct appears to have been that the customer was not a family member of the Claimant's. It is unknown what enquiries her line manager made of her at the time but it is clear that at the time of the dismissal, and appeal, the Claimant explained that the customer was close to her and why she referred to her as family.

66. I find that no reasonable employer would not give an employee considerable credit for 17½ years' unblemished service in circumstances where there were significant mitigating circumstances, such as her immediate apology, show of remorse and the involvement of other colleagues, who either escaped sanction altogether or had a lesser one imposed, notwithstanding their more senior role. I find that in all the circumstances the sanction was too harsh and one that no reasonable employer would have imposed. That is underlined by the far more favourable and inconsistent treatment of the Claimant's line manager.

67. I find therefore that in this case the actions of the Respondent fell outside of the band of reasonable responses and that the decision to dismiss was both procedurally and substantively unfair. For those reasons the claim succeeds.

68. I have considered whether the Claimant would have been dismissed, if a fair procedure had been adopted in accordance with *Polkey*. I cannot say that she would have been. I do not accept that the Respondent is able to say that the outcome would have been the same even had enquiries been made of her line manager, and the other colleagues involved in the initial allegation. Their conduct appears to suggest that the terms of the policy in their practice were not as clear as they could have been. I am reinforced in that view by Mr Chatwal's replies when he was asked in cross-examination about the terms of the policy and he was not entirely clear himself as to the terms on the use of the Clubcard for friends. Had proper enquiries been made and all the circumstances taken into account, including the Claimant's repeated acceptance of her wrong doing and her 17½ years good service, she may have faced a warning, similar to her line manager or not, which, although I have not been given evidence on this, is what may have happened to the other colleagues at the time, and retraining. The failing in carrying out those enquiries is too fundamental to the process to assess that the dismissal would have occurred in any event or a percentage to that effect. It is impossible to predict the outcome had the process been substantively and procedurally fair. I therefore make no deduction on this basis.

69. I go on to consider contributory fault. 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 basic and compensatory award by such proportion as it considers just and equitable having regard to that finding. The Claimant accepted throughout that her conduct was wrong and that she would not repeat it. To the extent that she contributed to her dismissal, I find that in light of all the circumstances of the offence, including the value involved, her colleagues' involvement on the first two occasions, her line manager's involvement on what became the only reason for the Claimant's dismissal, her immediate and repeated apologies and the remorse she showed throughout, that any deduction should be a relatively small one. I assess this at 10% as just and equitable in all the circumstances.

70. For the reasons set out, I find that the dismissal was unfair and that a 10% deduction is to be made of the basic and compensatory award to reflect the Claimant's contributory conduct. The matter proceeds to a remedy hearing on 8 October 2021.

71. The parties are asked that any updated Schedules of Loss are filed and served by 1 October 2021.

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Employment Judge Braganza
Date: 12 September 2021

Sent to the parties on
Date: 20 September 2021

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Michael Chandler
For the Tribunal Office