



EMPLOYMENT TRIBUNALS

Claimant: Mrs C Long

Respondent: Jewels May Ltd

Heard at: Manchester (remotely, by CVP)

On: 20,21, 27 October
2021

12 January 2022
(in Chambers)

Before: Employment Judge Rice-Birchall

REPRESENTATION:

Claimant: T Turton, Family member

Respondent: Mr S Brochwicz – Lewinski, Counsel

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's claim for holiday pay is dismissed on withdrawal by the claimant.
2. The claimant's claim of unfair dismissal fails and is dismissed. The claimant was fairly dismissed by the respondent.

REASONS

Introduction

1. This claim was listed for two days on 20 and 21 October 2021. It went part heard and the Tribunal resumed on 27 October 2021. The Tribunal reserved its decision and sat in Chambers on 12 January 2022.

The Issues

2. It was agreed at the outset of the hearing that the Claimant withdrew her claim in respect of holiday pay.

3. Accordingly, the only claim left to be determined was the claimant's claim of unfair dismissal, in relation to which the issues are listed below.

Unfair Dismissal

4. It was accepted by the parties that the claimant was an employee of the respondent with sufficient qualifying service to bring a claim of unfair dismissal.

5. The issues, therefore, for the Employment Tribunal to determine were:

- (1) whether the respondent had shown a potentially fair reason for dismissing the claimant and, if so
- (2) whether the dismissal was fair or unfair applying the test in section 98(4) of the Employment Rights Act 1996 ("ERA").

6. On point (1) the respondent said it dismissed for a reason relating to conduct, which is one of the potentially fair reasons for dismissal within section 98(2) ERA. The questions therefore for this Tribunal to determine were:

- Did the respondent have a genuine belief that the claimant was guilty of the conduct alleged?
- Did the respondent in fact dismiss for that reason?

7. As to point (2) if the respondent satisfied the Tribunal that it dismissed for a reason related to conduct, the next issue for the Tribunal to consider would be whether, in the circumstances, the respondent acted reasonably or unreasonably in treating the claimant's conduct as a sufficient reason for dismissing her.

8. If the Tribunal found that there was an unfair dismissal, the Tribunal would go on to determine:

- (a) Whether either party unreasonably failed to follow the ACAS Code of Practice on Discipline and, if so, to what extent, if any, should any award of compensation be increased or reduced under section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA).
- (b) Whether the claimant caused or contributed to his dismissal in such a way that it should result in a reduction of any compensation that might be awarded.

- (c) If the dismissal was found to be procedurally unfair, what the percentage chance was that the claimant would have been dismissed fairly in any event had a fair procedure been adopted.

9. Any other issues relevant to remedy would be addressed in evidence and submissions only after a decision had been made as to whether the dismissal was fair.

Evidence

10. The Tribunal had the benefit of a bundle of documents, and was taken to a number of documents within it.

11. All the statements were taken as read. The Tribunal heard the respondent's evidence first.

12. The Tribunal heard evidence from the claimant and from Mrs Kerry Welsh, managing director of the respondent, and Wendy Afonso, Centre Manager of Sarange, Heskin Hall Shopping Village which is where the respondent's shop is located, who acted as the dismissing officer for the respondent.

Findings of Fact

13. The respondent is a luxury jeweller trading and retailing high quality jewellery at one site.

14. The claimant was employed by the respondent as an Assistant Manager. She commenced her employment on 5 October 2017 as a part-time sales assistant and was promoted to Assistant Manager in January 2019, at which point she became a full time employee. She was a trusted employee, who was often left in charge. There was another employee named Tom Roth, who had previously been the Assistant Manager, but resigned and then returned to work as a sales assistant in April 2019. Another employee, Amanda, worked Sundays and would cover from time to time. Mrs Welsh worked in the business and Mr Welsh would work from time to time.

15. The respondent has a system in place when jewellery comes into the shop. It involves marking off items against the invoice and entering them onto the (computer) system. This should (ideally) be done within a week of the stock arriving. The stock is given a code, so that any sales can be correctly identified and logged onto the system. Once stock has been entered, it goes on display in the shop. The respondent has a number of suppliers including Cavendish French; Jonathan Lynne; and Banyan. Items from different suppliers are kept separate.

16. High value stock is always packed away at the end of the day to ensure safety and security. It is only insured if it is stored correctly.

17. On Friday 21 February 2020 at around 5pm, the claimant, Malcolm Welsh (Kerry Welsh's husband) and Tom Roth were packing away the high value stock. Kerry Welch went into the back of the shop to put some empty jewellery stands away, but as the shelf was full, she put them in the drawers underneath the shelf.

18. When she opened the second drawer, she noticed a bag of jewellery and another packet containing a gent's Sekonda watch. Mrs Welsh was shocked to see these items in the drawer as jewellery should not be stored in the drawers for security reasons. Mrs Welsh put the packets into her coat pocket and spoke with her husband about them that evening.

19. On further investigation, Mrs Welsh found that the items were from different suppliers (Cavendish French; Jonathan Lynne and Banyan) and had been invoiced on various dates between November 2019 and February 2020. The items from Cavendish French included two pairs of earrings which had been ordered for a customer and which had actually been reordered because they could not be found.

20. Mrs Welsh's suspicions were aroused at this point. Jewellery should not have been in that drawer and, further, jewellery from different suppliers should be kept separate. Mrs Welsh also suspected the claimant, as she was responsible for checking stock and entering it onto the system. Accordingly, on 23 February 2020, Mrs Welsh collected the previous twelve months' invoices in order to check whether the items in the bag had been entered onto the system and also to carry out an audit.

21. In her audit, Mrs Welsh noticed that neither the jewellery in the bag nor the Sekonda watch had been entered onto the system. She also found an invoice from Cavendish French dated 4 September 2018, which she believed the claimant to have processed, which appeared to show that 39 items with a value of £1890 were missing from the system.

22. On 25 February 2020, Mrs Welsh spoke to the claimant. She explained that she had found the jewellery and the watch. They discussed the procedure for when stock came in, which the claimant was fully aware of, as she confirmed that, if items were highlighted on the invoice they should be on the system. She confirmed that if they were ticked as well, then they had come in (the tick was to confirm that the item had arrived into the store). The claimant also confirmed that she understood that the items should have been stored in a safe, and not just in a drawer. The claimant stated that she didn't remember putting them in the drawer; that she was normally the one who would tidy the drawers up; and that she didn't know why she would have put the in the items on the drawer. The claimant insisted she had done nothing wrong.

23. Mrs Welsh explained to the claimant that she needed to further investigate and that the claimant was suspended on full pay pending the investigation. Mrs Welsh confirmed to the claimant in writing that she had been suspended pending investigation into stock and financial irregularities.

24. Mrs Welsh reviewed CCTV footage from the shop and found footage which clearly showed the claimant going into the drawer where the bag of jewellery and the watch had been found. In the footage, stills of which were in the Bundle, the claimant can be seen lifting the bag of jewellery out of the drawer and looking at it, then after looking in other drawers, taking out and looking at the bag of jewellery again but then quickly putting it back in the drawer, closing it and opening another drawer when Mrs Welsh walks into the back of the shop.

25. Mrs Welsh reviewed all of the sales books and checked and cross checked every receipt and the repair envelopes. She found that, in addition to the 39 missing items referred to above, other items had not been entered onto the system on various invoices. Further, whilst conducting a search of the shop and stockroom, Mrs Welsh found a Banyan invoice which had not been checked to say that the items had been received. Some of the items listed on that invoice were in the jewellery bag. In essence there were two issues: stock found in the wrong place (in the jewellery bag) and not on the system; and stock which couldn't be found and which also was not on the system.

26. Mrs Welsh also had some other concerns about the claimant.

27. In July 2018, she had placed an order for a friend. The agreement with the supplier from which the watch was ordered was that all orders would be paid in full at the time of order, with the respondent's credit card. However, she placed the order without taking a deposit (again in breach of policy which is to take a 50% deposit) and without Mrs Welch's approval (she approves all orders for family and friends). Further, the claimant told the supplier the order was urgent so that payment was not made at the time the order was placed. When Mrs Welch returned from holiday, the claimant showed her the watch, which had been in her handbag with the invoice stuffed inside the lid. The claimant acknowledged that she had not followed policy and that she should not have taken the invoice or the watch home without permission (as invoices are always kept in the shop).

28. In October 2019, the respondent's book keeper highlighted a lack of cash through the system, as a result of which a system was implemented in which the daily opening and closing balance needed to be recorded. Prior to this, Mrs Welsh believed that there were numerous instances of the claimant not keeping records properly, for example, by failing to state whether an item was paid for by cash or card. There were in addition allegations that the claimant had on more than one occasion borrowed money from the cash tin without putting it back.

29. In December 2019, a blue topaz ring was purchased by a friend of the claimant for £145. On 28 December, this was exchanged for a ring priced £85, so a credit note was issued for the remaining £60 (authorised by Mrs Welsh). Although the claimant informed Mrs Welsh that the friend had returned the ring, she never saw it, and on 15 February 2020, the claimant recorded an exchange with the ring originally purchased, but did not say what it had been exchanged for.

30. Also in December 2019, a customer brought in two watches for repair. They were given to Ian, the watch repairer, at the Dealers' Den (an event held for dealers to trade every Sunday morning). As Mrs Welch was away the following week, she asked the claimant to collect the repairs, to photograph them and send them to her so that she could price them up, and to tell the customers that their repairs had been done.

31. On Mrs Welsh's return, she received a call from the customer asking about one of the watches. Neither the claimant nor Tom said they knew anything about it. Ian confirmed that he had returned the two watches, but the repair envelope indicated that only one of the watches had been collected. It should not have been

filed as there was still a repair outstanding. On questioning, the claimant said she had not received any watches, but Mr Welsh was clear that he had handed the two watches to the claimant. As a result, the shop was searched including the safes, cupboards and drawers, as well as Mrs Welsh's home, but the watch wasn't found. The watch was not located and a replacement had to be found. On making further enquiries, Mrs Welsh established that three people had seen Mr Welsh giving the claimant the two watches along with other jewellery repairs. Despite this, the claimant denied ever seeing any of the watches even though she had sent a picture of one of the watches to Mrs Welsh after picking it up. The sales record also showed that the claimant had taken payment for the repair of the one watch, but this wasn't recorded properly, nor should it have been filed away as there was an outstanding repair.

32. Just before Christmas 2019, Mrs Welsh was on holiday but noticed from the cameras that the claimant was not at work as planned on the rota. Tom Roth informed Mrs Welsh that the claimant had called him to say she was running late and that she also had to pick up a child from school and so she had arranged for cover. Payroll had already been completed and so the claimant was paid for this day. Mrs Welsh has also had to speak to the claimant on a number of occasions about her timekeeping as she would frequently be late for work, particularly if Mrs Welsh was not due in.

33. Mrs Welsh found a gift voucher in the claimant's handwriting, dated as expiring on 10 April 2020. Mrs Welsh is the only person who can write gift vouchers, and, in addition, the voucher wasn't completed correctly. The records showed that the voucher was used to purchase a pair of earrings costing £95, so it appeared that the earrings were sold for £50 without authorisation.

34. Mrs Welsh also believed that the claimant had accessed an email containing payroll details of the staff which was addressed to her email account only, as she reviewed the CCTV which showed the claimant at the computer at the time.

35. Mrs Welsh wrote to the claimant on 3 March 2020 to inform her of the ongoing investigation and that she hoped to be in a position to contact her again within fourteen days.

36. On 16 March 2020 the claimant was told that Mrs Welsh hoped to meet with her on 24 March 2020 and to ensure that she would be available.

37. On 21 March 2020, Mrs Welsh invited the claimant to attend a disciplinary hearing on 24 March 2020. She enclosed a statement of her investigation along with exhibits of the evidence she had gathered. Although the letter states that the investigation was carried out by Wendy Alfonso, that was a mistake, as Mrs Welsh had carried out the investigation herself. The reference to Ms Alfonso has arisen because Mrs Welsh was aware of the fact that ideally, she would not both be an investigator and a decision maker.

38. On 23 March 2020, the claimant informed Mrs Welsh that she would not be attending the meeting as, by this time, the country had gone into lockdown and she

was mindful of the requirement to socially distance. Mrs Welsh replied to confirm that there would be appropriate social distancing and that the hearing would go ahead.

39. The claimant replied to say that she required documentation to prepare for the hearing and suggested an adjournment. She confirmed that Mr Turton, a family member, would accompany her at the hearing. She also raised an issue about the proposed chair of the hearing. In response, Mrs Welsh confirmed that she had already sent the documents; that the claimant could go and view the CCTV at any time; that Wendy Alfonso or Angela Ruttle would chair the meeting and that both were independent; and that she was entitled to bring with her a trade union representative or a work colleague but not a family member. Mrs Welsh agreed to move the meeting to 25 March 2020.

40. The claimant replied to state that she would not attend a hearing without Mr Turton in attendance and that she would not attend a hearing until the Government advised it was safe to do so.

41. Mrs Welsh responded to confirm that Government advice was that the claimant was able to go to work if it could not be done from home and that there would be safe social distancing. Mrs Welsh asked the claimant if she wanted to submit any evidence and advised her that if she failed to attend the hearing she would be considered as absent without leave.

42. The claimant did not attend the meeting and Mrs Welsh emailed her to confirm that the meeting had been rescheduled to 31 March 2020. Mrs Welsh informed the claimant that Tom Roth had offered to accompany the claimant and that the video evidence would be made available for her to review should she wish to do so.

43. The claimant responded to say that she did not want Tom Roth to accompany her and that it would be wrong to commit to definite arrangements for a meeting until the Government advice changed.

44. Mrs Welsh responded on 26 March to state that, as she was refusing to attend the meeting on 31 March, she would accept a written statement from her. It was confirmed that the meeting would go ahead in her absence should she not attend.

45. On 30 March 2020, the claimant provided a letter from her GP stating that she had been treated for anxiety; that she had been placed on medication; and that it would be detrimental to her health if she were to attend a disciplinary hearing. Mrs Welsh replied to ask the claimant whether she was being signed off sick. The claimant replied that, as the Government advice was to stay at home, she did not have to report in sick.

46. Later that day, the claimant emailed some questions for consideration at the hearing and some further requests for documents. Mrs Welsh postponed the hearing until 3 April 2020 by way of a letter dated 31 March. The letter set out the allegations against the claimant as follows: "theft; misappropriation; failure to follow the correct system for logging in stock; failure to store jewellery in the correct place; and accessing confidential information on the computer system, which is an abuse of

position.” The claimant was warned that, if proven, the allegations would constitute gross misconduct and could result in the termination of her employment. The letter confirmed that the claimant had already had sight of all of the relevant documentation.

47. On 2 April 2020, the claimant emailed Ms Alfonso regarding her appointment as chair and indicated that she would submit a written response to the allegations as far as she was able. Ms Alfonso responded to confirm that the claimant had already received the evidence she had been given and to confirm that she was not a close friend of Mrs Welsh, but that the relationship was one of Centre manager and tenant.

48. On 3 April 2020, the claimant contacted Mrs Welsh to confirm that she would not attend as it was contrary to government advice; the arrangements were not compliant with employment law and she had already booked annual leave. The claimant was not happy with Ms Alfonso as chair nor with Mr Welsh as notetaker. The claimant denied all of the allegations save that she accepted that, on one occasion, she did inadvertently access the system, but quickly realised her error and exited. She further stated that she could provide proof that she had not abused company time as she had notified Tom Roth and believed that Mrs Welsh had, in any event, been aware of this at the time it happened.

49. The disciplinary hearing went ahead on 3 April 2020 with Ms Alfonso as chair, Mr Welsh as notetaker and Mrs Welsh in attendance to explain her findings as investigation manager.

50. Ms Alfonso had been given the same paperwork as had been sent to the claimant, which included the exhibits. Ms Alfonso also reviewed the CCTV footage which she considered clearly showed the claimant opening the drawer and handling the bag of jewellery and watch.

51. The disciplinary hearing, which took place in the claimant’s absence, was minuted. Each of the allegations from the documents sent to the claimant and reviewed by Ms Alfonso was discussed in turn. Ms Alfonso asked questions which Mrs Welsh responded to. For example, Ms Alfonso asked Mrs Welsh about the CCTV footage. Mrs Welsh confirmed that they traced the delivery of the last pieces of silver jewellery in the bag back to 5 February 2020 and so she reviewed CCTV from that time. Mrs Welsh explained that, on 7 February 2020, the CCTV showed the claimant putting the drawer back and appears to put a bag in the drawer. Then she explained that CCTV from 18 February 2020 very clearly showed the claimant opening the drawer, handling the bag of jewellery and watch then putting it back in the drawer, then quickly closing the drawer and opening another above it before she (Mrs Welsh) went into the back office. Mrs Welsh confirmed that the same CCTV camera showed her discovering the bag of jewellery and watch in the same drawer, but that there was no CCTV evidence of anyone else using the drawer over the same period. Mrs Welsh went on to confirm that, when she had questioned the claimant about the bag of jewellery she claimed to have no idea about it even though she had handled it six days earlier.

52. Ms Alfonso considered the evidence before her. She considered that there appeared to be a pattern in the claimant’s behaviour which cast significant doubt on

her trustworthiness. She found that, in particular, the claimant's denial of having any knowledge of the jewellery bag and watch found in the drawer after having been seen just days earlier handling them caused her to question the claimant's honesty.

53. Ms Alfonso further concluded that, as regards the jewellery, the claimant had not followed the respondent's procedure despite receiving training and that her handling of the bag of jewellery as seen on CCTV and later denying knowledge of it was dishonest; that the watch was still missing and no explanation had been offered so it was reasonable to conclude a theft had occurred; that as regards the ring exchange it was reasonable to conclude that the claimant had stolen from the respondent; that issuing the credit note was outside normal processes and was dishonest; and the claimant's time keeping and borrowing showed a complete disregard for company procedure.

54. Ms Alfonso concluded that the allegations should be upheld; that they amounted to gross misconduct; and that the claimant should be summarily dismissed.

55. The decision was confirmed by a letter to the claimant dated 17 April 2020 from Mrs Welsh. The claimant was given the right of appeal.

56. The claimant indicated her intention to appeal in an email to Mrs Welsh dated 22 April 2020. Mrs Welsh responded and sent the claimant the disciplinary hearing minutes.

57. By email dated 28 April 2020, the claimant emailed her grounds of appeal, including that she continued to deny the allegations against her, that the process had been "consistently irregular and non-compliant"; that the case against her was "based on conjecture"; that there was no reliable or unbiased evidence and that the respondent's attitude and actions had been "bullying to the point of harassment."

58. The appeal hearing was scheduled for 5 June 2020. The respondent had difficulty in finding suitable premises in which to hold the appeal, and communicated with the claimant in that regard, hence the delay. The respondent asked the claimant for her grounds of appeal, but no further detail was forthcoming. The claimant's solicitor confirmed that the claimant would not be attending the appeal hearing.

59. The appeal was held in the claimant's absence by Ms Alfonso and was not upheld. Although the claimant stated that she denied the allegations she did not provide: any explanations or evidence to refute the allegations; any evidence of the alleged irregularity or non-compliance of the process; any evidence of the case against her being inconsistent and based on conjecture; no evidence to substantiate her challenge that the evidence was biased or unreliable; and no evidence to substantiate her allegation that Mrs Welsh's behaviour had been bullying to the point of harassment.

60. A letter was sent to the claimant on 8 June 2020 to confirm the outcome of the appeal hearing.

The Law

Unfair Dismissal

61. An employee has the right under section 94 ERA not to be unfairly dismissed (subject to certain qualifications and conditions set out in ERA).

Reason for dismissal

62. When a complaint of unfair dismissal is made, it is for the employer to prove that it dismissed the claimant for a potentially fair reason, namely a reason falling within Section 98(2) ERA or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the claimant held.

63. A reason relating to the employee's conduct is a potentially fair reason falling within section 98(2).

64. Where an employer alleges that its reason for dismissing the claimant was related to her conduct, the employer must prove:

- a. that at the time of the dismissal it genuinely believed the claimant had committed the conduct in question; and
- b. that this was the reason for dismissing the claimant.

65. The test is not whether the Tribunal believes the claimant committed the conduct in question but whether the employer believed the claimant had done so.

Fairness

66. If the respondent proves that it dismissed the claimant for a potentially fair reason, the Tribunal must then decide if the employer acted reasonably in dismissing the employee for that reason applying the test in section 98(4) ERA.

67. Section 98(4) ERA provides that "the determination of the question whether:

- a. the dismissal is fair or unfair (having regard to the reason shown by the employer) 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.

68. The Employment Appeal Tribunal (EAT) set out guidelines as to how this test should be applied to cases of alleged misconduct in the case of **British Home Stores Limited –v- Burchell** 1980 ICR 303. The EAT stated that what the Tribunal should decide is whether the employer who discharged the employee on the grounds of the misconduct in question "entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. First of all, there

must be established by the employer the fact of that belief, that the employer did believe it. Secondly that the employer had in its mind reasonable grounds upon which to sustain that belief and thirdly that the employer at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, has carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

69. The concept of a reasonable investigation can encompass a number of aspects including: making proper enquiries to determine the facts, informing the employee of the basis of the problem, giving the employee an opportunity to make representations on allegations made against them and put their case in response and allowing a right of appeal.

70. In 2009, ACAS issued its current code of practice on disciplinary and grievance procedures. The Tribunal must take into account relevant provisions of the code when assessing the reasonableness of a dismissal on the grounds of conduct (section 207(3) TULRCA).

71. Under the Code, employers should give employees an opportunity to put their case before any decisions are made. The Code identifies the need for a disciplinary meeting. It also provides that, when notifying an employee of a disciplinary meeting, the notification should contain sufficient information about the alleged misconduct and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. Furthermore, at the meeting the employer should explain the complaint against the employee and go through the evidence that has been gathered.

72. The Code also states that an employee who is not satisfied by the outcome of disciplinary proceedings should appeal and should be allowed to do so by the employer. It goes on to state that appeals should be heard without unreasonable delay and should be dealt with impartially (wherever possible by a manager who has not previously been involved in the case).

73. Even if procedural safeguards are not strictly observed, the dismissal may be fair. This will be the case where the specific procedural defect is not intrinsically unfair and the procedures overall are fair (**Fuller –v- Lloyds Bank** 1991 IRLR 336 EAT). Furthermore, defects in the initial disciplinary hearing may be remedied on appeal if, in all the circumstances, later stages of a procedure are sufficient to cure any earlier unfairness.

74. In applying section 98(4), the Tribunal must also ask itself whether dismissal was a fair sanction for the employer to apply in the circumstances. The test is an objective one. It is irrelevant whether or not the Tribunal would have taken the same course had it been in the employer's place, similarly it is irrelevant that a lesser sanction may have been reasonable. Rather section 98(4) requires the Tribunal to decide whether the employer's decision to dismiss the employee fell within the range of reasonable responses that a reasonable employer in those circumstances and in that business might have adopted (**Iceland Frozen Foods Ltd –v- Jones** 1982 IRLR 439). This "range of reasonable responses" test applies equally to the

procedure by which the decision to dismiss is reached (**Sainsbury's Supermarkets Limited –v- Hitt** 2003 IRLR 23).

Remedy

75. If a claim of unfair dismissal is well founded, the claimant may be awarded compensation under Section 113(4) ERA. Such compensation comprises a basic award and a compensatory award, calculated in accordance with sections 119 to 126 ERA.

76. Where the Tribunal considers that any conduct of the claimant prior to dismissal was such that it would be just and equitable to reduce the amount of the basic award to any extent, it must reduce the amount accordingly (section 122(2) ERA). In this regard, the question is not whether the employer believed the claimant committed the conduct in question but whether the Tribunal so believes.

77. So far as the compensatory award is concerned, ERA provides that the amount of compensation shall be such amount as is just and equitable based on the loss arising out of the unfair dismissal. In **Polkey –v- A E Dayton Services Limited** 1987 ICR 142 the House of Lords stated that the compensatory award may be reduced or limited to reflect the chance that the claimant would have been fairly dismissed in any event had a fair procedure been followed.

78. Separately, if it appears to the Tribunal that either the employer or the employee has unreasonably failed to follow or comply with the ACAS Code referred to above, the Tribunal may increase or decrease any compensatory award by up to 25% if it considers just and equitable in all the circumstances to do so (s207A TULRCA).

79. Furthermore, where the Tribunal finds that dismissal was to any extent caused or contributed to by any action of the claimant, it must reduce the compensatory award by such proportion as it considers just and equitable having regard to that finding (s123(6) ERA). As with any reduction under s122(2), the question is not whether the employer believed the claimant committed the conduct in question but whether the Tribunal so believes.

The right to be accompanied

80. The statutory right to be accompanied is set out in section 10 of the Employment Relations Act 1999. It provides that an employer must permit an employee to be accompanied to a disciplinary hearing by either a trade union representative or another of the employer's workers.

Discussion and Conclusions

Reason for dismissal

81. The respondent alleges that its reason for dismissing the claimant was her conduct, namely theft; misappropriation; failure to follow the correct system for logging in stock; failure to store jewellery in the correct place; and accessing confidential information on the computer system, which is an abuse of position.

82. The disciplinary process came about after Mrs Welsh discovered a bag of jewellery and a watch in a drawer. This was suspicious for a number of reasons and, on investigation, it was established that there was significant cause for concern.

83. The Tribunal is satisfied that, at the time of the dismissal, the respondent genuinely believed the claimant had committed the conduct in question. Mrs Welsh had up to the time when the allegations were made, had an excellent relationship with the claimant and trusted her to run the shop. She was clearly upset to have to have made allegations such as those made against the claimant, with who she had had an excellent working relationship. Her upset is evident from the transcript of the suspension meeting in which she says: "I'm sorry for both of us because I like you a lot...". Towards the end of the meetings she says: "I want to believe you because I'm good to you...". She conducted a thorough investigation from which it was evident that she had a genuine belief that the claimant was guilty of theft or misappropriation, or that at very least she had failed to follow appropriate procedures for logging and storing stock, as well as other allegations. Whilst there was no direct evidence of theft it was reasonable, on the balance of probabilities, to conclude that theft had been committed given the evidence available which cast doubt on the claimant's credibility and trustworthiness.

84. The Tribunal is further satisfied that the reason given is the reason for dismissing the claimant. No ulterior motive has been suggested. The respondent had no desire to terminate the claimant's employment for any other reason, and the relationship was good until the discovery of the bag of jewellery and the watch in the drawer.

85. Accordingly, the Tribunal is satisfied that the claimant's dismissal was for a potentially fair reason falling within section 98 of the ERA, namely conduct. The respondent therefore satisfies the first limb of the *Burchell* test.

Fairness

86. Fairness must be considered in the context of the circumstances, including the size and administrative resources of the employer's undertaking,

87. In this case, the respondent is a very small employer with only three employees in addition to Mr and Mrs Welsh. The Tribunal's findings are made in that context and notes that, despite the size of the employer, Mrs Welsh sought to try to ensure that the disciplinary officer who would make the decision on whether or not to dismiss the claimant was independent, even though, given the size of the undertaking, she could have been responsible for the investigation and decision.

88. The Tribunal is satisfied that the respondent entertained a reasonable suspicion amounting to a belief in the guilt of the claimant of that misconduct, namely theft; misappropriation; failure to follow the correct system for logging in stock; failure to store jewellery in the correct place; and accessing confidential information on the computer system. Once the bag of jewellery was discovered, there was suspicion, which was aimed at the claimant given that she worked full time in the shop and had overall responsibility for logging the jewellery onto the system. The respondent's investigation only served to confirm the respondent's suspicions.

89. The Tribunal is satisfied that the respondent did believe that the claimant was guilty. As stated above, Mrs Welsh did not want to believe in the claimant's guilt but believed that there was sufficient evidence to support her belief. Ms Alfonso, having reviewed the investigation report and heard what Mrs Walsh had to say concluded that, on the balance of probabilities, the claimant's handling of the bag of jewellery was dishonest; the claimant had failed to follow the respondent's procedures for logging in goods onto the system; that the watch was missing, there was no explanation for the ring exchange, a credit note had been issued outside the normal procedure and the claimant's time keeping and borrowing showed a disregard for company procedure. As Ms Alfonso was independent, she had no ulterior motive to draw the conclusions she did.

90. The Tribunal is also satisfied that the respondent had in its mind reasonable grounds upon which to sustain that belief. Most significantly, the claimant had been seen on CCTV handling the bag of jewellery only six days before she was questioned about it and denied all knowledge of it. That in itself was a reasonable ground upon which to sustain a belief that the claimant had, on the balance of probabilities, stolen/misappropriated jewellery, and also that the claimant had not stored jewellery in the correct place given that she acknowledged in the suspension meeting that jewellery should not be stored in a drawer. Further, items of jewellery from different suppliers should be kept separately, and the items in the bag were from different suppliers. There was also, from the invoices, and from the thorough audit undertaken by Mrs Welsh, clear evidence of processes and procedures not having been properly adhered to: Mrs Welch found an invoice from Cavendish French dated 4 September 2018 which she believed the claimant to have completed which appeared to show that 39 items with a value of £1890 were missing from the system. Finally, the claimant had admitted to accessing confidential information on the computer though she stated that it was a mistake.

91. The claimant has suggested that the finger was pointed at her and her alone, but given the CCTV footage of her handling the bag of jewellery, and Mrs Welsh's evidence that no one else went near that drawer in the time period reviewed by CCTV, there are reasonable grounds for Mrs Welsh to conclude that the claimant was involved and not other staff members. In fact, the claimant's evidence that she had just forgotten having seen the bag in the drawer and thought it unremarkable when Mrs Welch questioned her just days later, is not credible given that she acknowledged that jewellery should not be stored in those drawers.

92. As stated above, it was reasonable, on the balance of probabilities, for the respondent to conclude that the claimant had stolen property given the volume of evidence which cast doubt on the claimant's trustworthiness and honesty.

93. The Tribunal is also satisfied that the respondent had, at the stage at which it formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. Mrs Welch conducted a thorough review of all of the invoices and the computer system on which the jewellery was logged to see what was missing. She also conducted a thorough review of the CCTV footage. It is difficult to see what more could have been done. The respondent made proper enquiries to determine the facts. For such a small employer, this was a detailed and thorough investigation.

94. It is worthy of note that the Claimant sought to provide some explanation at the Tribunal hearing. However, the Respondent could only make a decision on the information it had before it at the time. As the claimant chose not to participate in the hearing, it made its decision on the information available to it, which was reasonable in all the circumstances of the case.

95. Further, the claimant was, by a letter dated 21 March 2020 fully informed of the basis of the problem. That letter included the respondent's full investigation report and all of the relevant enclosures to enable the claimant to fully understand the case against her. There may have been some delay in her seeing all of the enclosures, but she did have them in plenty of time in advance of the disciplinary hearing which eventually went ahead and resulted in her dismissal. The respondent, in its invitation to the claimant to attend a disciplinary hearing, also referred to items of jewellery and a video which the respondent stated were available for the claimant to view should she wish to do so. The respondent repeated that invitation more than once.

96. The Tribunal is further satisfied that the claimant was given the opportunity to make representations on allegations made against them and put their case in response. The claimant was invited to a disciplinary hearing which was postponed on a number of occasions to seek to accommodate the claimant. She was also, as an alternative, given the opportunity to make written representations. However, the claimant made it clear that she would not attend that hearing. She gave a number of reasons, including coronavirus, that she was sick and that she did not have all of the documentation requested, but ultimately she chose not to participate in the disciplinary process. Accordingly, the respondent did not have the benefit of any potential explanations the claimant could have put forward in determining the outcome of the disciplinary process (some of which she sought to put forward to the Tribunal. The most the claimant did was to give a bare denial of the allegations (other than the confidential information allegation which was admitted but was stated to have been in error).

97. The documentation requested included requests for policies, procedures, job descriptions and so on. Whether or not the claimant was sent these documents would not have prevented her from answering the allegations.

98. Another of the reasons the claimant gave for not choosing to engage with the process was the fact that the respondent chose not to allow her to be accompanied by Mr Turton, who is a family member. As set out above, the statutory right to be accompanied does apply to disciplinary hearings but an employee only has a right to be accompanied by a trade union representative or a work colleague.

99. The Tribunal is further satisfied that the decision not to allow the claimant to be accompanied by Mr Turton at the disciplinary hearing was reasonable in all the circumstances of the case. The respondent approached Tom Roth who agreed to accompany the claimant should she want to be accompanied, but she declined the offer. So, the claimant did not need to be without someone with her at the hearing.

100. The Tribunal notes further that the claimant was allowed a right of appeal, but that, even at that stage, she failed to engage in the process and to offer any

explanation other than bare statements. Although the appeal was dealt with by Ms Afonso, who had also made the decision to dismiss, it was reasonable for her to have done so given the size and administrative resources of the respondent, even though that meant that the appeal was not dealt with by a manager who had not previously been involved in the case.

101. The Tribunal is satisfied that dismissal was a fair sanction for the employer to apply in the circumstances. The Tribunal notes that the test is an objective one and that it is irrelevant whether or not the Tribunal would have taken the same course had it been in the employer's place, similarly it is irrelevant that a lesser sanction may have been reasonable. Rather section 98(4) requires the Tribunal to decide whether the employer's decision to dismiss the employee fell within the range of reasonable responses that a reasonable employer in those circumstances and in that business might have adopted. The Tribunal is satisfied that the decision to dismiss falls well within that range.

102. The respondent had ample ground to suspect the claimant of serious wrongdoing, yet that claimant was not prepared to participate in the disciplinary process in any way, or to offer any explanation or discussion. Most significant was the evidence around the jewellery bag found in the drawer but the other allegations put to the claimant all gave the respondent cause to doubt her honesty and integrity. Given the position of trust the claimant held, the decision to dismiss fell within the band of reasonable responses open to the respondent.

103. The Tribunal is further satisfied that the procedure by which the decision to dismiss was reached fell within the "range of reasonable responses" test. It is accepted that the claimant was not given any warning of the investigatory interview at which she was suspended, but notice is not a statutory requirement and the Tribunal finds that it was reasonable in all the circumstances of the case not to give notice of that meeting given the seriousness of the allegations that were to be put to the claimant and the nature of the relationship between the claimant and Mrs Welsh which was informal and friendly. The claimant was given numerous opportunities to participate in the disciplinary process and to put forward her explanations and views but failed to do so. The respondent conducted a full and thorough investigation on which it based its decisions, and also sought to ensure impartiality and independence in the decision making process.

Employment Judge Rice-Birchall
Date: 14 January 2022

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
20 January 2022

FOR THE TRIBUNAL OFFICE

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