EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107277/2019

Held In Glasgow 27 and 28 November 2019

Employment Judge M Robison

Miss S Cassidy	**Claimant** **Represented by** **Ms E Drysdale** **Trainee Solicitor**
Iceland Foods Limited	**Respondent** **Represented by** **Mr R Hignet** **Counsel**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the claimant was unfairly dismissed and the respondent shall pay to the claimant the sum of **THREE THOUSAND AND TEN POUNDS AND SEVENTY EIGHT PENCE** (£3,010.78).

The Employment Tribunals (Recoupment of Benefits) Regulations 1996 apply to this award. The prescribed element is **ONE THOUSAND THREE HUNDRED AND NINETEEN POUNDS AND EIGHTY FOUR PENCE** (£1,319.84) and relates to the period from 8 March 2019 until 3 July 2019.

REASONS

Introduction

1. The claimant lodged a claim with the Employment Tribunal on 7 June 2019 claiming unfair dismissal. The respondent lodged a response to that claim, arguing that dismissal in the circumstances was fair.

2. At the hearing, the Tribunal heard first from three witnesses for the respondent, namely Ms C McGowan, store manager and investigating officer; Ms Karen

Higgins, store manager, who conducted the disciplinary hearing; and Mr David McNicol, area manager, who conducted the appeal. The Tribunal also heard evidence from the claimant.

3. During the hearing, the Tribunal was referred by the parties to a joint file of productions (referred to by page number). The claimant lodged a supplementary bundle relating to remedy (SB).

Findings In Fact

4. On the basis of the evidence heard and the productions lodged, the Tribunal finds the following relevant facts admitted or proved:

5. The claimant, Miss Sharon Cassidy, commenced employment with the respondent as a part-time sales assistant on 5 August 2004 and worked at their shop in Paisley until she was dismissed for gross misconduct on 8 March 2019.

6. The respondent is a retailer of frozen and fresh food products through high street shops and online. The respondent currently employs 25,000 people across the UK. The shop in Paisley is a relatively small shop with three to four staff employed there.

7. Latterly when the claimant was employed at the Paisley store, the manager was Andy Sproule. Shortly after her dismissal he was succeeded by Karen Higgins.

Relevant policies and procedures

8. The respondent's employees are issued with an employee handbook (pages 37-74).

9. At page 61, under the heading "Iceland store's employee purchases", it is stated: "the following rules must be observed if you wish to make a purchase: Items for consumption at break times must be purchased at the time of the break. The receipt must be signed by a Manager (or their nominated person) prior to consumption; other goods may only be purchased at the end of your shift, or at the end of the trading day. Again, all receipts must be signed by a Manager (or their nominated person): once the goods have been purchased

they must be removed from the Iceland store immediately, or kept in an area authorised by the Manager ....."

10. The respondent's disciplinary procedure is referenced in the handbook at pages 68-71. It is there stated that misconduct includes "failure to comply or act in accordance with any current rule, policy or procedure" (page 69). Gross misconduct, which will normally result in dismissal (page 68), is stated to include "theft or attempted theft of company, employee or customer property or monies" as well as "unauthorised consumption of company food or drink on the company premises" (page 70).

11. The respondent's disciplinary policy/procedure is set out at pages 86 - 92. At page 91, it is stated that "when deciding whether a disciplinary sanction is appropriate, consideration should be given to: the facts of the case; the colleague's disciplinary record; their position and length of service; the sanction imposed in similar cases in the past; any mitigating circumstances that would make it appropriate to adjust the severity of the penalty; and whether any training, additional support or adjustments to the work are necessary".

12. On 1 August 2018, the claimant undertook new starter induction training (see page 135) which was refresher training. That training included the staff purchase policy including eating and drinking (page 135A).

The incident on 12 February

13. On 12 February 2019, the claimant started her shift as usual at 8 am. As there had been a stock count the evening before, Margaret Paterson, senior supervisor, asked the claimant to tidy up the stock left out (page 85).

14. Michelle Lauder, duty manager, started her shift at 10 am. At noon, she was asked to take over from the claimant when she ended her shift at the checkout. When she was tidying up she found a five pack of single wrapped twirls with only one in it. She asked Margaret Paterson what she should do with it (because it could not be discounted, there being less than 50% of the product left).

15. This packet was understood by Margaret Paterson to be a pack due to be reduced from the night before which had three twirls in it. Margaret Paterson searched the bin and found two empty twirl wrappers.

16. Margaret Paterson then checked the CCTV cameras, and she noted that at 10.33 am, the claimant could be seen picking up the twirls, open them and hand one to a child in a pram. She is then seen going round to the other side of the checkout, taking something, going under the checkout for a time, and when she stands back up, she appears to eat something and put something into her pocket.

17. On 14 February 2019, Ms Paterson spoke to David McNicol, area manager, who advised that she should contact HR and that the claimant should be suspended (page 96).

18. The claimant worked her shifts that week and attended for her shift as usual on Friday 15 February, when she was advised by Margaret Paterson that she was to be suspended on full pay pending an investigation into alleged gross misconduct for the theft of company property. The claimant said that she did not understand the reference to company property but was told nothing further (page 94).

19. By letter dated 19 February 2019, the claimant was advised that she was suspended for alleged gross misconduct for "CCTV reviewed showed burst packet of sweets, one given to customer and one consumed without payment" (page 97).

20. Caroline McGowan was appointed to investigate the matter. She considered a statement produced by Michelle Lauder (page 93) and by Margaret Paterson (pages 94-96).

21. On 22 February 2019, Ms McGowan attended the Paisley store. She spoke to Margaret Paterson about the incident.

22. Thereafter she interviewed the claimant at 3.40 pm. Notes were taken by Katie Fletcher (page 99 - 103). The claimant admitted giving a twirl to a customer's child, and to eating one herself. She said that she thought they belonged to "one of the staffs, maybe Caitlin's, from the night before" and said that "We're

always eating each other's food" and that "it's not uncommon for sweets to be left at tills".

23. She confirmed that there was no receipt attached, and was asked "Given that there was no receipt do you think it is acceptable to eat something, albeit a twirl, without a receipt?" to which she replied, "No not when you say it like that. But it's not uncommon for them to be lying about. I just thought they were someone else's". She confirmed that she did not ask beforehand who it belonged to.

24. It was put to her that this was a twirl that, "from her supervisor's statement", was among stock which she had been asked to repair and half price, but she denied that.

25. While it was put to the claimant that Ms Paterson had asked if she knew anything about the twirls, the claimant denied that, stating that she was "just asking if they were my sweets" and that she thought she was being sarcastic, as was her way on occasion, and from that she assumed they may have belonged to Ms Paterson. She said that she did not tell her that she had eaten one and given one away because she "never asked". She confirmed that "I didn't know it was stock I thought it was one of the staffs".

26. During the course of that interview, Ms McGowan showed the claimant the CCTV footage, and she confirmed when she was seen leaning down that she was putting the wrapper in the bin.

27. She confirmed that she was aware of and understood the staff purchase policy.

28. When she was asked if she had anything else to add she said that she thought she was being made an example of; and that "last week I heard Margaret say to tell Caitlin to stop eating at checkout before she paid for things so why are we being treated differently why is she not in her why's it me".

29. On 22 February at 4.30 pm, Ms McGowan took a statement from Ms Paterson. She asked: "On 12/2/19 did you ask Sharon to reduce and fix damaged stock left at checkouts after the stock count?", to which Ms Paterson replied "yes". She then asked, "When you found the twirl wrappers at the checkout when

Michelle made you aware had Sharon repaid and reduced the rest of the stock?", to which she replied "yes" (page 98).

30. Ms McGowan produced an investigation report (pages 104-105). She set out her conclusions based on the interviews and a review of the CCTV. One conclusion was that "Sharon half priced all the stock with the exception of the burst packet of Twirls". The report confirms that the claimant admitted giving a twirl to a child and eating one herself.

31. The investigation report also includes the following:

> "Michelle Lauder found a burst 5 pkt of Twirls at the checkouts with one left in it and 2 wrappers found in the same checkout bin, Michelle then informed Margaret Paterson.
>
> Margaret asked Sharon to repair and half price damaged stock left at the checkouts following the grocery stock count the night before.
>
> Margaret Paterson closed the store the night before and remembers scanning the burst packet of twirls at the checkouts that had only 3 in it - during the stock count.
>
> Margaret Paterson claims to ask Sharon if she knew anything about the twirls at the checkouts to which she claims Sharon replied "No".
>
> Michelle supports this in her statement by also saying Margaret asked Sharon if the twirls belonged to her and she replied no".

32. She concluded that there was a case to answer in relation to theft which constitutes gross misconduct.

33. By letter dated 4 March 2019, the claimant was advised that a disciplinary hearing would take place on 8 March 2019, "to consider the following alleged circumstances: which are that you have taken a product and consumed it without making a payment". A copy of the report but not the statements was enclosed. The claimant was advised that she was entitled to be accompanied.

34. The disciplinary hearing was conducted by Karen Higgins, store manager. Christopher Dolan, also a store manager, took notes (pages 107-113).

35. During the course of the hearing, the claimant was asked whether she thought the twirls were part of what she had to reduce that day, but she advised that she had not been asked to "repair stuff" but to hang up sweets. She confirmed there was no receipt attached to the twirl packet but said that was not uncommon either. She confirmed she knew the staff purchase policy.

36. When asked whether she had said in answer to a question from Ms Paterson that she knew nothing about the twirls when she was asked, she answered "she asked me if they were mine I thought she was being sarcastic". When asked whether she had admitted taking one, she said "she brought them out and asked me I thought they were hers and was being sarcastic cause I ate one the way she can be. She was then asked whether at any point that day she had told Ms Paterson that she had eaten one herself and given one to a child to which she answered that she "never asked, if she did I would have told her, if Margaret had asked me or told me they were not hers I would have paid for them".

37. When asked if she had anything to add, she asked why she was not being treated the same as others, and referred to Caitlin the week before having done the same thing.

38. After an adjournment of 12 minutes, the hearing resumed and the claimant was asked "what normally happens", to which she replied, "open sweeties left at the till and receipts in locker or something. I wasn't taking a packet of sweets off the shelf and opening". When asked what she could have done differently, she said that she should have checked that there was a receipt; that if Margaret had said something different she would have paid for them; and that she should not have been eating at the till.

39. Ms McGowan then concluded, "After reviewing all the information given to me and that you have admitted eating the twirl and giving one away even though there was no receipt attached and that you did not know who they belonged to and the fact you understood and can explain the staff purchase policy today I will be dismissing you. .." Ms McGowan was also noted as saying that dismissal was "in loo (sic) of notice...." but she denied saying that, and ticked the box "dismissal without notice".

40. The claimant went on to say that she did not understand why she was being treated differently from other staff members, but when asked to give examples, dates etc., she said that she could not remember any dates. Ms McGowan said that if they had that information they could investigate, but that she was "only here for this investigation".

41. By letter dated 11 March 2019, it was confirmed to the claimant that she was summarily dismissed with effect from 8 March 2019 for gross misconduct, Ms McGowan having taken into account the fact that the claimant "admitted the allegation", understood the staff purchase policy and that she had not paid for the item (page 114).

42. The claimant exercised her right of appeal, setting out grounds in an e-mail dated 19 March 2019.

43. By letter dated 2 April 2019, the claimant was advised that the appeal would take place on 12 April 2019. The appeal hearing was conducted by David McNicol, (area manager) with notes taken by Davie Horne (HR manager) (pages 118-123). The claimant was accompanied by a friend, Jennie O'Neil, for moral support.

44. After clarifying that there were four grounds of appeal, in regard to the first ground (that the sanction was too harsh), the claimant stated that she had not been asked to half price sweets but to take the white stock count stickers off them and hang them up, and that she had been asked by Margaret if the sweets were hers, and she said 'no', thinking that she was being sarcastic; and that she had said to the child's mum that they were Caitlin's because she thought they were; she confirmed that she had been spoken to on the shop floor and not in the office; and although it had stated in the notes that Margaret had asked, "do you know anything about these" she said that she had not said that, which would be confirmed by viewing the CCTV. She said that the CCTV would also confirm that Michelle was not there and did not take the wrappers out of the bin as stated in the notes.

45. The claimant again made reference to being treated differently, raising the incident in the staffroom when Margaret stated that Caitlin had been eating

sweets at the checkout and that she was asked to pay for them at the end of her shift. She said that if it had been pointed out to her that these sweets were to be half priced then she would have paid for them. She said, "I think that Margaret was in a bad mood that day. I felt what I did was good customer service".

46. The claimant gave another example of being treated differently during the appeal hearing, in regard to a colleague whom she said was seen stealing on CCTV but that she was advised by Andy Sproule that it was in her best interests to resign.

47. On 12 April 2019 at 12.30 pm, Mr McNicol interviewed Margaret Paterson by telephone. Notes were taken by Davie Horne (page 124 - 125). During this interview, Ms Paterson said that there had been four in the pack from the night before; she checked the bin and found that there were two wrappers; she said that she asked the claimant if she knew anything about them, with the pack in her hand.

48. Ms Paterson said that she was not sure whether the claimant had worked one or two shifts on the Wednesday or Thursday of that week. She said that she had not suspended the claimant until the Friday, after speaking to Mr McNicol on the Thursday.

49. Ms Paterson was also asked whether staff eat and drink at the checkout to which she replied, "I don't know about eating, but they did drink when Andy was there. Andy allowed it". When asked whether sweets belonging to staff lie about the tills, she said that she'd not seen anything.

50. Ms Paterson was asked about whether there had been any issues with Caitlin eating stock without paying for it, and she referred to an incident when Caitlin was on her break and had bought a burger and four pack of irn bru. She had given one to Michelle and Caitlin was advised that this could breach the staff purchase policy.

51. On 13 April 2019, Mr McNicol interviewed Cameron Pollock, a member of staff at the Paisley store. He took his own notes (page 129). When asked if he was aware of anyone else in the store eating at the tills, he replied, "Yes I have

noticed people doing if and when asked who, he said “Sharon for one; that was probably about if. Mr McNicol then asked, “so except Sharon is that the only person that are aware of eating at the tills” to which Mr Pollock replied, yes.

52. On 16 April 2019, Mr McNicol interviewed Andy Sproule by telephone, and he took his own notes (page 130). He asked him whether he had a conversation with a member of staff around stealing when he advised her it was in her best interest to leave the business. Mr Sproule answered, “no she just left”.

53. Mr McNicol also asked, “when you were there did anyone eat at the checkout”, to which he replied “Yes they were pulled up and warned not to do it again". When asked whether it was a common practice, he answered “no”.

54. On 18 April 2019, Mr McNicol interviewed Karen Higgins and took his own notes (page 131). She was asked whether since she had arrived at the store she had ever witnessed people eating at the checkouts, to which she replied, "On my first day there was a bottle of juice with a receipt attached and I took it through the back and spoke to everyone to confirm about not eating or drinking at checkouts”. When asked whether she had ever seen anyone eat, she answered no.

55. These statements were not forwarded to the claimant.

56. By letter dated 17 April 2019, the claimant was advised of the outcome of her appeal. That letter summarised each ground of appeal and provided findings as follows:

> “1. You believe that the sanction was harsh, given your length of service. The hearing was held in relation to alleged theft. Such an allegation is considered to be gross misconduct and your invite letter to the disciplinary hearing states that a possible outcome of the hearing could be a summary dismissal. You admitted eating a twirl at the checkout and giving one to a customer’s child. You told me that you thought that the sweets belonged to a member of staff as it is sometimes the case that staff leave sweets at the checkouts. My investigations have

found your claim of sweets being left by staff at the checkout to be untrue. Statements from colleagues have said that this is not the case. The sweets were at the checkout to be reduced in price due to the pack being damaged. Had you believed that the sweets belonged to another member of staff you had ample opportunity to check that fact before consuming the Twirl and giving one to a customer's child. You showed no remorse for what you did, the only explanation given was that you thought that they belonged to another member of staff. It has been established that they did not, therefore consuming them would be regarded at theft. I believe that the sanction was appropriate regardless of length service. I do not uphold this point of appeal.

2. You believed that you should have received pay in lieu of notice. You told me that Karen Higgins told you that you would receive one week's notice. Karen has told me that this is not the case, she told you that you would receive any money due to you. Summary dismissals result in termination of employment without notice. I do not uphold this point of appeal.

3. You believe that you have been treated differently to other colleagues. You told me of an incident when Margaret Paterson was complaining about a member of staff eating something then paying for it later. I have interviewed Margaret and have been told that this is not the case. The conversation that she had with Paul and yourself in the staffroom was in relation to someone taking a can of juice out of a 4 pack of juice and giving it to a colleague on the way to the checkout. This was dealt with appropriately at the time. You also alleged that [JD] was guilty of theft and was taken into the office by Andy Sproule....and advised to resign. I have interviewed Andy and he has told me that this is not the case. He stated that [she] did resign but was not encouraged to do so. As a company we would not advise anyone to resign as an alternative to attending a disciplinary hearing. Through the further investigations that I have carried

out, I can find no evidence that it is common practice in the Paisley store for staff to leave sweets lying at the tills and for other members of staff to eat them. I do not uphold this point of your appeal.

4. You don't feel that you got your points across during your disciplinary hearing. The notes from the day were signed by you as a true reflection of the hearing held. You were asked appropriate questions and given ample time to answer. If you did not feel that you had the opportunity to put your points across at the original hearing, then your appeal hearing allowed you the opportunity to address this. We agreed the points at the start of the hearing, and I allowed Jennie O'Neil, who was not a work colleague or trade union rep, to attend the hearing to assist you on getting your points across. I believe that I have taken your points into account when making my decisions".

Claimant's post-dismissal earnings

57. The claimant's net weekly earnings were £153.25 per week. The claimant sought employment following her dismissal (SB pages 9-17). She obtained employment with Ladbrokes Coral Group on 3 July 2019 but did not pass probation and so her employment was terminated on 19 November 2019. During that period she earned £3,161.92. She was in receipt of universal credit for the period from 28 April 2019 until August 2019.

Relevant law

58. The law in relation to unfair dismissal is contained in the Employment Rights Act 1996 (ERA). Section 98(1) provides that, in determining whether the dismissal of an employee is fair or unfair, it is for the employer to show the reason for dismissal and, if more than one, the principal one, and that it is a reason falling within Section 98(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. Conduct is one of these potentially fair reasons for dismissal.

59. Section 98(4) provides that 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, 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 dismissal and this is to be determined in accordance with equity and the substantial merits of the case.

60. In a dismissal for misconduct, in *British Homes Stores Ltd v Burchell* [1980] ICR 303, the EAT held that the employer must show that: he believed the employee was guilty of misconduct; he had in his mind reasonable grounds upon which to sustain that belief; and at the stage at which he formed that belief on those grounds, he had carried out as much investigation into the matter as was reasonable in the circumstances.

61. Subsequent decisions of the EAT, following the amendment to the burden of proof in the Employment Act 1980, make it clear that the burden of proof is on the employer in respect of the first limb only and that the burden is neutral in respect of the remaining two limbs, these going to "reasonableness" under section 98(4) *(Boys and Girls -v- McDonald* [1996] IRLR 129, *Crabtree -v- Sheffield Health and Social Care NHS Trust* EAT 0331/09).

62. In considering the reasonableness or unreasonableness of the dismissal the Tribunal must consider whether the procedure followed as well as the penalty of dismissal were within the band of reasonable responses *(Iceland Frozen Foods Ltd -v- Jones* [1982] IRLR 439). The Court of Appeal has held that the range of reasonable responses test applies in a conduct case both to the decision to dismiss and to the procedure by which that decision was reached *(Sainsbury v Hitt* 2003 IRLR 23). The relevant question is whether the investigation falls within the range of reasonable responses that a reasonable employer might have adopted.

63. The Tribunal must therefore be careful not to assume that merely because it would have acted in a different way to the employer that the employer therefore has acted unreasonably. One reasonable employer may react in one way whilst another reasonable employer may have a different response.

64. A lack of consistency may give rise to a finding of unfair dismissal *(Post Office v Fennell* 1981 IRLR 221 and *Hadjioannou v Coral Casinos Ltd* 1981 IRLR 352).

65. Under section 113 ERA, if the Tribunal finds that the claimant has been unfairly dismissed, it can award compensation under Section 112(4). Section 118 states that compensation is made up of a basic award and a compensatory award. Section 122(2) states that the basic award can be reduced if the Tribunal considers that the claimant's conduct was such that a reduction would be just and equitable.

66. Section 123(1) ERA states that the compensatory award is such amount as the Tribunal considers just and equitable having regard to the loss sustained by the claimant in consequence of dismissal in so far as that loss is attributable to action taken by the employer. This generally includes loss of earnings up to the date of the hearing (after deducting any earnings from alternative employment), an assessment of future loss, if appropriate a figure representing loss of statutory rights, etc. If the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the claimant, under Section 123(6) it can reduce the amount by such proportion as it considers just and equitable.

67. If the dismissal is found to be unfair on procedural grounds, it may be just and equitable to reduce compensation if the Tribunal considers there was a chance that had a fair procedure been followed that a fair dismissal would still have occurred. This is known as a *"Polkey"* reduction.

68. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRA) provides that if the ACAS Code of Practice entitled "Disciplinary and Grievance Procedures" applies and it appears to the Tribunal that the claim concerns a matter to which the Code applies and that the employer has failed to comply with the code in relation to that matter, and the failure was unreasonable, then the Tribunal may, if it considers it just and equitable in all the circumstances, increase the compensatory award it makes to the employee by no more than 25%.

Respondent's submissions

69. With regard to the reasonableness of the investigation, Mr Hignet submitted that all the respondent had to do was conduct a reasonable investigation, and not to investigate "every hare which the claimant set running". On the question of how to measure that, he said in this case that the admissions made by the employee were particularly important.

70. Dealing first with one of two primary defences put forward in the disciplinary hearing, that was that the twirls belonged to another member of staff, Mr Hignet relied on the respondent's staff purchase policy. This was designed to prevent arguments regarding what is and is not stock, the requirement to attach a receipt being for the purpose of creating a distinction between stock and otherwise. The rule that eating was to be done off the shop floor was similarly to prevent items of stock and non-stock from becoming mixed. There is no need, as Miss Drysdale argues, for the respondent to establish that the claimant knew that it was stock, because the policy means that if there is no receipt or is on the shop floor, it is assumed to be stock. Further investigation was not required because the claimant had admitted eating a twirl with no receipt at the investigation meeting, knowing about the staff purchase policy, and agreed that it was not acceptable to take stock without a receipt. She confirmed that she took no steps to find out who it belonged to before eating it and Margaret Paterson's evidence was that she had seen a burst packet the night before at the stock take. There was therefore no need for an investigator to pursue a line of enquiry to establish if a twirl had been brought in by another person from another store.

71. The claimant's second defence was that it was common practice, but there was no requirement here to undertake further investigation because the claimant had admitted that she understood the no eating rule and accepted that she should not be eating at the till. She was unable to provide the name of any member of staff who took part in this alleged common practice.

72. Mr Hignet submitted that the extent of investigation was within the range of reasonable responses, but if that is not accepted by the Tribunal, then further investigation was undertaken at the appeal stage. David McNicol interviewed

Cameron Pollock, Margaret Paterson, Andy Sproule and Karen Higgins which allowed him to conclude that there was no common practice under Andy Sproule's management. With regard to Ms Drysdale's point that staff are unlikely to tell tales and that the respondent should have watched the CCTV, it was not practical or reasonable to review CCTV kept for 17 days.

73. While in evidence the claimant went further by naming three names, she did not mention them during the disciplinary process so that could not be investigated. The claimant also said in evidence that Margaret Paterson gave her sweets at the till, but she makes on mention of this either. In the absence of a good explanation for these failings, her credibility is damaged.

74. Mr Hignet argued that Ms Paterson was consistent throughout in confirming that she asked the claimant if she knew anything about the bag of twirls. Although this is disputed by the claimant, it is for the employer to make the decision about whose evidence it prefers. The claimant's answer that she did not know anything about the twirls is telling, when she did know about the burst bag and yet denied knowledge. Karen Higgins and David McNicol were entitled to have regard to that in deciding if the offence was proven.

75. Mr Hignet submitted that this case has all the hall marks of a fair process. He argued that the failure to supply the claimant with the statements of Michelle Lauder and Margaret Paterson was not a procedural error because the salient points of the statements were summarised in the investigation report, allowing the claimant to challenge them during the process.

76. In any event, whether Michelle Lauder took the wrappers out of the bin or not; or whether the claimant was asked to "tidy up" or "repair and reduce" would have made no difference to the outcome. The claimant says that if Margaret Paterson had told her to discount the stock she would have paid for it, but there was no onus on Margaret Paterson to do so given the employer's rules make an assumption that these are items of stock.

77. With regard to procedure, even if the failure to supply the investigation statements was an error, it could not lead to unfairness because the claimant was able to say what she disagreed with based on the investigation report.

With regard to the failure to forward statements for the appeal, Mr McNicol investigated the lines of enquiry thrown up during the appeal which show that he approached the matter critically. But even this is an error, again it did not lead to any unfairness because the claimant would simply have disagreed with what is stated there, which was her position in any event.

78. With regard to the suspension, the fact that there was two days while she was working between the incident and the suspension does not undermine the process as there must be reasonable grounds to suspend, and Margaret Paterson did not act until she had spoken to the area manager on the Thursday.

79. While the "in loo of notice" point is difficult to explain, even if she did say it, she immediately thereafter ticked the box that she had decided dismissal without notice. In any event, even if she had changed her mind, Mr Hignet did not, without further consideration, believe that to be of consequence or significance in this case.

80. With regard to the reasonableness of the sanction, once a retail employer concludes that there is theft, the sanction of dismissal becomes almost inevitable because the loss of trust undermines the entire employment relationship. While the claimant argues that they failed to take account of her length of service and clean disciplinary record, these carry very little weight with the respondent as would be expected in a theft case.

81. With regard to mitigating factors, neither Karen Higgins nor David McNicol thought there were any, and that was reasonable where no remorse was shown.

82. With regard to disparity of treatment, the cases have to be truly similar and the focus is on this case and not how others were treated. The respondent's dismissal was in line with how other were treated eg the employee who took a can of energy drink and drank it without paying was dismissed. With regard to the claimant's examples, Caitlin's can be distinguished because the irn bru which she gave away was paid for; and the other member of staff was not given the option to resign.

83. Mr Hignet submitted that if the Tribunal decides that dismissal was too harsh, there must be contributory fault given that the claimant accepted that she was in the wrong, given the admission that she should not eat at the till and her acceptance that a burst packet without a receipt should be assumed to be stock. She herself accepted that a final written warning would have been appropriate. He therefore submitted that compensation should be reduced by 75%. Further, if the procedural errors led to unfairness, it is more likely than not that the outcome would be the same.

Claimant's submissions

84. Ms Drysdale lodged written submissions which she summarised in oral submissions. First, she set out the relevant law, then she made comments on the witnesses and proposed findings in facts.

85. The claimant argues there was no reasonable basis on which the respondent could have formed a belief that the claimant knew the items in question were the property of the company, and therefore guilty of theft. The item did not appear to be stock: the packet was open and sweets were missing from the packet; it had not been half priced; it was not on a shelf or a topper; or hanging up with other stock. Both Ms McGregor and Mr McNicol admitted in evidence that they had not established that the claimant knew the items were stock, and it was not reasonable to assume that the claimant knew or ought to have known that the items were stock.

86. The claimant's account remains consistent throughout the investigation that she was not told to repair stock. Margaret Paterson in her initial statement states that the claimant was to tidy up stock with no mention of half pricing or repairing damaged stock from which she later departs. It was Ms McGowan who first suggested that the claimant was half pricing and repairing stock and then she went out of her way to secure a statement from Margaret Paterson to support this. No CCTV evidence of the task the claimant was completing was presented or considered by the respondent; so the respondent could not have reasonably believed that the claimant knew this was damaged stock to be repaired.

87. Ms Drysdale submitted that the investigation and disciplinary processes were substantively and procedurally unfair. There was a failure to give the claimant notice of the allegations against her at the point of suspension. The claimant was not given copies of the statements, including Ms Paterson's third statement, which was taken after the claimant had been interviewed. These statements were considered by Ms McGowan in deciding whether to escalate the matter to a disciplinary hearing. It was unreasonable to conclude from the CCTV footage that the claimant was hiding without putting this point to the claimant or allowing her to make representations about what she was doing.

88. There was a failure by Ms Higgins to take account of the claimant's length of service and her clean disciplinary record. The claimant's consistent position was that she initially thought that they were Caitlin's then came to the view they might be Margaret's because of what she said to her. For Ms Higgins to have found the claimant to be dishonest because she said she knew nothing about the twirls is unreasonable when the claimant is clear that she was never asked this. Had Ms Higgins truly engaged with the statements before her, and listened to the mitigating evidence put forward by the claimant, she would have found that the claimant was not a risk and would not have taken the decision to dismiss her.

89. The claimant only admitted the allegation to the extent that she accepted giving sweets to a customer and consuming one without payment. There is no mention of theft and the claimant does not admit to stealing. The claimant had no reason to believe that these items were company property.

90. Ms Drysdale argued that the respondent had failed to establish that the conduct of the claimant was a deliberate and wilful contradiction of the contractual terms, so that it could not be categorised as gross misconduct.

91. With regard to sanction, the claimant submits that dismissal was not within the band of reasonable responses. The claimant did not know that the items in question were stock and therefore did not intend to steal. There was no evidence that the claimant was a risk, and relying on the HR notes at page 151, the claimant should only have been dismissed if it was believed that she was a risk going forward. The respondent did not consider the claimant to be a risk

by allowing her to continue working before suspending her. Since the claimant was not a risk, a sanction short of dismissal would be appropriate.

92. The respondent failed to take account of the claimant's inconsistent treatment arguments. The situation of the member of staff dismissed for taking a can of energy juice and drinking it without making payment is materially different, since that unopened and clearly stock. Ms Drysdale argued that the only similar circumstance which has been presented to this Tribunal is the member of staff, identity unknown, who might have taken the fourth twirl from the packet in question. Despite the seriousness with which the respondent dealt with the claimant, there was no investigation into the whereabouts of the fourth twirl.

93. In the appeal outcome letter, Mr McNicol's assertion that the statements of other staff members showed that the claimant's position that other staff would eat at checkout tills was untrue is not supported by the statements produced. These statements were not provided to the claimant. Since these were misrepresented in the appeal outcome, it is submitted that this is also substantively unfair. Furthermore, Mr McNicol conceded in cross examination that taking statements from members of staff to determine if they might have been eating at checkouts was unreliable, as "common sense" would suggest that people would not admit to their own wrongdoing.

94. The claimant submits that it was further unreasonable for Mr McNicol to rely on statements when he could have but failed to consider at least some CCTV footage.

95. The claimant put it to Mr McNicol that the incident with Margaret Paterson on 12 February had not occurred in the way Ms Lauder and Ms Paterson suggested. This was supported by the fact that the clamant had consistently described a different course of events. Had their statements been untrue this would have affected the way the other evidence had been viewed in relation to the allegations. In failing to consider this, Mr McNicol ignored the fact that this whole process might have been based on inaccurate accounts. In reexamination Mr McNicol said it would have made no difference to his decision making if the statements of Michelle Lauder and Margaret Paterson

been untrue, which shows that Mr McNicol had already made a decision about the outcome.

96. She submitted that even if a *Polkey* deduction was a possibility, it would be minimal because the procedural error was significant. She submitted that the errors were so fundamental that it could not be said that there was any real prospect of the claimant's dismissal being upheld absent these errors.

97. In relation to contributory fault, the claimant was not aware that the item in question was company property at the time of giving it to the child or eating one herself and the respondent has failed to show any reasonable basis to not accept this to be true. There is therefore no evidence to show blameworthy conduct.

Tribunal's deliberations and decision

Observations on the evidence and witnesses

98. There were a number of disputed facts in this case, and while I accept in regard to the reasonableness of the employer's actions in dismissing the claimant, it is for the respondent to make conclusions about whose version they prefer, my conclusions in respect of these disputed facts shed light on the credibility of the claimant's evidence.

99. In particular there was a dispute about whether the claimant was told to tidy up or to repair and reduce on the day of the incident. It was put to the claimant during the investigation meeting that, "from your senior supervisor's statement, this twirl was amongst a few things of stock to repair and half price", with which the claimant took issue.

100. However, the statement put to the claimant is not accurate, since Ms Paterson's handwritten statement, which is undated but which I conclude was written on the same date as Ms Lauder's, that is 15 February 2019, states that the claimant was told to tidy up but not repair and reduce (page 95 line 15). It is not until the investigation interview that this is confirmed by Ms Paterson, although in response to a leading question. In evidence Ms McGowan said that she had also discussed the matter with Ms Paterson. This must have been before the claimant's meeting if she were to have come to a view that she had

been asked to repair and half price items, when that is not what the statement says at all. It is significant in my view that Ms McGowan felt the need to obtain a supplementary statement, in order to have written confirmation of a matter which is contradicted in the claimant's statement.

101. The claimant said consistently that she was not asked to reduce and repair but that she was asked to tidy up. In regard to my conclusions about the credibility and reliability of the claimant's evidence I did consider this to be significant. It is significant that she was not asked to half price sweets because there were none to half price; this accords with Ms Paterson's first statement that she was asked to tidy up. This is significant because the claimant was not alerted to the fact that the twirls were to be repaired and reduced.

102. Another key fact in dispute is whether Ms Paterson said to the claimant words to the effect of "do you know anything about these" when she had the twirls in her hand, or whether she had said "are these yours".

103. The claimant has consistently stated that Ms Paterson asked whether they were hers. I note too that in the handwritten statement of Ms Lauder on 15 February, she states that the claimant was asked by Ms Paterson if the Twirls were hers (page 93 line 20). There is no reference there to her having said "do you know anything about these" in that statement. I considered this to be significant because if she had been asked "do you know anything about these" and said no, then that might be taken to suggest that she had something to hide. However her position is that she was only asked if they were hers, and that she was not asked whether she had eaten one or not and that was why, on the Tuesday, she did not mention this. I did not accept Mr Hignet's submission that Ms Paterson's was axiomatical ly the more natural question to ask, considering the context in which it was said.

104. Mr Hignet rightly submitted that it was not for this Tribunal to make conclusions on disputed facts to the extent that the question is whether dismissal fell within the band of reasonable responses and the employer was entitled to take a reasonable view on any facts in dispute. He submits that the respondent's decision to choose to believe Ms Paterson came within the range of reasonable responses.

105. However, given that this is a case about dishonestly, it is important to record my conclusions about the credibility of the witnesses that I have heard. I have concluded that the claimant was honest in the evidence which she gave not least because she was consistent throughout the disciplinary process and this is consistent with the evidence which she gave to this Tribunal.

106. I did think too that it was significant that Ms McGowan felt the need to obtain a supplementary statement. While it may be that Ms Paterson on reflection did subsequently refer to repairing and reducing, I do note that it suited the narrative for her to have said that, since otherwise the claimant was not actually instructed to do anything with the twirls.

107. For that reason, I accept that claimant's evidence and to the extent that this differs from that of the respondent's case, I put that down to their evidence being unreliable because of the limitations of the investigation undertaken, discussed below.

Reason for dismissal

108. The first issue for this Tribunal to consider is whether the respondent has shown that the claimant has been dismissed and that the reason for the dismissal was misconduct.

109. In this case although there may be some doubt about what exactly the claimant admitted to, there is no doubt that she did admit to the fact that she had consumed a twirl at the till, and to that extent at least, she knew that she was admitting to misconduct.

110. At paragraph 40 of the claimant's written submission, the claimant sets out the extent of her admission. She states that the allegation admitted is that "she is viewed on CCTV giving sweets to a customer and consuming one without payment, as can be seen on page 97. There is no mention of theft and the claimant does not admit to stealing. The claimant had no reason to believe that these items were company property and gave them away without payment on that basis".

111. Even if Ms Drysdale argues that the respondent could not have had a reasonable belief that she has committed theft, the claimant did admit that she

had consumed a product without making a payment. Rather, her position was that the product was not stock, belonged to someone else and so that payment was not required.

112. Bearing in mind the claimant's admission, I concluded that the respondent did have a genuine belief that the claimant had committed misconduct. The Tribunal therefore concluded that the first limb of the *Burchell* test had been met and that the respondent believed the claimant to be guilty of misconduct.

113. Accordingly, the respondent has shown that the reason for the dismissal of the claimant was conduct, which is a potentially fair reason for dismissal.

Reasonableness of decision to dismiss

114. The Tribunal then turned to consider whether the respondent acted reasonably in dismissing the claimant for misconduct. The question is whether it was reasonable in all the circumstances for the respondent to dismiss the claimant for misconduct. As discussed above, the issue is not whether this Tribunal would have dismissed the claimant in these circumstances but whether the dismissal was within the band of reasonable responses available to the respondent in all the circumstances.

115. In determining whether or not dismissal was reasonable in all the circumstances, the Tribunal then considered the second limb of the *Burchell* test, that is whether or not the respondent had in mind reasonable grounds upon which to sustain the belief that the claimant was guilty of misconduct.

116. Again the claimant's admission is relevant here. Ms Drysdale's submissions focus on the question whether the respondent had reasonable grounds to consider that the claimant was guilty of theft. In fact the allegation from the invite to the dismissal hearing is "to consider the following alleged circumstances: which are that you have taken a product and consumed it without making a payment".

117. I accept therefore that the respondent had reasonable grounds on which to conclude that the claimant had committed that form of misconduct.

118. The Tribunal then turned to the third limb of the *Burchell* test. The question is whether at the stage at which the respondent formed the belief that the claimant was guilty of misconduct, he had carried out as much investigation into the matter as was reasonable in the circumstances. The range of reasonable responses test applies to the question of the investigation as well as other procedural aspects leading up to dismissal, as this respondent well knows. The requirement is to conduct as much investigation as is reasonable.

119. As the ACAS guidance emphasises, the more serious the allegations, and the more significant the outcome, the more thorough the investigation by the respondent ought to be (see also *A v B* 2003 IRLR 405 EAT). This is particularly the case where facts are in dispute.

120. In this case, Ms McGowan had three statements which had been handwritten by Ms Lauder and Ms Paterson on 15 February, which is the day that the claimant was suspended. She then interviewed the claimant and thereafter interviewed Ms Paterson again, asking her just two leading questions. This was the basis on which the investigation report was compiled. There were however, as discussed above, a number of anomalies in the way that investigation was carried out.

121. These anomalies include, as discussed above, the fact that Ms Lauder's statement states that Margaret Paterson asked the claimant if the twirls were hers, rather than whether she knew anything about them. It is stated in the investigation report that Ms Paterson "claims to ask Sharon if she knew anything about the twirls at the checkouts to which she claims Sharon replied no". She goes on to state that "Michelle supports this in her statement by also saying Margaret asked Sharon if the twirls belonged to her and she replied no".

122. That gives at least the impression that Ms Lauder had agreed that Ms Paterson had asked if she knew anything about the twirls, although that is not an accurate summary of the statements.

123. Secondly, it is concluded that she had been asked to repair and reduce rather than tidy up. This resulted in one of the findings in the investigation report being

that the claimant had half priced all the stock with the exception of the burst packet of twirls, although again the statements do not support that finding.

124. Thirdly, although admittedly of less significance, the investigation report states that Ms Lauder had found two wrappers in the checkout bin, but the evidence does not support that (Ms Lauder statement page 93, line 17/18).

125. Further, there are a number of assertions made during the hearing which are not investigated.

126. First, reference is made in the investigation report to the claimant's claim that "it is not uncommon for sweets to be at the checkouts". The investigation meeting records that the claimant repeated, "But it's not uncommon for them to be lying about". There was however no further enquiry made into that assertion by the claimant. Secondly there is no further enquiry into the claimant's claim that "We're always eating each other's food".

127. Thirdly, during the investigation meeting, the claimant said that she thought they belonged to "one of the staffs, maybe Caitlin's, from the night before". The claimant is noted as stating, "I just thought they were someone else's".

128. Much made of this by Ms Drysdale, who stressed that the respondent had failed to establish that these items were not stock, and that they did not belong to another member of staff. Mr Hignet's position is that there was no need for the respondent to conduct any further investigation into that matter because of the respondent's staff purchase policy. That may well be acceptable where there is an admission regarding a breach of staff policy, but the situation where there is an assertion that the policy is often breached puts this into a different category. This at least warranted an investigation into the extent to which the policy was breached, even if not to establish whether the twirls were stock or not.

129. Fourthly, during the investigation meeting, the claimant also said that she thought she was being made an example of; and that "last week I heard Margaret say to tell Caitlin to stop eating at checkout before she paid for things so why are we being treated differently why is she not in here why's it me".

130. Ms McGowan did not follow this up, although she had the opportunity to do so when she interviewed Ms Paterson after interviewing the claimant, when she did not pursue this obvious line of enquiry.

131. Despite these limitations and inaccuracies in the investigation report, as Ms Drysdale stressed, it was this that was relied on to justify the disciplinary hearing and the background against which the hearing was conducted.

132. At the disciplinary hearing, the claimant again made reference to the fact that she believed that she was being treated more harshly than others by reference to the incident with Caitlin the week before having done the same thing. The claimant said this was different from the “irn bru” incident, which came to the respondent’s attention only at the appeal stage. Ms Higgins did not however take any steps to further investigate her claim, and she did not have the benefit of that issue having been investigated at the investigatory stage.

133. Despite this, and the claimant’s reference to how others had been treated, Ms Higgins then reflected on the outcome for the claimant during an adjournment of only 12 minutes. On resuming, she is aware of the value of asking the claimant, "what normally happens” to which the claimant replies that “open sweeties left at the till and receipts in locker or something.” Despite this assertion, Ms Higgins does not choose to investigate this claim either, but proceeds to advise that the claimant is dismissed.

134. The claimant in response, perhaps inevitably since no enquiry was made into her assertions, states that she did not understand why she was being treated differently from other staff members. Mr Hignet argues that the claimant’s failure to name names means that the respondent could not have been expected to conduct any further investigation. The claimant was specifically asked for dates (or she understood that she was being asked for dates) but she did not know any dates.

135. But in any event the claimant had already named someone she believed was treated differently but no account was taken of it. Further, the claimant had already been told by then that she was to be dismissed. Ms Higgins apparently did not believe she was under any obligation to investigate the treatment of

others concluding that it was only if she gave examples that she would investigate, and that she was "only here for this investigation".

136. In these particular circumstances, taking account of the size of the respondent's operation and the issues to be investigated, as well as the claimant's admissions and the seriousness of the outcome for her, I concluded that the extent of investigation was not reasonable.

137. Mr Hignet suggests that if the Tribunal concludes that the extent of investigation was unreasonable, that any defects could be said to be cured at the appeal stage since further investigation into these matters was carried out at that stage. Indeed, it is telling that the respondent does take the view that further investigation is required, when the claimant repeats the same concerns during the appeal hearing, again making reference to the Caitlin incident and suggesting that eating at the till is common practice. She also raises another example of being treated differently in regard to a former colleague whom she said was seen to be stealing on CCTV and who was permitted to resign.

138. Mr McNicol does then take steps to investigate her claims further before making his decision, presumably because he realises that these claims should have been investigated but were not.

139. The responses to his questioning of witnesses are also telling. Ms Paterson confirmed that Mr Sproule at least allowed drinking at the tills. This seems to be confirmed in the supplementary statement of Ms Higgins who said that she had found a bottle of juice at the checkout on her first day and had to warn staff not to do it. Although Mr Pollock appears to suggest that only the claimant ate at the tills, when asked whether he was aware of anyone else in the store eating at the tills, his first answer is, "Yes I have noticed people doing it". And although Mr Sproule states that it is not common practice, he does confirm that it happened because he said staff were pulled up and warned not to do it again.

140. While further investigation of this sort at the appeal stage may well be, in some if not many cases, sufficient to cure any defects prior to the dismissal, I am of the view that cannot be said here. That is because, as Ms Drysdale has highlighted, given that the claimant has by then been dismissed, current staff

members and indeed managers responsible for implementing the policy are not likely to admit to eating at the tills or the policy not being strictly implemented for fear of them too being dismissed, or if they name names, to the dismissal of colleagues.

141. While as Mr Hignet submitted, Mr McNicol is to be commended for taking the claimant's concerns seriously and investigating matters further, in this case it was simply too late to investigate the circumstances after the claimant had been dismissed because anyone who did admit to eating at the tills knew that might put their job, or indeed the job of their colleagues, in jeopardy.

Reasonableness of the sanction of dismissal

142. The Tribunal then turned in any event to consider whether the sanction of dismissal was reasonable in all the circumstances. In this case, the respondent categorised the misconduct as gross misconduct resulting in summary dismissal. The question is whether that was fair in all the circumstances, having regard to equity and the merits of the case, including the size and administrative resources of the respondent.

143. Ms Drysdale made submissions about gross misconduct, relying on case law decided before the 1996 Act (and indeed before the concept of unfair dismissal came into existence in 1971). While this may be relevant in a wrongful dismissal claim for notice pay, I accepted Mr Hignet's submission that these were irrelevant considerations in this case.

144. The question simply is whether, given the extent of any misconduct, the sanction of dismissal falls within the band of reasonable responses.

145. I have found in this case that the respondent failed to properly investigate the misconduct before making the decision to dismiss. In this case the claimant admits she did eat at the till but did not admit dishonesty. Had the respondent conducted a reasonable investigation, then the respondent may well have ascertained that the claimant was not dishonest, since she had not realised that the item was stock; that it was common for colleagues to eat each other's sweets; that receipts often got lost and that the respondent's apparently strict policy in that regard was not in operation at the Paisley store; and that while

she had eaten at the till this was a practice which might lead to general warnings to staff, it would not necessarily result in dismissal.

146. Mr Hignet argued that that the respondent having conclude that the claimant was dishonest had lost trust making dismissal inevitable. However had the respondent conducted a proper investigation they may well have reasonably ascertained that the claimant had not been dishonest in her actions and therefore there was no question of the claimant being a "risk" such that she could not be trusted not to take stock in the future. The extent of the investigation was lacking, so that the respondent did not have the benefit of robust information upon which to make conclusions that the claimant was guilty of gross misconduct.

147. That failure also impacts on the mitigation question. Mr Hignet argues there were no mitigating factors to be taken into account. He argues that this is particularly the case where the respondent has lost trust in the claimant. However, while it might be that length of service or clean disciplinary record are of limited relevance in a theft case, here I do not accept that there was sufficient investigation into this question to allow the respondent to conclude that the claimant was guilty of theft. The claimant had worked for the respondent for 15 years. She was dealt with on the basis that she had a clear disciplinary record.

148. I thought it interesting that the claimant during the appeal said that she thought that Margaret was in a bad mood, and suggested that she was wont to be sarcastic. This certainly can support speculation that the claimant was indeed being made an example of, which was what she suspected, but there were in any event a number of other factors which clearly indicate that the strict policies were not being adhered to.

149. I have formed the view that the strict policies which the respondent has introduced, for understandable reasons, were not strictly adhered to at the Paisley store. I believed that the claimant's explanation, given spontaneously and then consistently, that staff ate each other's sweets at the tills and that receipts were often lost or missing, was entirely plausible. This view was reinforced by the comments made when the issue of adherence to the policies

was investigated at the appeal stage. Had the respondent carried out a reasonable and proper investigation before making the decision to dismiss they would have had a clearer understanding of the extent to which policies were enforced at the Paisley store. In circumstances where there is admitted misconduct but where the policies relating to that are not strictly adhered to, I conclude that dismissal in these circumstances is a disproportionate response and is outwith the band of reasonable responses.

Procedural fairness

144. I have therefore concluded that the sanction of summary dismissal for the misconduct in question was disproportionate and therefore unfair.

145. However, I turned in any event to consider the question of procedural fairness. I have already concluded that the extent of investigation in this case was not reasonable and that the investigation at the appeal stage could not cure any defects at earlier stages.

146. Both Ms Drysdale and Mr Hignet focussed on failures in regard to furnishing with claimant with statements. Given my conclusions about the limitations in the investigation, and the fact that the conclusions in the investigation report do not properly reflect what is said in the statements, I am of the view that there would have been a value in the claimant having seen the statements in this case. It could not be said with confidence that had the claimant seen the statements it would have made no difference to the outcome; this is not least because the summary in the investigation report does not match the details in the statements. I also agreed with Ms Drysdale that Mr McNicol's conclusions in his outcome letter do not properly or accurately reflect what is said in the statements taken at the appeal stage.

147. Although Ms Drysdale argued that there was procedural unfairness because the claimant was not informed of the allegations before being suspended, I did not accept that submission, not least because it not an unusual practice, and because the claimant was subsequently informed with sufficient clarity that of which she was accused. Nor did I believe her indignation at the failure

to investigate the "fourth" twirl warranted, because I formed the view that this was simply an error on the part of Ms Paterson.

148. Given the size and resources of the respondent, taking account of equity and the merits of the case, I conclude that dismissal in these circumstances could not be said to be procedurally or substantively fair.

Compensation

149. Ms Drysdale had lodged a schedule of loss, seeking a basic award, a sum for loss of statutory rights and a compensatory award. Following discussion parties were able to agree the figures and the sums set out there, subject to arguments about *Polkey* reductions and contributory fault.

150. It was thus agreed that the basic award was £2,681.99, and that the compensatory award for the period from the date of dismissal to the date of the hearing was £5,801.61, less sums earned in mitigation, totalling £3,161 .92. The total agreed sum then amounted to £5,671 .56.

151. A figure of £350 was agreed for loss of statutory rights.

152. Mr Hignet argued that there could be no question that, if dismissal was found to be unfair, that there was contributory fault in this case given the claimant's admissions.

153. I require to decide whether the claimant's conduct was at all blameworthy because if I find that it was then I must reduce the award so far as is just and equitable.

154. I agreed with Mr Hignet that this is a case where there is undoubtedly contributory fault. The claimant knew that the policy was not to eat at the tills or on the shop floor and that there should be a receipt attached. I accepted that the policy was clear and that she understood it. Had it not been for her doing so, then she would not have found herself in this position.

155. However, I bear in mind that fact that I have concluded that the repondent's policy was not strictly enforced at the Paisley store when the claimant was employed there, and prior to her dismissal. In the circumstances I have

concluded that both the basic and compensatory awards should be reduced, and that the appropriate reduction for contributory fault is 50%.

156. While Ms Drysdale had argued for an uplift for a failure to follow the ACAS Code of Practice, following discussion she was not able to point to a specific provision which had been breached and therefore she did not insist or her argument.

157. With regard to the *Polkey* reduction, although I have found that dismissal was both substantively and procedurally unfair, I gave thought to whether had a proper procedure been followed that dismissal would be fair. I did not however I consider that it was appropriate to make any kind of *Polkey* reduction because I considered that had a fair procedure been followed then dismissal for the reasons relied on would in any event have been unfair.

158. The Employment Tribunals (Recoupment of Benefits) Regulations 1996 apply to this award, having been amended to include universal credit as one of the types of benefits to which recoupment applies (see Universal Credit (Consequential, Supplementary, Incidental and Miscellaneous Provisions) Regulations 2013, regulation 8).

159. As the claimant has been in receipt of universal credit, the relevant department will serve a notice on the respondent stating how much is due to be repaid to it. Meantime, the respondent should only to the claimant the amount by which the monetary award exceeds the prescribed element.

160. The prescribed amount consists of the loss of wages from the date of dismissal until those losses ceased, less sums earned. Here the dismissal took effect on 8 March 2019 and losses continued until 3 July 2019 when the claimant took up new employment. Taking account of sums earned and contributory fault, the prescribed amount is therefore £1,319.84. The balance falls to be paid once the respondent has received the notice from the relevant department.

Compensation table

Head of loss	Calculation	Subtotal	Total
Basic award	17.5 x £153.25	£2,681 .88	
Less 50% contributory fault		(£1,340.00)	£1 ,340.94
Loss of statutory rights			£350
Compensatory award (past losses) less sums earned in mitigation	£5,801.61 minus £3,161.92	£2,639.69	
Less 50% contributory fault		(£1,319.84)	£1,319.84
Total award			£3,010.78

Conclusion

161 . I have concluded that dismissal in the circumstances does not fall within the band of reasonable responses and is therefore unfair. The claimant is therefore entitled to compensation and the respondent shall pay to the claimant the sum of £3,01 0.78

Employment Judge: M Robison
Date of Judgment: 18 December 2019
Entered in register: 19 December 2019
and copied to parties