RESERVED JUDGMENT

EMPLOYMENT TRIBUNALS

Claimant: Ms D Giles

Respondent: Heatherleigh Care Limited

Heard at: Cardiff **On:** 16th May 22

Before: Tribunal Judge DS McLeese Sitting as an Employment Judge (Sitting Alone)

Representation
Claimant: In person
Respondent: Mrs Joanne Williams (Manager)

RESERVED JUDGMENT ON LIABILITY AND REMEDY

1. The claim of unfair dismissal is well founded and upheld.

2. The Respondent is to pay the Claimant the following sums:

Basic award	£647.50
Compensatory award	£1480.00
Total	£2127.50

REASONS

3. This is a claim by Donna Giles against her former employers Heatherleigh Care Limited. The Claimant was employed from the 27th August 2018 to the 8th November 2021.

4. A claim was raised in the ET1 relating to holiday pay but at the outset of the hearing it was indicated that that claim was not being pursued.

The Hearing

5. In the course of the hearing, I heard evidence from the Claimant. For the

Respondent, I heard from Mrs Joanne Williams who was a registered manager for the company.

6. In reaching my decision, I had regard to the evidence I was provided with and the evidence I heard during the hearing. I also had regard to the law and briefly set out the relevant parts in respect of these claims.

7. Regrettably, putting it neutrally, the parties had had difficulties in preparing the case for hearing. As a result there was no agreed bundle, bundles were filed late and were unpaginated. It also became apparent during the hearing that certain documents had not made their way into what had been provided.

8. However, there was a wish expressed by the parties to proceed and the difficulties were not insurmountable.

9. The documents provided were a Respondent's bundle of 82 PDF pages and a Claimant's bundle of 157 PDF pages. Additional documents and emails were provided during the course of the hearing totalling 28 pages.

10. The service user referred to in the course of this document is anonymised by use of their initials.

The Relevant Law

Unfair Dismissal

11. By virtue of Section 94 of the Employment Rights Act 1996 ('ERA 1996') an employee has the right not to be unfairly dismissed by their employer. In respect of what constitutes an unfair dismissal the relevant law is to be found within Section 98 of the ERA 1996.

12. Section 98(1) requires that in deciding whether a dismissal was unfair it is for the employer to show the reason for that dismissal. That reason must fall within a list of potentially fair reasons to be found within Section 98(2) of which subsection (2)(b) states:

"A reason falls within this subsection if it relates to the conduct of the employee."

13. Section 98(4) of ERA 1966 requires the Tribunal to consider whether the employer acted reasonably in dismissing the employee for one of the reasons in Section 98(2). In a conduct dismissal, the Tribunal is bound to consider the guidance issued by the Employment Appeals Tribunal in the Courts (including the decisions in British Home Stores Ltd v Burchell [1978] 379, Iceland Frozen Foods Ltd v Jones [1993] ICR 1, Post Office v Foley [2000] IRLR 827, Sainsbury's Supermarkets v Hitt [2003] IRLR 23).

14. In particular, the case law requires me to consider four sub-issues in

determining whether the decision to dismiss on the grounds of conduct was fair and reasonable:

14.1. Whether the employer genuinely believed that the employee had engaged in conduct for which he was dismissed;

14.2. Whether they held that belief on reasonable grounds;

14.3. Whether in forming that belief they carried out proper and adequate investigations, and

14.4. Thereafter, whether the dismissal was a fair and proportionate sanction to the conclusions they had reached.

15. In addition, the Tribunal must consider the reasonableness of the employer's decision to dismiss and, in judging the reasonableness of that decision, the Tribunal must not substitute its own decision as to what was the right course to adopt for the employer.

16. Rather, the Tribunal must consider whether there was a band of reasonable responses to the conduct within which one employer might reasonably take one view whilst another quite reasonably takes a different view. My function is to determine whether in the circumstances of the case, the decision to dismiss fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within that band it is fair. If it falls outside that band, it is unfair.

17. The Tribunal is also required to consider the fairness of the procedure that was followed by the employer in deciding to dismiss the employee. However, if the procedure followed was unfair, the Tribunal is not allowed to ask itself whether the same outcome (i.e. dismissal) would have resulted anyway, even if the procedure adopted had been fair (per Polkey v AE Dayton Services Ltd [1987] IRLR 503 HL).

18. The requirement for procedural fairness includes consideration of the reasonableness of the decision to dismiss up to and including any appeal process undertaken (West Midlands Co-operative Society v Tipton 1986 ICR 192, HL).

The Issues

19. It was agreed that the Respondent had dismissed the Claimant and that the reason it relied upon for that dismissal was gross misconduct. It was left for me to determine whether the decision to dismiss on the grounds of conduct was substantively and procedurally fair.

RESERVED JUDGMENT

Findings of Fact

The Dismissal

20. The Claimant was employed by the Respondent from 27th August 2018 to 8th November 2021.

21. The business of the Respondent related to looking after individuals, referred to as service users, in specialist supported accommodation.

22. The residential setting in which the Appellant was employed was the home to five people and the Appellant was employed as a support worker.

23. At the time with which the Tribunal was concerned the Respondent had decided to cease trading.

24. In February 2021 the Appellant had placed the bank card details of a service user (JP), on her phone. With the assistance of her colleague she had downloaded the “Uber Eats” app and a meal was bought for the five service users in the house.

25. This was documented at the time and the other four service users paid back JP for the meals bought on their behalf.

26. The payment and repayments to JP were recorded in the service user account sheet, although not the manner in which they were bought.

27. On the 19th October 2021 the Claimant resigned, giving four weeks’ notice of her intention to leave the company. Her notice was to expire on the 16th November 2021.

28. Also on the 19th October, Joanne Williams discovered that there was an anomaly in the bank account of JP.

29. There transpired to be a payment to Uber Eats for £8.78 on the 16th September that was not for JP.

30. Mrs Williams contacted Uber who without further details were unable to assist.

31. Mrs Williams was told by staff, including on balance of probabilities the Claimant whose evidence I accepted on this point, to cancel the card and contact the police. Mrs Willams did not do so.

32. It is not clear why she did not take any other action at that time but another anomaly came to light on the 5th November and Mrs Williams contacted the bank.

33. There transpired to be four Uber Eats transactions. On February 8th for

£40.48, 16th September for £8.78, 18th October for £8.92 and the 2nd November for £9.50. These had been taken from JP's account. The meals relating to the last three transactions were delivered to the Claimant's home.

34. The Claimant, approached Mrs Williams, showing her her phone and indicated that the payments had come from her account and that it was a genuine error as regards the last three payments.

35. The Claimant gave Mrs Williams money to cover the cost of purchase for JP.

36. Mrs Williams informed the Claimant she would be contacting Care Inspectorate Wales (CIW) and the regulatory authorities.

37. The bank refunded the money.

38. The Claimant was permitted to continue her shift both that day and on Sunday the 7th November 21.

39. The Claimant contacted Uber Eats and sought to have the money refunded to JP's card.

40. On the 4th November, the day before the additional transaction came to light, in response to an enquiry from the Claimant's new employer, Mrs William responded that there were "no safeguarding issues regarding any of the named individuals although there have been some disciplinaries".

41. On her evidence to me Mrs Williams indicated that as so far as the Claimant was concerned there were no disciplinaries, only discussions relating to medication and that that played no part in the decision to dismiss.

42. Within the evidence is an email from the new employer. It states that they were told the Claimant was to be dismissed by Mrs Williams in two phone calls on the 5th and 8th November.

43. On the 8th November, the Claimant's day off, she was sent a text by Mrs Williams. It read, "Can you come in around 1pm so we can discuss the incident that has happened. Thanks".

44. The Claimant attended as requested and was given her notice of dismissal which, on the balance of probabilities, was written prior to the meeting.

45. The decision to dismiss her, on Mrs Williams' own evidence to the Tribunal, had been prior to that meeting and not as she initially told me, in the meeting.

46. The decision to dismiss was on the advice of the safeguarding body prior

to the Claimant attending.

47. No consideration was given to suspending the Claimant.

48. Mrs Williams had no regard to the ACAS code.

49. The company's own disciplinary and grievance procedure was not followed.

50. The Claimant's contract in relation to dismissal states that;

> "In case of gross misconduct there will be no period of notice given. If you are in your probationary period or first year of employment, only one warning is required before dismissal.
>
> Before any of these actions are taken you will receive a letter setting out the details of the alleged misconduct and inviting you to a meeting to discuss the matter. You will have the right to be accompanied to the meeting by a work colleague or a trade union representative. After the meeting you will be informed if any further action will be taken. You have the right to appeal but must do so within 10 working days of receipt of notification of the decision".

51. The company's disciplinary and grievance procedure allows for a "full and thorough" investigation. It allows for notice of a disciplinary interview in writing with no fewer than five days' notice unless agreed. The right to be accompanied is provided for as is a right of appeal. None of those procedures were followed.

52. Despite the Claimant writing to both Mrs Williams and Mr Fletcher, the managing director of the company, contesting her dismissal she was afforded no right of appeal.

53. The Claimant was due to start with a new employer but they have not permitted this pending investigations by safeguarding and the police. Both have, on the evidence before me, now concluded with no action being taken.

<u>Submissions:</u>

54. Both parties appeared in person and without representatives.

55. Their submissions may be summarised as follows.

56. The Claimant accepts she made an error.

57. The Claimant says that the transaction in February, which was incidentally not given as a reason for dismissal, was verbally approved by Mrs Williams and that the later transactions were entirely innocent and that she

had removed the service users card from her Uber Eats app in February, replacing it with hers. She contends she was prevented from being able to give an explanation and that the process used and dismissal were unfair.

58. The company, through Mrs Williams and Mr Fletcher, say that the process was fair and even if it was procedurally unfair the outcome would have been the same.

59. They say that they considered it an allegation of theft and the evidence the Respondent had was enough for dismissal.

Conclusion On Dismissal:

60. It is not in dispute that the Claimant was an employee, that she had been an employee for a little over three years and that she was dismissed.

61. I find the primary reason for her dismissal was conduct.

62. The Respondent has shown that the primary reason for dismissal was a potentially fair reason, namely conduct.

63. Section 98 (4) of the Employment Rights Act provides:

Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

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

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

64. Turning to the legal test outlined above:

Whether the employer genuinely believed that the employee had engaged in conduct for which he was dismissed;

Whether they held that belief on reasonable grounds;

Whether in forming that belief they carried out proper and adequate investigations, and

Thereafter, whether the dismissal was a fair and proportionate sanction to the conclusions they had reached.

65. In this case the Respondent abrogated their responsibilities on the

evidence before me in relation to the actual decision to dismiss and were ostensibly led by the regulators whose advice Mrs Williams sought.

66. They genuinely believed the Claimant had used the card and that money had been taken from a service users account to deliver meals to the employee's house. That is not disputed.

67. The issue is that the lack of proper investigation and procedure meant that they could not have properly established whether or not the Claimant had any fraudulent intent or for that matter have proved her innocence from the point of view of any allegation of deliberate dishonesty.

68. It is of note that in the referral to the safeguarding team Mrs Williams says this, having outlined the Claimant's explanation as to how the payments came to be made, "I have explained to the staff member that this is not acceptable and that her card should never have been used through staffs personal phones and that this will have to be reported further. She had ensured that the information is deleted from her phone".

69. The difficulty with that is that I heard directly opposing evidence as to whether Mrs Williams was aware of the purchase of the birthday meal at the time in February. The Claimant says she was. Mrs Williams says she was not and did not approve it.

70. A reasonable employer could have decided that the mere fact, given the position of trust that the Claimant was in, that the service users bank details were in her phone and used at all, innocently or otherwise was enough to warrant gross misconduct.

71. The difficulty here is that a proper investigation may have highlighted the issue of Mrs Williams knowledge, or otherwise, of the card being put on the phone in the first place. If the Respondent concluded she did this may give credence to the Claimant's explanation as to how it came to be there. This may have influenced whether it was appropriate for Mrs Williams to be dealing with the investigation.

72. Notwithstanding that background relating to how the card came to be on the phone to pay for the meal in February, agreed to be for the service users, the decision to dismiss was within the range of reasonable responses for the employer given the position at the time.

73. The position of trust, breach of privacy, financial loss, albeit refunded, and data protection of a vulnerable individual could warrant gross misconduct, regardless of whether it was as a result of carelessness or malice.

74. Whether or not Mrs Williams' agreed to the card details being put on the Claimant's phone in February the fact the details were still on the phone in September and were used to purchase meals for delivery to the Claimant's home address would be sufficient for an employer to find that

dismissal was within a range of reasonable responses.

75. The dismissal was substantively fair.

76. In saying that the investigation and process leading to dismissal here was unfair and pre-ordained.

77. Having known about one transaction no action was taken. When the other transactions came to light the regulatory authorities were informed. The Claimant was permitted to keep working.

78. Upon advice, not Mrs Williams' own judgment, a decision was taken to dismiss.

79. The Claimant was invited in by text to speak to Mrs Williams and she was given a letter at that meeting, which on balance of probabilities was written before she arrived, confirming her dismissal.

80. She was not formally asked to give an account, save for on the day she volunteered her phone to Mrs Williams.

81. Despite contesting the dismissal she was not afforded a right of appeal.

82. Despite dismissal, on the facts as known to the Respondent, being within the range of reasonable responses the investigation and procedure in dismissing the Claimant were unfair.

83. The employer's own disciplinary and grievance procedures were not followed, the ACAS Code of Practice was not considered or followed.

84. Mrs Williams said she considered inviting a member of staff to accompany the Claimant. This was a potential witness and even if that was the case the Claimant would only have been made aware of that person and the offer to accompany her upon arrival for the meeting which she was called to by text three hours earlier.

85. No appeal was offered, despite being requested and the Respondent relied upon outside advice in simply deciding to dismiss the Claimant.

86. Mr Fletcher suggests there was no appeal offered as there was to be a police investigation but at the time the police had yet to be informed.

87. The dismissal was procedurally unfair and the claim of unfair dismissal is well founded and upheld.

REMEDY

88. The Claimant seeks compensation for the unfair dismissal.

89. I have been provided with very little in the way of documentation by either party in relation to this aspect of the claim.

90. I have schedule of loss which claims the Claimant worked 37 hours per week at £10 per hour. £370 gross per week.

91. Those figures are not disputed by the Respondent.

92. The Claimant had yet to start work with her new employers.

93. She claims loss of earnings of £10,950 representing 29 weeks work and asks that £1,794 of Universal Credit be offset leaving a total claim of £9,156.00.

94. The factual accuracy of the figures provided by the Claimant were not disputed.

95. The Claimant had given notice of her intention to resign and was due to cease employment on the 16th November 2021.

Submissions

96. The Claimant states she just wishes to be compensated, that this matter has affected her mental health and that she is struggling financially.

97. She did not provide any submissions, despite invitation, as to the effect of her contributory conduct. This is dealt with below.

98. The Respondent suggests that dismissal would have been the outcome regardless of any procedural shortcomings and that the future employer could have still let the Claimant work as there are no Social Care Wales proceedings. That is to say they say the new employers were not bound to prevent the Claimant working and it is their choice not to let her start work, rather than them being prevented from doing so by a regulator.

99. An award of compensation for unfair dismissal is made up of a basic and compensatory award (section 118 Employment Rights Act 1996 “ERA”).

100. The basis award in this case would ordinarily be £1295.

101. This is made up of a weeks’ pay for each year the Claimant was over 22 but under 41 and 1 and ½ weeks pay for the last year when she was 42.

102. The compensatory award claimed is £10,950 to represent the loss of earnings from her new employer.

Contributory Conduct

103. In respect of the basic award, s.122(2) of the ERA 1996 permits the Tribunal to reduce the amount awarded where satisfied that any conduct of the Claimant before the dismissal was such that it is just and equitable to make such a reduction. The decisions to reduce and the amount of any reduction are at the discretion of the Tribunal. It is not necessary for the conduct to have contributed to or caused the dismissal.

104. For the compensatory award, s.123(6) of the ERA 1996 states:

Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

105. The provision for reducing the compensatory award differs from that for reducing the basic award in two aspects. The conduct must to some extent have contributed to or caused the decision to dismiss. If that is the case, the amount of the compensatory award must be reduced. There is no discretion save for the amount of any such reduction.

106. There are a number of key considerations:

106.1. What is being assessed is the Claimant's conduct, not that of the Respondent;

106.2. The conduct must be culpable, blameworthy or wholly unreasonable;

106.3. The conduct must take place before the dismissal, been known to the Respondent and, for the compensatory award, at least in part contributed to the decision to dismiss;

106.4. In considering whether it is just and equitable to make a reduction (basic award) and the amount of any reduction (basic and compensatory awards), the nature of the conduct and the extent to which is caused the dismissal are relevant factors;

106.5. It is permissible to reduce awards by 100%. However, such cases are rare and unusual, given that they flow from an initial finding that the dismissal was unfair.

Polkey v AE Dayton Services Limited (1988) ICR 142, HL ('Polkey')

107. Pursuant to s.123(1) of the ERA 1996:

…the amount of the compensatory award shall be such amount as the tribunal considers just and equitable having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

In *Polkey*, it was held that the compensatory award can be reduced to reflect the likelihood that the Claimant would have been dismissed anyway and the Respondent's procedural errors made no difference to that outcome. Put another way, what were the chances of the Claimant being dismissed if the Respondent had followed a fair dismissal procedure?

108. In this case the Claimant, whether or not Mrs Williams was originally aware of the cards use or not, was culpable and responsible for it being used on her Uber Eats account. It was her phone and her responsibility to take the utmost care with the data and security of information belonging to a lady for whom she had a duty.

109. The Claimant says she deleted the card from her phone. It was her duty to ensure she did and to ensure that it could not be used and certainly not for meals that were delivered to her own address.

110. While the Respondent's clearly did not handle the dismissal well I am satisfied that the Claimant contributed significantly to her own dismissal.

111. The Claimant's conduct was the reason that her future employer did not immediately take her on to work. Not the conduct of the Respondent.

112. The Respondent cannot be held responsible for the future employers' decision not to start the employment.

113. In this case there are a number of salient facts:

- The Claimant was responsible for her phone, the storage of data on it and its use;
- The Claimant had resigned and was leaving the Respondent company eight days after her dismissal anyway;
- The Respondent, although I am satisfied they informed the new employers of the Claimant's dismissal, had no control over whether or not the Claimant was allowed to take up her role.

114. As regards the basic award I am satisfied that it should be reduced by 50% to reflect the conduct of the Claimant.

115. I am further satisfied that it is likely that the Respondent, given the nature of the position of trust occupied by the Claimant and the seriousness of the use of monies without authorisation, whether by mistake or malice, may well have dismissed the Claimant in due course.

116. When considering the losses sustained by the Claimant I find that the only losses attributable to the Respondent are negligible as it is the Claimant's conduct which led to her being unable to start her new job, not the conduct of the Respondent in the manner of dismissal.

117. I further bear in mind that the Claimant was due to leave her

employment with the Respondent in 8 days and so would not have been due wages beyond that date in any event.

118. Accordingly I must have reference to Section 123 of the ERA 96 which states, “the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer”.

119. In this case as I have stated the Respondent cannot be held responsible for the decision of the future employer to delay employment.

120. Accordingly, I limit the compensatory award to four weeks wages which is the period between the dismissal and the time that it reasonably would have taken to complete a proper and thorough investigation and dismissal process. In coming to this figure I have notionally allowed one week for the investigation, one week for notice of a hearing. One week for the hearing and a further week for any appeal. This is of course not an exact science and I have sought to use realistic time scales.

121. In the circumstances it is not just and equitable to reduce the compensatory element further as it only represents the time the Respondent should have taken to ensure the investigation and outcome were handled properly.

122. The recoupment provisions do not apply as the period for which the Claimant received Universal Credit, which began on the 21st December 2021 do not accord with a period for which the Tribunal has ordered payment to be made to the Respondent under the compensatory award.

123. The Respondent is to pay the Claimant the following sums:

- Basic award - £647.50 (£1295 divided by 2.)
- Compensatory award - £1480.00 (Four weeks wages.)
- Total - £2127.50

124. The Respondent will be entitled to deduct any tax and employee’s national insurance contributions due on this amount before payment to the Claimant. If that is not done, the Claimant is responsible for any income tax or employee national insurance contributions that may be due on the sums awarded in respect of unpaid wages.

RESERVED JUDGMENT

Tribunal Judge DS McLeese Sitting as an Employment Judge

Date : 18th May 2022

REASONS SENT TO THE PARTIES ON 13 June 2022

FOR THE TRIBUNAL OFFICE Mr N Roche