EMPLOYMENT TRIBUNALS

Claimant: **Mr C Hagan**

Respondent: **Sky Retail Stores Limited**

Heard at: **ET London South (via CVP link)** **On: 12 April 2022**

Before: **EJ Swaffer**

Representation

Claimant: In person

Respondent: Ms A Rumble of Counsel

RESERVED JUDGMENT

1. The Claimant was unfairly dismissed by the Respondent.

REASONS

Introduction

1. From 7 August 2017 until his dismissal on 25 November 2020 the Claimant was employed as a sales advisor by the Respondent. He advised on and sold Sky products to members of the public. At the material time the Claimant was based at the Respondent's retail stand in the Bentall Centre in Kingston upon Thames (the stand).

2. The Respondent operates small retail units or stands within shopping centres, selling television, broadband and telephony products to customers who approach the stand and wish to buy the Respondent's products.

3. The Claimant claims that his dismissal was unfair within Section 98 Employment Rights Act 1996 (ERA). On 3 February 2021 the Claimant made a claim for unfair dismissal, seeking re-engagement and compensation.

4. The Respondent contests the claim, stating that the Claimant was fairly dismissed for gross misconduct in the form of a breach of its data protection policies. It claims that it was entitled to terminate his employment because of his gross misconduct.

5. The Claimant was unrepresented, and gave sworn evidence. The Respondent was represented by Ms Rumble of Counsel, who called sworn evidence from Mr Ricky Davis Team Leader Sky Retail Stores Limited, Ms Tracy Halliday Sales Manager at Sky Retail Stores Limited, and Ms Margaret Kerr Regional Manager Sky Retail Stores Limited. I considered documents from an agreed 436 page bundle of documents which the parties introduced in evidence, plus other documents from the Respondent provided during the course of the hearing as agreed by the Tribunal. The Claimant also provided character references, which were not introduced in evidence.

Preliminary matters

6. Before I heard any evidence, I had to deal with the preliminary matter of the Respondent's witness statements. On the morning of the hearing, I was provided with three witness statements by Mr Davis, Ms Halliday, and Ms Kerr, which were not part of the bundle. There was also a witness statement by the Claimant dated 9 February 2022, which the Respondent had already received prior to the hearing, and a copy of which was provided to the Tribunal in advance of the hearing date.

7. There was no list of issues prepared in the case. The Respondent's representative had prepared her own suggested list, which I discussed with the parties and which was used as the basis for the list of issues agreed at the outset of the hearing. The list of issues was as follows:

    a. What was the reason for the Claimant's dismissal?

b. Was that reason a potentially fair reason?

c. Did the Respondent have a genuine belief that the Claimant had committed an act of gross misconduct?

d. Was this belief based on reasonable grounds?

e. Did the Respondent carry out a reasonable investigation?

f. Was the Respondent's decision to dismiss within a range of reasonable responses open to it?

g. If the procedure followed by the Respondent was unfair, would the Claimant have been dismissed in any event?

h. Did the Claimant contribute to the dismissal?

i. What should any remedy be?

8. The Claimant confirmed that the Respondent had paid all monies owing on the termination of his employment. His complaint was that the decision to dismiss for gross misconduct was unfair as the Claimant had the customer's consent to pass on her details, and the process which led to the dismissal was also unfair due to its duration.

9. Once the list of issues was agreed, I then sought submissions about the length of time each side anticipated spending in cross examination. The Claimant was not calling any additional witnesses; the Respondent had three witnesses, as referred to above. I adjourned so that the Claimant and I had time to read the statements of the Respondent's three witnesses.

10. I heard oral evidence from the Claimant, and from Mr Davis, Ms Halliday, and Ms Kerr.

11. Due to time constraints, I did not hear any specific evidence or submissions with regard to remedy.

Findings of fact

12. The relevant facts are as follows. Where I have had to resolve any conflict of evidence, I indicate how I have done so at the material point. References to page numbers are to the agreed bundle of documents. Many of the facts in this case are not disputed, but the details are included here as relevant background to my decision. The parties presented a significant amount of evidence to the Tribunal during the hearing. If this judgment and the reasons are silent on some of those matters, it is not that they were not considered, but that they were not sufficiently relevant to the issues that the Tribunal had to decide to be included in the final decision.

13. Generally, the Complaint met his performance targets. In 2018 due to family issues and his caring responsibilities as a single father, the Claimant moved to a flexible working arrangement. In late September 2019 the Claimant's grandmother died. She lived in Ghana, and was caring for his disabled son N. On 2 October 2019, the Claimant travelled to Ghana to attend the funeral and make arrangements to return N to the UK. Whilst the Claimant was in Ghana, his team leader AH sent a letter to the Claimant's home address stating that he was absent from work without leave (AWOL).

First investigation September-December 2019

14. It is not clear exactly when the first investigation began, but it covered the alleged AWOL and the Claimant's use of the stand phone to call Ghana during working hours. At the same time that the first investigation was taking place, on 28 November 2019 the Claimant expressed concerns about the behaviour of a female colleague, RD. On 3 December 2019 the Claimant contacted AH with a question about uniform policy, arising from a male colleague CE's dress.

15. A conduct meeting was held on 9 December 2019 in relation to the AWOL and telephone calls. An outcome letter dated 11 December 2019 was sent to the Claimant.

16. With regard to the AWOL, there is a dispute between the parties about the steps the Claimant states that he took to inform the Respondent of the bereavement and his wish to travel for the funeral. The Claimant refers to various steps as set out in the bundle; the Respondent denies that the Claimant made it aware that he wished to take leave to attend the funeral. I do not consider it necessary to make a finding of fact about what happened with regard to the AWOL incident, given that the allegation was not upheld and the issue is not relevant to the claim for unfair dismissal.

17. The allegation relating to the Claimant's use of the Respondent's phone for personal calls was upheld, in the following terms as set out in the outcome letter: *I confirm that you have been issued with a Final Written Warning given as a result of your conduct. In particular: In breach of Sky's acceptable use policy, you made 97 calls to Ghana between the dates of 23rd October 2018 and 19th September 2019 which resulted in a financial loss to Sky totalling £1.033.84. In addition, when making these calls which totalled 17 hours and 6 minutes, you were unavailable to support customers which had potential to result in reputational damage to Sky. This letter will be placed in your personal file and will be disregarded after a period of 12 months. Further recurrence of unacceptable conduct could result in further action being taken under the Conduct Policy.*

18. In the notes of the meeting, the investigator accepts in relation to the phone calls that the Claimant's *"decision making was impacted during a stressful and emotional time in [his] personal life"*, and gives this as the reason for issuing

the Final Written Warning rather than dismissing him. He also offered the Claimant an *"occupational health referral, to support both you and your line manager in understanding what your needs are in the work place".* The Claimant offered to repay the cost of the calls during the investigation, and subsequently repaid the monies owing.

19. The Claimant did not appeal against the Final Written Warning.

Second investigation (by Mr Davis) 11 December 2019- 28 May 2020

20. On 11 December 2019 RD alleged that the Claimant had intimidated, bullied, and harassed her. The same day, an investigation meeting was held by Mr Davis with RD in relation to her allegations of intimidation, bullying and harassment against the Claimant. In particular RD made allegations that the Claimant left his daughter for long periods at the stand, that the Claimant had shared log in details with his colleague CE contrary to the Respondent's policies, that the Claimant was inappropriately involved in RD's personal relationships, that the Claimant made inappropriate remarks to RD after she declined a date with him, that the Claimant made inappropriate comments about women who passed the stand, and that the Claimant played inappropriate music with offensive lyrics from the stand.

21. Between 11 and 19 December 2019, the Claimant continued to work on the stand as usual, including overlapping shifts with RD.

22. An investigation meeting was held by Mr Davis with the Claimant on 19 December 2019. The Claimant denied RD's allegations, and suggested that RD may be retaliating against him in relation to a separate incident where RD was suspected of bullying another (non-Sky) Bentall Centre employee. The Claimant was suspended on full pay after the meeting whilst Mr Davis carried out investigations.

23. The Claimant had been due to take annual leave between 20 December 2019 and 4 January 2020 and had planned to travel to Ghana with his children. In his statement dated 9 February 2022, the Claimant states at paragraph 7, that Mr Davis "*instructed me to make myself available for investigation interviews, at very short notice"* whilst suspended. I find that the Claimant interpreted this instruction as meaning that he was unable to take his pre-booked annual leave; he told me that he was afraid to take that leave, given what had happened when he went to Ghana in October 2019. Mr Davis told me that he did not know the Claimant had annual leave booked, and that this should still have been honoured whilst the Claimant was suspended. I find that the Claimant's decision not to travel to Ghana for his pre-booked annual leave was due to a misunderstanding of what Mr Davis meant by needing to make himself available. I do not find that Mr Davis told the Claimant he could not take his pre-booked annual leave. I find that the Claimant's actions in not travelling to Ghana for Christmas in 2019 were understandable given his recent experience

when he went to Ghana for the funeral in October 2019. I do not consider that this misunderstanding is particularly significant in terms of his claim for unfair dismissal.

24. On 7 January 2020 Mr Davis met with CE, who alleged that the Claimant was often late for work. He agreed with RD's allegation that the Claimant shared log in details and played inappropriate music on the stand.

25. On 5 February 2020 Mr Davis met again with RD. She alleged that the Claimant argued with her on the stand in front of customers and she felt intimidated. She alleged that the Claimant frequently left the stand for long periods when he was on his phone. The same day, RD resigned.

26. On 17 February 2020 Mr Davis again met with the Claimant, where the Claimant expanded on RD's possible motivation for making allegations against him.

27. On 9 and 27 March 2020 Mr Davis met with CE. CE agreed with RD that the Claimant left his daughter on the stand, alleged that he had accessed the Claimant's Sky account two or three times, and alleged that the Claimant made inappropriate comments about women.

28. During a meeting with former employee SC on 9 March 2020, SC alleged that the Claimant spent long periods away from the stand, long periods on his own mobile, that he would give customers his personal mobile number, made inappropriate comments about women, would leave his daughter at the stand, and would play inappropriate music at the stand.

29. Crucially for this case, during the meeting with CE on 27 March 2020 when Mr Davis was discussing allegations that the Claimant gave customers his personal mobile number contrary to the Respondent's policies, CE stated*: "I can also provide evidence that [the Claimant] kept customers numbers, he sent me a message with a customer's phone number asking me to call them and complete a deal. I called the customer [SF] from the stand phone. She became very upset and asked me why it was not [the Claimant] calling her. I apologised and said I would ask [the Claimant] to call her. I have provided this text message to [Mr] Davis during this investigation".*

30. Mr Davis met with the Claimant again on 15 April 2020. The Claimant confirmed his understanding of the Respondent's data protection policy, and that he was not allowed to give customers his personal mobile number. The Claimant explained that his grandmother had died and that on 2 October 2019 he was at Heathrow airport waiting to travel to Ghana. A potential customer (SF) rang him, and he explained that he was unable to assist her. The customer was dissatisfied, and he felt he was not providing a good customer service. The Claimant states that he suggested the customer should go to or call the stand where a colleague could assist her, but she did not want to do this. She was not willing to wait until he returned to work. The Claimant states that the customer asked him to pass her name and number to a colleague, which he did, sending her details to CE by text using his personal mobile and asking CE to call her. The Claimant said that he wanted to promote the

Respondent's business, and provide the best customer service. He felt pressurised by the customer. He also said that he had her consent to share her details, and she was only a prospective customer not an actual customer. I have no reason not to accept the Claimant's account of the events of 2 October 2019.

31. On 28 May 2020 Mr Davis concluded that there was a formal disciplinary case against the Claimant in relation to the allegations that he had given his personal log in details to another colleague, that he had a customer's details in his personal mobile phone and texted those details to another colleague without the customer's consent, that he made inappropriate sexual comments about women who passed the stand, and that he played inappropriate music with offensive lyrics from the stand. Ultimately, the allegations in relation to inappropriate comments to women and inappropriate lyrics were not upheld, and I will not discuss them in any further detail.

32. In his oral evidence, Mr Davis stated that at no point during his investigation had the Claimant made him aware of any mental health or memory difficulties.

33. Mr Davis also said that the delays in completing his investigation were due to the Claimant being on leave, the impact of Christmas and difficulties in arranging meetings with the witnesses, new information being provided at each meeting which meant further investigations were needed and more time needed for the Claimant to respond to the additional allegations, the Claimant being unavailable for a meeting due to his son's health, and the Claimant needing to isolate after contracting Covid19. I note that on 9 February 2020 the Claimant was caring for an unwell child, and said he needed a week to monitor her. I also note that on 1 April 2020 the Claimant informed Mr Davis by email that he was showing symptoms of Covid19, that family members were suspected to have Covid19, and asked whether questioning could take place after he had completed his isolation, assuming questioning by email was not possible. The Claimant also mentioned that he had been suspended for 4 months, and asked for details of his line manager as he had heard that KO'R had left. On 6 April 2020 Mr Davis replied to the Claimant, seeking clarification of the dates of his isolation period and providing details of his line manager. The issue of the length of the Claimant's suspension was not addressed, although Mr Davis did make the following comment *"I would also like to remind you of the confidentiality agreement that you have signed and also the conditions of your suspension which state you must not make contact with any member of staff without prior approval of the investigation manager".*

34. Part of the Claimant's terms and conditions of employment were set out in the Sky How We Work (HWW) document (page 53 of the bundle). This included a provision at page 8 under the heading *Keeping customer information safe* which states:

> *"we don't disclose customers' details to anyone else, and we don't write their personal details (such as name, address) anywhere other than on Sky approved collateral (such as Customer Checklists)".*

35. On page 7 (page 52 of the bundle), HWW states: "*We process all sales using our online sales systems (either Archimedes or RSG). Only when they are not available do we book the sale through the Sky Call Centre process. No other method can be used".*

36. Ms Kerr told me and in the absence of any evidence to the contrary I accept that customers and prospective customers are treated in the same way for the purposes of HWW and the Respondent's data protection policy, and that there are no differences in the polices which apply to the handling of their data.

37. The Respondent's Conduct Policy is set out at pages 64-67 of the bundle. At page 67 of the bundle, as part of the Conduct Policy, examples are given of what may amount to gross misconduct, including

    a. *serious breach of the terms and conditions of your employment and/or Sky rules and policies,*

    b. *negligent, reckless or wilful failure to comply with the provisions of Sky's Data Protection policies.*

<u>First invitation to disciplinary meeting on 4 June 2020</u>

38. In her letter to the Claimant dated 5 November 2020 inviting him to the disciplinary meeting, Ms Halliday refers to a letter from Mr Davis to the Claimant dated 26 May 2020 inviting him to a disciplinary meeting to be chaired by JB on 4 June 2020. That letter from Mr Davis was not introduced in evidence.

39. The meeting on 4 June 2020 did not proceed, and I quote from Ms Halliday's letter dated 5 November 2020 "*this meeting did not go ahead as you provided a fit note from your GP and stated you were not fit to attend which resulted in [JB] discussing an Occupational Health (OH) Referral with you, which you authorised and subsequently attended a telephone consultation on 18th June 2020. I have been advised, the OH Report stated you were not fit to attend meetings at that time however would be fit to return to work at the end of your fit note which was 30th June 2020. I believe you did not return to work and continued to provide fit notes covering your sickness absence. I have been made aware you have been able to communicate via another process, which I have taken into consideration and therefore, on that basis, it is reasonable for me to request you attend a Conduct Meeting in accordance with Sky's Conduct Policy"*.

40. There was no clear evidence before me as to whether the Claimant remained unfit to work between 30 June 2020 and the termination of his employment on 25 November 2020, although I note the reference to Ms Halliday's understanding that he continued to provide fit notes, and also the Claimant's own evidence that he provided a fit note from 4-30 November 2020. In any event, there is no evidence of any subsequent contact between the Respondent and the Claimant with regard to the disciplinary meeting until Ms

Halliday's letter from which I quote above.

Grievance meeting with Mr M Whan 28 August 2020

41. On 1 July 2020 the Claimant raised several grievances about his treatment. One of the Claimant's concerns was that the allegations raised by RD on 11 December 2019 could have been discussed during the conduct meeting on 9 December 2019.

42. In his oral evidence, the Claimant stated that the various allegations by RD and CE should not have been investigated as they were raised after he raised issues in relation to those colleagues, and after he had "survived" the first investigation. He considered that they should have been investigated during the first investigation in September-December 2019, as the alleged matters all happened during that period.

43. I am unaware of any findings made following the Grievance Meeting. However, I accept the Respondent's evidence that it would not have been possible to investigate RD's allegations prior to or during the 9 December 2019 conduct meeting, given that the allegations were not made until two days after the conduct meeting had concluded. This is important, as the Claimant has raised several times concerns about why these issues were not dealt with during that first investigation. I am satisfied this would not have been possible as the allegations were not then known. Similarly, I also accept the Respondent's evidence that it would not have been possible to investigate the allegations made by CE, given that they were made after the conduct meeting had concluded.

44. At the Grievance meeting on 28 August 2020, Ms Halliday was note taker. At the meeting, the Claimant also raised his concerns that the OH support recommended as part of the outcome of the 9 December 2019 meeting had not been forthcoming. He believed that he was only contacted by OH on 18 June 2020 after his GP had signed him off as unfit to work on 4 June 2020, and his psychotherapist Dr DK had written to the Respondent on 12 June 2020. After that contact, no other OH support had been provided to him. The reasons for this were not clear. I accept the Claimant's evidence that there was a clear link between the GP signing him off as unfit to work on 4 June 2020 as this meant that the disciplinary meeting could not take place that day, and the OH referral. I do not find that the letter from Dr DK was material in the Respondent's decision to refer the Claimant to OH.

45. The conclusion of the Grievance meeting was that there were issues to be investigated, although it was not clearly set out what those issues were. No further evidence was provided about the outcome of any subsequent investigation following the Grievance meeting. I consider that the outcome of any related investigations is not significant in terms of the current claim.

Disciplinary hearing with Ms Halliday 24-25 November 2020

46. On 5 November 2020 by the letter discussed above Ms Halliday invited the Claimant to a disciplinary hearing to discuss the allegations identified by Mr Davis. The meeting was held remotely on 24 November 2020, and the Claimant attended with his trade union (TU) representative; an earlier date of 17 November was rearranged at the Claimant's request so that the TU representative could attend. Ms Halliday states that at no point did the Claimant make her aware of any mental health issues, or state that he did not feel able to participate in the disciplinary hearing.

47. After discussion of the allegations with the Claimant, Ms Halliday dismissed all the allegations with the exception of the breach of the data protection policy in relation to the customer's details. In her letter dated 25 November 2020 (page 200), Ms Halliday states: *"You have been summarily dismissed for gross misconduct on the basis that you have breached Sky Retail How We Work and Data Protection, specifically by having a prospective customers name and contact number in your personal phone and texting those details to another advisor, without the customer's consent, for the purpose of obtaining a sale"*.

48. At the hearing, the Claimant accepted sending the customer's details to CE on 2 October 2019 using his personal mobile, and explained that he was not thinking clearly given his emotional state due to the bereavement and need to collect his son from Ghana. He was also pressurised by the customer.

49. Ms Halliday noted that the Claimant knew he should not save or share customer details, that he was aware of the Respondent's data protection policies, HWW, and the potential cost and damage to the Respondent's reputation should there be a data breach. Ms Halliday found no evidence the customer had consented to the Claimant passing on her details, and noted that to pass on details was still contrary to the Respondent's policies. She took into account the mitigation relating to his emotional condition at the time and the pressure he felt from the customer to help her. She did not attach any weight to the possible motivations of RD or CE in making allegations against the Claimant in this context, as there was a clear data protection breach. Ms Halliday upheld the allegation and dismissed the Claimant for gross misconduct on 25 November 2020.

50. In his oral evidence the Claimant accepted that he knew the Respondent's polices about customer data and the processes which should be followed, including how it should be recorded and processed. He accepted that customer details should only be recorded on the Respondent's approved collateral. He said that he did not record or save SF's details, merely passed them on with her consent. In any event she was a prospective customer, not an actual customer. The Claimant accepted that the Respondent had policies in place due to the importance of data handling to its business. He said that he believed Ms Halliday would have been aware of his mental health issues due to the letters sent by Dr DK to the Respondent on 30 November 2019 and 12 June 2020 (pages 238 and 240), and he did not therefore mention them during the meeting on 24 November 2020.

51. In her oral evidence, Ms Halliday stated that the issue of the customer's consent had no bearing on her decision to dismiss the Claimant, despite the reference in the letter dated 25 November 2020 to the Claimant acting without the customer's consent. She stated this was an error. I am concerned by the inclusion of a reference to consent in the decision to dismiss if that consent had no bearing on the decision to dismiss. It is also understandable that the Claimant would have found this concerning, given that his mitigation for his conduct included the customer giving consent to him sending her details to CE. However, I find that this error was rectified during the appeal hearing as described below.

Appeal hearing with Ms Kerr 30 November 2020-15 January 2021

52. On 30 November 2020 the Claimant's appeal against the decision to dismiss him was allocated to Ms Kerr. His grounds of appeal were that he had been signed off work since 4 November 2020 and was therefore unfit during the hearing on 24 November 2020, his mental health on 2 October 2019 should have been taken into account, there was no complaint by the customer about the use of her personal information, and that CE's intent in raising the issue was malicious.

53. On 10 December 2020 Ms Kerr chaired an appeal hearing. The Claimant expanded on his mental health issues, said that he was receiving treatment, that on 2 October 2019 he was travelling to his grandmother's funeral, and that the customer was pressuring him. He said he suffered from memory problems and anxiety. He provided Ms Kerr with the letters from the psychotherapist Dr DK, who had been treating him since 2014, with an additional letter dated 30 November 2020 (page 239). He explained that these factors all impacted on his decision making on 2 October 2019. The Claimant said that he had told his team leader about his mental health difficulties. He had assumed that Ms Halliday would have known about his mental health problems.

54. The Claimant also said he believed Ms Halliday would have known that he was not physically fit during the hearing on 24 November 2020. In her statement she states at paragraph 11 that the Claimant "*was provided with ample opportunity to tell me whether he was fit to proceed. [The Claimant] did not raise at any time during the disciplinary that he was not feeling 100% nor did he ever indicate to me during the disciplinary process that he was not feeling well".*

55. I note that there is no record in the notes of the meeting on 24 November 2020 that Ms Halliday checked with the Claimant whether he was fit to proceed. I also note that there is no reference in her witness statement to Ms Halliday asking him directly whether he was fit to proceed, although she did indicate he could request breaks as needed. I also note that Ms Kerr at paragraph 15 of her statement states that *"[Ms Halliday] asked him multiple times throughout the meeting whether he was fit enough to attend".* I find no record of Ms Halliday asking those questions in the notes of the meeting held on 24

November 2020, and therefore that she did not ask him directly whether he was fit to proceed. However, I also note the evidence that during the course of the investigation and disciplinary process the Claimant has requested that meetings should be postponed or rearranged due to health or other issues.

56. I further note that he was in receipt of a fit note on 13 November 2020 when he asked for the meeting planned for 17 November 2020 to be rearranged so that his TU representative could attend; there is no evidence that he raised any issues about his own health or fitness in connection with the request to rearrange the meeting, nor did he raise any such issues when the new date was given.

57. Given this, I find that if the Claimant had been feeling unable to attend or participate in the remote disciplinary meeting on 24 November 2020, on the basis of his previous behaviour it is more likely than not that he would not have agreed to attend the meeting whilst signed off by the GP. I also find that on the basis of his previous behaviour, the Claimant would have informed Ms Halliday either in advance or on the day of the meeting that he was unfit to proceed, or would have informed her during the meeting itself. I therefore do not accept the Claimant's argument that the meeting on 24 November 2020 should not have taken place as he was in receipt of a fit note from the GP.

58. Ms Kerr confirmed in oral evidence that there had been no complaint by the customer SF. She also accepted that the Respondent had no evidence that the customer did not consent to the Claimant passing on her details.

59. On 17 December 2020 Ms Kerr met with CE who said he had told his team leader about the data protection breach when he was asked for information about the Claimant. He said he had not raised it earlier as he had forgotten about it, and that he had not been aware the incident was a data protection breach at the time. The notes of that meeting (pages 221-224) indicate that CE appeared generally unwilling to answer questions, and later on 17 December 2020 CE informed Ms Kerr that he had just resigned from the Respondent.

60. On 22 December 2020 Ms Kerr met with AH, who denied the Claimant had ever raised any mental health issues with him, beyond the problems with his son N.

61. On 5 January 2021 Ms Kerr met with Mr Davis. Mr Davis confirmed that whilst he was acting as the Claimant's team leader, the Claimant had not raised any issues with his mental health or memory.

62. Ms Kerr said in evidence that there was no record of any conversation between the Claimant and KO'R about his mental health, which she would have expected to see recorded in some form if it had happened. KO'R had left the Respondent's employment and it was not possible to discuss matters with her.

63. On 15 January 2021 Ms Kerr upheld the Claimant's dismissal. Ms Kerr accepted that the Claimant was dealing with personal issues at the time of the data breach, but found that he had not provided evidence that he was suffering

from memory loss or anxiety, and that he did not raise this with Ms Halliday during her investigation. Ms Kerr found that the Claimant had ample opportunity to raise his ability to participate in the meeting on 24 November 2020 or to say that he was unwell, but did not do so. Ms Kerr considered that the lack of a complaint by the customer about the breach, or the delay in CE reporting the incident, were both irrelevant to the conduct which led to dismissal. The matter of the customer's consent to passing on her data was also irrelevant in terms of the breach of the data protection policies and HWW. Her letter (at page 248) states *"As we discussed during the course of our meeting, the customer in question never made a complaint and this has never been suggested at any stage. In addition, for the avoidance of doubt, as [Ms Halliday] confirmed in her outcome to you, although you have said that the customer gave their consent to you passing on their details, there is no evidence of this and, in any event, even if the customer had given their consent this does not change the fact that your actions were a breach of data protection".*

64. Ms Kerr also considered that CE's possible motivations in raising the 2 October 2019 incident were irrelevant, and in this context noted that Ms Halliday had dismissed the other allegations against the Claimant in part due to concerns about the credibility and motivations of the witnesses.

65. In oral evidence the Claimant said that he believed Mr Davis and Ms Halliday would have been aware of his health issues due to the letter(s) from Dr DK, and therefore he did not raise them with either Mr Davis or Ms Halliday. The Claimant accepted that Ms Kerr had considered these matters as part of the appeal.

Relevant law

66. Section 94 ERA confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under section 111. The employee must show that he was dismissed by the Respondent under section 95, but in this case the Respondent accepts that it dismissed the Claimant on 25 November 2020.

67. Section 98 ERA deals with the fairness of dismissals. There are two stages within section 98. First, the employer must show that it had a potentially fair reason for the dismissal within section 98(2). Second, if the employer shows that it had a potentially fair reason for the dismissal, the Tribunal must consider, without there being any burden of proof on either party, whether the employer acted fairly or unfairly in dismissing for that reason.

68. In this case it is not in dispute that the Respondent dismissed the Claimant because it believed he was guilty of misconduct. Misconduct is a potentially fair reason for dismissal under section 98(2). The Respondent has satisfied the requirements of section 98(2).

69. Section 98(4) then deals with fairness generally and provides that the

determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend 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 shall be determined in accordance with equity and the substantial merits of the case.

70. In misconduct dismissals, there is well-established guidance for Tribunals on fairness within section 98(4) ERA in the decisions in *Burchell 1978 IRLR 379* and *Post Office v Foley 2000 IRLR 827*. The Tribunal must decide whether the employer had a genuine belief in the employee's guilt. Then the Tribunal must decide whether the employer held such genuine belief on reasonable grounds and after carrying out a reasonable investigation. In all aspects of the case, including the investigation, the grounds for belief, the penalty imposed, and the procedure followed, in deciding whether the employer acted reasonably or unreasonably within section 98(4), the Tribunal must decide whether the employer acted within the band or range of reasonable responses open to an employer in the circumstances. It is immaterial how the Tribunal would have handled the events or what decision it would have made, and the Tribunal must not substitute its view for that of the reasonable employer (*Iceland Frozen Foods Limited v Jones 1982 IRLR 439, Sainsbury's Supermarkets Limited v Hitt 2003 IRLR 23*, and *London Ambulance Service NHS Trust v Small 2009 IRLR 563).*

Findings of fact and associated conclusions

Genuine belief/permissible reason

71. I find that the Respondent, in the persons of Ms Halliday and Ms Kerr, held a genuine belief that the Claimant was guilty of misconduct, and that the relevant misconduct fell within the scope of the Respondent's permissible reasons for dismissal. Their written and oral evidence was clear about why they dismissed, and included repeated references to the Respondent's data protection policies, HWW, and the Conduct Policy. I find that they formed the genuine belief that the Claimant breached the Respondent's data protection policy by texting the customer's details to CE using his personal mobile, and also by writing those details in his personal mobile as this personal mobile was not Sky Approved Collateral.

72. I accept the Respondent's evidence that the Conduct Policy entitled it to dismiss the Claimant as a result of the gross misconduct of which it genuinely believed he was guilty. I found no evidence that there was any other reason for the decision to dismiss the Claimant apart from the reason stated in the letter dismissing him. This finding is supported by the clear evidence that only the data protection breach was ultimately upheld.

Reasonable grounds for belief

73. The genuine belief was formed by the Respondent after extensive investigations, and two hearings. The Claimant admits sending the text with the customer's details using his personal mobile, and writing her details on his

personal mobile. Ms Kerr conducted further investigations after her meeting with the Claimant on 10 December 2020 prior to forming her view. Whilst there was some issue with regard to the relevance of the customer's consent in the decision to dismiss, I find that this was rectified by the appeal hearing.

74. The dismissal and appeal letters were clear in finding that the Claimant had breached the Respondent's data protection policies, and the Claimant accepted that he had done so.

75. I also find, given the clarity of the Respondent's policies with regard to handling of customer data and the clarity of the possible sanctions for breaching that policy, that breach of the data protection policy was a potentially fair reason to dismiss the Claimant. I accept the Respondent's unchallenged evidence (Ms Halliday's statement paragraph 20) that the Claimant was aware of the potential financial and reputational consequences to the Respondent as a result of a data protection breach.

Reasonable investigation

76. The Claimant contends that the Respondent did not carry out a reasonable investigation, referring to the lengthy period taken to carry out the investigation and conclude the disciplinary process, and his view that his mitigation was not taken into account (including his mental health concerns, the circumstances in which the breach occurred, the customer's consent, and the motivations of those who made the allegations). The Respondent contends that the investigation was reasonable.

77. The Respondent has clear policies on how investigations, conduct, and disciplinary matters should be carried out. It took great steps to investigate all the allegations made against the Claimant. This is evidenced by the number of meetings held by Mr Davis with the relevant parties, including RD, CE and the Claimant, as well as the further meetings held by Ms Kerr after the appeal hearing. However, this process, which included repeated interviews with a range of witnesses, had the result that new allegations and information continued to appear during the investigation stage. As part of the investigation process, there is limited evidence that the Respondent sought to explore the possible motivations of RD and CE in making the allegations against the Claimant during the conduct of the second investigation. It is troubling that RD's allegations were made only two days after the Claimant's first conduct meeting, and his being issued with the Final Written Warning, when considered together with the evidence provided by the Claimant about the difficulties in his working relationship with RD. I note that these difficulties all arose before RD made the allegations against the Claimant. I accept the Claimant's evidence that his working relationship with RD was difficult, and find that the Respondent did not take reasonable steps to explore those difficulties sufficiently as part of the second investigation.

78. Inextricably linked to the way in which the allegations against the Claimant came to light is the length of Mr Davis' investigation. I accept his evidence

(paragraph 15 of his statement) that there were some delays outside his control, including Christmas, Covid19, and simple logistics, but I also note that there were a number of delays during that 5 month investigation. I find that his explanations for the delays are insufficient to render this part of the process objectively reasonable. In reaching this view, I take into account the lack of any clear explanation for the gap of some 4 weeks between the interview with CE on 7 January 2020 and the second interview with RD on 5 February, the period of some 6 weeks between the interview with the Claimant about the data protection breach on 15 April 2020 and the decision to proceed with the allegations which was made on 28 May 2020, without any clear evidence as to why it took 6 weeks to decide to proceed; I note in particular that there is no evidence of any further interviews with any witnesses between 15 April 2020 and 28 May 2020.

79. Of most concern, however, is the period between the first planned disciplinary meeting on 4 June 2020 which did not take place, and Ms Halliday's letter dated 5 November 2020. I find that there is no evidence of any progress with the investigation or attempts to contact the Claimant with regard to the disciplinary meeting until Ms Halliday's letter dated 5 November 2020. This is notwithstanding the undisputed evidence that the Claimant had been in contact with the Respondent on 1 July 2020 to raise grievances, and attended a remote hearing to discuss those grievances on 28 August 2020. I accept the undisputed evidence that there was a fit note in relation to 4-30 June 2020. However, there is no evidence of any attempts to arrange a further disciplinary meeting before the letter dated 5 November 2020, and in particular no evidence in a large bundle of documents of the Respondent contacting the Claimant with regard to the disciplinary process between 4 June 2020 and 5 November 2020. I find this period of some 5 months without evidence of contact or attempted contact surprising, and at odds with the requirement for an investigation to be reasonable. In reaching this conclusion I note the Respondent's own Conduct Policy which states at page 65 that *"On-going sickness absence may not be enough of a reason for you not to attend a meeting".* To my mind this implies that the Respondent would keep an employee's sickness absence during a disciplinary process under review. Whilst the Claimant may have been providing fit notes during that period, he was clearly in contact with the Respondent and attended a remote grievance meeting on 28 August 2020 at which Ms Halliday was note taker. Given all this, I find that the delay between the first planned disciplinary meeting on 4 June 2020 and Ms Halliday's letter to the Claimant dated 5 November 2020 was objectively unreasonable, and falls outside the range of reasonable responses. This is due to the overall length of time that it took to carry out the investigation, and in particular the period of time during which there was no evidence of any attempt by the Respondent to contact the Claimant about the investigation.

Remedy

80. Due to time constraints, I did not hear detailed specific submissions with regard to

remedy.

81. The Tribunal will decide the remedy for unfair dismissal at a further hearing. This will include consideration of

    a. the original application for re-engagement
    b. the amount of any reduction in the compensatory award for unfair dismissal to be made under the principles in *Polkey v AE Dayton Services Limited 1988 ICR 142*
    c. the question of whether the Claimant contributed to his dismissal
    d. the question whether any adjustment should be made under section 207A(2) Trade Union and Labour Relations (Consolidation) Act 1992 for failure to follow the requirements of the ACAS Code of Practice on Disciplinary and Grievance Procedures.

EJ Swaffer

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Date 14 July 2022