EMPLOYMENT TRIBUNALS

Claimant: **Kachikwuo Amaechi-Onwukanjo**

Respondent: **London Underground Ltd**

Heard at: **East London Hearing Centre**

On: **06-08 July 2022**

Before: **Employment Judge Housego**

Members: **J Henry**
M Rowe

Representation

Claimant: Paul O'Callaghan, of Counsel

Respondent: Naomi Ling, of Counsel

JUDGMENT

The Claims are dismissed.

REASONS

Summary

1. The Claimant was a customer services adviser ("CAS") at a tube station. Part of his job was to empty cash machines. On 24 July 2019 there was a discrepancy of £1,400 and on 27 August 2019 another discrepancy of £810. The Claimant was interviewed about this on 10 December 2019 and suspended from work. He was dismissed on 12 June 2020. The Respondent says this was a gross misconduct dismissal. The Claimant says that his dismissal was unfair and that the human resources department discriminated against him on racial grounds, by telling him he should resign. The Respondent says that it was a fair dismissal for gross misconduct, and that if there was any procedural failing it made no difference, and in any event the Claimant caused or contributed to his dismissal 100%. It denies the factual basis of the race discrimination claim and says that even if the facts were made out there is nothing to suggest any connection with race.

2. The Tribunal's findings of fact were unanimous.

3. The Tribunal unanimously dismissed the race discrimination claim.

4. The Tribunal's judgment on the unfair dismissal claim was not unanimous.

5. The Tribunal decided by a majority (Judge Housego and Tribunal Member Henry, Tribunal Member Rowe dissenting) that the dismissal was not unfair.

6. The majority decided that the loss of such significant sums, where there were clear procedures and the view of the Respondent about such matters well known meant that dismissal was not outside the range of responses of a reasonable employer.

7. The minority opinion was that there were flaws in the process (particularly delay), that this was not an allegation of theft, and that the Claimant was an exemplary employee and so should not have been dismissed.

8. The Tribunal found that there was nothing to suggest anything said by the human resources department was linked to race or was a detriment.

Claims made and relevant law

9. The Claimant claims unfair dismissal[1] and that the dismissal, as well as being unfair was direct race discrimination[2].

[1] S98 of the Employment Rights Act 1996
[2] Section 13 of the Equality Act 2010:
"13 Direct discrimination
(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

10. In respect of the claim for unfair dismissal, the Respondent must show that the dismissal was for a potentially fair reason[3]. The Respondent says this was conduct, which is one of the categories that can be fair[4]. This is accepted by the Claimant as the real reason. He says it was unfair for a variety of reasons, mainly that this was so out of character they should not have dismissed him for it, and because they took so long he had no chance of remembering anything about that day. It must be shown that the decision to dismiss was fair[5]. The employer must follow a fair procedure throughout[6]. It is not for the Tribunal to substitute its own view of what should have happened, for it is judging whether the actions of the employer were fair, and not deciding what it would have done. Dismissal must be within the range of responses of the reasonable employer[7]. That range is not infinitely wide[8]. It is unfair not to consider alternatives to dismissal even if there is a genuine belief in gross misconduct[9].

11. The burden of proof as to the reason for dismissal is on the employer, on the balance of probabilities. There is no burden or standard of proof for the Tribunal's assessment of whether it was fair to dismiss[10]. If the dismissal was procedurally unfair the Tribunal has to consider assessing what would have happened if a fair procedure had been followed[11].

12. The Respondent does not accept that the dismissal was procedurally unfair, but also asserts that had the procedure been unfair the same result would inevitably have occurred. It says that any failing was cured by the appeal against dismissal. It says that in any event the Claimant contributed 100% to his dismissal[12].

13. The test for a claim that the Claimant has suffered unlawful discrimination is whether or not the Tribunal is satisfied that in no sense whatsoever was there less favourable treatment tainted by such discrimination. It is for the Claimant to show reason why there might be discrimination, and if he does so then it is for the Respondent to show that it was not. The Tribunal has applied the relevant case law[13], and has fully borne in mind, and applied S136[14] of the Equality Act 2010. Discrimination may be conscious or

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[3] S98(2) of the Employment Rights Act 1996
[4] Also S98(2) of the Employment Rights Act 1996
[5] S98(4) of the Employment Rights Act 1996
[6] Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23 CA
[7] Iceland Frozen Foods Ltd v Jones [1982] UKEAT 62_82_2907
[8] Newbound v Thames Water Utilities Ltd [2015] EWCA Civ 677, paragraph 61: "The "band of reasonable responses" has been a stock phrase in employment law for over thirty years, but the band is not infinitely wide. It is important not to overlook s 98(4)(b) of the 1996 Act, which directs employment tribunals to decide the question of whether the employer has acted reasonably or unreasonably in deciding to dismiss "in accordance with equity and the substantial merits of the case". This provision, originally contained in s 24(6) of the Industrial Relations Act 1971, indicates that in creating the statutory cause of action of unfair dismissal Parliament did not intend the tribunal's consideration of a case of this kind to be a matter of procedural box-ticking. As EJ Bedeau noted, an employment tribunal is entitled to find that dismissal was outside the band of reasonable responses without being accused of placing itself in the position of the employer. The authority he cited as an example among decisions of this court was *Bowater v NW London Hospitals NHS Trust* [2011] IRLR 331, where Stanley Burnton LJ said:
"The appellant's conduct was rightly made the subject of disciplinary action. It is right that the ET, the EAT and this court should respect the opinions of the experienced professionals who decided that summary dismissal was appropriate. However, having done so, it was for the ET to decide whether their views represented a reasonable response to the appellant's conduct. It did so. In agreement with the majority of the ET, I consider that summary dismissal was wholly unreasonable in the circumstances of this case."
[9] Brito-babapulle v Ealing Hospital NHS Trust (Disability Discrimination : Disability) [2013] UKEAT 0358_12_1406 (14 June 2013)
[10] Section 98(4) of the Employment Rights Act 1996
[11] Polkey v AE Dayton Services Ltd [1987] UKHL 8
[12] S122(2) and S123(6) of the Employment Rights Act 1996
[13] The law is comprehensively set out in Royal Mail Group Ltd v Efobi [2021] UKSC 33 (23 July 2021)
[14] "136 Burden of proof
(1) This section applies to any proceedings relating to a contravention of this Act.
(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
(3) But subsection (2) does not apply if A shows that A did not contravene the provision.
…"

unconscious, the latter being hard to establish and (by definition) unintentional. It is the result of stereotypical assumptions or prejudice.

Issues

14. In summary these are:

Unfair Dismissal

14.1. The Respondent had a potentially fair reason for dismissing the Claimant. The Respondent says the reason for the Claimant's dismissal was conduct (in line with s.98(2)(b) Employment Rights Act 1996), and the Claimant agrees that this was the reason.

14.2. It is not conceded that the procedure was unfair, but if it was, what would have happened had there been a fair procedure? The Respondent says dismissal was inevitable. The Claimant says that he would not have been dismissed at all.

14.3. What remedy should there be if the claim succeeds? The Claimant seeks reinstatement or re-engagement. This hearing is to deal only with liability.

14.4. Should there be any reduction for contributory conduct[15]?

Direct Race Discrimination

15. The Respondent's human resources partner dealing with his case is alleged to have told the Claimant that he should resign. The Claimant says that two other individuals were not told this, and that telling him to resign was race discrimination.

Notice pay

16. The dismissal was for gross misconduct. The Claimant says that this was not a fair dismissal, but even if it was a fair dismissal it was not gross misconduct and so notice pay was due.

Evidence

17. There was a bundle of documents which was augmented during the hearing, of nearly 500 pages.

18. The Claimant gave evidence first, followed by his trade union representative, Mashur Ali.

19. For the Respondent, oral evidence was given by: Frances McConnell (who investigated) Robert Newton (who dismissed), Raymond Adabra (who dismissed the appeal) and Ejenavi Agbonkpolo (of human resources).

Preliminary application

[15] S122(2) and S123(6) Employment Rights Act 1996.

20. The Claimant applied for discovery of all the error logs of the Respondent's machines. The Tribunal decided that it was far too late for such an application to be made. It would take time to provide such documentation, it was a large volume of documents and training was needed to interpret them. The Claimant would need time to peruse it, and applications to amend (and defend) claims (and defences) would be required. No good reason was given for not making this application earlier. However, that was not to preclude submissions that the Respondent had not taken adequate steps to satisfy itself that there was not a mechanical explanation for the accounting shortfall.

Facts found

21. The Claimant was a Customer Services Assistant. He started with London Underground Ltd on 01 February 2016.

22. There are no longer people selling tickets in Underground stations. There are passenger operated machines (POMs) selling tickets. While Oyster cards and credit cards are increasingly used to buy tickets there is still a large volume of cash used to buy paper tickets or top up Oyster cards.

23. The ticket machines are nearly 40 years old. They are augmented from time to time (and the contract for maintaining them costs about £66m a year), but this is not a modern system.

24. The money in the POMs is removed by a CSA. It is then fed through a cash handling machine which counts the money (CHM or "Coinsafe") This tells the CSA how much money has been put through it.

25. The POM tells the accounting system ("TOMSAF") how much money has been taken from it.

26. The CSA then manually inputs the amount counted by the CHM into the TOMSAF.

27. The cash itself remains in the Coinsafe machine. The majority goes automatically into a "vault", inaccessible to the CSA. Some remains in an accessible area and can be reused to provide change (the "BNR" – bank note recycling - part of the Coinsafe machine). Sometimes if the machine is full, cash is manually counted and put in bags in a secure area, to await collection by G4S.

28. If the CSA inputs a figure that does not correspond with the figure sent to the TOMSAF by the POM a discrepancy alert comes up. It does not say what the discrepancy is.

29. If there is a discrepancy alert the POM must be emptied completely. This is called a "dump". Then all the cash in the machine is counted.

30. The issue which caused the dismissal of the Claimant was that on July 2019 there was a shortfall in the cash amount input into TOMSAF which was lower, by £1,400, than the amount TOMSAF was told had been removed by the POM.

31. There was a second such shortfall of £810 on 27 August 2019.

32. It takes a while for all the financial reconciliations to be carried out. There can be problems (the technical details do not require explanation) which unravel themselves over a period.

33. By early September 2019 the 2 shortfalls were referred to Frances McConnell, a forensic investigator. It took her some time to analyse the data. She ascertained that there was no reported failure in the POM involved. She is at pains to say that she does not investigate whether someone has stolen money from LUL. She investigates whether someone has failed to follow cash accounting procedures. She knows only the ID number, not the person's name. She finds facts about the shortfall and reviews the reports the machines provide. She checked whether there was any reported failure with the machine in question at or near either of the dates of the irregularity, or before or since and there was not. Her report was a professional piece of work. She could find nothing wrong with the machine. She could not see that the cash had turned up somewhere else.

34. She interviewed the Claimant on 10 December 2019. She put the contents of her report to the Claimant. He agreed he knew the correct procedures and that a discrepancy alert from TOMSAF required him to complete a 'dump' and log it. He had no explanation for the two differences or why he had not followed the correct procedure. Her report was referred to Gary Jacobs, a Customer Services Manager ("CSM"), who suspended the Claimant on 10 December 2019. Mohammed Hussain, another Customer Service Manager, was appointed to conduct a formal Fact Finding Interview which was held on 15 January 2020. He decided that a formal Company Disciplinary Interview was required and notified the Claimant on 03 March 2020 that this was potentially a gross misconduct matter that could lead to dismissal

35. Robert Newton, Area Manager took that disciplinary hearing, on 12 May 2020 and the Claimant was represented by his trade union representative. The delay was due to various factors, mainly the pandemic, and dates the Claimant's trade union representative could not make. Mr Newton decided to dismiss the Claimant and did so by letter of 05 June 2020. His decision was based on the fact that on two occasions large sums of money were not accounted for by the Claimant. His letter of dismissal says that he did consider the Claimant's good conduct and the outcome of other comparator cases. He also stated that he considered whether any other outcome was appropriate. However, his oral evidence was that once the charge of failing to account was made out that was gross misconduct, and that the policy then required him to dismiss the Claimant.

36. Raymond Adabra, Head of Customer Services took the appeal. He has 26 years' experience. He has worked on the machines in question, if many years ago. He has taken such appeals before. In one such he overturned a

decision to dismiss because subsequent to the dismissal, but before the appeal, another member of staff at the same station was dismissed for a similar matter, accepting that he had taken the money, and was on duty at the time of the other accounting irregularity. Mr Adabra thought it more likely than not that the other had taken the money, and that, coupled with the fact that the person dismissed had complained that he was not well trained, and had asked for training, meant that he reversed that decision to dismiss.

37. Mr Adabra dismissed the Claimant's appeal, heard on 21 July 2020. The Claimant was again represented by his trade union representative. The outcome letter was not sent until 21 October 2020. Mr Adabra attributes this to work pressures arising from the pandemic. Whatever the work pressures it was unacceptable for the Claimant to be kept waiting so long.

38. In LUL almost everyone accused of "failure to account" for money is dismissed for gross misconduct. The Respondent's policy sets out that such matters are considered as gross misconduct. They are never charged as theft, but of "failing to account".

39. The human resources officer involved, Ms Agbonkpolo, had provided Mr Newton with a list of six similar cases to review, four of which were "failure to account" for cash. Three of these failure to account cases resulted in dismissal. In only one was there no dismissal, in a case where the loss was a little over £200. Mr Adabra regarded that as a mistaken outcome. His view is that failing to account for cash should result in dismissal whatever the amount, unless there is a cogent reason to explain the shortfall, as in the case where he reversed a dismissal.

40. There are perhaps 5,000 – 6,000 CSAs in LUL. Ms Agbonkpolo has about one such case every three months. There are three others in her team who have similar numbers of such cases. Therefore, there are perhaps a dozen such cases each year.

41. Ms Agbonkpolo discussed the disciplinary case with the Claimant as she was his HR contact and was trying to arrange the formal meeting in March 2020. He says she told him he should resign: she denies this. It is very likely the topic of resignation came up. About half of the people facing such a charge resign, perhaps to protect concessionary travel privileges for former employees, or to protect pension rights. Ms Agbonkpolo also knew that almost all such cases end up in dismissal, so was aware that having a resignation in a career history can be better than a gross misconduct dismissal. She did not tell him to resign. As she said in oral evidence this is a highly unionised organisation, and she would have directed him to his union for advice.

42. Financial discrepancies between the different machines are frequent and may be caused by issues with aging hardware, however considerable time is taken by finance to reconcile them. LUL does not undertake a full investigation for discrepancies unless they exceed £50.

The Claimant's case

43. He is a British of Black African heritage. The machines are old and fallible. There is no direct link between them, and the manual input of the amount of cash removed from the POM and counted by the CHM "Coinsafe" into the Finance accounting system is a reason for error. The machines do make errors in handling cash. Two others were not asked to resign, someone with a Polish name and someone with a Turkish name, neither of whom was black. It was unfair to expect him to remember on 10 December 2019 what had happened so long before. The investigation had simply been taken at face value, and Mr Newton did not know anything about the machines or the system. The appeal had not resolved matters. The Respondent had not applied any discretion to its process, and in his particular circumstances it was not fair to dismiss him automatically for a "failure to account". Ms Agbonkpolo had asked him to resign, and that was race discrimination.

The Respondent's case

44. There were two matters one on 24 July 2019 and the other on 27 August 2019, together amounting to £2,100, for which there was no explanation. While it was not said that the Claimant had stolen that money, after due enquiry it was clear that it had gone missing. There was no credible reason why the £2,100 shown as missing was not real money that had been paid by customers and which should have found its way to LUL's bank. The Claimant had failed to account for the money. The policy is clear – this was gross misconduct. An employer is usually entitled to dismiss for gross misconduct, and there was no factor making this an unfair sanction. Any failing in the process made no difference. Even if the dismissal was, for some reason, unfair the Claimant was 100% responsible for his dismissal. Ms Agbonkpolo denied telling the Claimant to resign but given that almost everyone who faced such a charge was dismissed it would not be unreasonable of her to speak to the Claimant about the subject. It was unlikely that she would be motivated by considerations of race, for she did not know the Claimant and even if she assumed that the Claimant was black, by reason of his name, so is she.

Policies

45. There is an ethics policy (paragraph 3.2.1, page 38), a Code of Conduct (3.8.3, page 48) and a disciplinary policy (3.2.5, page 423). These set out the obligations relating to the handling of money, and that failure to account is treated as gross misconduct which may lead to dismissal. The itemisation of matters taken to be gross misconduct includes "failure to account" but theft is not in that list. The Respondent charges all cases where money is missing as "failure to account", whether or not theft is suspected. The Respondent has a sanction of "suspended dismissal" which is in effect a strong final written warning.

Submissions

46. My record of proceedings contains a note of both Counsel's submissions, which set out their respective positions, outlining their cases. The substance of them is covered above or in the Tribunal's conclusions.

Conclusions

47. The Tribunal disposes of the race discrimination case shortly. Ms Agbonkpolo discussed resignation with the Claimant. She did not tell him to resign. As almost all cases go to a hearing which results in dismissal this is not inherently objectionable. The Claimant says that two others, not black, were not dismissed and were not told to resign. The Claimant has no evidence that they were not told the same as him. He did not resign when (he says) he was told to resign. They may have been told the same as he was told, and just like him ignored it. Whatever the facts are, the Claimant accepts that Ms Agbonkpolo did not know him. While the Claimant's name may suggest his ethnicity there is no coherent (or indeed any) reason why Ms Agbonkpolo should be negatively disposed to people who are black. The race discrimination claim is dismissed for these reasons.

48. The evidence of Mashur Ali was given in a way which was credible, but it did not assist the Tribunal. There are issues with machines, particularly when cash gets jammed, or a ticket is not issued. These can lead to discrepancies arising. They are totally different to this sort of discrepancy. They are usually of £5 or £10. The policy on shortfalls is similarly irrelevant. This is to deal with errors on the margins, not with shortfalls in the emptying of large ticket machines with a great deal of cash in them.

49. The argument put forward by the Respondent is that this is a straightforward case. LUL handles a lot of cash and has clear procedures for dealing with it. "Failure to account" for all revenue received is gross misconduct. It is set out in the disciplinary policy, and everyone, including the Claimant, knows this. Ms McConnell had carried out a professional investigation, and it was highly unlikely that there was a machine error. It had been shown by Ms McConnell's investigation that there was £2,100 missing. When the cash was input into the TOMSAF a discrepancy alert would have been displayed, which the Claimant must have seen. He did not report this as an issue in the log or do a machine "dump" as required by procedures. The Respondent did not have to prove (and did not assert) theft. The simple facts were that the Claimant had lost LUL £2,100, and in doing so had not followed accounting procedures. That was gross misconduct, and both Mr Newton and Mr Adabra had been entitled to take the view that a loss of this sum warranted summary dismissal, as with almost all other cases. All the members of the Tribunal accept that the factual bases set out in this paragraph are accurate, diverging on the conclusion to be drawn from them.

50. The case for the Claimant is that this is not a fair way to look at the matter. There is an implicit suggestion of theft, but that was not the allegation, which was of failing to account for cash. That is the perspective for the review by the Tribunal of sanction. It was accepted by the Claimant that this was properly a disciplinary matter. In that context the Claimant says that there

were a variety of circumstances which should have led to another outcome, no more severe than a final written warning, or a suspended dismissal.

51. These circumstances the Claimant raises are:

51.1. The Claimant has an unblemished disciplinary record.

51.2. He has a 100% attendance record.

51.3. The many testimonials he provided are numerous, include his manager, and are glowing in their evaluation of him, all made in full knowledge of the allegation made against him.

51.4. The Claimant had been in his role for three and a half years with no further cash issues after 27 August 2019.

51.5. There was no realistic fear of repetition, for the Claimant continued to carry out his role after 27 August 2019 until interviewed on 10 December 2019, and there was no other error.

51.6. He dealt with cash frequently. After 3½ months he had no chance of remembering anything about these two matters. The delays were for the 1st one July to December and for the second from August to March.

51.7. There was no reason why they could not have told him immediately. Ms McConnell was told about the discrepancies a matter of days after they occurred.

51.8. It was not fair to have a policy that resulted in dismissal in every case, save where the person could show where the money had gone, and that was the case. Even if that policy was fair, the dismissal was still unfair because of the delay in telling the Claimant of the shortfalls, because there was little chance that he would remember either of the two occasions when he performed this operation frequently.

51.9. If it was suspected that the Claimant had taken the money, that suspicion should have been allayed by December 2019, because there were no further shortfalls. It was a commonplace that when people got away with thefts from their employer they tended to carry on. There had been no other discrepancy in the ensuing 3½ months which made it unlikely that he had stolen the money.

51.10. The Claimant was a highly committed, conscientious and enthusiastic employee who loved his job. This makes it less likely that he would do anything intentional that breached accounting procedures. He was not accused of theft. This is a sanction for accounting errors, not for theft, and had to be viewed accordingly.

Majority decision

52. After lengthy consideration a majority of the Tribunal decided that these matters, while largely accurate, did not overcome the essential difficulty with the Claimant's case. This was the size of the shortfalls, and that there were two of them. The Claimant knew the procedures, and on two occasions did not respond to alerts that must have been displayed.

53. While the delays were wholly disproportionate, especially the delay in notifying the Claimant there was an issue in December 2019, and even allowing for Covid-19 later in the process, the Claimant said that alerts came up only about once a month. The process when they do is time consuming. To miss one alert would be surprising for an experienced person like the Claimant, and to miss two alerts means that the Claimant falls to be dealt with under the policy, which indicates dismissal is likely.

54. The Respondent is highly unionised, and if the policy was inherently unfair the union would have resisted it. There was no evidence to suggest that there is any workforce objection in principle to the policy on "failing to account".

55. The Tribunal was alert to the need not to substitute its own view for that of the employer. The majority considered that to find the dismissal unfair would be to do so. Tribunal Member Henry considered that the decision to dismiss was appropriate. Employment Judge Housego considered that given the factors set out above he would not have dismissed the Claimant but accepted that for the Respondent to do so was not outside the range of reasonable responses of the employer to the investigation report and what emerged during the process.

56. Employment Judge Housego and Tribunal Member Rowe found that Mr Newton had impermissibly considered himself bound by the policy to find gross misconduct and that having so found there was no alternative to dismissal. However, Mr Adabra has overturned a dismissal in another case. Employment Judge Housego considered that the unfairness of the automatic dismissal was corrected by the appeal. That it was so delayed is regrettable but does not imperil that conclusion.

57. All members of the Tribunal bore in mind and applied the guidance in paragraph 61 of Newbound v Thames Water Utilities Ltd [2015] EWCA Civ. 677 (03 July 2015):

> *"61. The "band of reasonable responses" has been a stock phrase in employment law for over thirty years, but the band is not infinitely wide. It is important not to overlook s 98(4)(b) of the 1996 Act, which directs employment tribunals to decide the question of whether the employer has acted reasonably or unreasonably in deciding to dismiss "in accordance with equity and the substantial merits of the case". This provision, originally contained in s 24(6) of the Industrial Relations Act 1971, indicates that in creating the statutory cause of action of unfair dismissal Parliament did not intend the tribunal's consideration of a case of this kind to be a matter of procedural box-*

ticking. As EJ Bedeau noted, an employment tribunal is entitled to find that dismissal was outside the band of reasonable responses without being accused of placing itself in the position of the employer. The authority he cited as an example among decisions of this court was Bowater v NW London Hospitals NHS Trust [2011] IRLR 331, where Stanley Burnton LJ said:

> *"The appellant's conduct was rightly made the subject of disciplinary action. It is right that the ET, the EAT and this court should respect the opinions of the experienced professionals who decided that summary dismissal was appropriate. However, having done so, it was for the ET to decide whether their views represented a reasonable response to the appellant's conduct. It did so. In agreement with the majority of the ET, I consider that summary dismissal was wholly unreasonable in the circumstances of this case."*

Minority judgment

58. Tribunal Member Rowe's opinion is that the whole process led inexorably to dismissal. The delay in raising the matters with the Claimant gave him little to no chance of remembering the events. He could only say what he thought would have happened not what he recollected did happen. He was not accused of theft, and that is highly relevant to the severity of the sanction imposed. The dismissal was for mistakes, not theft.

59. Once the shortfall has been categorised as such (and not a self-correcting issue) there is a linear process which leads inevitably to dismissal, unless the person can show good reason for the shortfall. That is next to impossible after so long a delay. There is no issue with the process of identifying the shortfall, and it is the reasonable to expect the person to give an account of the accidents / incidents of the day. If this is not done it is fair for dismissal to follow. What Mr Rowe decided was unfair – such that it was an unfair dismissal – was that the second stage, in this case, was so long delayed, meaning that the Claimant had no opportunity to escape the sanction which is always employed in cases of failure to account where no explanation is offered by the person charged with failing to account.

60. Once there is a shortfall and a report is ordered there is an inevitability about the process. The interview with the Claimant by Ms McConnell was predicated on guilt, rather than seeking to find out why or how the discrepancy had occurred. She interviewed him after coming to her conclusions rather than before coming to conclusions, and the starting point should have been what he had to say about it, as soon as she was asked to investigate.

61. Mr Newton had a closed mind – he regarded the discrepancies as necessarily gross misconduct, and that gross misconduct automatically meant dismissal. That was unfair. Mr Adabra's appeal was a review not a rehearing. That did not mean if could not be a fair appeal, but it restricted his ability to look at matters afresh. After so long it was not possible for Mr Adabra to come to a fair decision. While Mr Adabra had overturned one

dismissal that was because it had become clear what was likely to have happened in that case. It was not right for Mr Adabra to work on the basis that the person accused had to show what had happened to the money in order to avoid dismissal, and that would be impossible for the Claimant to do so after so long.

62. Mr Adabra's view was that the decision not to dismiss another person who failed to account for £200 was wrong in principle, so that he too considered that failing to account meant automatic dismissal (unless the person accused was able to show where the money had gone). That was not a fair approach.

63. To fail to account for cash is not, of itself, gross misconduct even if a policy says so[16]. This was not an allegation of theft (although many such discrepancies arise because of theft). Against the size of the losses and the fact that there were two of them the other factors must be weighed. On doing that, Mr Rowe finds that the delay (but not the other matters) makes dismissal unfair. It does not matter whether or not the failure to account was gross misconduct, because if it was gross misconduct the Claimant's dismissal was, in the particular circumstances of this case, outside the range of responses of the reasonable employer. The inability of the Claimant to pass effective comment on the matters (his account was all *"I would have.."* type answers, based on what normally happened and, understandably given the lapse of time, not on actual recollection), the fact that such an allegation almost always leads to summary dismissal, and the delay, with nothing untoward either before or since together mean that for this particular individual dismissal was unfair.

64. Mr Rowe would not make a *Polkey* reduction, on the basis that had a fair procedure been followed there would not have been a dismissal.

65. It was plain that the Claimant did not follow the correct procedure. For one reason or another he did not react to the discrepancy warning that must have come up on both occasions. He did not report the issue to management. If he had failed to take notice of the warnings, he could not report it. He was experienced at this work. No failure in the machines was reported. Mr Rowe takes this fully into account. He finds that it is contributory conduct within the meaning of S122(2) and S123(6) of the Employment Rights Act 1996. He decided that the dismissal was 25% caused or contributed to by the Claimant's actions or inactions (failing to report the discrepancies).

Disposal

66. As there is a majority finding that the dismissal was not unfair the claim for unfair dismissal must be dismissed.

67. The Tribunal observes that while Ms McConnell was undoubtedly sincere when she said that they did not bring up discrepancies when first detected, so as not to worry people and because of the volume of discrepancies, and

[16] To take an extreme example, a policy which said being late twice in one week was gross misconduct would not enable an employer to defend a case by an employee summarily dismissed for being 5 minutes late twice in a week.

they never have to in most cases as the cash turns up. It would be much better to worry people and give them an opportunity to explain, than not to tell them for so long that the individuals will have little to no chance of recalling the matter. It would be better if there was a maximum period within which such an interview must be held if disciplinary action was to be taken. (A side benefit is that if someone is stealing from LUL, revenue is protected by swift action, and those who do steal will not be able to say it was so long ago they have no recollection.)

Employment Judge Housego
Date: 09 August 2022