



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Miss E. Najafloo

v

Charlotte Tilbury Beauty Ltd

Heard at: London Central (CVP)

On: 16 and 17
August 2022

Before: Tribunal Judge RE Peer acting as an Employment Judge

Representation

For the Claimant: In person

For the Respondent: Ms Marianne Tutin of Counsel

JUDGMENT

- (1) The claimant's claim for unlawful deduction from wages in respect of holiday pay fails and is hereby dismissed.
- (2) The claimant's claim of unfair dismissal against Charlotte Tilbury Beauty Ltd fails and is hereby dismissed.

REASONS

CLAIMS AND ISSUES

1. The claimant, Miss E. Najafloo, worked for the respondent, a global cosmetics company, as a Retail Artist, from 23 July 2017 until her dismissal on 26 August 2021. The claim form was presented on 27 October 2021.
2. On 1 February 2022, Employment Judge J S Burns presided over a case management hearing. An Open Preliminary Hearing (OPH) to consider the claimant's pregnancy and maternity discrimination claim was listed. The claimant had a baby in March 2020 and took maternity leave until March 2021. EJ Burns noted that the claimant was distracted by her baby during

the call and requested her to try and ensure her baby was in charge of someone else during the OPH and any later trial.

3. On 23 March 2022, EJ Davidson presided over the OPH. The claimant's claims of pregnancy and maternity discrimination were dismissed. They were out of time. EJ Davidson recorded that it was acknowledged that the claimant must be near her daughter due to her daughter's medical condition but emphasised she should find someone to be with her daughter during the hearing so she can focus on the hearing. EJ Davidson also records that she told the claimant she would find it easier to participate on a laptop rather than on a phone.
4. On 2 August 2022, Regional EJ Wade refused the claimant's request for a postponement. The respondent objected to postponement. The claimant was told she could make her application at the hearing if she wished. The claimant did not request any postponement of the hearing before me although did refer to her previous application on the second day.
5. EJ Davidson made case management orders on 23 March 2022 which were sent to the parties in order to prepare the case for hearing. The claimant was ordered to provide a schedule of loss. The claimant has not provided any schedule of loss to date. The parties were ordered to prepare witness statements and detail provided about how to prepare witness statements. The claimant has not produced a witness statement which conforms with the case management orders. A lengthy email from the claimant has been taken as her witness statement. The parties were told they must have a copy of the hearing bundle and witness statements at the hearing. The claimant did not have a copy of the hearing bundle or the witness statements at the hearing before me. The claimant confirmed she had received these in electronic form and had read them but her laptop was broken so she could not access them. The respondent said the claimant had initially requested electronic copies. The claimant said she had called more recently and asked for hard copies. The respondent indicated that it had no awareness of this request. The respondent made arrangements to courier a hard copy to the claimant during the course of the hearing and in particular so the claimant had access to documents during the provision of oral evidence.
6. The claimant had her daughter with her throughout the hearing before me. The claimant was clearly distracted at times and left the hearing at times to respond to her daughter. The presence of the daughter was also potentially a distraction to others including those who attended to provide witness evidence. I was mindful that there were two previous occasions on which recommendation had been made to the claimant that she seek to find someone to take charge of her baby and she had not taken that course of action. The claimant did not provide any detail as to whether she had taken any steps to seek support from any friends or family for the purpose of the hearing. There was ample accommodation made for the claimant in the circumstances and I am confident the proceedings were conducted in a sufficiently flexible and fair manner to enable the claimant to fully participate.
7. The agreed list of issues was as follows:

A. Unfair dismissal

- 4.1 What was the reason for dismissal? Was it a potentially fair reason for dismissal in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 (ERA).
- 4.2 If there was a potentially fair reason for the dismissal, was the dismissal fair in all the circumstances having regard to section 98(4) ERA? Did the respondent act reasonably, having regard to the size and administrative resources of the respondent's undertaking, in treating the above specified reason for dismissal as a sufficient reason for dismissing the claimant?
- 4.3 If the Claimant was unfairly dismissed and the remedy is compensation:
- 4.3.1 what are the chances that she would have been dismissed in any event but for the unfairness and when would the dismissal have occurred? Should the Claimant's compensation be reduced as a result pursuant to *Polkey v AE Dayton Services Ltd [1998] ICR 142*?
- 4.3.2 would it be just and equitable to reduce the amount of compensation as a result of any conduct of the Claimant contributing to her dismissal, pursuant to section 122(2) of the ERA and if so, to what extent?
- 4.4 To what remedy is the claimant entitled if her claims succeeds? She seeks:
- 4.4.1 Re-instatement; or
- 4.4.2 Re-engagement;
- 4.4.3 and/or compensation.
- 4.5 Has the claimant taken reasonable steps to mitigate her loss?
- 4.6 If not, when should the claimant have mitigated her losses had she taken such steps?

B. Unlawful deduction from wages

- 4.7 Did the claimant take holidays in excess of her annual entitlement during the holiday year in which she was dismissed? If so, how much holiday was taken in excess of her entitlement?
- 4.8 Was the respondent entitled to make a deduction of £400 from the claimant's final salary payment in lieu of any excess holiday taken?
- 4.9 Is the claimant therefore entitled to receive payment in lieu of 11 days' accrued but untaken holiday in the holiday year in which she was dismissed?

THE HEARING

8. The hearing was a remote hearing. The form of remote hearing was fully remote by Cloud Video Platform. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The parties agreed in advance to the hearing being held as a remote hearing.

9. The tribunal ensured that members of the public could attend and observe the hearing. This was done via a notice published on Courtserve.net.
10. There was a witness statement bundle of 38 pages.
11. I heard evidence from the claimant on oath.
12. For the respondent, I heard evidence by way of affirmation from:
 - Margaret Bradley, Senior People Partner
 - Kellie Hillson, UK Regional Manager
 - Katie Johnson, Head of Retail, Education, Operations and Pro-Artistry
13. There was a main agreed trial bundle of 475 pages. I admitted additional evidence from the claimant and the respondent on the first day of the hearing. The respondent produced a leave spreadsheet. The claimant produced a 2019 hospital discharge letter and 2022 HMRC letter. I admitted further additional evidence from the respondent on the second day being a timesheet as clearly relevant to the issues in the case.
14. On the second day of the hearing, the claimant requested that she be permitted to ask additional questions of the respondent's witnesses. The claimant requested that the witnesses be asked whether CCTV displayed three men videoing her breastfeeding and who those men were. These questions were confirmed with the claimant as those she wished to ask. I refused permission to re-open oral evidence for these questions to be put to the witnesses. I refused permission on the basis that this would be disproportionate having regard to the time this would take and as the questions were not relevant to the issues in the case. In addition, I was mindful that the witnesses might in any event either not know the identity of the stated three men or not be in a position to share their identity. In preparing this judgment and reasons, I note that the claimant's own witness statement refers to these men as 'holding their phones towards me' at a point where the claimant said she was in the customer services area. This is an area said to be not covered by CCTV.
15. I read the evidence in the bundle to which I was referred and refer to the page numbers of key documents that I relied upon when reaching my decision below.
16. As the claimant was not legally represented, I took care to ensure that she was not disadvantaged as a litigant in person. I regularly explained the process and the issues and the relevance of the evidence given the claims made. I explained the standard of proof. This included giving the claimant an explicit opportunity to consider whether she had any questions about the evidence of the respondent's witnesses relating to her claim for unfair dismissal and additional time to reflect on this rather than simply stating she did not agree with what they said.

FINDINGS OF FACT

17. Having considered all the evidence, I found the following facts on a balance of probabilities.
18. The parties will note that not all the matters that they told me about are recorded in my findings of fact. That is because I have limited them to points that are relevant to the legal issues.

Background

19. The respondent is a global cosmetics company.
20. The claimant was employed by the respondent as a Retail Artist from 23 July 2017. From 1 July 2018, the claimant worked at the respondent's counter within Selfridges, Oxford Street, London.
21. On 19 July 2017, the claimant was sent an offer letter which included a summary of her terms of employment (147-149). The summary sets out that it is to be read in conjunction with the Contract of Employment and any terms in the Employee Handbook and that these documents form her terms and conditions of employment.
22. The summary sets out that the claimant's holiday entitlement is '28 days or the pro rata equivalent if you work part time.' The summary signposts the relevant detailed contractual clauses. In relation to holiday entitlement, clause 8 is the relevant contractual clause. The summary also sets out the working week as 40 hours.
23. The claimant had a contract of employment (149-161). Clause 8.1 of the claimant's contract of employment sets out that the holiday year is the calendar year and runs from 1 January to 31 December each year. Clause 8.2 contains a holiday entitlement chart which demonstrates that an employee working full time or contracted for 5 days per week has an entitlement of 28 days for the complete year whereas an employee contracted to work for 1 day a week has an entitlement of 6 days holiday for the complete year.
24. Clause 8.3 contains the following:

"If, on the termination of your employment, you have exceeded your accrued holiday entitlement, the excess may be deducted from any sums due to you from us. If you have any unused holiday entitlement, we may require you to take such unused holiday during any notice period."
25. Clause 10 is as follows:

"You authorise us to deduct from your remuneration any sums due from you to us during your employment or in any event on its termination including but not limited to any overpayment of salary, holiday taken in excess of that

accrued during the holiday year, loans, advances, relocation expenses, training costs, employee pension contributions, the cost of repairing any damage or loss to the company's property caused by you (and of recovering the same) and any other sums owed to you by us. Should any monies be owed after any such deductions you agree to make payment to us of the outstanding sums upon request."

26. The respondent had a contractual right to deduct sums from any final salary payment to reflect any excess annual leave.
27. The respondent has an Employee Handbook which contains detail about employees' contracts and the respondent's policies. The Employee Handbook contains the respondent's disciplinary procedure and code of conduct. The code of conduct sets out that gross misconduct is a serious breach of contract and includes misconduct likely to prejudice the respondent's business or reputation or irreparably damage the working relationship and trust between employer and employee and will normally lead to summary dismissal. Examples of gross misconduct are set out. The first example is 'theft or fraud or other dishonesty'.
28. The respondent has a 'Global Discount Policy' which sets out that the respondent has a commitment to honesty and integrity and an expectation of high standards from all employees. The Global Discount Policy is stated to be one of the main ways that employee commitment is recognised and rewarded. The policy gives employees access to a significant discount on select products of the respondent subject to an annual limit and other conditions.
29. The respondent also has a maternity policy. The claimant took maternity leave during her employment with the respondent and had the benefit of this policy.

Leave

30. In accordance with her contract of employment, the claimant's holiday entitlement for each complete year was 28 days pro rata. The claimant therefore had an annual entitlement of 28 days or 224 hours leave when working full time. From April 2021, the respondent calculated leave entitlement in hours.
31. On 25 June 2019, the claimant reduced her hours to 24 hours per week. The claimant's holiday entitlement was pro-rated in accordance with her contract. The claimant therefore had an annual entitlement of 16.8 days or 134.4 hours' annual leave.
32. The claimant was on maternity leave between 1 March 2020 and 28 February 2021.
33. The claimant took unpaid parental leave between 1 March 2021 and 28 March 2021 (219).

34. The claimant took annual leave between 29 March 2021 and 19 April 2021. The claimant's return to work date was 20 April 2021 (219).
35. The claimant gave evidence that 29 March 2021 to 19 April 2021 was 'my holidays, the rest as I mentioned wasn't annual leave. I was awaiting approval of my flexible working request.' The claimant was contracted to work 24 hours per week. The claimant accepted she did not work during the period 23 April to 29 April 2021 but said she was awaiting the outcome of her flexible working request and she was not on annual leave. The claimant said managers approved leave and it was booked online on 'Charlotte's Web'.
36. The claimant did not accept that her holiday during 29 March 2021 to 19 April 2021 was 9 days. The claimant said a rota showed she took 6 days leave during April 2021 and she relied on that information and it was not her fault if HR had information that it was 9 days. A rota for April 2021 (372-377) shows a total of 7 days' leave for the claimant during the whole of April 2021. The 26 April 2021 is marked as holiday. The claimant is marked as rostered on a shift on 30 April 2021. The rota in the bundle is not consistent with the claimant's own acceptance in oral evidence that she did not work in April 2021 as it records shifts and holiday during the period she says she was neither on holiday nor working. The rota is undated and I find it is not a record of the final position.
37. An absence calendar for the claimant dated 29 April 2022 records the claimant as on annual leave from 29 March to 19 April 2021 inclusive and 23 April to 29 April 2021 inclusive (320). A timesheet shows 12 days of holiday during April 2021. This is consistent with the claimant's 24 hour a week working pattern, the claimant's own evidence that she took holidays between 29 March 2021 and 19 April 2021 and her acceptance that she did not work for the period 23 April to 29 April 2021. A total of 12 days leave during April is also consistent with the contents of the claimant's email of 5 July 2021 which sets out: "On April I used 12 days Holidays and since May I returned to work. So 5 days Left, I had right to use my holidays before I change Hours (but because company to make sure I'll back I agreed to take it after my return to work and it's time to take now)".
38. The claimant gave evidence that this statement did not mean that she agreed or accepted she took 12 days leave during April 2021. She said she was repeating what she had been told by another manager. I did not find this to be a satisfactory explanation. The context for the email of 5 July 2021 was a catch up which included an explanation about leave entitlement. The claimant is clearly asserting her right to a remaining 5 days of annual leave on the basis that she understands she has an entitlement of 17 days and has taken 12 days.
39. I find that the claimant took 12 days or 96 hours annual leave during April 2021.
40. On 6 May 2021, the respondent refused a flexible working request to work 4 hours per week made by the claimant on 10 April 2021 but offered her 6

hours per week. The claimant accepted this offer. The respondent also allowed the claimant to split her 30 minute break into 2 periods of 15 minutes to facilitate breastfeeding/expressing breast milk and secured agreement from Selfridges that she could use a room during her breaks for this purpose.

41. On 9 July 2021, the respondent explained to the claimant that her leave entitlement was pro-rated. The claimant worked 24 hours per week until 9 May 2021 and 6 hours per week thereafter. The claimant's annual entitlement based on the 6 hour contract was 4.2 days or 33.6 hours. The claimant's entitlement to annual leave for 2021 was therefore calculated to be a total of 75.6 hours for 2021. The entitlement of 75.6 hours was for the complete year on the assumption that the claimant would work the entire year. The claimant was in deficit of 20.4 hours against her annual entitlement at that point (227, 229).
42. A dismissal outcome letter dated 6 September 2021 recording the outcome of summary dismissal on 26 August 2021 sets out that the claimant had taken annual leave in excess of her entitlement and was in deficit of 32.05 hours which would be reflected in her final pay (306).
43. As at 26 August 2021, the claimant's accrued entitlement to annual leave was clearly less than 75.6 hours as that was her total annual entitlement and the year had not yet completed. A holiday entitlement chart records the accrual rate and entitlement as 64.03 hours on 26 August 2021. I find that the claimant had taken annual leave of 32 hours in excess of her entitlement at the point her employment ended.
44. The respondent deducted £400 from the claimant's final pay representing 32 hours at a rate of £12.50 being the claimant's hourly rate of pay. The respondent had a contractual right to take this step. The final pay slip shows a deficit of £169.20 (311). The respondent does not seek to recover the amount owed by the claimant.

Prior disciplinary warning

45. On 11 July 2021, an investigation meeting was held with the claimant. The meeting was related to an incident on 28 June 2021 regarding return of items purchased online to a physical store in Westfield shopping centre and excessive use of the respondent's Global Discount policy.
46. On 22 July 2021, the claimant was invited to a disciplinary hearing scheduled for 26 July 2021 to consider allegations that she had sought a full refund of items purchased online with an employee discount and had breached annual limits on the Staff Discount policy of £750 in 2018 and 2019 and £1000 in 2020. The claimant had overspent by nearly £4000.
47. On 29 July 2021, the respondent invited the claimant to a rescheduled disciplinary hearing on 4 August 2021.
48. On 4 August 2021, the claimant attended a disciplinary hearing in relation to the allegations of breaches of the respondent's discount policy. The

claimant was issued with a first written warning to remain live for 6 months during which her use of the employee discount was to be suspended. The warning was stated to relate to the overspend and significant abuse of the employee discount policy. In evidence and submissions, the claimant accepted she had breached the discount policy and did not seek to suggest the warning was in any way invalid.

Dismissal

49. On 1 August 2021, the claimant was contracted to work a 6 hour shift from midday to 6pm.
50. The claimant's mother had charge of the claimant's daughter who was then just over a year old. They spent the day in Selfridges. During the course of the day, the claimant's mother took items without paying from Selfridges totalling over £600. This was recorded on CCTV. The claimant's mother has received a 2 year ban from the store. In oral evidence and submissions, the claimant said that she did not deny anything that her mother had done but that she herself had not done anything wrong.

Claimant's written statement

51. The claimant's written statement sets out that around 2pm she went upstairs to the toilet, contacted her mum and went to the café, changed her daughter's nappy, played and went back to the counter. At around 4pm she went upstairs in the lift with her mother and daughter. Her mother had brought her daughter down to the counter as the daughter was not well and hungry as she had last been fed in a taxi at 12. They took the lift to a customer service area as it was quiet. The claimant fed her daughter. The claimant sets out that 3 men in orange uniform were holding their phones towards her whilst she was breastfeeding. The claimant sets out that she tidied up her daughter's bag and in taking her coat from a yellow Selfridges bag on the buggy saw water and juice.
52. The claimant's written statement also sets out that before her shift finished her mum came to the counter as the daughter was crying and she was asked to leave her shift early and was given permission to take a small yellow Selfridges bag to put some gifts from her manager in and that she put this bag under the buggy. The claimant then showed her mother out and went to her locker and exited from the staff entrance. The claimant was then taken by security to a room where her mother and daughter were. She was told security had followed her mother and her mother had taken items without paying. The claimant was also accused of taking her gifts and the yellow Selfridges bag.

Suspension from duties and removal of store approval

53. On 2 August 2021, the claimant was notified that Selfridges had temporarily removed her store approval due to allegations of gross misconduct arising from events on 1 August 2021 (245).

54. On 4 August 2021, the claimant was informed that she was suspended from her duties on full pay due to the allegations of gross misconduct and related investigation (264).

Investigation

55. The claimant was invited to attend an investigation meeting on 6 August 2021 (264).
56. On 6 August 2021, an investigation meeting took place. The notes of the investigation meeting record that the claimant said items her mum had were all gifts and that her mum 'may forget to pay' (256) and that around 4pm she 'asked my mum why she bought water, and that she can't take things without payment' (257). The notes also record that the respondent informed the claimant that it was accepted that the claimant had been given a gift bag of items. The claimant accepted that the notes correctly recorded that the statement of a security guard had been read out to her during the investigation meeting. The statement sets out that the claimant had been seen by the plain clothed security guard in the area without CCTV coverage looking at concealed items with her mother. The claimant did not provide an explanation as to why the statement was wrong. The notes record that the claimant said she did not look in her mother's cream bag. In oral evidence, the claimant was asked about this and did not provide any explanation other than to say she had explained everything.
57. The notes record that the claimant acknowledged that she understood they were not permitted to give empty Selfridges bags to people but that she had just put it in the buggy. In oral evidence, the claimant said that it was her manager's responsibility to warn her about this.
58. The notes record that there were 'serious concerns regarding the incident...and your involvement in that. I do have reasonable belief that you may have been aware of the concealment of stolen property from Selfridges store by your mother, specifically in relation to activity involving your mother's cream bag.'
59. The claimant raised serious allegations during her oral evidence to the effect that the respondent had deliberately omitted points raised from the notes of both the investigation meeting and the disciplinary hearing. These allegations had not been raised previously or put to the respondent's witnesses. The allegations were raised when it was suggested to the claimant that the notes recorded statements made by her that were contradictory. The claimant confirmed that the allegation was of omission not amendment. The claimant did not provide any clear explanation as to what it was said had been omitted. The claimant did not clarify before me how any alleged omissions might in any way undermine the evidence available to the respondent and the decision reached. The claimant had an opportunity to raise concerns after receipt of the notes of the investigation meeting but did not do so. The claimant did not raise any concerns about the notes of the disciplinary hearing on 26 August 2021 and was able to review and agree the notes of the hearing on 25 August 2021. I find that the

respondent did not omit material matters from the notes of the investigation meeting or the disciplinary hearing. Other than the claimant's assertions, there was no evidence before me to suggest that the respondent had done anything other than produce faithful and accurate notes of the investigation and disciplinary meetings. I find that the notes record what was said at the investigation meeting and the disciplinary hearing.

Disciplinary hearing

60. On 10 August 2021, the respondent invited the claimant to a disciplinary hearing on 12 August 2021 convened due to the allegation of gross misconduct 'specifically that you have provided items to your mother without taking payment, which constitutes theft and breach of trust and confidence' (267 – 268). The claimant was sent the investigation meeting notes, a statement from a plain clothed security guard, letter confirming temporary removal of store approval by Selfridges. The claimant was invited to view the CCTV footage ahead of the disciplinary hearing. The claimant was informed of her right to be accompanied by a colleague or trade union official. The claimant was notified that potential outcomes included a final written warning or dismissal.
61. On 16 August 2021, the respondent invited the claimant to a rescheduled disciplinary hearing on 18 August 2021 (274-275). The hearing was rescheduled as the claimant was unable to attend on 12 August 2021 as she was stated to be seeking legal advice. The claimant was sent the investigation meeting notes, a statement from a plain clothed security guard, letter confirming temporary removal of store approval by Selfridges and additional evidence provided by Selfridges being a statement from Selfridges Beauty management team and an investigation report listing the items recovered. The claimant was invited to view the CCTV footage ahead of the disciplinary hearing. The claimant was informed of her right to be accompanied by a colleague or trade union official. The claimant was notified that potential outcomes included a final written warning or dismissal.
62. On 18 August 2021, the respondent invited the claimant to a rescheduled disciplinary hearing on 25 August 2021 (282-283). The hearing was rescheduled as the claimant was unable to attend on 18 August 2021 due to childcare. The claimant was resent the evidence collated with an additional document being a report statement from Selfridges Security Manager. The claimant was invited to view the CCTV footage ahead of the disciplinary hearing. The claimant was informed of her right to be accompanied by a colleague or trade union official. The claimant was notified that potential outcomes included a final written warning or dismissal.
63. The claimant accepted in oral evidence that she had received the invite letters and enclosed documents sent to her in advance of the disciplinary hearing.
64. I find that the claimant was aware that she faced an allegation related to the events on 1 August 2021 specifically that she had provided items to her mother without taking payment which was theft and a breach of trust and

confidence. I therefore find that the claimant was aware that the disciplinary concerned her involvement in events on 1 August 2021 and that the respondent's trust and confidence in her was in question. I find that she was aware of her right to be accompanied and had a reasonable period of time to consider matters and prepare for the hearing. I find that the claimant had available the notes of the investigation meeting and the evidence and had a reasonable opportunity to consider and challenge these.

65. I also find that the claimant was given a reasonable opportunity to view the CCTV footage. The claimant said in oral evidence that she did not view the CCTV footage as it was false. She then clarified that she meant the footage about her was false. The claimant said she was 100% sure that she had done nothing wrong. The claimant did not view the CCTV footage in advance of the disciplinary hearing or at any point.
66. The disciplinary hearing took place on 25 and 26 August 2021.
67. The notes of the disciplinary hearing (284 – 299) record that the claimant understood her mum bought the juice and water. The claimant accepted in oral evidence that this was different from her statements in the investigation that she told her mum she can't take things without payment.
68. The notes of the disciplinary hearing record that the claimant was asked why she directed her mother to a non-staff customer service area. The claimant said it was because she needed a quiet place to feed her baby. The claimant was told that CCTV showed she had fed her baby in the café at 217pm and the claimant replied that it wasn't busy in the café at 217pm. The statement from the plain clothed security officer was read out namely that he could see the mother showing the claimant items that had been taken about 5-6 times. The notes record that the claimant said she didn't touch her mum's bag. In oral evidence, the claimant said she had no answer for this and she still didn't care and this was false information.
69. On 26 August 2021, the claimant was summarily dismissed for gross misconduct. The respondent's reasons were that there was a belief that the claimant gave her mum a Selfridges bag (the small bag). The respondent also considered there was a breach of trust and confidence 'especially as on the CCTV footage you covered the Selfridges bag with concealed items in with a baby blanket' (the larger Selfridges bag which had been with the buggy during the day). The respondent also took into consideration the statement from the security guard who witnessed the claimant and her mother look at concealed items 5-6 times. The dismissal was without notice as this was considered gross misconduct.
70. On 26 August 2021, Selfridges confirmed in writing that the claimant's store approval was permanently removed.
71. On 6 September 2021, the respondent (Kellie Hillson) confirmed the outcome of dismissal in writing (305-306). The letter sets out that the respondent reviewed the available evidence, considered the claimant's comments and her length of service and the live first written warning. The

letter records that the available evidence including the claimant's version of events meant it was clear there are concerns in regard 'to your involvement and facilitation of the theft' and the respondent held a reasonable belief that the claimant was aware of the concealed items her mother had taken and provided her with an empty Selfridges bag to facilitate this. The letter refers to the CCTV footage and sets out that the footage shows the claimant 'covered a Selfridges bag that contained items your mother had concealed with a baby blanket at 2.26pm'. The claimant had admitted putting a Selfridges bag in the pram the mother was looking after whilst she was working against Selfridges policy. The letter records that there was a reasonable belief the bag was given to facilitate the theft and that a blind spot on CCTV was selected to view the concealed items.

72. I find that the claimant gave no good reason why she put the Selfridges bag in the buggy when she was given permission to take it for her 'gratis' which was in her locker during the disciplinary hearing or in evidence before me.
73. The letter also sets out that on 26 August 2021, the claimant was given an opportunity to review the notes of the 25 August 2021 hearing at the hearing on 26 August 2021. The claimant highlighted two points to be updated and these were amended and the claimant agreed the notes were a true reflection of the conversation.
74. I find that the respondent considered the evidence available and gave reasons for the decision to summarily dismiss the claimant.

Appeal

75. On 7 September 2021, the claimant emailed stating that she wished to appeal the decision as she did not agree with most of the things on the outcome letter (308). On 8 September 2021, the respondent requested by email that the claimant state her grounds of appeal and the specific points she was appealing (308). On 8 September 2021, the claimant emailed 'all of the evidence you provided it's on lie and accusations and I have not done anything wrong and I won't accept any of it' (309).
76. On 20 September 2021, the respondent (Katie Johnson) invited the claimant to an appeal hearing on 29 September 2021 (313-314). The letter set out the claimant's right to be accompanied.
77. At the meeting on 29 September 2021, the respondent confirmed with the claimant that her grounds of appeal were that the decision was unfair and the evidence was a lie.
78. On 6 October 2021, the respondent set out the appeal outcome in writing (318-319). The letter records that there was no new evidence or information presented for consideration at the appeal hearing. The respondent set out that 'I share the reasonable belief that, taking all of the evidence into consideration, the allegations of gross misconduct occurred. I note the previous and recent sanction held on your personnel file which also referred to breach of trust and confidence.' The letter records that the respondent

had no reason to disbelieve the statements provided by Selfridges security department or the eyewitness account and these were compelling. The letter also sets out the recognition that the claimant was having a hard time personally as family members were unwell but that there was nothing to suggest the dismissal decision should be overturned.

79. I find that the claimant had the opportunity to appeal the dismissal decision and a reasonable period of time to prepare for the appeal in order to explain why she thought the dismissal decision was wrong. I find that the claimant set out that the evidence was a lie and the decision was unfair but did not explain in any detail why she maintained the evidence was a lie. I find that the evidence does not demonstrate that the claimant has provided any good or compelling reason why the plain clothed security officer would lie or why any other evidence was false.
80. The claimant affirmed in oral evidence that she had read the Employee Handbook although she accepted that she had only read the Global Discount policy after the 4 August 2021 disciplinary. I find that to the extent the claimant was not familiar with relevant policies and procedures she had access to relevant policies and procedures and ought to have been aware of them and their application to her as an employee of the respondent.
81. I find that the respondent considered relevant factors including the circumstances of the claimant's family being unwell and gave reasons for upholding the decision to dismiss.
82. The claimant gave evidence that on 11 September 2021 her daughter was diagnosed with type 1 diabetes. This is not disputed and I accept this evidence. The claimant also gave evidence that she was her daughter's full time carer and did not think she could work until her daughter went to nursery. I therefore find that on the claimant's own evidence she would be unlikely to have been in a position to perform duties under her employment contract until her daughter was at least 3 years old.

LAW

Unfair dismissal

83. The test for unfair dismissal is set out in section 98 of the Employment Rights Act 1996 (ERA).
84. Under section 98(1), it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal and that it is "either a reason falling within subsection (2) or "some other substantial reason of such a kind as to justify the dismissal of an employee holding the position which the employee held."
85. Once an employer has shown a potentially fair reason for a dismissal, the determination of the question whether the dismissal is fair or unfair, having regard to that reason "...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 that question shall be determined in accordance with equity and the substantial merits of the case.” (Section 98(4) of the ERA).

86. In **British Home Stores Ltd v Burchell [1980] ICR 303**, the EAT explained the test in conduct dismissals. Where a dismissal is based on belief in an employee’s misconduct, the employer must establish that they believed there was misconduct, had reasonable grounds for that belief and that as much investigation as reasonable in the circumstances had been carried out.
87. In **Wincanton Group plc v Stone [2013] ICR D6**, the then President of the EAT, Mr Justice Langstaff, set out the general principles to apply regarding the relevance of earlier warnings. The issue remains whether the employer acted reasonably or unreasonably in treating conduct as the reason for the dismissal but an employer is entitled to take account of any previous warning given in good faith and “*the employer is entitled to think at the time of the dismissal for later misconduct that the warning should have been given, and the employer’s actions in response in that light to any new misconduct must be judged on the basis that the employer is entitled to take that view.*”
88. When considering reasonableness, the tribunal cannot substitute its own view. Instead, I am required to consider the decisions and actions of the employer through the lens of the range of reasonable responses test. The test applies to the procedure followed and to the question of dismissal. The ultimate question for the tribunal is whether dismissal was within the band of reasonable responses open to a reasonable employer.
89. When considering the question of the employer’s reasonableness, the tribunal must take into account the process as a whole, including any appeal stage (*Taylor v OCS Group Limited [2006] EWCA Civ 702*; *West Midlands Cooperative Society Ltd v Tipton [1986] ICR 192, HL*. Each case will turn on its own facts.

Polkey Principles

90. In accordance with the principle established in *Polkey v AE Dayton Services Ltd [1988] ICR 142* if I find the dismissal to be unfair, I am required to consider the possibility (in terms of a percentage chance) that the respondent would have been in a position to fairly dismiss the claimant. This also includes considering when a fair dismissal would have been able to take place (*Mining Supplies (Longwall) Ltd v Baker [1988] ICR 676* and *Robertson v Magnet Ltd (Retail Division) [1993] IRLR 512*).

Unlawful deduction from wages

91. Section 13(1) of the ERA provides that an employer must not make a deduction from the wages of a worker unless the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker’s contract or the worker has previously signalled in

writing his agreement or consent to the making of the deduction. Section 23 ERA sets out the right to complain to an Employment Tribunal of an unlawful deduction from wages and any claim must be presented within 3 months beginning with the date of payment of wages from which the deduction was made unless it was not reasonably practicable to present it within that period and the tribunal considers it was presented within a reasonable period thereafter. Extension is made to the primary time limit for early conciliation where ACAS is notified within the primary time limit.

ANALYSIS AND CONCLUSIONS

92. I turn now to the application of the law to the facts I have found in this case.
93. There is no dispute that the claims before me were brought in time having regard to the applicable statutory time limits and that the claimant has the necessary status to bring the claims.

Unlawful deduction from wages

94. I have found that the claimant had taken annual leave in excess of her entitlement when her employment ended. I have found that the excess was 32 hours. There is no dispute that the sum of £400 was deducted from the claimant's final salary. I have found that the sum of £400 represents 32 hours at a rate of £12.50 per hour. I have also found that the respondent had a contractual right to deduct sums representing excess annual leave from any final salary payment. I have therefore concluded that the deduction of £400 was a lawful deduction from wages.
95. Accordingly, the claimant's claim for unlawful deduction from wages fails and is dismissed.

Unfair Dismissal

96. It is clear from the findings above that the reason for the dismissal was conduct which is a potentially fair reason. I therefore turn to consider the fairness of the dismissal and whether the employer acted reasonably or unreasonably in treating that reason as a sufficient reason for the claimant's dismissal.
97. I consider whether the respondent genuinely believed in the claimant's misconduct and whether there were reasonable grounds for that belief. There is no requirement for matters to be proven to a standard such as that used in criminal proceedings of beyond reasonable doubt rather the respondent has to have reasonable grounds on which to base their belief that the misconduct occurred.
98. I have concluded that the misconduct for which the claimant was dismissed is encompassed by the allegation set out in the invite to disciplinary hearing. From the findings above, it is clear that the claimant was aware what was in contention. I am satisfied that Katie Hillson who had conduct of the disciplinary hearing and reached the decision to dismiss had a genuine

belief that the claimant had engaged in misconduct due to awareness and thus involvement in her mother's theft of items and had given a yellow Selfridges bag to her mother by placing it in the buggy contrary to policy. I have also concluded taking account of my findings above that there were reasonable grounds for that belief based on a reasonable investigation.

99. The claimant received formal invite letters in relation to the disciplinary hearing which was twice rescheduled on the request of the claimant. I have found that the claimant was notified of her right to be accompanied, had a reasonable opportunity to prepare in advance of the disciplinary hearing and was provided with all the available evidence. The claimant was also provided with an opportunity to view CCTV evidence. Although there was no obligation on the claimant to view the CCTV evidence, the claimant has provided no good or plausible explanation as to why she did not view the CCTV footage particularly given she maintained in evidence that any footage about her was false. As the claimant did not view the footage, it is unclear on what basis she has concluded that the footage of her was false. The disciplinary hearing lasted a considerable period of time as it took place over two days. The claimant clearly had sufficient opportunity to put forward her case and explain what happened on 1 August 2021.
100. The claimant also had the opportunity to appeal the outcome. The claimant was aware of the basis of the dismissal decision and her position was an assertion that the evidence was false. Katie Johnson who heard the appeal also took account of the claimant's personal circumstances including that family members were unwell but did not find this was mitigation for the claimant's conduct. Account was also taken of the live warning on the appellant's file. That warning was for actions which amounted to significant abuse of an employee benefit in relation to the respondent's products and demonstrated a complete disregard for the respondent's policies.
101. The respondent's disciplinary procedure makes clear that theft or dishonesty is gross misconduct as it goes to the trust and confidence needed in an employee. I have concluded that in all the circumstances the respondent acted reasonably in considering that the claimant's misconduct was gross misconduct given the misconduct found was awareness of her mother's theft and the surrounding circumstances and that the appropriate sanction was dismissal without notice.
102. The claimant has not identified any particular aspect of the procedure the respondent carried out that was unfair or any particular component of a fair procedure that was lacking. I have concluded that in all the circumstances the dismissal was procedurally fair.
103. I have considered the procedure and circumstances of the claimant's dismissal overall. In doing so, I have taken account of the nature of the respondent's business and the size of the respondent. In all the circumstances, I find that the decision to dismiss is within the range of reasonable responses of a reasonable employer and that the respondent acted reasonably in treating conduct as a sufficient reason to dismiss the claimant.

104. The claimant's claim for unfair dismissal therefore fails.

**Tribunal Judge Peer acting as an Employment
Judge
23/08/2022**

Sent to the parties on:

.24/08/2022

For the Tribunals Office