EMPLOYMENT TRIBUNALS

Claimant: Mr Michael O'Neill
Respondent: Poundland Limited

Heard at: Liverpool (in person (day 1) and remotely, by CVP (day 2)) **On:** 18th May 2022 and 22nd July 2022

Before: Employment Judge L Cowen

REPRESENTATION:

Claimant: Ms P Thompson (USDAW representative)
Respondent: Mr M Curtis (counsel)

JUDGMENT

The judgment of the Tribunal is that the Claimant was not unfairly dismissed for gross misconduct and the claim is dismissed.

REASONS

Introduction

1. The Claimant, Mr O'Neill, was employed by the Respondent as an Assistant Manager at the Bromborough branch of Poundland, until his dismissal on 9th July 2021.

2. The Claimant claims that his dismissal was unfair within section 98 of the Employment Rights Act 1996. The Respondent contests the claim. The Respondent submits that the Claimant was fairly dismissed for gross misconduct, namely violation of the Respondent's policy regarding the use of their time recording programme (which is called "Kronos").

3. The Claimant was represented by Mrs Thompson (USDAW representative) and gave sworn evidence. The Respondent was represented by Mr Curtis, counsel, who called sworn evidence from Miss Lindsay Morgan-Hanglin (store manager) and Mr Lee Dryden (area manager) on behalf of the Respondent.

4. I considered the documents from an agreed 256-page bundle of documents which the parties introduced in evidence. I also considered an agreed document entitled "Schedule of Kronos inconsistencies/amendments". This summarised information relating to the Kronos recordings of the Claimant's time at work on days prior to his dismissal. Mrs Thompson also provided written closing submissions to supplement her oral closing submissions, which I have considered.

5. Judgment was reserved at the conclusion on the hearing on 22nd July 2022.

Preliminary matters

6. On 18th May 2022, the case was heard in person at Liverpool Employment Tribunal. As a preliminary issue, the Claimant was asked to confirm the scope of his claim. He confirmed that the claim was for unfair dismissal, and that there was no breach of contract claim.

7. The Claimant also sought to amend his claim to broaden the issues for the tribunal to determine. It was determined that the issues which the Claimant sought to raise fell within the scope of the current claim and so no amendment was necessary. A list of issues was agreed. The issues are set out below.

8. On 22nd July 2022, the case was heard remotely through CVP. The hearing on 22nd July 2002 was heard remotely following a request being made by the Respondent to hear the second day of evidence remotely. There was good reason for this request which I need not set out here. The Claimant was asked, as a preliminary issue, whether he wished to apply to adjourn to allow the case to be heard in person and he indicated that he did not wish to apply to adjourn. The Tribunal heard from the Claimant, and both parties made closing submissions.

Issues for the tribunal to decide

9. The Claimant claims for unfair dismissal. Although issues relating to whether any adjustment to any compensatory award should be made to reflect the likelihood that the Claimant would have been dismissed in any event (per **Polkey v AE Dayton Services Ltd [1987] UKHL 8)** and contributory conduct issues concerned remedy and would only arise if the Claimant's complaint of unfair dismissal succeeded, it was agreed that evidence and submissions would be made regarding these issues which would be determined at this stage.

10. It is accepted that the claim was brought in time.

11. It is accepted that Claimant was an employee of the Respondent and that he had the relevant qualifying length of service. It is accepted that he was dismissed on 9th July 2021. The following issues were identified for the Tribunal to determine:

i) What was the reason for the Claimant's dismissal? As it was agreed that the Claimant was dismissed for misconduct this issue did not need to be determined by the Tribunal.

ii) Was the dismissal fair/unfair? This necessitates consideration of the following issues:
   (i) Did the employer have a genuine belief in the employee's guilt?
   (ii) Did the employer hold this genuine belief on reasonable grounds and after carrying out a reasonable investigation?
   (iii) Did the employer act within the band or range of reasonable responses open to an employer in the circumstances?

iii) If the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the Claimant would still have been dismissed had a fair and reasonable

procedure been followed, in accordance with the principles in **Polkey v AE Dayton Services Ltd [1987] UKHL 8**;

iv) Is it just and equitable to reduce the compensation award to reflect the Claimant's blameworthy or culpable conduct, and if so, by how much?

The Findings of Fact Relevant to the Issues

12. The Claimant, Mr O'Neill, commenced employment with the Respondent, Poundland Ltd, in February 2013. He was employed as a Senior Sales assistant. In 2015, he was seconded to work as Assistant Manager of the Birkenhead branch of Poundland in November 2015. Following this, he managed several stores including Liverpool, Birkenhead, Wallasey and Ellesmere Port. He was then made a full time Assistant Manager and he worked in the Bromborough store until his dismissal on 9th July 2021.

13. The Claimant's promotion shows that he was a well-regarded and trusted employee. He had not had any sanctions, either informal or formal, in relation to his work in the 8 years prior to his dismissal. The Claimant accepted in his evidence that he had a high degree of autonomy in his role and a high degree of responsibility.

Kronos time management system

14. Of significance to this case is the Respondent's time and attendance system. This is called "Kronos". This system was introduced in 2017. The parties were in agreement regarding how Kronos works. It uses staff members' fingerprints to record their attendance at work (through their time of arrival at work and their time of departure). Data from Kronos is linked to the Respondent's payroll system and employees rotas are uploaded to Kronos in advance.

15. The Kronos system works by the employee using their fingerprint to record their time entering work. If the rota records that they are due to start work at 9am, if they start at 8.55am, they will be paid from 9am. If they enter at 9.05am, they will be paid for 55 minutes of that hour. Store managers and assistant store managers can make manual adjustments to the figures recorded by Kronos; this is through a process of clearing off exceptions that are flagged up by the system when someone's actual times in or out of work vary from what their rota indicates they would do, which is what Kronos would record.

16. Store Managers and Assistant Store Managers could do this to reflect situations where an employee may have worked additional hours to those shown by the Kronos record. When amendments are made in this way, the system allows the person amending the record to enter a comment in a comment box to show why they have made the relevant amendment.

The Claimant's knowledge of the Kronos time management system

17. There was some dispute regarding the level of information the Claimant was given regarding Kronos and how it worked. The Respondent submitted that the Claimant had received training regarding the use of Kronos, and that as part of this training, he would have understood that misuse of the Kronos system amounted to gross misconduct. The Respondent has produced a training record that shows that the Claimant completed 4 e-learning modules regarding the Kronos system in April

2021. He passed with a score of 100 on each module. He took each quiz twice. Each module took between five minutes and fifteen minutes of recorded learning time.

18. In his evidence, the Claimant was very frank in his explanation that he had not fully engaged with the e-learning. He explained that due to pressure of time, other members of staff provided him with the relevant answers, which he inputted into the online quiz in order to pass the test. Although the Claimant did not fully engage with the e-learning provided to him, I have found that he would have known what the Kronos system was, and what it was used for. He was clear when describing in evidence how the Kronos system worked, and that it was used to calculate pay.

19. I am also satisfied that the Claimant knew that misuse of the Kronos system was a serious matter. A specific question from the e-learning module has been produced by the Respondent. Although the question is difficult to read, it asks the person completing the quiz to indicate whether misuse of Kronos will be treated seriously. The answer to this is obviously yes. I acknowledge the Claimant says he did not really engage with this learning, but it is a simple question with an obvious answer, and I find that the Claimant was aware that misuse of Kronos would be treated seriously.

20. The Respondent has also produced a Disciplinary Policy, dated October 2020. Paragraph 13 of that document is headed "*Matters that Poundland views as amounting to gross misconduct include (but are not limited to)".* Included in the list below is "*Kronos manipulation*". In his oral evidence, the Claimant confirmed that this policy "*possibly could have been available on the intranet",* but that there was no hard copy in store. The Disciplinary Policy also states that in cases of gross misconduct, the sanction applied will be dismissal without notice.

21. I conclude that given the clarity of this documentation, and the training that was provided to the Claimant, he did understand that Kronos manipulation would be taken seriously, and would amount to gross misconduct.

The Claimant's amendments of the Kronos time management system

22. The parties have produced an agreed schedule which shows the times when the Claimant's recorded hours (through Kronos) differ from the actual hours when CCTV showed him to be present in store. These may be summarised as showing 8 dates between 27th May 2021 and 18th June 2021 when the time on the punch in/out record was amended. The changes range from adding half an hour to the punch in/punch out time, to adding around 3 hours to the punch out time.

Circumstances of the Claimant's dismissal

23. On 28th June 2021 the Claimant returned to work following a one week holiday. He started his shift at 6am. At 8am, a store manager from the Birkenhead store arrived at the store and informed him he was being investigated for anomalies on his time sheet. In the meeting that followed, he was asked about discrepancies between what Kronos showed regarding his attendance at work, and what was shown through CCTV showing his arrival and departure at work.

24. During the meeting, the Claimant accepted that he had, on occasion, left early because he had not been able to take a break or because he was owed time by the Respondent. He was clear in the meeting that he had worked his contracted hours.

25. At the end of the meeting, the Claimant was suspended on full pay. A letter from 28th June 2021 informed the Claimant that he would be suspended on full pay whilst an investigation in respect of the allegation of gross misconduct regarding manipulation of the Kronos system would be carried out.

26. A disciplinary hearing was held on 9th July 2021. The meeting was attended by the hearing manager, Miss Lindsay Morgan-Hanglin, and Jennifer Hartless acted as the company note taker. Miss Morgan-Hanglin had experience of conducting disciplinary hearings, having carried out approximately 8 in the previous 3 years. The Claimant was represented by Mrs Pam Thompson, his USDAW representative. The hearing was held at the Birkenhead store.

27. Prior to the hearing, the Claimant had asked that the hearing not be held there, as a member of staff there had highlighted concerns about his working hours and this store was where the investigation manager, Pam Layfield, worked. The Claimant was told that the meeting had to take place at the Birkenhead store as this was the only store where CCTV could be viewed. However, this suggestion is undermined by the fact that the CCTV was ultimately viewed on a pen drive using a laptop belonging to a member of staff.

28. In his oral evidence, the Claimant raised concerns about the hearing being held at the Birkenhead store due to the potential that Miss Morgan-Hanglin could have been influenced by others working at the Birkenhead store. Miss Morgan-Hanglin had not been asked questions about this when she gave her evidence. Concerns about her being influenced by others in the store were not raised by the Claimant during his appeal.

29. I do not find that Miss Morgan-Hanglin was influenced by staff working at the Birkenhead store. Miss Morgan-Hanglin gave a clear account of the process of her decision making, and I have accepted that this account was complete, and referred to others that she consulted (namely, Miss Gemma Brookes in Employee Relations ("ER")). I do not find that she was influenced by others working in the store.

30. Prior to the meeting, Mrs Thompson had requested details of the Kronos policy that the Claimant had allegedly broken, and she was informed that this was "*not an ER policy*" and that he should contact "*profit protection*" to obtain the policy. During the hearing, the Claimant asked for a copy of the Kronos policy. Miss Morgan-Hanglin spoke to Miss Brookes in the ER team about this, and was informed that there was no written Kronos policy. Miss Morgan-Hanglin confirmed that she did not tell the Claimant in the hearing that there was no Kronos policy. She was not able to explain why she had not told the Claimant there was no such policy.

31. During the meeting, the Claimant admitted he had made mistakes in relation to the rota and his start time. He said that he had not done this on purpose nor done so for any financial gain. He explained that he had left work early on one occasion because his daughter was unwell. He said he had left work early on one occasion because he had not been able to take his break. The Claimant explained that it was common practice for members of staff to not take breaks during the day and to then take the time back at the end of their shift. He did not provide any names of anyone who had done this. He explained that he had often worked above his contracted hours. He explained that he did not ring his area manager prior to amending the Kronos record as amending Kronos had not been an issue before, and he also said that he had tried to ring "Andy" (Andrew Rigby, the Area Manager) but he never

responds. He stated that Andy had not responded to previous emails asking for help. He said that nothing he did was done "*maliciously*".

32. CCTV was shown during the meeting, though the Claimant did not want to see more than a few clips of the available CCTV. There is no dispute that the CCTV showed clips from a camera which showed the Claimant using the clock-in machine at the Birkenhead store. The clips showed him arriving later than the time his rota stated as his scheduled start time and showed him by the clock-out machine ready to leave the store earlier than the time at which he was scheduled to finish.

33. CCTV that might have supported the Claimant's account that he had not been able to take breaks during his working day and had so amended his Kronos times was not obtained, despite this being raised as a potential avenue of inquiry by the Claimant. Miss Morgan-Hanglin stated that she did not think it necessary to obtain further CCTV as she felt she had sufficient information to reach a decision from the CCTV she had seen.

34. At the end of the meeting, Mrs Thompson submitted that the Claimant did not believe he had falsified his hours to show that he had worked a greater number of hours than he had worked and he did not accept that any changes to Kronos were manipulations for personal gain.

35. The Claimant asserts that there was no investigation of whether it was common practice for people to take time back through Kronos to reflect missed breaks or additional hours worked in the way the Claimant did. Miss Morgan-Hanglin stated that she spoke to Mr Rigby (Area Manager) about these matters over the phone, but she did not take a statement from him, or seek to interview him.

36. Miss Morgan-Hanglin also stated that Mr Rigby had told her that support had been provided to the Claimant, but no detail was provided regarding this. She could not remember whether this conversation had taken place before or after the disciplinary. She stated that she asked him about whether the amendment of Kronos was common practice, and he said he would investigate, but she heard nothing further from him.

37. Miss Morgan-Hanglin stated that she informed Mr Rigby what the Claimant had said so he could consider whether there was evidence of common practice and follow up and take any appropriate disciplinary action. Miss Morgan-Hanglin stated that she did not receive feedback from Mr Rigby that there were issues of common practice, though she was aware of two cases involving store managers to whom the Claimant might have been referring when he referred to common practice. No statement was taken from Mr Rigby. No notes of any telephone call were produced at the tribunal hearing. Mr Rigby did not provide evidence to the tribunal.

38. Miss Morgan-Hanglin explained that she did not think it was appropriate to adjourn the hearing to obtain more information on these issues as they were irrelevant to her decision. Her view was that these matters would not have amounted to relevant mitigation as she had already made her decision based on the facts of the timecards. This, for her, was such serious misconduct, that dismissal was the only appropriate sanction. She accepted in her evidence that there was no evidence of financial gain from the Claimant's actions. I accept that Miss Morgan-Hanglin spoke to Mr Rigby about the issue of common practice and the issue of support for the Claimant, but I have concluded that there was no detailed investigation of these issues.

39. The meeting ended with the Claimant being summarily dismissed. The notes state that Miss Morgan-Hanglin said "*they are putting it down as falsification and from this day are terminating your employment*". The notes also state that dismissal was the only sanction in the case as the Claimant had admitted to clearly falsifying documents (timesheets). The notes state that the Claimant's length of service was considered but the fact that the Claimant's contract did not say he could take time back at his own leisure to gain hours back. The notes state that falsification was entered into daily timesheets, his being clocked in on Kronos was a health and safety risk as people would think he was still in the building and he had manipulated Kronos for personal gain.

40. The parties do not agree regarding who took the decision to dismiss the Claimant. The Claimant asserts that the decision was taken by ER rather than Miss Morgan-Hanglin. He referred to Miss Morgan-Hanglin's comments that "*they are putting it down to falsification*" and "*they have advised me*" in support of his assertion that the decision to dismiss was not taken by Miss Morgan-Hanglin. He also refers to different versions of the dismissal summary sheet indicating that details were added after the decision to dismiss had been taken to suggest that someone other than Miss Morgan-Hanglin took the decision to dismiss him.

41. Miss Morgan-Hanglin explained that she had discussed the Claimant's case with Miss Brookes from ER. She stated that the purpose of this discussion was to confirm she had followed the correct process and that her proposed decision was in line with other decisions of a similar nature. She stated that after discussing the case, Miss Brooks confirmed that Miss Morgan-Hanglin's reasoning was sound.

42. Miss Morgan-Hanglin explained that she believed that the allegations were well-founded and she a reasonable belief that the Claimant had falsified his hours for personal gain. She did not think that other sanctions would be appropriate due to the seriousness of the Claimant's actions, the admissions he made in the hearing, and the fact that he considered the amendment of Kronos to be something he could do because others were doing it.

43. She stated in her evidence that the decision was hers. When asked why there was an entry in the disciplinary notes that stated "*read through notes told to terminate contract*" she said she did not know why she had written that, as the decision was "*100% hers*". She explained comments along the lines of "*they are putting it down as*" and "*they have advised*" as reflecting the opinions of the HR colleague she spoke to, but the decision ultimately being hers. She could not explain the duplicate dismissal forms, but was clear that she sent only one through HR, that being the one with reasons included.

44. I have found that the decision to dismiss was a decision taken by Miss Morgan-Hanglin. Miss Morgan-Hanglin was very clear in her oral evidence regarding the reasons for her decision, and she clearly explained that although she spoke to HR, the decision was ultimately hers. In her evidence, she conveyed the certainty with which she felt dismissal was the appropriate outcome, and the reasons for that certainty. I accept that this decision was hers.

45. The Claimant was written to on 15th July 2021 to confirm the outcome of the disciplinary meeting. The letter states that he was summarily dismissed due to "*Gross breach or the Kronos Policy wherein you falsified your own hours to show that you worked a greater number of hours than you actually worked* [and] *Gross breach of the Kronos Policy wherein you manipulated Kronos for personal gain*".

46. The Respondent suggested to Miss Morgan-Hanglin that it was unfair that the Claimant had been dismissed for breaching the Kronos policy, when it was accepted no such policy existed. Miss Morgan-Hanglin stated that the dismissal was fair because the Claimant was falsifying the timecards to say he was in the business when he wasn't. She did accept that in the disciplinary hearing, they did not discuss other policies (such as the time and attendance policy) nor did they discuss any training the Claimant had had in relation to Kronos. I have found as a fact that there was no discussion of such matters in the disciplinary meeting, and that the Kronos policy referred to in the letter of 15th July 2021 did not exist.

The appeal against the decision to dismiss

47. The Claimant submitted his appeal against this decision on 21st July 2021. The appeal hearing was scheduled to take place on 20th August 2021 at the Chester store. Mr Lee Dryden was the hearing officer, and Colin Brown acted as notetaker. At the relevant time, Mr Dryden was an Area Manager, responsible for Wales and the West Midlands area.

48. The Claimant was again represented by Mrs Thompson. This hearing was adjourned because the Claimant had not been provided with the notes from the disciplinary hearing. He was provided with these notes. He also raised the lack of any Kronos policy that had been provided to him. He was told this would be looked into. The reconvened appeal hearing took place on 25th August 2021. Mr Dryden once again acted as the hearing officer and Colin Brown as the notetaker.

49. During the appeal, Mr Dryden told the Claimant that there was no Kronos policy as such, and provided him with a document entitled Kronos Upgrade Version 8.1. This document provides guidance on the use of Kronos, and includes a paragraph stating that if any changes are made to the times shown, a comment must be left explaining why the changes were made.

50. During the appeal, the Claimant accepted that he had amended his punch in/out times to take back time that he had lost for missing his breaks. He submitted that this was common practice. The Claimant stated that he had tried to contact his area manager, Mr Rigby, about requesting support and about leaving the store early. It was noted during the hearing that there was no policy that permitted colleagues to take back time in this way. The Claimant admitted during the hearing that he should have instead amended the rota.

51. Mr Dryden accepted during the course of the appeal that the allegation that the Claimant had made a financial gain from the falsification of Kronos entries could not be substantiated and was dropped. It was accepted that there was no financial gain made by the Claimant.

52. The meeting was adjourned partway through to consider the Claimant's response and to carry out further investigations.

53. Mr Dryden states in his witness statement that he contacted the IT Team to request emails sent from the Claimant's store to Mr Rigby during July 2021. In his oral evidence he admits that this was an error on his part, and that he should have requested emails from June 2021 (the Claimant was suspended on 28th June 2021). Mr Dryden accepted that he could not address the matter the Claimant raised as he had asked for emails from the wrong period.

54. Mr Dryden also explained in his oral evidence that he had spoken to Mr Rigby about the appeal, and that he had spoken to him to confirm that there were no emails to him from the Bromborough store relating to this case. Mr Dryden did not document this conversation as it was a "*simple question and answer*" and he did not feel the need to document it. He later clarified that the conversation he had with Mr Rigby took place after the appeal hearing.

55. The appeal process was further delayed by Mr Dryden's absence from work. When he returned to work, he notified the ER team on 14th September that his decision was to uphold the original decision. Mr Dryden states that he upheld the decision for several reasons. They may be summarised as follows:

i. The decision to dismiss was in line with the Respondent's approach to Kronos manipulation and the approach was clear in the Respondent's disciplinary policy. Although the "Kronos policy" was unwritten, the Claimant was aware that manipulating the Kronos record was not acceptable;

ii. The Claimant did not provide adequate mitigation to explain his actions. Mr Dryden had not been able to find evidence of the Claimant emailing Mr Rigby. The Claimant had also not provided any evidence of emails or attempts to telephone Mr Rigby himself. In any event, Mr Dryden felt that it was not adequate mitigation that the Claimant had said he raised the matter of his workload with his manager, but then unilaterally took the steps he did to resolve it;

iii. After checking with the disciplining officer if there was any evidence of a common practice of manipulating the Kronos system, Mr Dryden was told she was not aware of this, and his view was if such a practice became known, the individuals would be disciplined.

iv. As the Claimant had worked less hours than he had recorded, which was also less than his contracted hours, he did benefit and receive personal gain from his actions;

v. The Claimant had ample opportunity to correct his hours on the system.

vi. The Claimant's actions were a direct breach of the Kronos procedures and rules relating to Time & Attendance.

vii. The Claimant had 8 years' service with the business and was on Assistant Manager and should have been leading by example.

viii. The seriousness of the Claimant's actions outweighed his 8 years length of service;

ix. Mr Dryden did not believe the Claimant was being honest when he said why he had to work through his breaks. I believed that when he worked through his breaks it was with the intention to leave early, as when this did happen he had other options available to him (for example, he had management on shift during that day (at midday) scheduled in, and if he had planned correctly then he could have had his break.

x. No other sanction was appropriate as manipulation of the Kronos system was very serious and fundamental to the relationship of trust and confidence. As a

supervisor. Poundland would need to place trust in the Claimant to instruct others to do the right thing. Dismissal was therefore justified.

56. The Claimant was notified, by letter, dated 2nd October 2021 that he had been unsuccessful in his appeal and his dismissal stood. The appeal outcome notified him that the circumstances giving rise to the dismissal were of gross misconduct. It stated that mitigation had been taken into account, and that Mr Rigby and the IT department had confirmed that no emails were received from the Claimant seeking help. The letter stated that his previous experience should have made him able to cope with what was required of him at the store.

57. The letter also stated that as he worked fewer hours than recorded and less than his contracted hours, he did benefit and receive personal gain. It was also confirmed that he did not have authorisation to work in excess of his contracted hours and then take this time in lieu. It was confirmed that financial loss could not be quantified and should not have been part of the decision to dismiss. The letter stated that as an Assistant Manager trust was key, and he had not done the right thing by amending the Kronos records rather than his rota. This was done on more than one occasion. The letter confirmed that his length of service was taken into account. It also stated that there was no Kronos policy, but because his actions were in breach of the Kronos procedures and the time and attendance policy, this would not have made a difference to the decision to dismiss.

58. The Claimant asserts that this was the first time he was told about the time and attendance policy, and he was not able to review this policy or raise concerns about it during the disciplinary process. Mr Dryden could not recall the documents that were provided to the Claimant during the appeal hearing. He thought that he did share some items, but he could not recollect which ones. The notes show that what was shared was the Kronos upgrade version document referred to above.

59. The Claimant also asserts that he was dismissed in breach of a policy (the Kronos policy) that does not exist. Mr Dryden stated that this was discussed in the appeal hearing, and that he did explain to the Claimant that the issue was not about a breach of the Kronos policy, it was about trust and confidence and the Claimant's integrity. The notes do record that in the meeting Mr Dryden stated that there was no Kronos policy. They also record that Mr Dryden said "*I challenged loss of faith in integrity in your role*" which indicates that the issue of integrity was discussed, and I find that it was discussed in the appeal hearing. The fact that amending the Kronos record in the way the Claimant did was a health and safety issue and that it placed others at risk was also discussed.

60. The Claimant asserts that at the appeal hearing there was no attempt to obtain and review further CCTV, which the Claimant submits would be relevant as it would show he had worked his contracted hours. Mr Dryden stated that at the point of his involvement in the case, he could not have obtained any further CCTV as CCTV would be overwritten after 30 days.

61. Mr Dryden was clear however, that even if it was correct that the Claimant had been working through his breaks, and had so adjusted the records only to claim back time that he could have taken as his break, it would have made no difference to the outcome of the appeal. Mr Dryden stated that what concerned him was the number of examples of "*late ins, corrected swipes*"*;* this was a concern because of the impact on trust and integrity. He said that the Respondent business was robust around their non-negotiable approach to Kronos manipulation/edits for personal gain.

His view that that demotion to a supervisor post would not be appropriate in this case given the risks of the Claimant's behaviour.

62. The Claimant asserts that there was no investigation of whether adjusting hours on the Kronos system was common practice, and there was no investigation of his claim that he had tried to seek support because he was finding it difficult to cope with the work he was required to do.

63. In his oral evidence, Mr Dryden said he had spoken to Miss Morgan-Hanglin about this, but it was suggested that she might not know as she did not work at the Claimant's store. Mr Dryden stated that in his experience as an area manager, it is not common practice to take back time owed. He said he was aware of others being dismissed for Kronos manipulation. He stated that he had spoken to Miss Morgan-Hanglin and Ms Pam Layfield (a store manager at the Birkenhead branch) about whether they had followed this up, but he didn't pursue this issue as he thought it was not his role to reinvestigate, and in any event, it would not change the outcome if there was a common practice of the kind described by the Claimant. There was therefore very limited investigation of whether the practices described by the Claimant were common at the store.

64. Following Mr Dryden's determination of the Claimant's appeal, his dismissal stood, and he submitted his claim to the Employment Tribunal on 8th December 2021, after following the appropriate ACAS procedure.

The law

65. Section 94 of the Employment Rights Act 1996 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 she was dismissed by the Respondent under section 95, but in this case the Respondent admits that it dismissed the Claimant (within section 95(1)(a) of the 1996 Act) on 9th July 2021.

66. Section 98 of the 1996 Act 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 Respondent 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 Respondent acted fairly or unfairly in dismissing for that reason.

67. Section 98(4) 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.

68. In misconduct dismissals, there is well-established guidance for Tribunals on fairness within section 98(4) 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.

69. 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**).

The parties' submissions

70. The Claimant accepts that he was dismissed for misconduct which is a potentially fair reason for dismissal. He claims that the Respondent did not have a reasonable belief to find that the misconduct had taken place and the decision to dismiss was outside the reasonable band of responses.

71. The Claimant submits that it was not reasonable for the Respondent to treat the alleged misconduct as a sufficient reason for dismissal as there was not sufficient evidence before the Respondent to be able to form a genuine belief of guilt. He submits that the Respondent dismissed the Claimant for breaching the Kronos policy, and later admitted that there was no Kronos policy.

72. The Claimant submits that the Respondent produced other documents such as an update document and referred to a time and attendance policy, however the Claimant submits he was not dismissed for these matters and the Claimant was not given the opportunity to provide his opinion on this policy during the disciplinary process. It is submitted that for these reasons, and due to the Claimant's length of service, the Respondent did not act reasonably under Section 98(4) in treating conduct as a sufficient reason for dismissal.

73. The Claimant also submits that the investigation carried out by the Respondent was inadequate in the following respects:

i. The Respondent's disciplining officer did not take the decision to dismiss the Claimant, her decision was made by the company ER team;

ii. The Respondent did not have a Kronos policy, and so they could not have formed a reasonable belief that the Claimant had breached such a policy;

iii. The Respondent did not seek to check whether the Claimant had worked through his breaks or worked his contracted hours. This would have been confirmed had all CCTV been reviewed;

iv. The CCTV was viewed on the Manager's personal laptop rather than on the store TV monitor, which is against company policy and GDPR;

v. The Respondent did not seek to properly investigate whether it was common practice for staff to take breaks at the end of shifts or take back time that they were owed;

vi. The Respondent did not seek to properly investigate whether the Claimant had been struggling in his store and had sought support from his Area Manager;

vii. The Respondent did not have any evidence of their financial loss;

viii. The Respondent did not have any evidence that the Claimant had personally gained from his conduct;

ix. The Claimant had not been properly trained on the new Kronos system and that he needed support.

74. The Claimant submits that the decision to dismiss was not within the band of reasonable responses for the following reasons:

i. The Claimant's 8 years' of loyal and unblemished service;

ii. It was common practice for Managers to miss their breaks due to pressures of work and to then take this time back. It was common practice for Managers not to always record this on Kronos;

iii. There was no financial or personal gain, and no financial loss to the company;

iv. There is evidence to suggest that Store Managers did act in the manner alleged by the Claimant, in that Miss Morgan-Hanglin and Mr Dryden referred to Store Managers who have now been investigated for their actions;

v. Other colleagues had done the same as the Claimant and were not disciplined (for example, the Manager who logged the Claimant out on the Kronos system after he had left on the day of his suspension). The Claimant had therefore been treated inconsistently to others;

vi. The Claimant disputes that there could have been a loss of faith or integrity in his role, as he always worked his contracted hours and above. The Claimant was also following his example led by Store Managers. He had requested support and this had not been given;

vii. Miss Morgan-Hanglin did not take the decision to dismiss the Claimant, her decision was made by the ER team;

75. The Claimant submits that it was not reasonable to dismiss the Claimant in all of the circumstances when taking into account the above, and that a lower sanction would have sufficed.

76. The Claimant does not accept that any reduction to reflect the Claimant's contributory fault or the likelihood that he would be dismissed had a fair procedure been followed should be considered.

77. The Respondent submitted that there was no unfair dismissal, that the reason for the dismissal was misconduct, and that the Respondent had a genuine belief in the Claimant's misconduct because of the evidence that he had falsified hours, and that in stating he had worked for more hours than he did, he had manipulated the system for personal gain. It was submitted that the misconduct was the changing of times on Kronos.

78. The Respondent submitted that the decision to dismiss was taken by Miss Morgan-Hanglin. The Respondent submits that the Respondent had reasonable grounds for the belief that the Claimant was guilty of misconduct; the Claimant had

admitted changing times on Kronos. He changed them so the system showed him arriving earlier and leaving later than he did. That was falsification.

79. The Respondent submitted that the suggestion that he was only taking back time owed was irrelevant; the concern was that he had falsified hours. The Respondent's Disciplinary Policy stated that manipulation of Kronos was gross misconduct.

80. The Respondent submitted that the investigation was reasonable. The respondent had records showing the amendments to Kronos. The Claimant admitted making these amendments. The Respondent submitted that no further investigation was needed. The Respondent submitted that the Respondent witnesses were clear regarding their view of whether there being a common practice of amendment was significant, and that it was not viewed as significant. The Disciplinary Policy and training provided made clear that manipulation of Kronos was gross misconduct. What was in issue was whether the Claimant manipulated Kronos for personal gain; it was submitted that the Respondent was entitled to conclude that he did.

81. It was submitted that dismissal was within the band of reasonable responses to the Claimant's conduct. It was submitted that the reference to the policy that did not exist did not render the whole process unfair and that this issue was rectified on appeal. It was submitted that the Claimant understood what conduct was a cause for concern on the part of the Respondent.

82. It was further submitted that if applicable, reductions for **Polkey** and contributory fault should be made.

83. The Claimant also then confirmed that although there had been reference to notice pay in closing submissions, this was to refer to what would be payable should the claim for unfair dismissal succeed, and there was no breach of contract claim (as had been previously indicated).

The Tribunal's conclusions

84. The Claimant was dismissed for misconduct, namely the falsification of time management records (through the Kronos system). This is clear from the dismissal letters he was sent, and from all parties' accounts of his dismissal.

85. I have concluded that the Respondent had a genuine belief in the Claimant's guilt. There is evidence from the Kronos records and the CCTV that the Claimant had amended the Kronos records so that they did not reflect the actual times when he was at work. This would amount to falsification of the Kronos records (regardless of the motive for this conduct, and regardless of whether the Claimant believed he held a genuine reason to amend the record). Claiming to be at work when he was not would have resulted in personal gain, as in, the payment of wages. This would be so regardless of whether the Claimant believed he had a legitimate claim to those wages through the hours he had actually worked.

86. I have concluded that the employer held this belief on reasonable grounds and after carrying out a reasonable investigation. When considering whether the Respondent held this belief on genuine grounds, and after carrying out a reasonable investigation, I have considered whether the Respondent acted within the band or range of reasonable responses open to an employer in the circumstances. I have had regard to the size of the Respondent business and the resources at its disposal.

87. I have found that the Respondent held the belief on reasonable grounds given the evidence they had showing that Kronos had been manipulated by the Claimant (namely the Kronos times, the CCTV and the Claimant's admissions that he had amended his Kronos times).

88. I have considered the investigation and disciplinary proceedings as a whole. I find that the investigation was reasonable. I have found that the decision to dismiss the Claimant was taken by Miss Morgan-Hanglin. I do not think Miss Morgan-Hanglin was acting under the direction of ER, and do not find that there was any improper pre-determination of his case by anyone unfamiliar with the relevant evidence.

89. The investigation is not rendered unreasonable through not obtaining all potentially relevant CCTV. I consider this would have been disproportionate, even having regard to the Claimant's evidence that CCTV of only the managers' break room needed to be checked. I accept the evidence of Miss Morgan-Hanglin and Mr Dryden that the issue was not whether the Claimant had worked his contracted hours, it was that he had chosen to amend the Kronos record without discussing this with a senior manager and without gaining permission to do so. I therefore do not conclude that investigation of additional CCTV would have raised matters of relevance to the investigation, and that not obtaining this CCTV renders the investigation unfair.

90. I also conclude that there was limited investigation of whether it was common practice for staff to take breaks at the end of their shift, or to amend Kronos records to allow them to take time back that they are owed by the Respondent. However, I do not conclude that this is a material issue relevant to the decision to dismiss the Claimant. Ms Morgan-Hanglin and Mr Dryden were clear in their evidence that if others were amending Kronos records unilaterally they would have been disciplined. They were aware of others who had done this and been disciplined. The witnesses were clear that the gravamen of the Claimant's conduct was his unilateral amendment of Kronos records. I have found it was reasonable for them to conclude that detailed investigation of this issue was not necessary.

91. I have reached a similar conclusion regarding the investigation that took place regarding the Claimant asking for support. I accept that there was limited investigation of this, and in fact Mr Dryden's investigation of this was impeded by his erroneously requesting the wrong date when reviewing Mr Rigby's emails. However, I have concluded that whether the Claimant asked for support or not was something of a peripheral issue; the issue at the heart of his dismissal was his decision to amend the Kronos records. I accept the Respondent's account that this would not be relevant mitigation.

92. I do not consider the fact that the Claimant's Kronos record for the date he was dismissed to amount to unequal treatment; this was a one-off, where he was scheduled to be in work all day and left work following his being suspended on full pay. I do not think not amending Kronos in those circumstances amounts to unequal treatment. I also think if there was any breach of GDPR in showing the footage on a staff laptop, and I am not convinced that there was, this would not be a factor that would indicate the investigation was unreasonable.

93. I do find that the reference to financial loss to the company in the initial disciplinary finding was in error, as was conceded by Mr Dryden. However, this error was corrected at the appeal hearing.

94. The reference to breach of a Kronos policy was incorrect – there was no such policy. The Claimant asked about this policy at his initial disciplinary hearing and he should have been informed that it did not exist. Mr Dryden rightly recognised that there should not have been a reference to breach of this policy in his evidence. There was no good reason why the Claimant was not told this policy did not exist in his disciplinary hearing on 9th July 2021. Had this error not been corrected at the appeal hearing on 25th August 2021 I might have reached a different conclusion regarding the reasonableness of the investigation.

95. I have however concluded that this error was rectified at the appeal hearing when it was clarified that there was no written Kronos policy, and that the dismissal related to the falsification of Kronos records which undermined the trust and confidence that could be placed in the Claimant, and amounted to misconduct within the terms of the Respondent's disciplinary policy. The Claimant was, or should have been aware of this policy, which was available to him. He had also undertaken training on Kronos, which, even with the scant attention paid to the training that the Claimant described, would have made it clear that any falsification of Kronos data amounted to serious misconduct.

96. Taking the investigation as a whole, I therefore conclude that the investigation carried out was reasonable, and the Respondent held their belief as to the Claimant's guilt on reasonable grounds.

97. I have finally considered whether the penalty imposed, summary dismissal, was within the band of reasonable responses available to the Respondent. In considering this issue, I have reminded myself that 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**).

98. I have had regard to the Claimant's long, unblemished service with the Respondent. I have had regard to his impressive promotion, and the fact that this demonstrates the high regard with which he was held by the Respondent. I have considered whether the Respondent acted reasonably in characterising the misconduct as gross misconduct, and also whether the Respondent acted reasonably in going on to decide that dismissal was the appropriate punishment. I am mindful that an assumption that gross misconduct must always mean dismissal is not appropriate as there may be mitigating factors (**Britobabapulle v Ealing Hospital NHS Trust [2013] IRLR 854**).

99. I consider that given the seriousness of the Claimant's conduct in amending the Kronos records, the Respondent was correct to categorise the misconduct as gross misconduct. The company disciplinary policy is clear that Kronos manipulation is serious misconduct, and that serious misconduct can result in dismissal. Amending the Kronos records raises issues regarding payment and staff safety. This is of fundamental significance. The Claimant was also a manager, and so could be expected to lead by example. I have also concluded that the Respondent acted reasonably in determining that dismissal was the appropriate punishment. This flows from the seriousness of the misconduct. I also accept the Respondent's evidence that concerns regarding his integrity would remain were the Claimant to have been demoted to another role, and that retraining would not be a sufficient response. I

have therefore determined that dismissal was within the band of reasonable responses available.

100. I have therefore concluded that the Claimant was not unfairly dismissed, and his claim is accordingly dismissed.

Employment Judge L Cowen

Date: 12 October 2022

JUDGMENT AND REASONS SENT TO THE PARTIES ON
20 October 2022

FOR THE TRIBUNAL OFFICE

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