



EMPLOYMENT TRIBUNALS

Claimant: Ms J Fraser Morris

Respondent: Lidl Great Britain Limited

Heard at: London South

On: 01 and 02 September 2022

Before: EJ England

Representation

Claimant: In Person

Respondent: Ms H Hogben, Counsel

JUDGMENT

1. The Claim of Unfair Dismissal succeeds and the Claimant is awarded a Basic Award of £633.60.
2. The Claim of Wrongful Dismissal does not succeed and is dismissed.

REASONS

1. The issues for consideration were principally provided by an agreed list of issues filed on the morning of the hearing:
 1. “What was the reason or, if more than one, the principal reason for the Claimant’s dismissal?
 - a. The Respondent relies on conduct
 - b. The Claimant alleges that she was targeted.

2. Did the dismissing officer, Mr. Murphy, believe that the Claimant was guilty of misconduct?
3. Were there reasonable grounds upon which to sustain that belief?
4. At the stage at which he formed the decision to dismiss the Claimant, had Mr. Murphy carried out as much investigation into the matter as was reasonable in all of the circumstances?
5. Did the Respondent fail to properly investigate the Claimant's grievance?
6. Did the Respondent consider alternatives to dismissal?
7. In the circumstances (including the size and administrative resources of the the Respondent's undertaking), did the Respondent act reasonably or unreasonably in treating the Claimant's alleged misconduct as a sufficient reason for dismissing her?
8. Did the Respondent fail to comply with the ACAS Code on Disciplinary and Grievance Procedures? If so:-
 - a. Is it just and equitable to award an ACAS uplift?
 - b. If so, what does the Tribunal consider to be a just and equitable percentage?
9. Did the Respondent fail to comply with the Claimant's right to be accompanied contrary to s10 of the Employment Relations Act 1999?
 - a. If so, is the Claimant entitled to compensation of up to 2 weeks' pay?"
2. I confirmed with both parties that the issues above were agreed and by further agreement, added after discussion the following issues:
 - a. the question of whether dismissal was in the range of reasonable responses
 - b. the issues concerning Wrongful Dismissal:
 - i. What was the Claimant's notice period?
 - ii. Was the Claimant paid for that notice period? It was agreed she was not.

- iii. Was the Claimant guilty of gross misconduct? / did the Claimant do something so serious that the Respondent was entitled to dismiss without notice?
 - c. Issues overlapping with remedy that would be considered at the liability stage, notably of a *Polkey v AE Dayton Services Ltd [1988] 1 AC 344* reduction (explained at the outset of the hearing) and whether any reduction should be made for contributory conduct.
 3. I was provided with a bundle of documents running to 288 pages. References within this judgment in square brackets are to pages of the agreed bundle with a colon indicating a paragraph number. The electronic pages did helpfully match the pagination but there were no bookmarks in line with the practice direction.
 4. There was a witness statement from the Claimant that was signed and dated from the 8th of August 2022 and two witness statements from the Respondent, one from Mr Michael Murphy, the dismissing officer, and one from Mr. Allen Pepper, the appeal officer. Mr Murphy's was not signed, he no longer works for the Respondent, Mr Peppers was signed.
 5. I heard evidence from all of the witnesses that gave evidence. I read those witness statements and read what seemed to me to be the pertinent documents that were referred to in some reading time at the start of the hearing. At the end of the trial I heard submissions orally from both parties.

FINDINGS OF FACT

6. The parties gave evidence about a number of matters and this judgment will not make findings on all. It is not the Tribunal's function to record all of the evidence presented and this judgment does not attempt to do so. Although all evidence has been considered, the findings focus on those matters that are material to the issues.
7. My role is to assess these facts on the balance of probabilities. This is not a Criminal Court and I do not assess the facts on the standards applicable in an equivalent criminal trial. I say this because I recognise the seriousness of the allegations made against the Claimant and assess them in that context but applying the civil standard of proof of a balance of probabilities, i.e. are the facts more likely than not to have occurred.
8. The Respondent is part of the British based operation of the Lidl group, the well known "value supermarket" as it describes itself, which operated originally in Germany. The ET3 states that it employs over 25,000 people and I bear that in mind in terms of the consideration under section 98(4) of the Employment Rights Act 1996 that requires me to consider the size and administrative resources of the Respondent.
9. The Claimant was employed within its Shepherds Bush store as a customer assistant. She started in July 2012 and she was dismissed for gross misconduct in July 2021, therefore had approximately 9 years service.
10. I was informed that the Claimant had been previously been issued with a warning by the Respondent in February 2021 based on an allegation about not using a 'counter cash box', which I understood to be essentially an overflow for

cash when one's till becomes too large to hold the cash. I was not asked to look at the reasonableness of that and even if I was I consider I would have had very limited powers to do so and I note the Claimant did not appeal that warning in any event. In terms of the relevance to these proceedings, that warning was not an allegation of dishonesty and Mr Murphy the dismissing officer was clear that for him it was certainly background and relevant but it did not have a material effect on his decision to dismiss. That he felt justified to dismiss regardless of that warning is consistent with his letter of dismissal [236] which says that he notes the existence of that warning but it does not say that was a reason why dismissal was justified. I do note though that in the grounds of resistance at paragraph 21 the Respondent relies on that warning to justify dismissal in a hypothetical situation, i.e. the *Polkey* sense that if the Claimant had not been dismissed at the time, and Mr Murphy confirmed that it would be the case for him were he dealing with such a hypothetical.

11. The Respondent operates a procedure to deal with food that is reaching its use by date. The first stage is an orange sticker which indicates a 30% discount applied when food is close to its date of expiry. Mr Pepper's witness statement at para. 19 explains that for meat and poultry that would be applied approximately 2 to 3 days before the use by date. The second stage applies what is called the 'too good to waste policy' in which on the day of expiry items were given a set value of either 90p, £2 or £10 depending on their original value. The Claimant says that what was written down in the official policy was not always what happened in practice and I accept that and note that is consistent with Mr Murphy's description to me in live evidence when he said that 'the front end of the store moves at 100 miles an hour', but I do not consider the material events that occurred here involving the Claimant's dismissal to have arisen from some flexible application of the too good to waste policy or a misunderstanding of the policy on the Claimant's part.
12. On the 22nd of May 2021 the Claimant was handed a pack of chicken by a customer who informed her that they did not wish to buy it; that aspect is not disputed by the Respondent. The Claimant asked her colleague, Ms Samina Kalam, to purchase the chicken on her behalf and the Claimant gave Ms Kalam her cards to do so. There was then largely an immaterial event in which Ms Kalam purchased the chicken using the Claimant's card but only applied the standard staff discount of 10% and not a greater reduction in light of the use by date. The events up to this point were agreed as I understood but there was a dispute about what happens after this point.
13. Ms Kalam provided a statement signed by her on the 29th of May 2021 [122] and she said that the Claimant noticed the absence of a greater discount and asked her to refund the purchase that had been made with only the 10% discount and apply the greater discount when purchasing again. The Claimant was said then to have said that the discounted price should be £2, Ms Kalam said no it was only a 30% reduction because the chicken's use by date was not until the next day, the Claimant then obtained a code from who I understood to be a supervisor, Yasir, for Capri Sun priced at £2 and asked Ms Kalam to process the chicken using the Capri Sun code. Ms Kalam did not think what the Claimant had done was right so she reported the matter to Mr Kashka Callendar, often referred to as 'Kash', a store manager.
14. The Claimant's account on the other hand differed from that to some degree. The Claimant's witness statement does agree largely with Ms Kalam's account

and at para. 4A of her witness statement she says “I asked a colleague Samena to process the discount. She said the sell-by date was tomorrow and not today. I did not agree with her as the customer had returned it. I then asked Yasir to do it.”. In cross examination the Claimant distanced herself from that witness statement and she said ‘myself and Samina had no conversation, I gave her my discount card and credit card, she was behind me and cannot have a conversation with someone behind me’. She said her witness statement had been put together by solicitors and she did not see this part. Her witness statement also at paragraph 4A says that the customer told her it was dated that day, i.e. the 22nd and that was why the customer did not want to buy the chicken.

15. Balancing the various facts, I accept the version outlined by Ms Kalam and reject that given by the Claimant, at least in terms of her live evidence rather than her witness statement. I considered individual considerations as I will outline as well looked at them in the round to form a composite picture together with other aspects about the Claimant’s account as explained in this judgment.
16. Firstly, the inconsistency given by the Claimant’s account. In cross examination she was referred to [164] and this is part of the Claimant’s response to the statements made within the disciplinary procedure and there it is said that there was no conversation. She says ‘we did not have any of the conversations’ at paragraph 5 on that page. That is at least consistent with the live evidence but clearly inconsistent to the witness statement. I accept the solicitors who previously acted for the Claimant would certainly have had a hand in writing and drafting the witness statement for their client’s approval but I do not accept that’s the reason why the witness statement was different to what the Claimant says now. She signed that witness statement, confirmed at the start of her evidence that there were no changes she wished to make, the mistake the Claimant alleges to have been made occurs in two different places in that paragraph 4A and there is a lot of detail given about this alleged mistake. It seems therefore less likely to me the Claimant would have read through all that that as she she must have done to approve the witness statement and not noticed all of the detail which she says is now wrong. As a minor point on the subject of witness statements I also recall the Claimant raising at the start of the hearing her concern that Mr Murphy had not signed his witness statement and I take that as a sign that she was astute to the importance of those statements and of signing them to confirm their accuracy.
17. Further inconsistency is displayed by the appeal minutes [248], in which the Claimant agrees some of the conversation did occur and says “I told her [Samina] it was expired and it should be £2”. That is a page typed and signed by the Claimant and that suggestion that there was such a conversation is therefore again a reversal from what was said in the disciplinary hearing and indeed what was said in tribunal, but consistent with what she says in her witness statement and what Ms Kalam stated.
18. Secondly, I note that the Claimant does agree with some of Ms Kalam’s account. For example at the bottom of [164] she refers to the discussion about the £2.
19. I also consider that on the Claimant’s account that there was no conversation it does not make sense as to how the subject of the reduction to £2 came up,

the reduction by the Capri Sun was then obtained and then provided to his Ms Kalam, all of which apparently happened without a conversation.

20. I also found the Claimant's explanation about other aspects unconvincing related to this point. She was asked in cross examination about her claim that she could not have a conversation with someone behind her and how therefore she spoke to Ms Kalam in the first place and she answered that when Ms Kalam was passing that she asked her to do the transaction for her. That seemed to me to be grasping at straws to try and make sense of the position she had now put herself in by saying that a conversation could not be had with someone behind her and I did not accept that it was effectively a lucky coincidence that Ms Kalam happened to be passing at the precise point to therefore make sense of her account.
21. Another unconvincing aspect was the evidence given about not looking at the use by date on the packet. This is stated again at paragraph 4A of the Claimant's witness statement and she says that she did not look simply because the customer told her it expired that day. I found that inherently unlikely given the Claimant was intending to buy that product and to consume that herself, it was in her hands when she was given it and when she gave it to Ms Kalam and again was back in her hands later when she decanted the packet. I also accept the conversation did happen as Ms Kalam says and given that part of that is Ms Kalam saying to the Claimant that the chicken expired tomorrow, i.e. the 23rd and not 22nd, I find it inconceivable that the Claimant would not then have looked at the expiry date. The correct account I find was given by the Claimant herself, again showing an inconsistency to her account later, at the top of [149] in the disciplinary hearing. The notes again signed by the Claimant record, "when I saw the date I decided I wanted it, and as it's short dated I knew it's either 90p or £2".
22. My next consideration was that in contrast to the Claimant and the inconsistencies, Ms Kalam was consistent when she was later interviewed. At [194-195], she was interviewed later after her initial statement, her evidence was consistent, and ultimately that consistency aids the credibility of what she says.
23. Further, it is not disputed that Ms Kalam raised her concerns with management and that's why all of this about the chicken came to light. Accepting that as a fact, Ms Kalam's reported conversation with the Claimant is consistent with her raising her concerns with management, she says essentially that the conversation with the Claimant gave her cause for concern and that is why she raised it. All of that in my judgement makes sense as to why she then did raise the matter.
24. Ms Kalam's account is also consistent with other witness accounts. [121] is a statement from Mr Callendar and he gives clear evidence of what Ms Kalam told him about the conversation on the 22nd. Against that, the Claimant says that those two must have been collaborating and she highlights the timing of their statements. Other than an assertion that they were collaborating and the fact of the timing I see no other basis for the allegation that there was collaboration. I do not consider that the timing alone shows collaboration and instead likely reflects the simple fact that the similar time was the time at which the investigation process was happening and both were asked to separately provide their statements at the same time.

25. One further point the Claimant makes is that she criticises the absence of Ms Kalam in the disciplinary hearing and indeed within this tribunal. She is right that Ms Kalam did not appear at either stage and I agree that there would be more weight that could be placed on her evidence were she to have appeared, but the Claimant's objection on this point I think over simplifies the analysis of evidence. Her absence as a live witness in the disciplinary hearing did not mean that her written contemporaneous accounts did not count as evidence and could not be considered as part of the overall balance of evidence. As in the employment tribunal, written evidence is part of that balance of evidence that can be considered, it was not the only evidence considered during the disciplinary hearing and is not the only evidence that I look to here. Further and specifically with Ms Kalam, although the Claimant does make general accusations against 'management' in terms of saying they were essentially 'out to get her', there is no such allegation made against Ms Kalam. Ms Kalam was a fellow store assistant and there is no suggestion of a vendetta or that she was making all this up, for example.

Further events on 22 May 2021

26. At some point on 22 May, the Claimant removed the chicken from its original packaging and put it in a plastic bag. The Claimant says that this was because she had to get the train home from London to Milton Keynes and this made it easier to carry. Mr Pepper in his witness statement calls that explanation "extraordinary" and I agree with that description. I find that explanation hard to accept. The difference in weight between the original packaging and a plastic bag I consider to be very small indeed, I accept a plastic bag will be smaller in size but the Claimant does not suggest that she did the same with other items of shopping, she agreed in cross examination that particular shop/purchase was 'a full shop', so overall the decanting would have made very little difference and if anything the chicken would have been better protected in the original packaging than a plastic bag. As a general point I find it very surprising if it were done for the ease of transport given the issues around hygiene of decanting the chicken and potential mess when decanted into a bag instead of the original sealed packaging. The Respondent's explanation on this point is that the action of essentially getting rid of the packaging and putting it into a bag is consistent with the knowledge that the packet had the expiry date on it and I consider that is the most likely explanation.

27. One significant concern I do have about this point is that another deputy store manager, Mr Vikas Sharma, provided a statement [127] in which he says that he found the packaging and the expiry date was the 23rd of May 2021. However, he also says that the Claimant told him where to find the packaging. That is an important factor and I considered whether that undermined the Respondent's whole case that the Claimant knew of the expiry date given she was telling Mr Vikas where to find the packaging. On balance I do not consider it is that extreme when balanced against the rest of the evidence as outlined within this judgment. If that did happen as he reports - although I do not see that the Claimant anywhere says that it did happen, but in any event he says it happened - I consider that may be a mistake by the Claimant in the same way that she's made mistakes in her evidence within the Tribunal. I note that within the same statement from Mr Vikas he says that at first when she was asked about the products she said she did not know where it was and then only later did she call him and say where to find the packaging.

28. At the end of the shift on the 22nd May when the Claimant had finished her shift and collected her shopping bags, they were searched by two deputy store managers, Mr Sharma and Ms Jalpesh. They saw the chicken in the bag, had concerns about the purchase of sunflower oil that had no receipt but that was subsequently resolved and no wrongdoing is alleged against the Claimant in that regard, and concerns were also raised about a dwarf plant purchased with a reduction of 30%.
29. A formal investigation thereafter was started, the Claimant was interviewed on the 24th of May 2021 [111]. That hearing was carried out by Mr Desmond Premph, a store manager or a different store. Notably in the investigation hearing the claim was asked about the purchase of the dwarf plant. Statements were obtained and those appear at [121-128]. The contents and individuals providing those are those already referred to about events on the 22nd as well as some others; there were six in total.
30. By letter of the 1st of June 2021 the Claimant raised a grievance. She essentially responded to the allegations that had been made and complained about the way she had been treated, in particular an allegation about the way she had been targeted by the management. The Respondent thereafter treated the grievance as overlapping with the disciplinary and dealt with both procedures together.
31. A disciplinary hearing was then organised on the 4th of June [109], initially for a hearing on 9th June. On the 7th of June the Claimant asked for that to be re-arranged as she wanted time to obtain union representation. That request was agreed by the Respondent and the meeting was postponed until the 16th of June 2021. There was correspondence from the Claimant about a request for various people to attend with her and she was told that the policy said that she could be accompanied by a trade union representative or a colleague.
32. The disciplinary invitation letter makes a mistake as to one of the allegations because instead of referring to a dwarf plant it refers to the purchase of a sunflower. The invitation included the statement that she had the right to be accompanied, a warning that she may be dismissed and included the documents related to the allegations including the six statements referred to above and the receipts related to the purchases. The Claimant provided a written response to those statements [166] she refers to the purchase of “the plant”.
33. The disciplinary hearing took place on 16th of June 2021 [144] and was chaired by Mr Murphy as the decision maker. Points to note are that at the outset the Claimant explained that she could not obtain a union representative or colleague to accompany her and she was asked if she was happy to proceed and she essentially said yes, also again at the outset [147] the error of the reference to the sunflower rather than the dwarf plant was explained and the Claimant did not suggest that she misunderstood the allegations or in any way was disadvantaged by that incorrect reference.
34. After the initial disciplinary hearing Mr Murphy felt that he wanted to do further investigation. He interviewed or caused to be interviewed seven members of staff, largely overlapping with those who had already provided statements. In his invitation to the reconvened disciplinary hearing [181] he included the

further evidence of those interviews he had obtained. I asked him whether by the time of the invitation to the re-convened hearing he had made up his mind and he said no he had not. I accepted that because it was consistent with his approach to the start of the reconvened hearing [219]. The Claimant responded to that further evidence [216] and Mr Murphy said and I accept that he also considered that before the reconvened hearing.

35. The reconvened hearing went ahead on 12th of July. The Claimant was informed of the outcome which was then followed up in writing [232] that she was being dismissed for the allegations. The incorrect allegation referring to the sunflower plant was again included but the letter explained that mistake and that the dwarf plant was the correct version. The grievance decision was also made within that letter and was not upheld.
36. The Claimant appealed the decision to dismiss her [230] and the appeal hearing was chaired by Mr Pepper on the 2nd of August [247]. Again there was an incorrect statement made within the Respondent's letters. The original appeal decision letter confusingly said 'the original decision to dismiss was incorrect and the decision is upheld', which therefore had to be corrected and a further version was sent on 19th of August 2021 [263]

LEGAL PRINCIPLES

37. For unfair dismissal, the broad framework for consideration is that from *British Home Stores v Burchell* [1978] IRLR 379 and *Sainsbury's Supermarkets Ltd v Hitt* [2003] IRLR 23, as reflected in the list of issues. I also raised that I considered the case of *A v B* [2003] IRLR 405 to be relevant, essentially outlining the broad proposition that the gravity of charges against an employee and the potential effect on them are at least relevant to the quality and standards of the investigation and the importance of a conscientious inquiry is reinforced.
38. For wrongful dismissal I explained that different considerations apply and I emphasised to the Claimant that I was essentially being asked whether the Claimant did the acts she was being accused of, again as reflected in the list of issues.

CONCLUSIONS

Unfair Dismissal

39. The first question is what was the reason for the Claimant's dismissal? The Respondent relies on conduct, the Claimant says that she was targeted and in particular that she was treated differently. She points out that nobody else, in particular Ms Kalam and Yasir, were disciplined but I do not consider that fact to demonstrate the Claimant had been targeted, in particular because no one else involved had been accused of acting dishonestly. Ms Kalam's account from the outset was that she felt that she had been pressured or manipulated into carrying out the transaction and she was the one that on the day raised her concerns. Yasir certainly made mistakes and I understand the Respondent accepts that and therefore imposed training upon him and I do not consider that not disciplining him shows some targeting of the Claimant. The Claimant's suggested that she was targeted was investigated [183] and in particular it is not suggested as I understand, certainly not with any credibility, that the

Claimant was targeted by Mr Murphy and there is no credible evidence of that and notably she did not make any accusation along those lines before she was dismissed, although she does suggest that he was bias after dismissal. Again I make the same point that the primary and original source of the evidence against the Claimant came from Ms Kalam and she is not accused as a fellow store assistant of being part of the targeting or vendetta against the Claimant. I therefore accept the reason relied upon by the Respondent of conduct, I accept Mr Murphy genuinely believed that reason and have not seen convincing otherwise.

40. Turning to the substance of the issues, this is really a tale of two allegations and I consider that the two aspects of the chicken and the dwarf plant were handled very differently. In terms of whether there were reasonable grounds for the belief in misconduct regarding the chicken, the Respondent had a set of statements and then interviews which were consistent on the main elements of the accusations, they suggested the Claimant had asked Ms Kalam to purchase the chicken on her behalf knowing the expiry date was the following date and that discount of £2 was therefore not applicable.
41. Against that, the Claimant's defence in the original disciplinary hearing was that she did look at the date and therefore knew it was either 90p or £2, which does not suggest she did not understand the policy because on her account she understood it to be expiring that day and therefore it was either 90p or £2. Later she said that she did not know the expiry date because she did not look at the packaging, which as explained above I found hard to believe. She decanted the chicken and again above I have outlined my view that I find her explanation on this aspect again hard to believe. These aspects of her defence provided further reasonable grounds for the belief in misconduct because for the Respondent they were also hard to believe.
42. A point made by the Claimant that she emphasised at the time and repeated in this tribunal is that she did not conduct the transaction and it was Ms Kalam and Yasir that were involved so she cannot be guilty in the way alleged. I consider it really beside the point that someone else actually pushed the buttons to conduct the transaction. If the Claimant directed the transaction, as I accept that she did, it adds nothing to defend herself by saying that she did not conduct the transaction and moreover it comes across that the Claimant considers that she can escape liability by pointing the finger and accusations at others in that way. Again I make the point in terms of whether there were reasonable grounds that there is no question about Ms Kalam's motive, who was the main witness about the initial conversation. I therefore consider in respect of the chicken that there were reasonable grounds to sustain the belief in misconduct.
43. In terms of the dwarf plant the main if not sole evidence was from a Manager, Mr Daniel Ogidi, that said he did not authorise the reduction to 30% whereas the Claimant said that the reduction had been authorised by him. Unlike the chicken, there did not appear to be supporting statements that went to the material issues. Mr Murphy explained to me when I asked him, 'you have to use a manager's fob to buy it' and he agreed that there is no suggestion the Claimant stole the plant in terms of not paying for it at all, but instead the allegation was that she bought it for a discounted rate when no discount was applicable. Given that the Claimant had to have a manager's fob or authorisation to buy the product and she did buy the product, I do not follow

how it is alleged that she bought it improperly. There is no case made by the Respondent, for example, that she somehow took or pick-pocketed the fob from a manager to buy the plant, so I therefore do not consider there are reasonable grounds for a belief in misconduct dismissal for this aspect.

44. As the plant was one of the two allegations for which she was dismissed, I do not consider therefore that the Respondent did have reasonable grounds for a belief in the misconduct overall.
45. The next issue concerns the investigation and whether the Respondent carried out as much investigation into the matter as is reasonable. Again, I have very different views on the two different allegations. For the chicken I remind myself of the seriousness of the allegation and the principle outlined in *A v B*. The Claimant raises as a problem that she says the CCTV of the customer giving her the chicken and some of the events that followed was not provided to her. The test that the employment tribunal looks at is not one of perfection or whether the employer did everything they could do and I consider the CCTV to be of very limited probative value. It would corroborate that the customer gave the Claimant the chicken but that was not disputed by the Respondent. The Respondent says there is no sound captured by the CCTV and there does not appear to be any suggestion otherwise from the Claimant and so I do not consider that the CCTV would have helped the Respondent determine the relevant issues.
46. The events afterwards were more important. There was a mistake in the disciplinary letter as I have explained regarding a sunflower rather than dwarf plant and Mr Murphy's witness statement at MM13 addresses that mistake. There is no suggestion the Claimant did not understand what she was being accused of, in the original investigation hearing she was asked about the correct item, in the disciplinary hearing it was clarified right and the start [147] and the Claimant did not suggest she misunderstood. The Claimant again seems to defend herself by seeking more than I consider the Respondent was required to provide in terms of perfection. She says that she should have been told of the clarification in writing and I agree that would have been better if the Respondent had have set out the issue in clearly in a letter. Mr Murphy seemed to have a view that it would be wrong to correct the accusation because it was already set out in writing and I do not consider that is correct, instead that a different letter could have simply been sent and replaced the original accusation, but he did in any event explain that to the Claimant clearly in person and as he pointed out in his live evidence, the Claimant was provided with a confirmation in writing that the accusations had been changed because she was provided with the hearing notes after the first disciplinary hearing when the correction was made. I do not consider therefore there was any unfairness created by this issue.
47. As general points I considered that Mr Murphy was thorough in carrying out further interviews and supplying them to the Claimant and relevant people and witnesses to the events were interviewed. The absence of packaging was certainly notable, particularly as the packaging was apparently seen on the evening of the 22nd. Again it definitely would have better if that had been retained and that did give me some cause for concern, similarly I think it would have been better if more questions had been asked to establish what happened in that regard. However, the stage at which that packing was seen was on the day of the original events, there was no formal investigation commenced at that

stage, there was not a convincing argument that the managers who saw that packet were wrong about what they said or they were lying in any regard and I consider Mr Murphy therefore was entitled to accept their first hand accounts of what they say they saw regarding the packet, particularly as that was consistent with other evidence such as that of Ms Kalam.

48. I consider therefore there was a reasonable investigation regarding the chicken, however the dwarf plant investigation I considered was deficient in two regards. Firstly regarding the CCTV of it being purchased. The only reason the Respondent stated for why CCTV was not obtained was because it had no sound and Mr Murphy's view was that the sound was important so that it could be seen what was said between the Claimant and Mr Ogidi. I think that that misses the point and the relevance. I enquired of Mr Murphy about whether the images alone from the CCTV, i.e. without the sound, show whether or not a fob was used and his answer was '100% it would show'. On that basis and given the key issue was whether or not a fob was used and whether or not there was management approval, particularly given the Claimant herself raised this, for example at the top of [166] the Claimant said that she wanted the CCTV to be obtained, I do consider it to be a failing to have not obtained that CCTV.
49. A second point linked to that concerns the till logs. Again Mr Murphy confirmed to me that it would have been possible to see if a manager's approval had been given for that transaction although not which manager provided that authority. That seemingly would have been a simple enough piece of data to have obtained and Mr Murphy did not suggest otherwise or present any reason why that was not done. Therefore on those two points I do not consider that as much investigation as was reasonable was carried out and again I bear in mind the seriousness of the allegations and conclude that the failures in respect of the dwarf plant mean there was no reasonable investigation overall.
50. The next issue is whether the Respondent failed to properly investigate the Claimant's grievance. The Claimant has not specified what the Respondent apparently did wrong and I find that argument/assertion unconvincing. The Claimant was told that the grievance would be dealt with as part of the disciplinary because of the overlap, I accept there was an overlap and it was sufficient to deal with them together. The ACAS Code on grievances at paragraph 46 deals with overlap and says the issues can be combined and the Respondent points out that is also consistent with their policy. The answer to the grievance was outlined in the disciplinary letter, stating that there is "no evidence", which I think is often a dangerous statement to make and may be a simplification but broadly it was correct there was no evidence in terms of the suggestion that the Claimant had been targeted.
51. The next issue is whether the Respondent considered alternatives to dismissal as well as the broader issue of whether dismissal was within the range of reasonable responses. I consider that dismissal certainly could have been within the range in respect of the chicken but cannot say that dismissal overall was within the range of reasonable responses given the failures regarding reasonable grounds and the investigation in respect of the dwarf plant.
52. In terms of the chicken allegation Mr Murphy at MM31 explains he did consider alternatives and I accept that evidence. The Claimant did have nine years service and certainly that is a relevant factor but allegations such as this that strike directly at the heart of the relationship of trust and confidence that exists

or should exist between an employer and employee means that the length of service does not negate the justification of dismissal. The policy at [71] clearly envisages such allegations to be within the definition of gross misconduct.

53. The next issue is whether the Respondent acted reasonably in dismissing and my conclusion has to be no in light of the findings I have outlined above. I note the size of the employer which was a large employer of over 25,000 people.
54. Did the Respondent fail to comply with the ACAS Code regarding disciplinary and grievance procedures? I consider there is no failure regarding the grievance and there was likely a general failure regarding the need to investigate that would come within part 4 of the code but I would not consider it just and equitable to increase any award on that basis given the findings I have made about the chicken allegation and my view on wrongful dismissal.
55. The final issue within this part is whether the Respondent failed to comply with the Claimant's right to be accompanied under s.10 of the Employment Relations Act 1999. This gives the right that the Claimant is to be informed that she could be accompanied by a trade union representative or a colleague. She was told of that right and I note that the first hearing was adjourned to enable the Claimant to obtain representation. She was unable to but it does not mean she was not given the right.
56. My conclusion on all of the above therefore is that the claim of unfair dismissal does succeed. I emphasise though that it is not a victory on the Claimant's part to take pride. If the Respondent had relied on the accusation regarding chicken only then I would have said that was a fair dismissal, but the problems related to the dwarf plant mean that it was unfair overall.

Wrongful Dismissal

57. Whilst bearing in mind the different legal tests and issues that apply, in light of my findings above I consider that the Claimant did commit gross misconduct that justified not paying notice. I will not repeat all of the above but in particular I place reliance on the consistency of the statements made essentially against the Claimant and her account, the inconsistency and the changing account of the Claimant's story, the fact I found aspects hard to believe such as that the Claimant did not look at the date and the story regarding decanting the chicken and in general I found the Claimant's defence unconvincing; often it appeared to be based on pointing accusations at everyone apart from her and based solely on imperfections rather than accepting responsibility, some of which was valid but often a distraction from the key issues. I therefore find that the claim for wrongful dismissal fails and is dismissed.

Remedy/Compensation

58. I turn finally to whether compensation should be reduced for the various factors outlined in the issues. The first issue is whether a fair dismissal could have occurred had the procedural failings not occurred and the chances that this would have occurred, in line with *Polkey*. I explained this principle to the Claimant at the start of the hearing.
59. I am reminded of Mr Murphy's answer in re-examination when he was asked whether if there was a failing regarding the dwarf plant and if that had not been

relied upon and it was just the chicken allegation, would he have dismissed and he said 'yes', he was very clear and he explained that there would still be a loss to the business and there would still be dishonesty in relation to that loss. I accept his account as true and accurate, it is consistent with the Respondent's case throughout and indeed the seriousness of that allegation. I also consider the fact that Claimant was on a written warning could and would have been considered relevant as Mr Murphy explained as particularly if there were fewer allegations now relied upon. My finding therefore is that it is 100% likely the Claimant could and would have been dismissed at the same time were a fair procedure applied and those procedural aspects remedied. I recognise that this finding represents a fairly extreme case where I am giving a 100% certainty of a hypothetical scenario but I do consider this is appropriate in the fairly extreme circumstances of the seriousness of the allegations and my findings on what happened. In my view therefore there such a finding would remove any compensatory award to the Claimant.

60. The final issue to deal with is whether any compensation should be reduced for contributory conduct. Although I have given my conclusion that no compensatory award would be applied, there is a separate award claimed of a basic award and contributory conduct can be applied also to the basic award as well as contributory. The Respondent contends for a 100% reduction to both the compensatory and basic award. The difficulty I consider in applying a 100% reduction to the basic award is that the Claimant was dismissed for two allegations and I cannot say a 100% contribution reduction is appropriate in light of the allegations regarding the dwarf plant and what I have outlined as omissions in the evidence and investigation. My starting point therefore is a 50% reduction, representing the minimum reduction in light of the chicken allegation as one of two.
61. The test for the Tribunal is what is "just and equitable", per s.122 ERA 1996, and applying my discretion within that relatively broad test I balance my un-comfortableness at the Claimant being awarded anything in light of what I have found happened (in that the Claimant, on the balance of probabilities did abuse a discount procedure to make a purchase below its value), against the fact she has ultimately succeeded in her claim and there is uncertainty about the dwarf plant allegation. The balance that I consider appropriate is an award of 10% of her basic award, therefore a reduction of 90%.
62. Applying the above findings, it was agreed in the Tribunal hearing that the outcome of my findings meant that the appropriate award was 10% of the basic award (re-calculated from the schedule of loss), totalling £633.60.

Employment Judge England

Date 02 December 2022