EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms Sheeba Robinson	**v**	**Currys Group Ltd**

Heard at: Watford **On:** 17 and 18 October 2022
Before: Employment Judge French

Appearances:

For the Claimant: Mr McCrossan, Counsel
For the Respondent: Mr Tibbetts, Counsel

JUDGMENT having been sent to the parties on 10 November 2022 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. This is a claim by way of a claim form presented on 21 January 2022 for unfair dismissal. The respondent accepts that it dismissed the claimant but denies that it was unfair, asserting conduct as the reason, thereby entitling them to summarily dismiss. Whilst the ET1 had ticked a number of boxes in relation to additional claims as well as particularising further claims, the claimant's representative confirmed at the outset that no such additional claims were being pursued and this therefore proceeds as an unfair dismissal claim only.

Evidence

2. By way of evidence, I had a bundle consisting of 633 pages together with CCTV footage. I had a witness statement from the claimant as well as hearing oral evidence from her. I also had the witness statement of the appeal officer, Mr McMillan, as well as hearing oral evidence from him and I also heard closing submissions from both representatives.

Issues

3. I am grateful to the parties for agreeing a list of issues at the outset which I do not rehearse and which effectively take the template of the well known Burchell test.

Findings of fact

4. The claimant was employed as a Sales Assistant from 11 December 2015 until her dismissal on 23 September 2021 at the respondent's Ruislip branch having originally been based at the Hemel Hempstead branch.

5. The respondent is a large nationwide retailer selling household goods and electrical items with its own Human Resources support and systems.

6. From 5 January 2021 until March 2021 the respondent's stores were closed to customers for usual browsing and purchasing due to national lockdown restrictions as a result of the covid-19 pandemic. The stores did however remain open for click and collect orders, whereby a customer would place an order online and collect in-store.

7. Following a stocktake of Apple AirPods Headphones on 13 February 2021 and 15 February 2021 it was discovered that one set of AirPods were missing between those dates when compared to the respondent's stock take. As a result of the missing item on the stock take inventory, CCTV footage was viewed for the relevant period.

8. From the CCTV footage, between 14 and 15 February 2021, this showed that the only people to enter the cabinet in which the missing items were stored were the claimant herself and another member of staff, Krishica Murugathas referred to as Kiri throughout proceedings and subsequently in these reasons. The footage of Kiri was reviewed and appeared to correspond to existing customer orders being processed. However, the footage of the claimant from 15 February appeared to show her taking an item from the cabinet which did not correspond with such a customer order.

9. As a result, an investigatory meeting was held with the claimant on 20 February 2021 and that was conducted by Mr Hassan. The claimant was asked to account for her actions on the CCTV which appeared to show her acting suspiciously before bending down and picking up an item from the cabinet in which the AirPods were kept. During this meeting Mr Hassan considered that the claimant was unable to account for why she had removed an item from the cabinet and the claimant had stated that she believed that it was USB or hard drives that were kept in that cabinet.

10. As part of that investigation, Kiri's, handling of orders was reviewed and the respondent's finding was that her actions were in line with their internal procedures for handling orders and that the claimant's actions were not. As a result, following those enquiries, the claimant was referred for disciplinary proceedings and placed on suspension. She was sent an invitation letter at pages 168 to 170 of the bundle which I find sets out the allegation against her and advises her of her right to be accompanied. It also warns her of the possible outcome of the proceedings being dismissal.

11. Those proceedings were subsequently conducted by Mr Peter Hird, General Manager, and took place over the course of three meetings. The first was held on 4 March with the subsequent meetings on 11 March and 23 September 2021.

12. At the meeting on 11 March Mr Hird arranged the final meeting to take place without delay, namely scheduled it to take place one week later on 18 March.

13. The process was ultimately delayed to 23 September and I find that that was as a result of the claimant's sickness. That sickness began on 17 March, as evidenced at page 500, and continues throughout that period; again evidenced at pages, 503, 505, 517 and finally the sick note at page 265. That evidence indicates that the claimant was sick from 17 March which is clearly the reason why the meeting on 18 March was postponed. There were various exchanges thereafter regarding her continued sickness and although the claimant contended in evidence that she was well from August, her own witness statement, which she confirmed as accurate at the outset of these proceedings, stated that she was ill until September 2021. That fact is supported by the evidence particularly the sicknote at page 265 which shows the illness continues into September and is also supported by the email at page 267 from the claimant to Mr Hird dated 10 September to say that she is much better as of that date.

14. I find that that is the first time that the respondent is aware that the claimant was better and, as a result, an invitation to attend the reconvened proceedings was sent on 16 September with the meeting to take place on 23 September. As to that delay I am therefore satisfied that that was not at the hand of the respondent and was as a result of the claimant's unfortunate ill-health during that time.

15. During the disciplinary meetings the claimant's account was that she was initially assisting Kiri in picking items which formed part of her job role and that she was assisting with orders to help another colleague. She asserted that she had paperwork to that effect. When challenged on the fact that CCTV showed no paperwork in her hand she stated that she was picking something up from the floor. When challenged further, her ultimate account was that she could not remember given the lapse of time.

16. At the meeting on 11 March the claimant asked Mr Hird to speak to additional witnesses which was done. The relevant parts of their accounts in terms of my findings are at pages 237, 242 and 157 in which all witnesses state that they knew AirPods were kept in that cabinet and did not support the claimant's account. Kiri also confirmed that the claimant was not picking for her and that she had not given her any paperwork. As a result of those enquiries and the claimant's own account, Mr Hird found that an act of gross misconduct by reference to their own polices at pages 78 to 79 of the bundle had been committed and summarily dismissed the claimant.

17. The claimant then lodged an appeal on 15 October by way of letter at 274 to 277 of the bundle. That appeal was conducted by Mr McMillan on 7 December having been postponed previously at the claimant's request.

18. The claimant accepted in her evidence before the Tribunal that Mr McMillan took her through all of the appeal points raised in her letter. You can also see that Mr McMillan considered each of these points as demonstrated at pages 307 to 311 and then further in the outcome letter which appears at page 318 whereby he responds to each ground.

19. During the appeal process Mr McMillan asked the claimant whether she had any additional witnesses and she confirmed that there were none. He also asks her for any mitigation which is raised and page 323 confirms that that mitigation was taken into account, namely length of service and the fact that there were no previous sanctions.

20. In terms of the appeal process, Mr McMillan had reference to all of the documents that Mr Hird had referred to save for CCTV footage which, at that stage, he was told had been wiped.

21. Having reviewed the evidence before him I find that he raised a concern with HR about the lack of CCTV and the impact this had on his decision. As has been pointed out in questioning, he saw it as a "red flag". He was subsequently advised by HR that he could make his determination based on the available evidence and his account is that that is what he did.

22. It is suggested by the claimant that the HR advice in that regard, influenced or changed Mr McMillan's decision. I do not accept that. It is not uncommon in this situation for an appeal officer to take guidance from HR. In fact, I will go so far as saying I consider it perfectly proper to do so and had Mr McMillan not taken that guidance having identified the lack of CCTV, there could have equally been criticism placed upon him. This was a large company with a designated Human Resources Team, and I would expect to see their guidance if requested. Clearly, they cannot advise him of what decision he should make but, in these circumstances, I am satisfied on his account, that they did not.

23. It is further suggested that notes taken by Mr McMillan at page 575 of the bundle, in which he states his conclusion is that the claimants appeal would need to be upheld, is evidence that he had made his decision and that HR then changed that decision. I am satisfied with his explanation as to those notes and the fact that they are simply notes or an aide memoire. In reaching that decision, I note that the document is not typographically correct or put into any formalised language. I accept his explanation that it was him putting his initial thoughts down onto paper and to effectively act as an aide memoir to explore the issues further.

24. This is supported by the document at pages 312 to 313 which states that he does not believe the claimant's account and suggests that the appeal would be unsuccessful. This is in direct conflict with the noted conclusion on page 575 that the appeal should be upheld. Again, these notes are informal notes and I do not know the dates that they were taken but, effectively it amounts to two documents containing different thoughts. I accept his explanation that both documents were that thought process, effectively typed into a notepad form. It was not that he had reached a decision which was subsequently changed by Human Resources.

25. I was also taken by the claimant to the fact that the dismissing officer told the claimant that stock was counted daily when this is clearly not supported by the stocktake which shows a count on 13 February and 15 February only. Criticism was made of Mr McMillan that he did not consider this as troubling. Whilst I accept it is clearly a misstated fact, my assessment is that it has no bearing on the procedure overall. The claimant did not act upon the statement to her detriment; she was still able to account for her actions

despite the misstatement; and it did not lead her to state or do anything in reliance of that fact. I therefore do not consider that Mr McMillan should have considered it as troubling, and I do not consider that it impacted fairness overall.

26. As to the length of time that it took to conclude the appeal, this was effectively five months from the date the claimant lodged it to the date she received the outcome and clearly amounts to a delay. However, I do not consider that it is outside of the band of reasonable responses given the circumstances.

27. I take into account that this is a large retailer whose priorities at the time of the appeal was the busy Christmas period. This was also a time where there was a further national lockdown and the respondent was dealing with that as well as the general pandemic conditions and the effect that that has on the staffing, with employees working from home or absent due to sickness which adds to delay.

28. I am satisfied that Mr McMillan submitted his response on or around 17 January, the appeal meeting being 7 December, and taking into account the Christmas period, I consider that that was reasonable. That is then delayed by Human Resources and although I have been told that there was a period of his leave and also potentially leave within the HR Department, the respondent accepts that that delay was a procedural defect. To be clear, the delay on my findings, at the hand of the respondent, is from when the Human Resources team received Mr McMillan's outcome on or around 17 January and sending this the claimant the outcome in March which was a delay of six to seven weeks.

The law

29. Section 94 of the Employment Rights Act confers on employees the right not to be unfairly dismissed and enforcement of that right is by way of complaint to the Tribunal under s.111. The employee must show that she or he was dismissed by the respondent under s.95 but in this case the respondent admits that it dismissed the claimant.

30. S.98 of the Act deals with fairness of dismissals. There are two stages within s.98, the first is that the employer must show it had a potentially fair reason for the dismissal and 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.

31. In this case the respondent states that it dismissed the claimant because it believed that she was guilty of misconduct. Misconduct is a potentially fair reason for dismissal under s.98(2).

32. S.98(4) then deals with fairness generally and provides that determination of the question whether the dismissal was fair or unfair having regard to the reasons shown by the employer shall depend on whether, in the circumstances including the size and administrative resources of the employer, 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.

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

34. In Taylor v OCS Group Ltd 2006 ICR 1602, CA, the Court of Appeal stated 'It may appear that we are suggesting that employment tribunals should consider procedural fairness separately from other issues arising. We are not; indeed, it is trite law that S.98(4) requires the employment tribunal to approach their task broadly as an industrial jury. That means that they should consider the procedural issues together with the reason for the dismissal, as they have found it to be. The two impact upon each other and the employment tribunal's task is to decide whether, in all the circumstances of the case, the employer acted reasonably in treating the reason they have found as a sufficient reason to dismiss.'

35. Therefore, where an employee is dismissed for serious misconduct, a tribunal might well decide that, notwithstanding some procedural imperfections, the employer acted reasonably in treating the reason as sufficient to dismiss the employee.

36. Thus, not every procedural defect will render a dismissal unfair. For example, in D'Silva v Manchester Metropolitan University and ors EAT 0328/16 the EAT upheld an employment tribunal's conclusion that a flaw in the disciplinary process that rendered it 'not ideal' did not render the dismissal unfair.

37. In Sharkey v Lloyds Bank Plc EATS 0005/15 Mr Justice Langstaff, then President of the EAT, observed that it will almost inevitably be the case that in any alleged unfair dismissal a claimant will be able to identify a flaw, small or large, in the employer's process, and that it is therefore for the tribunal to evaluate whether that defect is so significant as to amount to unfairness. Langstaff P stated: 'Procedure does not sit in a vacuum to be assessed separately. It is an integral part of the question whether there has been a reasonable investigation that substance and procedure run together.'

Therefore it is important for tribunals to consider the reasonableness of the whole procedure, including the decision to dismiss, in the round.

Conclusions

38. There has been a suggestion throughout the proceedings by the claimant that the allegations made against her were fabricated in response to her having raised a grievance.

39. There is no evidence before me of a grievance having been put in by the claimant before the date of the allegation, namely 15 February. The claimant suggested that this was submitted in January 2021 however there is no evidence in the bundle to support that. I understand it is accepted by the respondent that the claimant did raise a grievance in February 2021, but this was after the allegations and therefore the allegations simply could not have been fabricated as a result of her grievance because the only grievance on record was sent after the allegations.

40. There is no evidence before me that this dismissal was for any reason other than conduct. The invitation to the disciplinary meeting states conduct, the outcome confirms conduct and there is no reference to any grievance at any stage by way of that being the reason for the dismissal. I am therefore satisfied that the respondent dismissed for conduct and, of course, that is a potentially fair reason under s.98(2).

41. I am satisfied that the respondent had a genuine belief that the claimant was guilty of misconduct. There was a stock take which confirmed an item was missing followed up by a further stock take confirming the missing item and a thorough search for the item which remained missing. I have been able to review the CCTV of 15 February 2021 and make my own assessment of the same. I do consider that this does show the claimant acting suspiciously and looking around; she then quickly moves to the cabinet from which I am satisfied, based on the witness evidence, that the AirPods are stored. The item is then concealed by her body and I am satisfied that, in terms of looking at that footage, there is no scanning of any item to match with an order when compared to the video shown of Kiri which shows the usual process for processing click and collect orders.

42. The claimant referred me to the video after the allegation and indicated that she had no items in her hand after delivering items that the pickup point. I stress that simply because there is no CCTV of the claimant leaving the store with the item, this does not mean that the respondent had no genuine belief in her guilt based on the footage that it did have, and the other evidence obtained. The claimant was interviewed and given a chance to account, during which her answers were defensive and evasive.

43. The claimant gave varying accounts throughout the process and changed her account when challenged offering no good reason for doing so. The accounts taken from the other employees as part of the process do not support what the claimant says. I also note the conversation that the claimant had with one colleague in which she indicated that she wanted wireless headphones.

44. I am satisfied, based on all those facts, that the respondent had a genuine

belief that the claimant was guilty of misconduct.

45. In terms of reasonable grounds to believe that there was an initial investigation, the claimant spoken to, and CCTV is reviewed. There were three disciplinary meetings and during those meetings my assessment of the claimant's response is that she was evasive and avoided answering questions. She denied any knowledge that the AirPods were kept in the cabinet despite all of the other witnesses confirming that is where the same were kept.

46. The claimant stated at the outset of one of the disciplinary meetings at page 141, that she believed that the missing item was a store tablet. In her subsequent answer at page 142 of the transcript she makes reference to headphones despite the fact that at that stage she said she was not aware that such an item was missing as confirmed in her earlier answer at page 141. This response is therefore not credible.

47. Her accounts did change throughout saying that she was picking an order for Kiri, to picking something off the floor, to closing the door of the cabinet to ultimately saying that she could not remember. Her account in terms of the process being that the warehouse was called once an order was placed and that being the position prior to her furlough, simply is not supported by the other witness evidence.

48. The claimant also asserted that she could not remember due to the passage of time between the incident and her being asked questions. She was first shown and asked about the footage just six days after the alleged incident and therefore I do not accept that to be a credible explanation as to why she was unable to give an account or why she could not recollect. The account that she had paperwork in her hand is not supported by Kiri at page 157 who confirms that she had not tasked her with any paperwork and nor is it supported by the CCTV in terms of showing paperwork in her hand or her performing the correct scanning process.

49. For those reasons I am satisfied that the respondent's belief in the claimant's guilt was held on reasonable grounds.

50. In terms of the investigation and the procedural fairness overall, there was an investigation; the claimant was asked for her account, and CCTV was obtained. There were three lengthy disciplinary meetings following which all witnesses that the claimant asked to be spoken to were spoken to. The allegation was outlined, and the claimant was given a full opportunity to comment on the same.

51. In terms of the appeal process, the claimant was asked whether there were any additional witnesses that needed to be spoken to, to which she said there were none. Her mitigation was raised and considered, and I am satisfied on the evidence before me that all 15 points in terms of her appeal were addressed.

52. In terms of the delay to the disciplinary proceedings and the fact that they did not conclude until 23 September, as I have already said, that was due to the claimant's own sickness and therefore had no bearing on fairness overall.

53. Although not raised by Mr McCrossan in his closing submissions, clearly throughout the process the claimant took issue with not being informed correctly about how many items had been taken and I accept that there was confusion at the investigation stage, at that time it being believed that additional items were missing, which were subsequently traced and found. What is clear however is that by the disciplinary stage it was one missing item, and the claimant knew very well the case against her. That was set out in the letter at 168 to 170.

54. She was sent the investigation script, the suspension script, the witness statements, the AirPod stock count and disciplinary policy ahead of the first disciplinary meeting.

55. At the outset on the meeting on 4 March, the claimant raised the issue regarding the lack of clarity over how many items were missing. That is at page 177 and it confirms that she was aware that it was now just one item.

56. At page 179, again, it is confirmed during the course of that meeting that it is only the AirPods and again it is just one item. Therefore, I am satisfied that at the disciplinary stage the claimant was clearly aware of the allegation against her, and I do not consider that there are any issues of fairness arising out of the issue concerning the number of alleged missing items.

57. Issue was also taken by the claimant in terms of having not being shown the CCTV or this only being shown to her on 4 March. The minutes from the meeting on 11 March quite simply do not support that. It says that the CCTV is shown; it takes the claimant through detailed shots of what is being shown, it then asks questions based around what is being shown and it simply not plausible that it was not shown in light of that questioning.

58. The claimant, in cross examination, attempted to say that the notes are incorrect when they suggest CCTV was shown. They are not signed by her, however the notes were given to her at the end of the meeting and she took two hours to review them. She does not state in her witness statement that they are incorrect. Based on that evidence, I am satisfied that she was shown the CCTV a number of times throughout the process and was given a full opportunity to comment on the same.

59. As to the incorrect statement regarding the stocktake being done daily, as I have already stated I do not consider that the claimant has relied on that in any way to her detriment. The fact of whether the items are counted daily or otherwise is not determinative. The fact is that an item is missing, evidence is then gathered from the period between the two stock counts that are done and that leads to an investigation. The claimant is still fully able to comment on the allegation, despite the stock count not being daily and it has no bearing on the overall procedure.

60. At page 161 of the bundle there is information given to Mr Hird by Mr Hassan. I cannot see that that expressly states that the items are not counted daily. It says it was last counted on Saturday which thereby infers that it is not daily. There is then a later question towards the end of that page, which refers to daily personal searches. Of course, he is not here to question him on that, but I am not persuaded that is a direct lie or attempt to mislead the claimant and in any event, nothing turns on it.

61. As to Mr McMillan being influenced by Human Resources, I have already outlined my findings regarding the fact he took advice. In my view, it has not affected fairness and his decision was an independent one. As I have already outlined there could have been criticism of him had he ignored the fact the CCTV was missing. Instead, he carefully considered the impact of this on his decision and reached a conclusion taking into account all of the circumstances and I consider it perfectly proper for him to have sought guidance from Human Resources.

62. In terms of the delay regarding the appeal outcome, the respondent accepts this was a procedurally flaw and I have made findings on that. Ultimately the case has to be looked at as a whole. The initial delay, on my findings, was reasonable. It took time convening a chair and then the claimant not being available. The delay was effectively sending the outcome to the claimant which was a delay of six or seven weeks.

63. In that regard I have regard to the case cited above, and applying the case of Sharkey I am reminded that in nearly every case the claimant is likely to find some defect. Taken as a whole, this whole process was delayed; it was of course no fault of the claimant, but her own sickness led to an earlier delay. In terms of the process overall, the respondent followed up on everything that the claimant raised in terms of the investigation. She was provided with all of the evidence against her, extensive meetings were held, and she was given a full opportunity to account and comment on the CCTV. Having regard to all of those circumstances, I do not consider that the delay takes us outside of the band of reasonable responses or indeed renders the whole procedure unfair.

64. For those reasons I am satisfied that there was both a reasonable investigation and a reasonably fair procedure.

65. As to the level of sanction, this was clearly a very serious allegation and even taking into account the length of service of the claimant and the fact that there were no previous sanctions, taking of an item for personal gain will clearly breach trust and confidence and indeed the claimant accepted that herself. The respondents disciplinary policy referred to this type of conduct as gross misconduct for which dismissal would be considered. It may be that another employer would not have dismissed but that is not the question here; the question is whether the dismissal was in the band of reasonable responses, namely that a reasonable employer could take, and I determine that it was.

66. Therefore, in all of the circumstances, the respondent had a genuine belief that the claimant was guilty of misconduct, that was held on reasonable grounds and a fair investigation and procedure was followed. The dismissal was in the band of reasonable responses and, as such, I do not find that the claimant was unfairly dismissed. As such her claim for unfair dismissal is dismissed.

_____

Employment Judge French

Date:12.01.2023

Judgment sent to the parties on

19 January 2023

For the Tribunal office