EMPLOYMENT TRIBUNALS

Claimant: Ms A Fisher

Respondent: Cruise Clothing Limited

Heard at: **Nottingham** **On:** **14 & 15 December 2022**

Before: **Employment Judge Varnam**

Representation
Claimant: In person
Respondent: Mr S Sanders, counsel

RESERVED JUDGMENT

1. Cruise Clothing Limited is substituted as the Respondent to the claim in place of Frasers Group plc, pursuant to rule 34 of the Employment Tribunal Rules of Procedure 2013.

2. The claim of unfair dismissal fails and is dismissed.

3. The Claimant was wrongfully dismissed by the Respondent. If not agreed between the parties, damages for wrongful dismissal will be decided at a remedy hearing on **28 March 2023**.

REASONS

Introduction

1. This is my decision in respect of the Claimant's claims that she was unfairly and wrongfully dismissed from her employment as a store manager. Having completed ACAS early conciliation, the Claimant's ET1 (naming Frasers Group plc as the Respondent) was received by the Tribunal on 9 February 2022. On 2 May 2022 an ET3 was filed in the name of Cruise Clothing Limited. As I set out below, one of the issues that I need to decide is the correct identity of the Claimant's employer.

2. The final hearing came before me on 14 and 15 December 2022. While the Claimant has solicitors on the record, she represented herself at the

hearing. The Respondent was represented by counsel, Mr Sanders. I am grateful to both for their assistance during the hearing.

3. The Respondent called two witnesses. Mr Robert Flower, the dismissal officer, and Mr Ian Melville, the appeal officer. Both were cross-examined in detail by the Claimant. The Claimant then gave evidence on her own behalf, and was cross-examined by Mr Sanders. I then heard closing submissions from Mr Sanders and from the Claimant. By the time that submissions had concluded it was approaching 3pm on the second day of the hearing, and rather than rush to give judgment orally I reserved the decision.

4. At the hearing, I heard evidence and submissions only on questions of liability. I did not hear evidence or submissions on remedy issues, other than on the question of whether there should be deductions to any awards made in respect of unfair dismissal to reflect either contributory fault or the possibility that the Claimant would have been fairly dismissed in any event. A provisional remedy hearing was listed to deal with questions of remedy if the Claimant succeeded in one or both of her claims.

5. Before turning to deal with the substance of the Claimant's claims, I will deal with two preliminary issues.

First Preliminary Issue: Correct Respondent

6. The relevant background to this issue is as follows:

(1) As I have observed, the ET1 was brought against Frasers Group plc.

(2) The ET3 was then filed in the name of Cruise Clothing Limited. The Grounds of Resistance filed with the ET3 asserted that Cruise Clothing Limited was the correct Respondent to the claim, and that Frasers Group plc should be removed.

(3) On 15 June 2022, the Tribunal wrote to the Claimant's solicitors to ask whether they agreed that Cruise Clothing Limited was the correct Respondent. On 22 June 2022 the Claimant's solicitors e-mailed the Tribunal stating that the Claimant objected to Cruise Clothing Limited being the Respondent.

(4) The Claimant's solicitors e-mail sets out the following basis for this objection:

> *The Claimant maintains that the correct title of her employer was 'Frasers Group Plc', and, as at the date of her dismissal, she was assigned to work for the 'SportsDirect.com Retail Ltd' division of Frasers Group.*

The e-mail had attached to it the Claimant's P60 for the year ending April 2021, which named Sportsdirect.com Retail Ltd as her employer, and payslips with a Frasers Group heading, and Sportsdirect.com Retail Ltd as the payroll name.

(5) On 28 June 2022 the Respondent's solicitors e-mailed the Tribunal reasserting that Cruise Clothing Limited was the correct Respondent. The e-mail had attached to it a copy of the Claimant's statement of terms and conditions of employment, signed by her on 20 March 2014. This names the employer as Cruise Clothing Limited. The e-mail goes on to explain that Frasers Group plc is the parent company of both Cruise Clothing Limited and Sportsdirect.com Retail Limited, and that for administrative reasons Cruise Clothing Limited employees are paid through Sportsdirect.com Retail Limited.

(6) On 9 August 2022, Employment Judge Adkinson directed that the identity of the correct Respondent would be resolved at the final hearing.

7. Neither party put forward additional evidence as to the identity of the employer. For the Respondent, Mr Sanders placed reliance on the written statement of terms and conditions, identifying Cruise Clothing Limited as the employer. The Claimant said that she considered that Frasers Group plc was her employer because, in addition to the matters previously raised by her solicitors, the managers who dismissed her and heard her appeal were employees of Frasers Group.

8. Guidance on questions of the identity of the employer was provided by the then-president of the Employment Appeal Tribunal, Choudhury J, in ***Clark v Harney, Westwood & Riegels*** [2021] IRLR 528. In particular, at paragraph 52, having considered existing case law on the point, Choudhury J identified the following principles to help determine such questions:

a. *Where the only relevant material to be considered is documentary, the question as to whether A is employed by B or C is a question of law: Clifford at [7].*

b. *However, where (as is likely to be the case in most disputes) there is a mixture of documents and facts to consider, the question is a mixed question of law and fact. This will require a consideration of all the relevant evidence: Clifford at [7].*

c. *Any written agreement drawn up at the inception of the relationship will be the starting point of any analysis of the question. The Tribunal will need to inquire whether that agreement truly reflects the intentions of the parties: Bearman at [22], Autoclenz at [35].*

d. *If the written agreement reflecting the true intentions of the parties points to B as the employer, then any assertion that C was the employer will require consideration of whether there was a change from B to C at any point, and if so how: Bearman at [22]. Was there, for example, a novation of the agreement resulting in C (or C and B) becoming the employer?*

e. *In determining whether B or C was the employer, it may be relevant to consider whether the parties seamlessly and*

consistently acted throughout the relationship as if the employer was B and not C, as this could amount to evidence of what was initially agreed: Dynasystems at [35].

9. Having regard to point (c) in Choudhury J's list of relevant factors, it seems to me that the statement of terms and conditions, signed by the Claimant on 20 March 2014, eleven days before the agreed start date of her employment, is the starting point. Nothing in the evidence that I have heard suggests that that statement of terms and conditions did not reflect the agreement of the parties at the time that it was signed. The statement of terms and conditions clearly indicates that Cruise Clothing Limited was the employer. In the absence of anything to suggest that the statement did not reflect the true agreement of the parties as of March 2014, I accordingly find that, when the Claimant's employment began, Cruise Clothing Limited was her employer.

10. I must then consider whether there has been any change of employer. Again, there was no evidence before me to suggest that there had been. I had no evidence whatsoever of any agreed novation of the contract substituting Frasers Group plc (or any of its other subsidiaries) for Cruise Clothing Limited. I had no evidence to suggest that a transfer had taken place pursuant to the **Transfer of Undertakings (Protection of Employment) Regulations 2006** or otherwise.

11. I have considered whether the fact that Sportsdirect.com Retail Limited paid the Claimant's salary, or the fact that the managers who conducted the disciplinary process were employed by Frasers Group, meant that it could be inferred that there had been some novation or other transfer of the Claimant's employment. I do not think that such an inference does arise. It is commonplace within large commercial groups for certain functions that would ordinarily be carried out by the employer to be carried out by different companies within the same group: as it was put by Lady Stacey, sitting in the Employment Appeal Tribunal in ***Wittenberg v Sunset Personnel Services Ltd*** (2013) UKEATS/0019/13, '*the test is who actually was the employer rather than who carried out some of the functions that an employer has to carry out*'.

12. The fact that Sportsdirect.com Retail Limited is named as the employer in the Claimant's P60 is also not persuasive on this point. The P60 is not a contractual document. The naming of Sportsdirect.com Retail Limited is likely to reflect the fact that that company paid the Claimant, but it cannot override the contractual agreement embodied in the statement of terms and conditions.

13. In summary, I have before me a written statement of terms and conditions which I am satisfied embodies the parties' contract. This names Cruise Clothing Limited as the employer. I have nothing else before me to suggest either that this was not the true position, or that the position was changed at any point. Cruise Clothing Limited was plainly the Claimant's employer throughout her employment.

14. I add that it is not clear to me why, on the Claimant's case, the fact that the Claimant was paid through Sportsdirect.com Retail Limited would

make Frasers Group the employer. True it is that Frasers Group is Sportsdirect.com Retail Limited's parent company, but they are separate legal entities. If the payment by Sportdirect.com Retail Limited was indicative of employer status, that employer status would be more likely to adhere to Sportsdirect.com Retail Limited than to Frasers Group. But neither party has contended that Sportsdirect.com Retail Limited should be the Respondent.

15. For the above reasons, I have concluded that the correct Respondent to this claim is Cruise Clothing Limited. Mr Sanders did not contend that the fact that Frasers Group was named as the Respondent in the ET1 should in itself mean that the claims were dismissed. Rather, he invited me to substitute Cruise Clothing Limited as the Respondent.

16. Rule 34 of the Employment Tribunal Rules of Procedure 2013 provides that the Tribunal may add any person as a party, by way of substitution or otherwise, if it appears that there are issues between that person and any of the existing parties falling within the jurisdiction of the Tribunal which it is in the interest of justice to have determined in the proceedings. The Tribunal may remove any party apparently wrongly included.

17. Since there is no doubt that the Claimant was dismissed, and since I have found that Cruise Clothing Limited was the employer that dismissed her, there are clearly issues between the Claimant and Cruise Clothing Limited which are within the Tribunal's jurisdiction, and that it is in the interests of justice to determine those in these proceedings. I also consider that Frasers Group plc was wrongly included in the proceedings. In the circumstances, I exercise my powers under rule 34 to substitute Cruise Clothing Limited as the Respondent in place of Frasers Group plc.

18. In the remainder of this judgment, references to 'the Respondent' are to Cruise Clothing Limited.

Second Preliminary Issue: Is there a wrongful dismissal claim?

19. In section 8 of the Claimant's ET1, the Claimant (or her solicitors) had ticked boxes indicating 'I am owed notice pay'. This seemed to indicate a claim for wrongful dismissal, the Claimant having been dismissed without notice. However, the detailed Grounds of Complaint appended to the ET1 do not refer specifically to a wrongful dismissal claim.

20. The Tribunal had treated the ET1 as raising a wrongful dismissal claim, since the code 'BOC' (breach of contract), used for, among other things, wrongful dismissal claims, had been used on the Tribunal file.

21. In its Grounds of Resistance, the Respondent stated that it understood the claim against it to be for unfair dismissal only. This might be a fair reading of the Grounds of Complaint alone, but, as I have indicated, reading the ET1 as a whole there is an apparent wrongful dismissal claim.

22. At the beginning of the hearing, I raised the question of whether there was a wrongful dismissal claim with the parties. For the Respondent, Mr Sanders fairly accepted that the ticking of the relevant boxes in section 8

of the ET1 did appear to intimate a wrongful dismissal claim, and he was content for the hearing to proceed on the basis that such a claim was before the Tribunal. He accepted that he was able to deal with such a claim, particularly since the factual question to which it gave rise (namely, whether the Claimant had committed gross misconduct) overlapped very substantially with issues that he would have had to address in any event when dealing with such matters as contributory fault in relation to the unfair dismissal claim.

23. It did not seem to me that the Respondent was prejudiced by approaching the case on the basis that there was a wrongful dismissal claim. Notwithstanding the fact that the Grounds of Resistance suggest that the Respondent only considered an unfair dismissal claim to have been brought, in my view the Respondent was sufficiently on notice of the wrongful dismissal claim because of the boxes that had been ticked in section 8 of the ET1, and Mr Sanders appeared ready to deal with the factual issues that arose.

24. I accordingly heard evidence and submissions on wrongful dismissal, and will decide the wrongful dismissal claim as well as the unfair dismissal claim.

Findings of Fact

25. I now turn to set out the relevant factual findings that I have made. Over the course of a day-and-a-half of evidence, a number of matters were addressed, not all of which are set out below. I have borne in mind all the evidence that I have heard, but confine myself to dealing with those matters which directly affect the outcome of the Claimant's claims.

26. The Claimant was employed from 31 March 2014 as store manager at the Cruise store in Derby. The store sold high-end men's fashion clothing.

27. The Claimant was provided with a written statement of terms and conditions of her employment. For present purposes, I need only refer to clauses 4.3 and 4.4 of the statement of terms and conditions. Clause 4.3 provided that:

> *Upon completion of four weeks' employment, the period of notice will be one month served in writing by either side*.

Clause 4.4 provided that:

> *Upon completion of two years' service, the period of notice will increase by one additional week for each completed year of service up to a maximum of twelve weeks after twelve years' service*.

28. The Claimant has over thirty years' experience working in retail, and until the events leading up to her dismissal, she had an unblemished disciplinary record with the Respondent.

29. Besides the Claimant, a number of other employees worked at the Cruise store in Derby, under the management of the Claimant. Two sales

assistants who played a particular part in the events giving rise to this claim were Ms Sydney Elliott and Ms Jennifer Camm.

30. The store normally operated with three employees on duty at any one time, including the Claimant. The Claimant's evidence, which I accept, was that in the months prior to September 2021 the store had often been short-staffed, and that she herself had had to work long hours – in excess of her contracted forty hours per week – in order to ensure that the store functioned adequately. I accept that this placed the Claimant under substantial stress.

31. On the afternoon of 1 September 2021 the Claimant was working in the store. While there should ordinarily have been three employees in the store, the only other employee in the store that day was Ms Elliott. Ms Elliott needed to leave promptly at 6pm, and the Claimant considered that she had to leave at the same time as she could not be on the premises alone.

32. At around 5.10pm, Ms Elliott found a bag on the shop floor, containing what she (correctly) believed to be cannabis.

33. Ms Elliott radioed the Claimant, asking her to come to look at what Ms Elliott had found. The Claimant did so.

34. The Claimant's evidence was that she initially thought that the bag contained buttons for clothing. I accept that this was her initial belief. Among other things, it is in part consistent with what Ms Elliott herself said during the subsequent investigation (Ms Elliott said that the Claimant had said that she had seen the bag earlier, but had left it because she thought it contained buttons). The Claimant has also been consistent in her account on this point, having given it as early as the investigatory meeting that was held with her on 4 September 2021.

35. However, Ms Elliott told the Claimant that she thought that the bag contained cannabis. The Claimant sniffed the contents, apparently by way of confirmation of this. I find, therefore, that from almost immediately after the existence of the bag was drawn to her attention, the Claimant knew that its contents were probably cannabis.

36. The Claimant then said something to Ms Elliott along the lines of 'do you know anyone that does this'. In her evidence, the Claimant said that she said this because she wanted to know how Ms Elliott had been able to identify the cannabis.

37. What followed is heavily disputed, and goes to the heart of the claims. Ms Elliott's account, given in a statement taken by James Brennan of the Respondent on 3 September 2021, was that the Claimant

> *…asked me if I knew anyone who liked [cannabis]. I said no. She said I could have given it to them to get rid of it.*
>
> *I stayed quiet.*

> *[The Claimant] said she knows what it was by seeing/smelling it, and made a joke about the customer coming back in.*

38. In a statement given to the appeal officer, Mr Melville, on 20 October 2021, Ms Elliott amplified her account as follows:

> *[The Claimant] said 'do you know anyone that does this', I said 'no' and she started laughing and said 'if you do, you can give it to them or you can have it' and with that I just said 'no' and tried to walk away, she followed me and kept repeating what she had just said, 'are you sure you don't know anyone'/"you can give it to them'/'do you know anyone that wants it', and then she started trying to guess which customer dropped it, and then she said something along lines of 'I might offer it him back'.*

39. Ms Elliott was thus making a clear allegation that the Claimant had offered to give her illegal drugs, for personal use by herself or others. On 20 October 2021, Ms Elliott added the allegation that the Claimant expressed a willingness to return the bag of cannabis to whichever customer was presumed to have dropped it.

40. The Claimant denies that she made the comments alleged by Ms Elliott, or that she in any way suggested that she was going to allow Ms Elliott to take the bag of cannabis away for personal use by herself or her friends. It will be necessary in due course for me to resolve this factual issue. I will set out my conclusions on it when I come to consider the claim for wrongful dismissal.

41. The Claimant placed the bag of cannabis by a till near the front of the store, where it was in full view of the CCTV camera. She told me, and I accept, that she did this in order to ensure that there was a record of the location of the cannabis.

42. The Claimant did not take any other action in respect of the bag of cannabis that afternoon. In particular, she did not take any steps to dispose of it, nor did she inform any more senior person within the Respondent's organisation of what had been found. I accept that this was largely because there was limited opportunity for her to take action between 5.10pm, when the bag was found, and 6pm, when the Claimant and Ms Elliott left the store.

43. The next day, 2 September 2021, the Claimant was back in the store from 8am. She was working with Ms Camm. Again the store appears to have been understaffed for much of the day.

44. Towards the start of the day, the Claimant spoke to Ms Camm, and told her about the bag of cannabis that had been found. In a statement made to the Respondent's James Brennan on 3 September 2021, Ms Camm gave the following account:

> *I was at the front till with [the Claimant] about 11/11.30. She said "a customer left us a present". Showed me a bag of weed.*

> *She asked me if I or any of my friends wanted it. She asked me to dispose of it after my shift and said "it's up to you if you take it home or get rid of it, I'll never know", gave me a wink, made me feel uncomfortable.*

45. Like Ms Elliott, Ms Camm was clearly alleging that the Claimant had, at the very least, indicated that she was happy for Ms Camm to take the bag of cannabis home for personal use or to give to her friends.

46. The Claimant accepted that she asked Ms Camm to dispose of the cannabis if it was still in the store at the end of the day. She says, however, that she told her to put it in a bin across the road from the store. The Claimant said that she asked Ms Camm to dispose of the cannabis, rather than doing it herself, because she was worried that if she herself removed the cannabis from the store then she might be accused of having taken it for personal use. She said that she considered that if Ms Camm removed the drugs from the store, then Ms Camm would be less at risk from such an allegation, because the Claimant would be able to vouch for her.

47. The Claimant denied, however, that she had made any suggestion that Ms Camm should take the drugs home for personal use. Again, this is a dispute of fact that I will resolve when I come to consider the wrongful dismissal claim.

48. The Claimant did not take any further steps to dispose of the cannabis on 3 September. She did not contact any of her superiors within the Respondent's organisation to ask for advice or instructions on disposing of the cannabis.

49. The Claimant did have conversations with more senior employees of the Respondent during the day. In particular, at 2.15pm that day the Claimant telephoned Jackie Watkinson of Human Resources. They spoke for 16 minutes and 19 seconds, but the Claimant did not mention the cannabis. The purpose of the telephone call was to discuss another employee, who had not returned to work after leaving early that day, and who had not responded to the Claimant's efforts to contact her.

50. The Claimant told me that she did not mention the cannabis to Ms Watkinson because she did not consider it to be an HR issue. I accept that this was the Claimant's reason; nonetheless, she clearly had time for a lengthy conversation with a relatively senior employee, and did not mention the cannabis.

51. The Claimant also telephoned James Brennan, her area manager, late on 2 September. Mr Brennan did not answer. The Claimant left an answerphone message about an issue to do with the keys to the store. She did not mention the cannabis in her message, although Mr Brennan appears to have been clearly an appropriate person to report the issue to.

52. The Claimant's evidence was that if she had managed to speak to Mr Brennan, then she would have discussed the cannabis with him. She said that she did not mention it in the answerphone message, because she did

not want to create a sound recording about such a potentially sensitive matter.

53. The Claimant said that she did not have time during the day to contact anyone else about the cannabis.

54. I did not find the Claimant's account that she would have discussed the cannabis with Mr Brennan if she could have spoken to him, or her explanation that she was too busy to telephone anyone else about the cannabis, convincing. As to the suggestion that she would have spoken to Mr Brennan about the matter had she got through to him, the Claimant did not suggest this in her investigation, disciplinary, or appeal hearings, and I am satisfied that she would have mentioned it had her account to me been accurate. I also do not find the explanation that the Claimant was too busy to make a report to anyone else convincing. While I accept that the Claimant was very busy and that the store was understaffed, the Claimant did have time for a sixteen-minute telephone call to Ms Watkinson. She had time to telephone Mr Brennan about an issue with keys. In my view, if she had wanted to contact someone about the cannabis, she could have made time for a short telephone call.

55. The overall impression that I have is that the Claimant was prioritising other matters over disposing of the cannabis.

56. The Respondent has a drugs and alcohol policy. However, that policy contains nothing particularly germane to the events that had transpired. It does not contain anything telling employees, or store managers, how they should react if cannabis is found in their store, having apparently been dropped by a customer.

57. On the evening of 2 September 2021, it appears that Ms Camm, in accordance with the Claimant's instructions, took the cannabis out of the shop and threw it away somewhere. Curiously, I have seen no evidence that anyone from the Respondent ever asked Ms Camm precisely what she had done with the cannabis.

58. A bag of cannabis was found on 3 September 2021 in an alleyway behind the store. I am not satisfied that this was the same bag of cannabis that had been found by Ms Elliott on 1 September. For one thing, in an e-mail on 19 October 2021, James Brennan said that the bag found in the alleyway had a smell so pungent that, even when stored away from the shopfloor 'it stunk the place out' and could be smelled outside the office where it was stored. No one suggested that the bag found on 1 September had any particularly strong smell. But ultimately little turns, in my view, on whether the bag found on 3 September was the same as that apparently thrown away on 2 September. While the discovery of the bag in the alleyway was seen by the Respondent as proof that the bag found in the store was cannabis, I am satisfied that both bags contained cannabis, whether or not they were one and the same bag.

59. The Claimant was not present when Ms Camm disposed of the cannabis, and did not take any steps to verify that it had in fact been disposed of.

60. 3 September 2021 was the Claimant's day off. Ms Terri Brown, an assistant manager from Sports Direct (another company within the Frasers Group) was covering as manager of the store. On that day, the Respondent's management became aware of the events of the previous two days. As best I can discern, piecing together accounts set out in statements and e-mails from Ms Camm and Mr Brennan, neither of whom gave evidence, the sequence of events by which management became aware was as follows:

    (1) Ms Elliott and Ms Camm were both working, and had a discussion about the matter. According to the statement that Ms Elliott made to Mr Melville on 20 October 2021, Ms Camm told Ms Elliott that she was leaving the Respondent's employment because the Claimant had offered her cannabis.

    (2) Ms Elliott and Ms Camm approached Ms Brown and gave their accounts to her.

    (3) Ms Brown then telephoned Mr Jonny Walker, one of the Respondent's area managers, and told him what Ms Elliott and Ms Camm had told her.

    (4) Mr Walker then telephoned Mr Brennan, and informed him.

    (5) Mr Brennan then telephoned Ms Brown, and (as set out in an e-mail from Mr Brennan to Mr Melville on 18 October 2021):

        > *I asked [Ms Brown] what had happened and she explained the situation saying the staff on duty had told her that [the Claimant] had offered them drugs the day before and when they refused she had told them to simply throw them away in the alley*.

61. By 1.30pm, Mr Brennan was at the store, where he and Ms Brown conducted interviews with Ms Elliott and Ms Camm, and obtained statements, the salient parts of which I have quoted at paragraphs 37 and 44 above.

62. The Claimant was back at work on 4 September 2021. Before the store opened, she was approached by Mr Walker, who asked her to attend an investigatory meeting. This was then conducted between 8.03am and 9.43am. Mr Walker chaired the meeting, and Mr Nick Ardelt took minutes. The minutes were subsequently signed by the Claimant, and I accept them as broadly accurate, albeit not verbatim.

63. I note the following points from the minutes:

    (1) Mr Walker informed the Claimant of Ms Elliott's allegation that the Claimant had offered her the cannabis for personal use. The Claimant's response is minuted as '*that's not what I recall the conversation'*.

(2) The Claimant was asked about Ms Camm's allegation that the Claimant had said that it was up to Ms Camm whether she took the cannabis home or got rid of it. The Claimant replied '*I don't recall saying that. I just asked her to dispose of that as I can't be seen to be taking that out of the store, better I ask a member of staff rather than myself*'.

(3) The Claimant accepted that she should have telephoned Clinton (the Respondent's security manager) or Mr Walker regarding the drugs.

(4) The Claimant said on a number of occasions that her concern was getting the cannabis out of the store.

(5) The Claimant explained, by way of mitigation, that she was extremely tired at the time, as a result of the heavy workload that she had been experiencing.

64. At the conclusion of the meeting, Mr Walker suspended the Claimant while the investigation continued.

65. Mr Walker subsequently prepared a document headed 'Investigation Summary', in which he recommended that the matter should proceed to a disciplinary hearing.

66. On 8 September 2021, the Claimant was invited to attend a disciplinary hearing, to be chaired by Mark Stonehouse. The letter inviting the Claimant to this disciplinary hearing does not appear to be in the bundle.

67. At 12:02 on 8 September 2021, the Claimant wrote to Ms Watkinson of HR, requesting the following documents:

(1) The Respondent's drugs and alcohol policy.

(2) The company policy on the number of consecutive days on which an employee could work.

(3) The Claimant's Kronos time card for the two months prior to suspension, and comment logs for lateness.

(4) A report showing the number of hours that the Claimant had worked in the two months prior to suspension.

(5) A copy of an e-mail that the Claimant had sent to HR and Mr Brennan on 30 August 2021 regarding Covid reporting.

(6) A copy of an e-mail from the Claimant's store to Sports Direct requesting staff cover on 2 September 2021.

(7) A copy of e-mails sent to Mr Walker and Mr Stonehouse on 21 and 22 August 2021, concerning annual leave.

(8) A schedule of hours actually worked, including headcount cover for the Claimant's store.

68. The Claimant explained to me that items (2) to (8) were requested in support of her contentions that the store had regularly been short-staffed, and that she had been overworked, in the run-up to September 2021.

69. At 10:18 on 9 September 2021, Ms Watkinson e-mailed the Claimant providing a copy of the drugs and alcohol policy. She said that all the other documents requested by the Claimant had been forwarded to the Respondent's shared service department '*to arrange using the correct process*'. It does not, however, appear that the documents listed at paragraph 67(2) to 67(8) above were ever provided to the Claimant. No explanation for this was provided to me.

70. At 15:22 on 9 September 2021 the Claimant e-mailed Ms Watkinson, asking that CCTV footage showing the period between Ms Elliott finding the cannabis and the Claimant and Ms Elliott both moving away from the cash desk be available at the disciplinary hearing.

71. On 14 September 2021, Ms Watkinson wrote to the Claimant, rearranging the disciplinary hearing so that it would now take place on 17 September 2021, and be chaired by Mr Flower. By a further letter dated 15 September 2021, the disciplinary hearing was again rescheduled to 20 September 2021.

72. Both the 14 September and the 15 September letter state the allegations against the Claimant as follows:

- *Not disposing of an illegal substance which had been left in the store by a customer.*
- *Offering illegal substances to less senior members of your team.*

Both letters also informed the Claimant that the Respondent viewed the allegations against the Claimant as gross misconduct, which could result in the Claimant's dismissal.

73. The disciplinary hearing, chaired by Mr Flower, went ahead on 20 September. Mr Flower is an area manager employed by Frasers Group plc, with experience of conducting disciplinary hearings, including hearings resulting in dismissal. Prior to the hearing, Mr Flower had reviewed the statements from Ms Elliott and Ms Camm, the investigation summary from Mr Walker, the minutes of the investigatory meeting, and the drugs and alcohol policy. At the outset of the meeting, Mr Flower and the Claimant also viewed CCTV footage of the events of 1 September.

74. The Claimant was accompanied at the meeting. Minutes were taken by Mr Jamie Watson. They have been signed by the Claimant, and I accept them as broadly accurate, albeit not verbatim.

75. I note the following from the minutes:

(1) The Claimant said that, once the drugs were found, she knew that she needed to telephone someone about it, but had not had time to do so.

(2) The Claimant denied that she had offered the cannabis to Ms Elliott or Ms Camm for personal use. She said that she had told Ms Camm to dispose of it in a bin across the road from the store, which was emptied regularly.

(3) The Claimant commented on '*the amount of people who walk past you smelling of [cannabis]*'.

(4) The Claimant reiterated points that she had made in the investigatory meeting, concerning her workload and the pressure that she had been under.

76. Mr Flower subsequently decided to dismiss the Claimant. He set out his reasoning at paragraphs 17 to 19 of his witness statement and expanded upon his explanation during his oral evidence. In summary:

(1) Mr Flower found that the allegations against the Claimant were true. In respect of the allegation that the Claimant had offered Ms Elliott and Ms Camm the cannabis, Mr Flower clearly accepted the accounts of Ms Elliott and Ms Camm, and rejected the account from the Claimant. In his witness statement, he characterised her account as 'strange, inconsistent and not necessarily truthful'. He was particularly critical of her claim that she believed that the bag contained buttons.

(2) He found that as a senior employee of many years' standing, the Claimant must have known what was expected of her, that she had access to advice, and that he could not find a good reason why she had not contacted anyone to find out how she was supposed to dispose of the cannabis.

(3) He considered that the incident was extremely serious. It could, he found, have brought the Respondent into disrepute or endangered the health and safety of employees (particularly Ms Camm, who had been asked to dispose of the cannabis).

(4) He accepted that the Claimant was remorseful, but did not view this as changing the outcome, given how seriously he viewed her actions.

(5) He accepted the Claimant's mitigation, namely that the store had been short-staffed and that she had been overworked. He also had regard to the Claimant's length of service and unblemished disciplinary record. But he did not consider that this overrode the seriousness of her actions.

77. There was initially some uncertainty in my mind as to what Mr Flower considered to be especially serious in respect of the allegation of 'not disposing of an illegal substance'. In response to a question from me, Mr Flower explained that he felt that the key issue was the delay in disposing of the cannabis, which was left in the store for around 24 hours. He also considered that there was a breach of the duty of care owed to Ms Camm in leaving her, as a junior employee, to dispose of the cannabis.

78. The Claimant was informed of her dismissal by a letter from Ms Watkinson, dated 22 September 2021 and received by the Claimant by e-mail on the same day, informing her that her employment would terminate without notice on 24 September 2021. I note that, since the notice of dismissal was received by the Claimant on 22 September, it appears that she was in fact given two days' notice of dismissal, not no notice as stated in the letter.

79. The letter of 22 September informed the Claimant of her right to appeal, and the Claimant exercised that right. On 28 September 2021 the Claimant e-mailed Ms Watkinson raising twelve grounds of appeal. These were:

1. *There is no evidence that it was an illegal substance that was found.*
2. *There is no evidence that I offered illegal substances to less senior members of staff.*
3. *There is no company policy or procedure for what to do if something suspected to be an illegal substance is dropped by a customer on company premises.*
4. *There is no breach [of] a company policy or procedure which would cause loss of trust and confidence to be undermined.*
5. *The 'treated as' illegal substance was removed from the premises.*
6. *There is no evidence of bringing the company into disrepute regarding this incident.*
7. *The investigation and disciplinary process was not conducted correctly.*
8. *I requested CCTV for a specific timeframe…on some cameras, the footage was stopped before [Ms Elliott] picked the packet up off the floor at the back of the store. This is unfair.*
9. *I requested certain documents as part of my initial evidence that were not…made available to me for m hearing or this appeal…*
10. *Failure by the business to provide a policy procedure to protect its employees and its own business reputation.*
11. *Potential future threat of business reputation – by persistence of certain individuals within the business to discredit the Flannels name by attacking my length of service and experience/reputation to their own ends.*
12. *I believe the business has not taken in to account any mitigation circumstances that I raised to my actions taken on that day.*

80. On the evening of 28 September 2021, the Claimant e-mailed to Ms Watkinson a series of documents that she considered supported her appeal. In the hearing before me, those documents on which the Claimant placed the greatest weight were statements that Ms Elliott and Ms Camm had provided during a different investigation (conducted by the Claimant) in August 2021. In particular the Claimant relied on the fact that both Ms Elliott and Ms Camm then said that they liked working at the Derby store and felt safe doing so.

81. Mr Melville, lead area manager, was deputed to hear the appeal. On 7 October 2021 Ms Watkinson wrote to the Claimant, informing her of this, and inviting her to an appeal hearing on 15 October 2021.

82. Mr Melville prepared for the appeal hearing by reading the Claimant's grounds of appeal, Mr Walker's investigation notes, the notes from the disciplinary hearing, the investigation pack that had been provided to Mr Flower, and the dismissal letter. He was not at any point provided with the documents that the Claimant had e-mailed to Ms Watkinson on 28 September 2021. I was not provided with any explanation as to why these documents were not passed to Mr Melville.

83. The appeal hearing went ahead on 15 October 2021. The Claimant had been informed of her right to be accompanied at the meeting, but chose to be unaccompanied. Minutes were taken by Mr Rob Davies. There had been some issue over who was to take minutes, but this had been resolved by the time of the appeal hearing, and no objection was taken to Mr Davies, so it is unnecessary to explore this issue further. The minutes taken by Mr Davies were signed by the Claimant, and I accept them as broadly accurate, albeit not verbatim.

84. From the minutes, I note the following points in particular:

(1) At the outset of the meeting, the Claimant raised as an issue the fact that she had not been provided with CCTV footage. The Claimant had been given the opportunity to view CCTV footage of some of the events of 1 September 2021 with Mr Flower prior to the disciplinary hearing. As I understand it, however, her complaint is that the entirety of the CCTV footage from the point at which Ms Elliott found the bag of cannabis to the point at which Ms Elliott and the Claimant left the store was not provided.

(2) The Claimant was given a full opportunity to expand upon her grounds of appeal.

(3) The Claimant questioned whether the substance found was indeed cannabis.

(4) The Claimant emphasised the point that the Respondent did not have a policy or procedure to deal with a situation such as that which had arisen.

(5) The Claimant told Mr Melville that she had asked Ms Camm to dispose of the bag of cannabis in the public bin by the end of the day on 2 September 2021 if the Claimant had not managed to discuss the matter with a more senior manager before then. The Claimant said that Ms Camm had disposed of the cannabis at around 5.30pm that day, apparently while putting the bins out.

(6) The Claimant was asked why she had not sought advice from a more senior manager on 2 September, and said that she felt that the information about the bag of cannabis needed to be conveyed orally rather than by text message or e-mail, and that she had not had time to

contact anyone on that day. She did not mention telephoning Mr Brennan, although in evidence to me she suggested that had Mr Brennan answered her telephone call to him then she would have discussed the matter with him.

(7) The Claimant was asked why she did not mention the matter to Ms Watkinson when they spoke on 2 September, and replied that she did not consider that an HR officer would have been the appropriate person to discuss this with.

(8) The Claimant said that she considered that there was an attempt to remove her from the Respondent's business because she was a 50-year-old woman and did not fit the Respondent's desired staff profile.

(9) There was some suggestion from the Claimant that the allegations from Ms Elliott and Ms Camm that she had offered them the opportunity to take the cannabis for personal use was motivated by an attempt to remove her from her job.

(10) The Claimant conceded that it might have been best if she and Ms Camm had disposed of the cannabis together, rather than the Claimant leaving Ms Camm to do so alone.

85. Following the appeal hearing Mr Melville undertook further investigations. In particular:

(1) On 18 and 19 October 2021, he engaged in an e-mail exchange with Mr Brennan concerning whether the substance found was indeed cannabis. Mr Brennan explained that a bag of cannabis had been found in an alleyway behind the store on 3 September 2021, and that the police had subsequently confirmed that this was cannabis.

(2) Mr Melville spoke to Mr Flower about CCTV footage. No notes were taken, but Mr Melville's evidence, which on this point was not challenged and which I accept, was that Mr Flower told him that the Claimant had had the opportunity to view CCTV footage prior to the hearing.

(3) On 20 October 2021, Mr Melville took a further, more detailed, statement from Sydney Ellliott. I have quoted the key parts of this at paragraph 38 above.

(4) Mr Melville obtained a statement from Ms Watkinson, dated 21 October 2021. This confirmed that the Claimant had spoken to Ms Watkinson for sixteen minutes on 2 September 2021. Ms Watkinson's statement also confirmed what documents had been provided to the Claimant, and dealt with her request for additional CCTV footage, although the statement does not make clear why the additional footage had not been provided.

86. Mr Melville's witness statement explained that he had also sought to speak to Jennifer Camm, but that she had left the Respondent's

employment, so this was not possible. This part of his evidence was unchallenged, and I accept it.

87. Having conducted these further investigations, Mr Melville issued a detailed decision letter to the Claimant on 22 October 2021. This letter runs to seven pages, and responds to each of the Claimant's twelve grounds of appeal in some detail. In summary, Mr Melville dismissed the appeal. I will not set out each point that Mr Melville made in his letter, but will simply summarise what I consider to be particularly relevant to the decisions that I will in due course have to make:

(1) M Melville plainly accepted that the Claimant had offered the cannabis to Ms Camm and Ms Elliott. In other words, like Mr Flower he preferred the accounts of Ms Camm and Ms Elliott to the Claimant's account.

(2) In response to the argument that there was no procedure dealing with the situation that had arisen, Mr Melville made the point that '*there cannot be a policy or procedure for every eventuality that may happen…*'. He went on to point out that in her disciplinary hearing the Claimant had accepted that she ought to have telephoned a more senior manager to seek advice on the situation.

(3) Mr Melville considered that the documentation that the Claimant had requested, but not received, prior to the disciplinary hearing was not relevant to her case.

(4) Mr Melville did not consider that the dismissal was connected with any plot to bring about the Claimant's dismissal.

(5) Mr Melville said that he had considered the mitigation put forward by the Claimant, but did not consider it to be relevant to the decision made, which was based on a failure to take responsibility for a situation.

88. Mr Melville's written and oral evidence as to his reasoning was in line with what I have set out in the preceding paragraph. I add that he said that he had accepted that the Claimant worked long hours and was under stress, but did not consider that that was sufficient exculpatory or mitigatory evidence in light of his conclusions as to her actions.

89. I asked Mr Melville what had led him to the conclusion that the dismissal was justified. He relied on the alleged offering of the cannabis to Ms Elliott and Ms Camm for personal use. As regards the first bullet point at paragraph 72 above ('not disposing of an illegal substance…'), Mr Melville said that in his view the misconduct justifying dismissal consisted of the delay in disposing of the cannabis, the failure to take advice concerning this, and the fact that the role of disposing of the cannabis had been delegated to a junior member of staff, when in his view the Claimant as store manager should have taken responsibility for this. He said that in his view there was time on 2 September for the Claimant to take advice on disposing of the cannabis, particularly having regard to her sixteen-minute telephone call to Ms Watkinson that day.

Relevant Law: Unfair Dismissal – liability

90. Pursuant to section 98 of the **Employment Rights Act 1996**, a Tribunal hearing a claim of unfair dismissal must consider the following points:

(1) The Respondent must prove the reason for dismissal.

(2) The Respondent must also prove that that reason was a potentially fair reason.

(3) If the Tribunal finds that there was a potentially fair reason for dismissal, it must consider whether, in all the circumstances (including the size and administrative resources of the Respondent's undertaking) the Respondent acted reasonably in dismissing for that reason.

My determination as to fairness should be in accordance with equity and the substantial merits of the case.

91. Potentially fair reasons for dismissal are enumerated in section 98(2) of the **Employment Rights Act**. They include, at section 98(2)(b), a reason which relates to the conduct of the Claimant. That is the potentially fair reason relied upon by the Respondent in this case.

92. In consider whether the Respondent acted reasonably in dismissing the Claimant, the Tribunal must apply the 'range of reasonable responses' test. This requires the Tribunal to consider whether the Respondent's decisions were within the range of responses open to a reasonable employer, acknowledging that in many situations a variety of different actions and decisions may all be reasonable. It is an error of law for a Tribunal to substitute its own view of what would have been reasonable for that of the Respondent's decision-makers: see the judgment of the Court of Appeal in ***Sainsbury's Supermarkets Limited v Hitt*** [2003] IRLR 23. Putting that another way, the mere fact that I might have acted differently had I been in the position of Mr Flower or Mr Melville does not mean that their decisions were unreasonable or that the decision to dismiss was unfair. Rather, I must consider whether a reasonable employer could act in the way that Mr Flower and Mr Melville acted. In the following paragraphs, when I use the word 'reasonable', it must be considered by reference to the range of reasonable responses.

93. Specific guidance concerning the approach to be adopted by a Tribunal considering a dismissal for a reason relating to an employee's conduct was laid down by the Employment Appeal Tribunal in ***British Home Stores Ltd v Burchell*** [1978] IRLR 379. In particular, following ***Burchell***, I should consider the following matters:

(1) Whether the Respondent genuinely believed that the Claimant was guilty of the misconduct alleged.

(2) Whether the Respondent had reasonable grounds on which to sustain that belief.

(3) Whether the Respondent had carried out a reasonable investigation into the allegations against the Claimant.

(4) Whether dismissal was a reasonable sanction in the circumstances.

94. As a more general point, I must consider the reasonableness of the procedure conducted by the Respondent, as part of my consideration of the fairness of the dismissal.

95. The range of reasonable responses test applies to the investigation into misconduct and to procedural matters generally as much as to any other stage of the ***Burchell*** test: see, for example, ***Taylor v OCS Group Ltd*** [2006] IRLR 613, per Smith LJ at paragraph 48. It is not every procedural flaw which will render a dismissal unfair – rather, consideration must be given to the impact of any procedural flaw, and where it has had little impact on the ultimate decision, its relevance to the question of whether or not the dismissal was fair may be considerably lessened: see the judgment of Lady Wise, sitting in the Employment Appeal Tribunal in ***NHS 24 v Pillar*** (2017) UKEATS/0005/16, at paragraph 29.

96. When carrying out an investigation, an employer should have regard not only to evidence that may serve to prove an employee's guilt, but should also consider evidence that may exculpate the employee or at least show the existence of mitigating circumstances: ***A v B*** [2003] IRLR 405. However, an employer is not required to investigate every argument advanced by an employee – the question is always one of the reasonableness of the investigation as a whole: see the judgment of the Court of Appeal in ***Shrestha v Genesis Housing Association Limited*** [2015] IRLR 399, per Richards LJ at paragraphs 22-23.

Relevant Law: Unfair dismissal – remedy

97. The majority of issues concerning remedy for any unfair dismissal were adjourned to be considered at a possible future remedy hearing. However, I explained to the parties that, if the Claimant's unfair dismissal claim succeeded, I would be considering two matters at this stage:

(1) Contributory fault: I would be considering whether to make a reduction to the Claimant's compensatory and/or basic awards to reflect any contribution that she herself had made to her dismissal. This would involve me determining (i) whether the Claimant had engaged in any blameworthy conduct, and (ii) if so, whether that had contributed to her dismissal. If I found that the Claimant had engaged in blameworthy conduct that contributed to her dismissal, then it would be necessary for me to assess the extent to which such conduct had contributed to the dismissal, and I would ordinarily then make a deduction from the Claimant's awards to reflect this contribution. Any such deduction would, however, be subject to the overarching need to make an award of compensation that was just and equitable.

(2) *Polkey* reduction: If I found that the dismissal was unfair because of an error of procedure, then it would be necessary for me to consider whether, had a fair procedure been followed, the Claimant might still

have been dismissed fairly. Pursuant to the judgment of the House of Lords in ***Polkey v A. E. Dayton Services Limited*** [1988] 1 AC 344, the chance of the Claimant being fairly dismissed should be made in percentage terms, and a percentage reduction may be made from the Claimant's compensatory award to reflect the percentage chance that she would have been fairly dismissed in any event.

98. Accordingly, if I find that the Claimant was unfairly dismissed, I will need to consider whether to make contributory fault and/or *Polkey* reductions.

Relevant Law: Wrongful Dismissal

99. Ordinarily, an employee is entitled to be given notice of their dismissal. I have quoted at paragraph 27 above the provisions of the Claimant's contract in respect of notice. Given those express provisions, it is not necessary for me to address the statutory notice provisions contained in section 86 of the **Employment Rights Act 1996**, since they are not more generous to the Claimant than the express contractual provisions.

100. If an employer dismisses without giving an employee the notice to which they are entitled, that dismissal is a breach of contract (and so wrongful), and the employee is entitled to damages.

101. An employer is ordinarily entitled to dismiss without notice only where an employee has committed gross misconduct. This is expressly provided for in clause 4.6 of the Claimant's statement of terms and conditions, but in any event it is a matter of general law. The right of an employer to dismiss summarily for gross misconduct is an expression of the general principle that a party to the contract is entitled to terminate the contract summarily if the other party commits a repudiatory breach of that contract.

102. In ***Mbubaegbu v Homerton University Hospital NHS Foundation Trust*** (2018) UKEAT/0218/17, Choudhury J (sitting in the Employment Appeal Tribunal), at paragraph 32, explained the concept of gross misconduct in this way:

> *…conduct amounting to gross misconduct is conduct such as to undermine the trust and confidence inherent in the relationship of employment. Such conduct could comprise a single act or several acts over a period of time.*

103. When hearing a complaint of wrongful dismissal in which it is contended that the employer was entitled to dismiss without notice because the employee had committed gross misconduct, the Tribunal must make its own factual findings as to whether the employee had, as a matter of fact, committed gross misconduct. The situation is different from that which pertains in an unfair dismissal claim, where the Tribunal merely assesses the reasonableness of the employer's decision. In a wrongful dismissal claim, the Tribunal must come to its own decision on the facts.

104. Where it is alleged that an employer was entitled to dismiss summarily because the employee had committed gross misconduct, it is for the employer to prove, on the balance of probabilities, that the employee did commit gross misconduct.

105. In making my factual determinations on the wrongful dismissal claim, I have particularly borne in mind the decision of His Honour Judge Auerbach, sitting in the EAT in ***Hovis Limited v Louton*** (2021) EA-2020-000973. In that case, an employment judge was found to have erred in not considering evidence relied upon by an employer, because the witnesses to the alleged misconduct had not been called to give evidence before the Tribunal. HHJ Auerbach made the following helpful observations about the law, at paragraphs 23 to 27 of his judgment:

> *…it is an error of law for the trial judge to fail to consider at all, evidence of a particular type, such as documentary or hearsay evidence, simply because it is of that type, unless it falls properly to be excluded from consideration because of the application of some rule of evidence or other established exclusionary legal principle.*
>
> *As to that, rule 41 Employment Tribunals Rules of Procedure 2013 provides that employment tribunals are not bound by any rule of law relating to the admissibility of evidence in proceedings before the courts. So, hearsay or documentary evidence, or other types of evidence, of whatever nature, are not, as such, inadmissible, and if such evidence is sufficiently relevant to what the tribunal has to decide, then it should be considered. But the assessment of the evidence, and what weight to attach to it, is, of course, a matter for the tribunal.*
>
> *There is, specifically, no rule that hearsay evidence cannot be considered or given weight by a tribunal. The judge is, of course, entitled to give consideration to how the fact that the evidence is hearsay may have a bearing on the assessment of its reliability and what weight to attach to it. In particular, witnesses who give oral evidence to the tribunal in person are required by rule 43 to do so on oath or affirmation. Their evidence can also be tested by cross-examination in front of the tribunal in a way that hearsay evidence cannot.*
>
> *[…]*
>
> *The fact that a hearsay statement has not been given under oath, or tested in that way at trial, are considerations that may of course inform the judge's assessment of its reliability or credibility, or otherwise of what weight to attach to it, but that is a different matter. They are also not necessarily the only considerations that may affect the evaluation of hearsay evidence. The tribunal needs to consider all the relevant circumstances in the given case, such as the particular circumstances in which the statement was made, the nature of the record of that statement, and so forth.*

> *Nor…is there any rule that oral evidence given, and tested, at trial, must or will always, as it were "trump" opposing documentary or hearsay evidence. The credibility and reliability of the oral evidence must itself still be subject to some evaluation; and it may also, in a given case, be outweighed by a determinative document, or a hearsay account, which, in all the circumstances, the judge finds more reliable or compelling.*

Analysis and Decision

106. Having set out the relevant law, I now turn to apply it to the facts of this case. I will start with the unfair dismissal claim, and then move on to the wrongful dismissal claim, including my finding on the issue of whether or not the Claimant did offer cannabis to Ms Elliott and/or Ms Camm.

Unfair Dismissal

107. I am in no doubt that the reason for the dismissal was the fact that Mr Flower believed that the Claimant had (i) offered cannabis to Ms Elliott and Ms Camm, and (ii) failed to dispose properly of the cannabis.

108. These reasons for dismissal were plainly matters relating to the Claimant's conduct.

109. It follows that I am satisfied that the Respondent has proved a potentially fair reason for the dismissal.

110. I must therefore consider whether the Respondent acted reasonably in dismissing for this reason. This involves the application of the ***Burchell*** test set out above. I will consider each stage of that test in turn.

Did the Respondent genuinely believe that the Claimant was guilty of the misconduct alleged?

111. As I have set out above, I accept, having heard the evidence of Mr Flower, that he did genuinely believe that the Claimant had committed the acts of misconduct alleged against her. I also conclude that the appeal failed because Mr Melville shared this belief. In closing submissions, the Claimant confirmed that she did not dispute that Mr Flower and Mr Melville's beliefs were genuine, but I would have found them to be so in any event. In particular, I found both Mr Flower and Mr Melville to be honest witnesses, with no reason to lie about the reason for dismissal.

Did the Respondent have reasonable grounds on which to sustain that belief?

112. In my view, this question also falls to be answered 'yes'.

113. As to the allegation that the Claimant had not acted properly in disposing of the cannabis, the majority of allegations were not the subject of factual disputes. There was no dispute that the Claimant had not in fact telephoned a more senior member of the Respondent's management team to seek guidance. In her evidence to me, the Claimant suggested

that she would have spoken to Mr Brennan about the matter had he answered the telephone when she rang. However, not only did I reject that evidence, but it was not put forward in either the disciplinary or the appeal hearing.

114. There was also no dispute that the cannabis had remained in the store throughout 2 September, nor was there any dispute that the Claimant had delegated the role of disposing of the cannabis to Ms Camm, a junior member of staff.

115. As to the allegation that the Claimant had offered cannabis to Ms Elliott and Ms Camm, Mr Flower had evidence to sustain his belief that this had happened, in the form of the statements from Ms Elliott and Ms Camm. On the appeal, Mr Melville had more evidence, because he had himself interviewed Ms Elliott and obtained a more detailed statement from her.

116. The Claimant has criticised the decision to accept the accounts of Ms Elliott and Ms Camm. As is set out below, I have myself made a different finding of fact on this issue from that made by Mr Flower and Mr Melville. But I remind myself that the question is whether a reasonable employer could accept the accounts of Ms Elliott and Ms Camm in preference to that of the Claimant.

117. Mr Flower, and on appeal Mr Melville, were confronted with a dispute of fact turning entirely on witness evidence. Such disputes of fact are a matter of judgement for the individual decision-maker. There was nothing about the accounts from Ms Elliott and Ms Camm which was so obviously unreliable as to render it unreasonable to prefer their accounts to the Claimant's. Indeed, as the Claimant accepted, there was no apparent reason for Ms Elliott and Ms Camm to lie. In short, theirs was evidence upon which Mr Flower and Mr Melville were entitled to rely.

Did the Respondent carry out a reasonable investigation?

118. On the face of it, the Respondent did carry out a reasonable investigation into the allegations against the Claimant. I form this view, as a *prima facie* conclusion and subject to my consideration of certain specific criticisms that have been levelled at the investigation, for the following reasons:

(1) The Respondent took early steps to gather evidence as to the main issue that was to prove the subject of a factual dispute, namely whether cannabis was offered to Ms Elliott and/or Ms Camm, by obtaining statements from both employees.

(2) The Respondent took ample steps to obtain the Claimant's account, both in respect of the allegations relating to Ms Elliott and Ms Camm, and in respect of the circumstances surrounding the finding and eventual disposal of the cannabis. This included the investigatory meeting chaired by Mr Walker, as well as the meetings with Mr Flower and Mr Melville.

(3) CCTV footage of the finding of the cannabis was viewed, although from the evidence that I heard it does not appear that this actually took matters much further. While the Claimant asked Mr Flower some questions concerning the CCTV footage, neither party considered the footage to be important enough to play to me as part of their case or in support of cross-examination.

(4) When it came to the appeal, Mr Melville took steps to obtain the further evidence that I have identified at paragraph 85 above. This seems to me to be evidence of Mr Melville conscientiously fulfilling his role as appeal officer, by ensuring that possible gaps in the evidence before him were closed. In so doing, he obtained fuller evidence from Ms Elliott in support of her allegations, and I also consider that the evidence obtained from Ms Watkinson was an important part of the overall investigation, because it addressed the question of whether the Claimant had had the opportunity to speak to more senior managers on 2 September.

119. My initial overall impression, therefore, is of an investigation in which the obviously relevant evidence was obtained, and in which Mr Melville in particular made sure to obtain further evidence that seemed relevant.

120. However, I have considered whether any of the specific criticisms of the investigation mean that it fell below the standard to be expected of a reasonable employer. I note that the standard to be expected of the Respondent, a division of a large publicly-listed company, is high, given its size and substantial administrative resources.

121. The first criticism relates to the failure to provide either the Claimant or Mr Flower (or, later, Mr Melville) with the documents (other than the drugs and alcohol policy) requested by the Claimant on 8 September 2021. In my view, the fact that these documents were not provided, combined with the absence of an explanation for this omission, does open the Respondent to criticism. Where an employee seeks documents as part of her defence to a misconduct charge, it will generally be good practice to provide those documents. This gives the employee the fullest chance to advance her defence, and ensures that all potentially-relevant documents are before the decision-maker.

122. The second criticism relates to the failure to provide Mr Melville with the documents that were sent to Ms Watkinson by the Claimant on the evening of 28 September 2021. Again, this failure is in my view a legitimate ground of criticism. Where an employee sends documents to an employer, with a view to them being considered as part of the appeal, best practice dictates that they should be provided to the appeal officer, so that he can form a view as to their relevance and at least have them in mind during his considerations. The failure to forward the documents to Mr Melville, or even to alert him to their existence, meant that they were not considered by him.

123. So there are in my view two valid criticisms of the investigation. However, the question that I must consider is not whether the

Respondent's investigation at all times followed best practice, nor whether it was beyond reproach. It is whether, viewed as a whole, it was reasonable. In my view, the two criticisms outlined above do not take the investigation as a whole outside the range of reasonable responses.

124. In considering flaws in an investigation, it is necessary to consider the impact of those flaws on the investigation as a whole (see ***NHS 24 v Pillar***, summarised at paragraph 95 above). Here, it seems to me that the flaws had limited impact on the investigation.

125. As to the failure to obtain the documents sought by the Claimant on 8 September 2021, these did not appear to me to be documents that could have had any bearing on the question of whether the Claimant was in fact guilty of the misconduct alleged. As I understood the Claimant and the evidence as a whole, their relevance potentially went to her mitigation – namely, her suggestion that she was heavily overworked and stressed, and that this had contributed to any mistakes she had made. It is, of course, important not to disregard mitigatory evidence when conducting a disciplinary investigation However, as ***Shrestha*** (summarised at paragraph 96 above) makes clear, not every line of mitigation need always be investigated – the question is always one of overall reasonableness. I do not consider that not looking fully into the truth or otherwise of one line of mitigation was such a significant failure as to render the investigation as a whole unreasonable. The mitigation was only one feature of the case. Moreover, I accepted the evidence of Mr Flower and Mr Melville that they had accepted the Claimant's account that she was overworked and stressed. They simply considered that this did not sufficiently mitigate what they found her to have done. In my view, where the factual basis for the mitigation was accepted by Mr Flower and Mr Melville, it was not necessary for the Respondent to conduct a more detailed investigation into the truth of that factual basis; the situation might have been very different had the mitigation been rejected because Mr Flower and Mr Melville did not accept that the Claimant was stressed and overworked.

126. As to the failure to forward documents to Mr Melville after 28 September 2021, I remain wholly unable to discern how the documents were relevant to this case. None of them related to the factual allegations. The Claimant did not put forward any evidence that they were relevant to mitigation. The documents upon which she placed greatest weight were statements from Ms Camm, Ms Elliott, and another employee, Ms Tegan Townsend-Smith, obtained in August 2021 in respect of a different investigation, in which they said that they were happy working at the Derby store. However, this does not seem to me to undermine the allegations made by Ms Camm and Ms Elliott – indeed, as Mr Sanders submitted, the fact that the complainants had previously been happy working for the Claimant might seem rather more likely to bolster their credibility than to undermine it. Ultimately, having seen the documents and having heard the Claimant's evidence and her cross-examination of Mr Melville (in which she referred to some, but not all, of the documents) I do not consider them to have had any relevance to the matters that Mr Melville had to decide. I do not consider that the failure to forward apparently irrelevant documents to Mr Melville rendered the appeal process or investigation as a whole unreasonable.

127. For these reasons, while the Respondent's investigation was not flawless, it fell well within the range of reasonableness. I am satisfied that the evidence that was relevant to the substantive issues in dispute was obtained, and that no materially-relevant lines of enquiry were omitted or overlooked.

128. I have considered whether the fact that Mr Melville obtained further evidence means that the investigatory process prior to the appeal is open to criticism. I do not consider that it does. In part, Mr Melville was responding to matters raised in the appeal. But even to the extent that he was not, I do not consider that the fact that Mr Melville obtained further and fuller evidence means that the evidence initially obtained was the result of an unreasonably insufficient investigation. Even prior to Mr Melville's further investigation, a sufficient investigation had taken place into the allegations and the Claimant's responses to them. Mr Melville's actions improved the quality of the investigation, but it was within the range of reasonableness without them.

129. If I were wrong on that last point, however, I would have concluded that any unreasonableness in the investigation prior to the appeal was remedied by Mr Melville's further investigation as part of the appeal.

130. In summary, I am satisfied that the investigation was within the range of reasonable responses.

Was dismissal a reasonable sanction in the circumstances?

131. As I have found, Mr Flower and Mr Melville both concluded that the Claimant had offered junior employees the opportunity to take a bag of cannabis away from the Derby store for their own personal use, or for the use of their friends. I have found that Mr Flower and Mr Melville had reasonable grounds for that belief, and that overall the investigation was reasonable. I must assess the reasonableness of the dismissal in light of the conclusions that Mr Flower and Mr Melville reached – i.e. I must consider whether dismissal was reasonable if the Claimant had indeed offered cannabis to Ms Elliott and Ms Camm. Against that background I am driven to the conclusion that dismissal was a reasonable sanction.

132. Mr Flower and Mr Melville were plainly entitled to regard the offering of cannabis as an extremely serious matter. The conduct that they found to have occurred was, on the face of it, a criminal offence. It would certainly be wholly improper for a manager to offer to supply illegal substances to their subordinates. Such conduct would be improper in itself, as it would involve an employee whom the Respondent had placed in a position of seniority and responsibility facilitating the commission of criminal offences, whether or not she also committed offences herself. It would also run the risk of causing significant reputational harm to the Respondent.

133. Subject to any mitigation, therefore, I conclude that the finding that the Claimant had offered cannabis to Ms Elliott and Ms Camm by itself entitled the Respondent to dismiss.

134. The Respondent was also entitled to place weight on the actions of the Claimant in not disposing of the cannabis in a more appropriate manner. If this had been the only allegation against the Claimant then I would have required some persuading that, in and of itself, this rendered dismissal reasonable. But when I consider this conduct alongside the Respondent's conclusions about the offering of cannabis, the allegation of not disposing of the cannabis properly added weight to the case against the Claimant, and added force to the case for dismissal.

135. I have considered whether the Claimant's mitigation – in particular, the fact that she had been overworked and stressed – rendered it unreasonable to dismiss the Claimant. I do not consider that it did. While the Claimant's mitigation should have been (and, I find, was) borne in mind, Mr Flower and Mr Melville were entitled to conclude that it did not sufficiently reduce the severity of the Claimant's actions (as found by them).

136. I add that the fact that the Claimant had a previously unblemished disciplinary record does not render the decision to dismiss unreasonable. The conduct which Mr Flower and Mr Melville found was so serious that they was reasonably entitled to regard it as justifying dismissal, notwithstanding the absence of previous misconduct. Equally, the conduct found was so obviously wrong that the fact that the disciplinary policy does not specifically preclude it does not render the dismissal unfair.

137. In summary, I find that the dismissal was well within the range of reasonable responses, in light of the Respondent's reasonable findings.

Procedure generally

138. Going beyond the specific question of the reasonableness of the investigation, I have considered the general procedure adopted by the Respondent. In my view, this procedure was plainly reasonable. The Claimant was kept informed of the allegations against her, and she was given three opportunities (in the investigation meeting, the disciplinary hearing, and the appeal hearing) to set out her case. The procedural failings that I have identified at paragraphs 121 and 122 above do not render the dismissal unfair, for the reasons that I have already given. I have no hesitation in finding that the procedural framework adopted by the Respondent was within the range of reasonableness.

Unfair Dismissal: Conclusions

139. For the reasons set out above, I find that the Respondent had a potentially fair reason for dismissal, namely conduct, and that it acted reasonably in dismissing for that reason. It follows that the unfair dismissal claim fails and is dismissed.

140. As I have set out above, had the unfair dismissal claim succeeded, I would have gone on to consider contributory fault and ***Polkey*** deductions. It is unnecessary to do so, given the failure of the unfair dismissal claim, and I do not, therefore, address ***Polkey***. In respect of

contributory fault, given my findings as set out below, I would if appropriate have made a reduction of 30% to both the compensatory and the basic awards.

Wrongful Dismissal Claim

141. As I have set out above, in respect of this claim the question is different, and I am required to consider whether the Claimant in fact committed gross misconduct.

142. There were two allegations against the Claimant, and in submissions Mr Sanders confirmed that each was alleged to amount to gross misconduct. I will therefore consider each in turn, starting with the allegation that the Claimant had offered cannabis to Ms Elliott and Ms Camm.

Allegation of offering cannabis

143. In respect of this allegation, there is a dispute as to whether the misconduct occurred at all. I must now resolve this.

144. The question of whether the Claimant had offered cannabis to Ms Elliott and/or Ms Camm came down to a dispute of fact between the Claimant on the one hand and Ms Elliott and Ms Camm on the other. At this stage, I note that it would be open to me to accept the allegations in respect of one employee, but not in respect of the other. However, neither party argued for such an approach, and in both parties' submissions the allegations were dealt with together. I therefore deal with them together for the most part, but I have borne in mind that they are distinct allegations.

145. As to the factual dispute, the Respondent has not called Ms Elliott or Ms Camm to give evidence. I was not given a clear explanation for this, although one may well be found in the Respondent's apparent (albeit, in my view, erroneous) belief that a wrongful dismissal claim was not before the Tribunal. In any case, I do not regard the failure to call Ms Elliott and Ms Camm as something that leads me to draw an adverse inference against the Respondent.

146. As the judgment in ***Hovis Limited v Louton***, quoted at paragraph 105 above, makes clear, I must also give due weight to the evidence that I have from Ms Elliott and Ms Camm, in the form of their statements made in September and October 2021. But the fact that they have not come before the Tribunal to give evidence on oath or under affirmation may affect the weight that I give to their evidence.

147. Against this background, what do I make of the evidence from Ms Elliott and Ms Camm? I make the following points:

(1) The evidence from Ms Camm is extremely limited. As relevant, it consists of no more than the few lines quoted at paragraph 44 above. Perhaps there was little more for her to say. But her account is nonetheless a bare-bones one, lacking any detail. I am also not aware of the precise questions that elicited her account.

(2) Ms Elliott's account is more detailed. It consists of the brief statement quoted at paragraph 37 above, but also of the subsequent fuller statement to Mr Melville at paragraph 38 above. Detail is helpful, and to this extent Ms Elliott's account perhaps merits more weight than Ms Camm's.

(3) However, there are grounds for questioning both accounts. Ms Elliott and Ms Camm had discussed the matter between themselves prior to reporting their concerns to Ms Brown. This is something that may be completely innocent, but it does raise a concern about cross-contamination of their accounts, or, at the worst, collusion. Moreover, Ms Elliott's account contains a degree of possible inconsistency, in that her second statement contains an allegation that the Claimant said that she would offer the cannabis back to the customer who was presumed to have dropped it, and this allegation does not appear in the first statement. Ms Elliott's second statement also suggests a far greater degree of persistence in the Claimant's alleged offers than was suggested in the first statement. Again, this could have an innocent explanation, or it could reflect an attempt to bolster the case against the Claimant.

(4) The points identified in the previous subparagraph are not decisively destructive of the credibility of Ms Camm and Ms Elliott's accounts. But they do give rise to questions which call for answers. In the absence of Ms Camm and Ms Elliott, those questions have gone unanswered, and the Claimant has been deprived of the opportunity to pursue potentially fruitful lines of cross-examination.

(5) Where Ms Camm and Ms Elliott were advancing very serious allegations against the Claimant, and where there are unanswered questions about their evidence, the fact that I have not been able to hear that evidence tested under cross-examination must adversely affect the weight that I give to the evidence. This is not to fall into the error identified in ***Louton*** and disregard the evidence because it is hearsay; I give the evidence some weight, but the matters that I have identified reduce the weight materially.

(6) I accept Mr Sanders' submission that Ms Camm and Ms Elliott had no obvious reason to lie, on the evidence that I have heard. Of course, cross-examination might have elicited such a reason. But in any event, the mere fact that someone has no reason to lie is merely a factor to be weighed in the balance. A lack of reason to lie makes it less probable that Ms Camm and Ms Elliott were lying. But it is only one factor.

148. Overall, my view is that I must give some weight to the written accounts from Ms Camm and Ms Elliott, but that that weight is limited. This is not only because they are not present, but because they are putting forward serious allegations against the Claimant, in circumstances where there are unanswered question marks hanging over their accounts.

149. Against the evidence from Ms Camm and Ms Elliott, I had to balance the Claimant's evidence, given in the Tribunal and subject to cross-examination. I have found the Claimant to be a reliable witness on this point. I bear in mind that I have not accepted her evidence in relation to certain other matters. But that does not mean that I am bound to reject all her evidence. On the question of whether she offered cannabis to Ms Camm and/or Ms Elliott, she has been consistent in her denials, and I found that consistency on this point to be maintained during cross-examination. Mr Sanders criticised the Claimant's evidence as inconsistent, and he gave various examples of what he said were material inconsistencies. For example, it was pointed out that in her witness statement the Claimant said that she was not familiar with the appearance or smell of cannabis, whereas in the investigation meeting she spoke about people walking past smelling of it. Mr Sanders also pointed out that the Claimant's evidence was somewhat unclear as to whether she asked Ms Elliott whether the contents of the bag were cannabis, and as to what precisely she did say to Ms Elliott. It was suggested that the Claimant increased the vehemence of her denials between the investigatory meeting (where she is recorded as having said that she 'did not recall' offering cannabis to Ms Camm or Ms Elliott) and the disciplinary meeting (where she made a positive denial). However, in my view these matters, and the others that were urged on me as evidence of the Claimant's unreliability, were minor and peripheral. Terminological issues (such as whether the words 'I don't recall' are a sufficiently strong denial) take me nowhere – different people use different terminology, and I had no evidence to suggest that this terminology had any special significance when used by the Claimant. Equally, the other inconsistencies relate to matters that are not at the heart of the case (it is difficult to see what difference it would make if the Claimant had asked Ms Elliott whether the contents of the bag were cannabis, for example, or that anything would have turned on whether the Claimant became aware that the contents were cannabis because Ms Elliott told her, or because she recognised the appearance or smell), and to the extent that they are indeed inconsistencies they are in my view no more than one would ordinarily expect to see when honest witnesses attempt to recount peripheral details from over a year earlier. So I did not find that the criticisms of the Claimant's reliability on this point were made out.

150. Besides the generally positive impression that I formed of the Claimant's evidence on this point, the inherent probabilities seem to me to point against the Respondent's case. In particular, the Respondent alleges that the Claimant, after an unblemished seven-year career with the Respondent, and a thirty-year career in retail, did something as bizarre and irresponsible as offering cannabis to junior members of staff. Of course, people sometimes do bizarre and irresponsible things, but on the face of it the allegation against the Claimant was inherently improbable.

151. I have concluded that the Respondent's evidence was sufficient to raise a case, albeit not a strong one, for the Claimant to answer. In my view, her evidence more than answers that case. I have accordingly concluded that the Respondent has not proved its allegation that the Claimant offered the cannabis to Ms Elliott and/or Ms Camm.

152. I add that had I found that the Claimant had offered the cannabis to Ms Elliott and Ms Camm, I would have had no hesitation in concluding that this was gross misconduct.

Failures in disposing of the cannabis

153. In respect of this allegation, the facts are substantially undisputed. The Claimant, being in a position of seniority and responsibility, did not take advice from a more senior member of staff about disposing of the cannabis, delayed in doing so for around twenty-four hours after the cannabis had been found, and ultimately delegated the role to a junior employee, without taking steps to ensure that the disposal was carried out. The question then is whether this amounted to gross misconduct – that is, to conduct so bad that it undermined the relationship of trust and confidence inherent in the employment relationship.

154. In my view, the Claimant's conduct was certainly open to criticism. In particular, I accept Mr Sanders' characterisation of the delegation of the role of disposing of the cannabis to Ms Camm as an abdication of responsibility. As the store manager, the Claimant should have taken the lead in ensuring the disposal, or should at the least have taken steps to make absolutely sure that the disposal occurred. I place less weight on the delay and the failure to take advice – these seem to me to be failures of process which aggravate the failure to dispose of the cannabis responsibly, but if the cannabis had been disposed of responsibly notwithstanding these other failures then I cannot see that the Respondent would be justified in dismissing for them.

155. Overall, however, my view is that while the Claimant's actions amounted to misconduct, they were not gross misconduct. In my view, the correct analysis of the Claimant's actions in disposing of the cannabis is that she was confronted with a situation which was, from her point of view, unprecedented. The Respondent had no policy or procedure for the situation, so the Claimant was left to make a judgement call as to what to do next. She proceeded to make the wrong call, for the reasons that I have identified above. But in my view, applying the test set out in ***Mbubaegbu*** and quoted in paragraph 102 above, a one-off mistake in a difficult and unprecedented situation, made by a manager with an unblemished seven-year employment history is not such as to undermine the relationship of trust and confidence.

Wrongful Dismissal: Conclusion

156. In light of my conclusions above, I find that the Respondent has not proved that the Claimant committed gross misconduct. It follows that, in dismissing the Claimant with less than her full contractual notice period, the Respondent was in breach of contract, and the Claimant's dismissal was wrongful.

157. I use the expression 'less than her full contractual notice period' rather than simply saying 'without notice', because, as set out at paragraph 78 above, the Respondent informed the Claimant on 22 September 2021 that she was to be dismissed with effect from 24

September 2021. While this was said to be a dismissal 'without notice', it seems to me that it is in fact a dismissal on two days' notice, since the Claimant received and became aware of the letter on 22 September.

158. Had I found that the Claimant had committed gross misconduct, it might have been necessary to consider whether the Respondent's actions in giving two days' notice, rather than dismissing without notice, amounted to affirmation of the contract such that it lost its right to dismiss without notice (see, for example, ***Harrison v Norwest Holst Group Administration Ltd*** [1985] IRLR 240 and ***Cockram v Air Products plc*** [2014] IRLR 672). However, the question is not clear cut, I heard no argument upon it, and it is unnecessary for me to explore this issue further in light of my findings.

159. At the conclusion of the hearing, a provisional remedy hearing was listed. This will go ahead, unless the parties can agree remedy for wrongful dismissal. I encourage them to seek to do so, since the exercise of quantifying the wrongful dismissal claim is likely to be fairly straightforward. In particular, unless the Claimant is able to show that she has suffered losses as a result of the breach of contract which go beyond the pay that she would have earned during her notice period (and no such contention has so far been advanced) compensation for wrongful dismissal will simply consist of the difference between the gross sum that the Claimant would have earned from the Respondent during her notice period, and the gross sum that she in fact earned from alternative employment during this period.

160. Should the remedy hearing proceed, one point upon which I will wish to be addressed is what the Claimant's contractual notice period was. Clause 4.3 of the Claimant's terms and conditions provides that:

> *Upon completion of four weeks' employment, the period of notice will be one month served in writing by either side*.

This clearly provides for a one-month notice period once four weeks' employment has been completed. Clause 4.4 goes on to say that:

> *Upon completion of two years' service, the period of notice will increase by one additional week for each completed year of service up to a maximum of twelve weeks after twelve years' service*.

It appears to me that 'the period of notice' which is increased by one week per year's service over two years' service, is that identified in clause 4.3 – i.e. one month. So, for the Claimant, who had seven years' complete service, the combined effect of clauses 4.3 and 4.4 appears to be that the Claimant was entitled to a notice period of one month pursuant to clause 4.3, and then an additional five weeks pursuant to clause 4.4. If this were right, her notice period would exceed the statutory minimum of seven weeks. I have heard no argument on this point as yet, and therefore make no conclusive finding one way or the other, but if the parties are not able to agree the correct construction of the notice period clauses, then I will wish to hear from them on this point.

161. Separate case management directions have been issued in respect of the remedy hearing.

Conclusion

162. For the reasons set out above:

(1) The unfair dismissal claim fails and is dismissed.

(2) The wrongful dismissal claim succeeds, and remedy in respect of that will be determined at a forthcoming hearing, if not agreed between the parties.

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Employment Judge **Varnam**

21 January 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

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FOR EMPLOYMENT TRIBUNALS