EMPLOYMENT TRIBUNALS

Claimant: Mr B Moran

Respondent: G4S Cash Solutions (UK) Limited

Heard at: Manchester **On:** 11-12 January 2023

Before: Employment Judge Phil Allen

REPRESENTATION:

Claimant: Ms L Moran (lay representative)
Respondent: Ms G Holden, counsel

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant was not unfairly dismissed. The claim for unfair dismissal does not succeed and is dismissed.

The above Judgment having been signed on 12 January 2023 and sent to the parties on 13 January 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunal rules of procedure 2013, the following reasons are provided:

REASONS

Introduction

1. The claimant was employed by the respondent as a cash and valuables in transit driver from 4 February 2004 until 1 February 2022. The claimant was dismissed and claims that the dismissal was unfair.

Claims and Issues

2. As an unfair dismissal claim, the issues had not been identified in advance of the hearing. The issues were discussed and confirmed at the start of the hearing, based (in part) on issues identified by the respondent's barrister in an opening note.

3. The issues identified were as follows:

   a. What was the reason or principal reason for the claimant's dismissal?

   b. Was it related to the claimant's conduct?

   c. Did the respondent believe the claimant to be guilty of misconduct?

   d. Did the respondent have reasonable grounds upon which to sustain that belief?

   e. At the stage that the belief was formed, had it carried out as much investigation into the matter as was reasonable in the circumstances?

   f. If yes, was the decision to dismiss the claimant fair in all the circumstances?

   g. Was dismissal within the range of reasonable responses of a reasonable employer?

   h. If the claimant was unfairly dismissed, should any deduction be made because the claimant would have been fairly dismissed in any event (in accordance with **Polkey**)?

   i. Did the respondent unreasonably fail to comply with the ACAS code of practice on disciplinary and grievance procedures and, if so, should any award be increased (and by what percentage)?

   j. Did the claimant's conduct contribute to his dismissal and should any award should be reduced as a result?

4. It was identified at the start of the hearing that only the liability issues would be determined first, with remedy issues would be left to be determined if the claimant succeeded in his claim. However, issues h-j above were identified as being matters which would be determined alongside the liability issues, even though they were strictly remedy issues.

5. The claimant's unfair dismissal claim was best understood by what was set out in box 8.2 of his claim form (14). In that he contended three things:

   a. The respondent was in breach of its own procedures, as its own procedure says that a disciplinary hearing should take place within fourteen days of the alleged offence/conduct wherever practicable, whereas the claimant's disciplinary hearing took place one hundred and thirty days after the second incident;

   b. The respondent's procedure stated that if the alleged offence was of a serious nature the claimant should be suspended and the details confirmed promptly in writing. The claimant was not suspended until 21 January 2022 (which was for alleged misconduct in September 2021) and the suspension was not confirmed in writing; and

c. The claimant contended that other drivers who had made similar or more serious errors had had no action taken against them or had not had the same action as the claimant.

6. Prior to his dismissal, the claimant had a pre-existing final written warning. At the start of this hearing I confirmed with the claimant what he was raising in relation to that warning, particularly in the light of an email which he had sent to the Tribunal questioning why documents about the warning needed to be included in the bundle at all. The claimant confirmed that the final written warning was not in dispute as part of these proceedings. It had been appealed at the time, and it was clear that the claimant did not agree with it, but in these proceedings the claimant was not disputing that issue. It was confirmed that I would read the decision letter imposing the final written warning, but not any other documents relating to it. It was agreed that a final written warning was in place at the time the decision to dismiss was made.

Procedure

7. The claimant was very ably represented at the hearing by Ms Moran, his daughter and a lay representative. Ms Holden, counsel, represented the respondent.

8. The hearing was conducted in-person at the Manchester Employment Tribunal with both parties and all witnesses in attendance at the hearing.

9. An agreed bundle of documents was prepared in advance of the hearing. With the additional pages which were added to it, the bundle ran to 165 pages. On the first morning I read the pages referred to in witness statements, as well as the documents and pages which I was asked to read by each of the parties. Where this Judgment contains a number in brackets, that is a reference to the relevant page in the agreed bundle.

10. I was provided with witness statements containing the evidence from each of: the claimant; Mr Wayne Hayes, Branch General Manager for Liverpool and the disciplinary decision-maker; Mr Paul Banham, Cash Centre Business Support Manager and the person who heard the appeal; and Mr Michael Linney, Section Manager.

11. Witness statements had been ordered to be provided to the other party by 30 August 2022. The parties had agreed to vary that order and provide witness statements to each other on 30 October 2022. The claimant complied with the order as amended and sent his witness statement on that date. The respondent did not do so. The following day the respondent's in-house employment solicitor emailed the claimant apologising, proposing to send witness statements by 17 November, and explicitly undertaking that he had not and would not open or read the claimant's witness statement in the meantime. The witness statement of Mr Banham was provided on 2 December 2022 and that of Mr Hayes on 5 December 2022. I was provided with a witness statement signed by the solicitor giving reasons for the delay and confirming that the claimant's witness statement had not been read prior to the respondent's statements being prepared and sent to him.

12. As the respondent had not complied with the Tribunal's orders, the starting point was that it was not able to call its witnesses to give evidence at the hearing.

The respondent applied to be able to call Mr Hayes and Mr Banham and to rely upon the statements produced for them. The claimant objected, for entirely understandable reasons.

13. I heard brief submissions from each of the parties and made the decision that the respondent should be allowed to call the two witnesses and rely upon the statements provided. I emphasised that the respondent's failure to comply with the Tribunal's orders was entirely unacceptable. I was unimpressed by the failure to comply with the order and, in addition, was unimpressed by what I considered to be the considerable delay in the respondent drafting and providing witness statements to the claimant after the ordered date had been missed and after the claimant had provided his statement to the respondent. However, I accepted the respondent's solicitor's undertaking and the statement which he had given (as an officer of the Court) that the claimant's statement had not been opened or read prior to statements being prepared. I also was required, as the respondent's counsel emphasised, to balance the prejudice to the respondent of refusing its application with the prejudice to the claimant of allowing it. If I refused to allow the respondent to call the dismissing officer to give evidence in an unfair dismissal claim, the impact would in practice be that the respondent would fail in its defence to the claim. There was prejudice to the claimant in the delay as a party without professional representation, but he had been provided with all the statements by 5 December 2022 and a fair hearing was possible. Accordingly, I allowed the respondent to call the two witnesses and to rely upon the statements prepared for them.

14. The position of Mr Linney was different. Mr Linney attended the hearing because he had been ordered to do so by the Tribunal. The claimant had applied for the witness order to be made. Mr Linney is a manager at the respondent and the respondent had prepared and provided a witness statement on his behalf. The respondent's representative accepted that in practice Mr Linney should be treated at the hearing as one of the respondent's witnesses, and accordingly the claimant's representative was able to cross-examine Mr Linney.

15. On the morning of the first day I read all the witness statements. I then heard evidence from each of the respondent's witnesses, who were each cross examined by the claimant's representative. The claimant then gave evidence from mid-afternoon on the first day until mid-morning on the second day. He was cross examined by the respondent's representative.

16. After the evidence was heard, each of the parties was given the opportunity to make submissions. As she was not a professional representative, the claimant's representative was allowed to make submissions second as she wished to do so, and the respondent did not object. The respondent's representative provided a written closing submission as well as making oral submissions.

17. I was grateful to both the claimant's and the respondent's representatives for the way in which the hearing was conducted, which was entirely appropriate.

Facts

18. The claimant commenced employment on 4 February 2004 and he worked for the respondent for just under eighteen years. He was employed as a cash and

valuables in transit driver. The claimant delivered and collected money from customers. There was no dispute that such deliveries and collections could involve significant sums of money.

19. On 8 April 2021 the claimant was issued with a third level final warning for inappropriate behaviour/conduct (55). That was to remain on the claimant's record for eighteen months. The respondent's procedure provided for third level warnings to remain live for twelve months, but it stated that the period could be extended to eighteen months (152). As I have explained, the imposition of the final written warning was not an issue before me, but it is fair to record that the claimant did not agree with the sanction which had been imposed and was disappointed that it had been after such long service. The respondent's procedure (152) says that dismissal will normally result if, following a final warning, conduct remains unsatisfactory. The letter sent to the claimant (55) stated that "*If during the 18 month period there are any further concerns in regards to your conduct then further disciplinary action will be taken and this warning will be taken into account*".

20. The respondent operates a set of golden rules. There was no dispute that they were well known and that the claimant had been trained on them. One of those rules was that an employee should "*Never let a container out of your possession without a receipt*".

21. On 21 September 2021 the claimant delivered a bag to a particular customer, but when he was later asked for the receipt he was unable to locate it. The claimant had no idea where that receipt was. The claimant accepted that this breached the golden rule, albeit he emphasised that he had obtained a receipt when the container had left his possession, it was just that he was unable to find it later.

22. On 24 September 2021 the claimant made a delivery to a customer's store and did not leave with a receipt. When he returned to the store the following day, the claimant was provided with the receipt. The claimant accepted that this breached the golden rule.

23. There was no question whatsoever about the honesty of the claimant. When the omissions were identified, it was confirmed with the customer that they had received the deliveries. No money was lost, taken, or misplaced. The respondent's position was that the absence of a receipt or receipts meant that the respondent could have been liable for the sums as they would have been unable to prove that they were delivered if challenged about it.

24. An investigation was undertaken into the two issues. The claimant was interviewed on 29 September 2021 about the 24 September issue (61), and on 14 October 2021 about the 21 September issue (66). An investigation report was completed by the investigator on 2 November 2021 (65). He recommended a formal disciplinary hearing to be chaired by a manager at Branch Management level or higher because of the live warning. The investigation report said under the hearing "*Mitigating Factors*" that the claimant "*had to work around approved process for petrol station to store delivery due to batching error. Although it does not justify delivering containers without obtaining receipts it made the whole delivery process more complicated than it should be. Brendan took honest and open approach to the investigation.*"

25. It was the claimant's evidence that at one of the investigation meetings he raised with the investigator that he believed he should be looking for a new job as he had a current final written warning. The investigator told him not to do so. In the light of what transpired, that answer was a source of grievance for the claimant, and I understand why that was the case.

26. I heard some evidence about the respondent's money delivery and collection processes, and issues that had arisen with them. I do not need to address them in detail. I would perhaps summarise the position by saying that the processes that the respondent had in place and which were actually being operated by the claimant, were not as robust as I would have expected. The hand-held device used by the claimant for the customer in question at that time, would not enable him to use it to record a collection from the customer's garage which was then delivered to the customer's store. A work around had been identified, which involved using receipts completed either manually or only partly electronically. The claimant's evidence was that the work around was more onerous and time-consuming for the driver. The claimant's case was that had the hand-held devices operated correctly on the relevant days, the issues with receipts would not have been checked and identified. That evidence would appear to have been correct, albeit it was also the evidence I heard that it was always possible that receipts could be checked, such as if a customer raised an issue.

27. The use of receipts was described in the hearing as the failsafe, something which the claimant accepted. Receipts were to be collected and delivered by the driver to the office at the end of the working day. The claimant's process for collating and storing receipts was to place them on the visor in the vehicle attached with an elastic band. Perhaps surprisingly, the respondent did not have any formal process for retention and return of the receipts, or an identified way of retaining and storing them (save for placing them in an envelope at the end of the day).

28. The respondent's disciplinary procedure says (149): "*The disciplinary hearing should take place within 14 days of the alleged offence or conduct, wherever practicable. The timing and location of the meetings must be reasonable*". For the claimant's dismissal there was a period of one hundred and thirty days from the second incident to the disciplinary hearing (24 September 2021 until 1 February 2022). The investigation report itself was completed well outside the fourteen day period.

29. The claimant was first invited to a disciplinary hearing in a letter from Mr Holmes of 30 November 2021 (77). That and the subsequent meeting invites, provided the usual information including the right to be accompanied and a summary of the allegations. The notes and documentation obtained in the investigation were provided to the claimant. The first invite said the hearing was due to take place on 6 December. The second invite dated 15 December from Mr Banham said the hearing would be on 22 December (83). The third invite dated 22 December from Mr Banham said the hearing would be on 5 January (84). The fourth invite of 21 January from Mr Hayes said the hearing would be on 31 January (85). I was also provided with a further invite from Mr Hayes of 26 January arranging the hearing for the same date. The final invite letter from Mr Hayes of 28 January 2022 arranged the hearing for 1 February (89).

30. I was provided with some emails which detailed the respondent's managers' attempts to agree who should conduct the hearing and when (79). They, in summary, recorded illness, absence, short-staffing and workload issues, as reasons for the changes in managers and the delay. The first email was dated 30 November, which I would observe was a long time after the fourteen-day period had expired. In one of the emails Mr Holmes offered Mr Banham that he would "*pay you in beer*" if he conducted the disciplinary meeting the following week. I find it to reflect very poorly on the respondent's management team that such terminology was used when discussing a hearing which could result in an employee being dismissed – something which should always be considered to be of the utmost seriousness.

31. Notably, an email of 10 December 2021 from the operations manager for the Manchester hub urged Mr Banham to arrange the hearing after 3 pm so that the claimant could have completed at least part of his work for the day. The claimant was critical of this email and contended that it proved that the respondent wished to retain him in employment for the busy Christmas period when it was short staffed. I do not draw the same conclusion from this email as the claimant, but I do find what was written to be, at the least, somewhat incongruous in circumstances where a hearing was being arranged which could well lead to the claimant's dismissal (and indeed did).

32. The claimant in his evidence acknowledged that the hearing was delayed on two occasions for reasons relating to the claimant. A hearing in January was postponed due to a short period of the claimant's ill health. The move of the hearing from 31 January to 1 February was as a result of the claimant attending an urgent blood test. In his appeal, the claimant drew a distinction between the first seventy-three days between the offence and the hearing initially being arranged. In her submissions, the claimant's representative highlighted that all but five or six days of the delay were attributable to the respondent.

33. The claimant confirmed in evidence that his recollection of the events was not affected by the delay. He would have preferred that it was done as quickly as possible so that he could have got on with his life. His representative emphasised the impact that it would have upon anyone to have such a decision hanging over them for a long period of time.

34. The claimant was not suspended for the vast majority of the time between the incidents and the disciplinary hearing. He was suspended on 21 January 2022. That followed a further event. It was common ground that the claimant was not provided with any written confirmation of his suspension or the reasons for it. The respondent's policy clearly provided that such written confirmation should be provided promptly following suspension (150). I did not hear any evidence from the respondent's witnesses about the reasons for that suspension.

35. The disciplinary hearing took place on 1 February 2022. It was heard by Mr Hayes. Mr Hayes' evidence was that at the time he was asked to hear the claimant's disciplinary case, he had never met or heard of the claimant. The claimant was accompanied by a colleague, and a note taker also attended. I was provided with the notes of the hearing (90). The claimant accepted that the notes were accurate in recording the formal part of the meeting. There was a dispute of evidence about something said by Mr Hayes at the start of the meeting as the attendees were still

sitting down in relation to how long the process should take. I do not need to resolve the difference in evidence about what was said.

36. In the disciplinary hearing, the claimant confirmed that he was aware of the relevant golden rule and the importance of it. He accepted that he did not have the receipt which had been lost. He referred to his colleague as being more organised than he was with the receipts and said that he was slapdash at best at times. The reference to being slapdash was repeated later in the meeting. In the Tribunal hearing the claimant's evidence was that the reference to being slapdash was a reference to the need to rush in, do the job, and get out, due to the pressure of work under which drivers were placed. The claimant did not raise workload pressures in the internal procedures as explaining the golden rule breaches.

37. The disciplinary hearing lasted for a little over one and a half hours before it was adjourned. After adjourning for three quarters of an hour, Mr Hayes returned and informed the claimant of his decision. The full decision as explained was recorded in the notes of the meeting (94). I will not repeat all that was said. Mr Hayes found that a golden rule had been breached twice. He expressed the view that the two breaches occurring in close succession represented a considerable amount of risk to the business. He referenced the slapdash comment and expressed the view that it did not fill him with confidence. He concluded that the sanction he would have imposed would ordinarily have been a twelve month warning, in the light of the fact that there was no cash loss and the claimant's length of service. He went on to say "*However, I am aware that you are already on an 18 month warning for a conduct issue. Therefore it is with regret that I have to inform you of my decision to dismiss you from the business today due to the totting up of warnings*". The claimant was dismissed with immediate effect and paid in lieu of notice.

38. The decision was confirmed in a letter of 2 February 2022 (96). That stated: "*As you already currently have a live Final Formal Written Warning, and you have received an additional disciplinary sanction, I have decided to terminate your contract*".

39. The claimant appealed on 3 February (98). The claimant highlighted in his appeal some of the same matters which he did in his claim to the Tribunal, including the delay in the disciplinary hearing and the fact that he had not been suspended. The appeal was heard by Mr Banham on 11 March 2022. Mr Banham's evidence was that before his involvement in this process he had never met or heard of the claimant. Notes of the hearing were provided (105). The claimant was accompanied at the appeal hearing by a work colleague, and a minute taker also attended. The grounds of appeal were discussed. The claimant raised his argument that he was being inconsistently treated. Mr Banham expressly stated in the appeal that there had been no accusations of theft, it was a case of not following the processes which had been set out. Following the hearing Mr Banham looked into the allegation of inconsistency of treatment which the claimant had raised, before making his decision. The appeal was not upheld and a written decision was provided, in which Mr Banham responded to each of the claimant's appeal points (112). In his evidence to the Tribunal Mr Banham explained his reasons for rejecting each of the grounds of appeal.

40. Mr Banham agreed that the timeframe from the date of the offence to the date of the disciplinary hearing was "*unacceptable*". He emphasised that the policy said only that the hearing would be conducted within fourteen days wherever reasonably practicable. He concluded that the delay would not have altered the outcome of the disciplinary hearing. On the claimant's point about not being suspended, Mr Banham pointed out that the dismissal was not on grounds of gross misconduct, an allegation of which would typically warrant suspension, but was because of conduct "*due to already being on a live final warning for a previous conduct related issue*". He also acknowledged that a suspension letter should have been issued when the claimant was suspended.

41. The respondent's procedure provided for a further appeal stage. The claimant appealed on 22 March 2022 (117). The grounds of appeal reflected the key points in the Tribunal claim including: the length of time taken to complete the disciplinary process; the absence of suspension; and the alleged inconsistent treatment. Mr Holmes heard the second appeal on 7 April 2022 and notes were provided (127). The appeal was not upheld in a letter of 13 April 2022 (131). I did not hear evidence from Mr Holmes. The claimant raised no particular issue about the conduct of the second appeal.

42. Mr Linney is now a section manager, but for seventeen years was a driver for the respondent. In his evidence he provided his view that the decision to dismiss the claimant was "*slightly harsh*" when no cash had actually been lost.

43. The circumstances of the other situation raised by the claimant as being comparable, were confirmed in evidence by Mr Linney. The other driver had breached the same golden rule. He had obtained a collection receipt instead of a delivery receipt. The other driver was a relatively new starter. No formal disciplinary action was taken. It was clear that an investigation of sorts was undertaken as demonstrated by emails (157). Mr Banham's evidence in his statement was that the other driver received a note to file and further training. The other driver had not previously been issued with a warning. He was not dismissed, or indeed subjected to any formal sanction.

44. Mr Linney also confirmed in his evidence that he was aware of a driver who had been dismissed after he failed to get a receipt, when that driver was already on some type of warning at the time the issue occurred.

45. In his evidence, the claimant also raised an occasion when the hand-held terminal for a driver had erroneously recorded him as missing one hundred and twenty one bags of twenty pence pieces and that error had not been raised or explored further by the vault officer, in contrast to the issue raised by the claimant's hand-held device. This was not in practice evidence of an inconsistent outcome in comparable circumstances, but was the claimant evidencing the flaws with the respondent's equipment which I have already addressed, and some inconsistency about what was raised with management and investigated.

The Law

46. The unfair dismissal claim was brought under Part X of the Employment Rights Act 1996.

47. The respondent bears the burden of proving, on the balance of probabilities, that the dismissal was for misconduct. If the respondent does persuade me that it held the genuine belief and that it did dismiss the claimant for that reason, the dismissal is only potentially fair. I must then go on and consider the general reasonableness of the dismissal under section 98(4) of the Employment Rights Act 1996. That section provides that the determination of the question of whether a dismissal is fair or unfair depends upon whether in the circumstances (including the respondent's size and administrative resources) the respondent acted reasonably or unreasonably in treating the misconduct as a sufficient reason for dismissing the claimant. This is to be determined in accordance with equity and the substantial merits of the case. The burden of proof in this regard is neutral.

48. In conduct cases, when considering the question of reasonableness, I am required to have regard to the test outlined in **British Home Stores v Burchell [1980] ICR 303**. The three elements of the test are:

(1) Did the employer have a genuine belief that the employee was guilty of misconduct?

(2) Did the employer have reasonable grounds for that belief?

(3) Did the employer carry out a reasonable investigation in all the circumstances?

49. The additional question is to determine whether the decision to dismiss was one which was within the range of reasonable responses that a reasonable employer could reach.

50. I must not substitute my own view for that of the respondent. I must not slip into what is sometimes called the substitution mindset. It is not for me to decide whether I would have dismissed the claimant had I conducted the disciplinary hearing and considered the evidence which was in front of the decision-maker.

51. In considering the investigation undertaken, the relevant question is whether it was an investigation that fell within the range of reasonable responses that a reasonable employer might have adopted. In considering fairness, it is important that I look at the process followed, as a whole, including the appeals.

52. I am also required to have regard to the ACAS code of practice on disciplinary and grievance procedures. That provides that "*whenever a disciplinary or grievance process is being followed it is important to deal with issues fairly. There are a number of elements to this: Employers and employees, should raise and deal with issues promptly and should not unreasonably delay meetings, decisions or confirmation of those decisions.*"

53. The respondent's representative made reference in her closing submissions to **RSPCA v Cruden [1986] ICR 205**. That is a case in which a Tribunal had found that a delay in the disciplinary process had rendered the dismissal unfair, and that finding was not overturned on appeal. I had understood that the respondent's representative had drawn a distinction between the two cases, because in **Cruden** the claimant was prejudiced by the delay which rendered him unable to properly

recall the incident, something which was not present in this case. In fact, the respondent's representative corrected this during submissions. In any event, **Cruden** as an authority confirmed only that a delay in a disciplinary process can render a dismissal fair (as it had done in that case), it did not decide that a delay must always do so.

54. With regard to a case where there is a final written warning upon which the decision is based, the respondent's representative in her closing submissions relied upon **Wincanton Group plc v Stone 2013 ICR 6.** The claimant was not contending that the previous warning was not imposed in good faith. I am not able to go behind that warning, and indeed I stopped the respondent's counsel from asking questions about the matters which led up to it. It was submitted that I am required to remember that a final written warning always implies that any subsequent misconduct of whatever nature will usually be met with dismissal.

55. In relation to a dismissal following a final written warning, the starting point is the terms of section 94 itself. The question is whether the final written warning was a circumstance which a reasonable employer could reasonably take into account in deciding to dismiss, which in this case it was.

56. Relevant to this decision was consideration of consistency. Equity as used in the words of section 98(4), includes the concept that equivalent misconduct should result in the same punishment and, where one person is penalised more heavily than others who have committed the same offence, that employer will not have acted reasonably in treating that offence as a sufficient reason for dismissal.

57. The respondent's representative relied upon **Hadjioannou v Coral Casinos Ltd IRLR 352** as authority for the fact that an inconsistency argument is only relevant where: the employees have been led to believe that certain conduct will not lead to dismissal (which was not the situation in this case); evidence of other cases being dealt with more leniently supported a complaint that the reason for dismissal was not really the one relied upon (which was also not what the claimant was arguing); and decisions made in truly parallel circumstances indicted that it was not reasonable for the employer to dismiss – the respondent relied upon **Doy v Clays Ltd EAT 0034/18** to say that this meant truly similar or sufficiently similar rather than truly parallel. The respondent's representative also counselled against attaching too much weight to consistency of treatment rather than the words of section 98(4) itself, citing **Hadjioannou, Securicor Ltd v Smith 1989 IRLR 356** and **Kier Islington Ltd v Pelzman EAT 0266/10**.

58. I won't outline the law as it applies to **Polkey**, the uplift for an unreasonable failure to comply with the ACAS code, or contributory fault, save to address one matter. At the start of the hearing, I raised the question of the respondent's representative's reliance upon an argument of contributory fault at the hearing when it had not been pleaded by the respondent, that is included in the response that it put together. In her submissions, quite correctly, the respondent's representative highlighted what was said by the Employment Appeal Tribunal in **Swallow Security Services Ltd v Millicent EAT/0297/08** which was that if contributory conduct is identified, I am obliged to consider contributory fault irrespective of whether it had been pleaded by either of the parties.

Conclusions – applying the Law to the Facts

59. I find that the principal reason for the claimant's dismissal was the misconduct identified on the two occasions in September 2021 when the claimant had been unable to provide a receipt for a container which had been let out of his possession and, accordingly, he was in breach of (or at least unable to evidence compliance with) one of the golden rules. That was the reason why Mr Hayes dismissed the claimant, when he found that misconduct in circumstances where the claimant had a current final warning. That did relate to the claimant's conduct. Mr Hayes did reasonably believe the claimant to be guilty of the misconduct found. There were reasonable grounds for that belief; indeed, the claimant admitted it.

60. I also find that at the stage that the belief was formed, the respondent had carried out as much investigation into the matter as was reasonable in the circumstances. The investigation was a reasonable one. When the claimant raised issues in a hearing they were considered. When he raised further issues in his appeal, they were considered and to an extent further investigated.

61. Was the dismissal within the range of reasonable responses of a reasonable employer? I find that it was in circumstances where the claimant had a final warning in place. I agree with what Mr Linney said and that the dismissal was slightly harsh, where the claimant had been employed for eighteen years and no cash was actually lost. However, the fact that I think it was slightly harsh, does not mean that it fell outside the range of reasonable responses of a reasonable employer. The fact that other employers may not have dismissed, did not render this dismissal unfair.

62. The claim as actually pursued in practice focussed upon the broader application of section 98(4) of the Employment Rights Act 1996 and whether the decision to dismiss the claimant was fair in all the circumstances. That argument has been pursued based upon the arguments in the claim form which I set out at the start of this Judgment.

63. Starting with the delay, there was a notable and significant disconnect between the fourteen days which the respondent's procedure set out or aspired to and the length of time taken in this case. I accept that the policy is not contractually binding and includes words which introduce a caveat to the fourteen days, but where an employer chooses to set out in its own policy a timescale to which it will normally comply, I would expect there to be some greater attempt made to adhere to such a timescale.

64. Mr Banham described the delay as unacceptable. I agree. I do not find that the respondent dealt with issues promptly. It did begin the investigation relatively promptly. It did not finish the process promptly. I understand some of the reasons for delay. However, as I have already highlighted, the process had been notably delayed even before the emails which evidenced the reasons for the delay in arranging the hearing. I also accepted the claimant's representative's submission that the workload issues did not make the failure to arrange the hearing more quickly reasonable. Mr Banham's evidence was that there were ten managers who could have conducted the disciplinary hearing. I have already addressed the emails which addressed arranging the hearing. Putting aside the short delays introduced by the

claimant's health and blood test, I do find the delay to be unreasonable. The respondent did not comply with what is said in the ACAS code of practice.

65. However, I do not find that the delay and failure to adhere to the ACAS code in this respect rendered the dismissal unfair. There was no impact from the delay on recollections or the outcome of the hearing. I appreciate the point made by the claimant's representative about the difficulty of having such a process hanging over someone when they are an employee. However, I also accept the respondent's representative's submission that (at least financially) there was a benefit to the claimant in remaining employed throughout the process. The claimant was fully able to engage with the process and take part in the hearing. He could recall the events, which he had admitted shortly after they occurred. I do not find that the delay renders the dismissal unfair. I do not find that in the circumstances (including the respondent's size and administrative resources) the respondent acted unreasonably in treating the misconduct as a sufficient reason for dismissing the claimant, applying the section 98(4) test.

66. I do not find the arguments arising from the suspension particularly assisted the claimant in his claim. Had he been dismissed for gross misconduct, then the lack of initial suspension and indeed the email from Mr Puzynski (80) requesting that the claimant be allowed to undertake his work, would have pointed strongly against an argument that the misconduct was such that the claimant could not remain employed. However, where the claimant was dismissed on a totting up basis, the lack of suspension was not material to the fairness of the dismissal. I note that the respondent also failed to comply with its procedures when suspending the claimant. That was not good or correct practice, but it did not render an otherwise fair to dismissal to be unfair.

67. I have already explained the law about inconsistent treatment. I can understand why the claimant has raised the other person which he has and appreciate that involved a failure to adhere to the requirements of the same golden rule. However, the two situations and outcomes are not sufficiently similar for the lack of dismissal in the other case to render the claimant's otherwise fair dismissal, instead unfair. I am not persuaded that the length of service of the two individuals made a material difference. I understand that the respondents drew a distinction between one wrong receipt in the other case, and the absence of two receipts for the claimant. The most significant and material difference was the claimant's final warning, which the other person did not have. I agree that in the light of the similarities it is surprising that the other case did not result in a formal disciplinary procedure, when the breach of the golden rules was emphasised as being so important for the claimant in this case. However, as the other person was not dismissed and would not have been in any event as he did not have a final warning even had he been treated comparably to the claimant, that does not render the dismissal of the claimant unfair (applying what was said in the **Hadjioannou** case), in that the other case was not truly or sufficiently similar.

68. I therefore find that in all the circumstances (including the respondent's size and administrative resources) the respondent acted reasonably in treating the misconduct as a sufficient reason for dismissing the claimant, applying the section 98(4) test.

69. As a result, I do not need to go on and determine the other issues, but I will briefly address them.

a. Had I found that the claimant had been unfairly dismissed as a result of the delay, I would have found that there was a 100% chance that the claimant would have been fairly dismissed by this respondent in any event, applying the approach set out in the case of **Polkey.** That decision did not take any account of the matters which led to the January 2022 suspension as I did not hear sufficient evidence for me to take that into account. That is based upon the misconduct that was found.

b. I would have found that the respondent unreasonably failed to comply with the ACAS code of practice on disciplinary and grievance procedures, albeit I cannot say whether I would have determined if any award should be increased or by what percentage, as that would have depended on what I had found.

c. I would have found that the claimant contributed to his own dismissal and it would have been appropriate to reduce the award to reflect that contribution. However, in the light of my view that the dismissal was slightly harsh and the fact that what occurred was one receipt was lost and one left behind, it is unlikely that I would have reduced the awards by 100% due to contributory fault, but a significant contribution such as 75% would have been appropriate.

70. In practice the points at paragraph 69 are not determinative of the outcome, as they are additional points which I would have needed to determine had I found that the dismissal was unfair. I have not found the dismissal to be unfair, for the reasons I have explained.

Employment Judge Phil Allen

6 February 2023

JUDGMENT AND REASONS
SENT TO THE PARTIES ON

7 February 2023

FOR THE TRIBUNAL OFFICE