



EMPLOYMENT TRIBUNALS

Claimant: Elizabeth Chand

Respondent: EE Limited

Heard: by CVP in Birmingham

On: 2nd and 3rd of October 2023

Before: Employment Judge Codd

Appearances

For the Claimant: Ms Grumbs (Counsel)

For the Respondent: Ms Nketiah (Counsel)

JUDGMENT

1. The claim for unfair dismissal is not well founded and is dismissed.
2. The claim for wrongful dismissal is not well founded and is dismissed.

Employment Judge Codd

02.11.2023

DECISION AND REASONS

Introduction

1. The claimant was employed by the respondent as a Senior Customer Advisor within various branches of the respondent's high street stores. She commenced her employment on the 21st of August 2007, initially as a part time advisor, before being promoted and taking a full time role. At the time of her dismissal she was working in the West Bromwich store.
2. The claimant was dismissed on 14th November 2022, for gross misconduct. She engaged in early conciliation between the 9th of February 2023 and the 2nd of March 2023, before issuing her claim (in time) on the 31st March 2023.
3. The claimant avers that the decision to dismiss her amounted to an unfair dismissal, and that a reasonable employer would not have deemed her conduct to be gross misconduct, or if it did, that a reasonable employer would not have dismissed her for this. She further claims that she was wrongfully dismissed, and that she should have been paid her notice pay.

Background

4. The claimant had approximately 16 years of good service at the time of her dismissal and no previous disciplinary action had been logged against her. She had on three occasions (including in the West Bromwich store), been sponsored by her manager, for the application process to the Aspire management academy. This is an application process for management training. She was unsuccessful in obtaining a place, on each occasion.
5. During late 2021 the claimant's parents were taken unwell with separate conditions. Those resulted in the claimant having to take periods of emergency leave to care for them. The respondent supported the claimant on three occasions to take periods of leave associated with this. The claimant claims that throughout 2022 the situation with her caring responsibilities was such that, she was on call for their medical appointments and under significant stress emotionally, which impacted upon her work performance. The claimant argues that coupled with this the stressful environment of the store resulted, in her making a number of poor decisions.
6. The respondent became aware (via a compliance audit) that there were a number of transactions completed by the claimant which were said to be 'forced churn.' This is a term used for a monthly mobile phone contract that is later unpaid. It is said the claimant had been non-compliant with the respondents policies and

procedures, resulting in contracts being entered, which should have been declined. These allegations can be summarised as follows:

- A) On the 2nd of June 2022, that the claimant completed a credit check for a customer indicating an address had been used for three months, which was rejected. 4 minutes later the claimant completed a second credit check where the address duration had been changed to three years, resulting in a successful credit check.
 - B) On the 26th of August 2022, the claimant processed two sales consecutively for the same customer. Each sale was created using a separate BAN, and each BAN contained a different address for the customer. BAN is a term for a customer identity and each customer should only ever have one BAN. Each BAN created contained a separate sale and were completed consecutively.
 - C) On the 28th September 2022 when scanning a customer's ID, - which produced a 'REFER code', that she manipulated the situation in order to approve the transaction in contravention of the customer connections policy. The claimant obtained a reference number from IT, usually for instances of technological problems with the scanner, when she should have referred the case for further identification to be provided. In so doing the claimant was able to authorise the transaction without identification being provided.
 - D) On the 2nd of October, the claimant accepted a customer's ID for an order which had been processed by a colleague. The claimant failed to check the ID, and consequently did not note that the date of birth did not match the date noted on the respondent's system.
- 7. The claimant was placed under investigation. An investigation meeting took place on 14th of October 2022, completed by Deann Perry – a manager from another store. This concluded that the matter should proceed to a disciplinary hearing.
 - 8. The claimant attended a disciplinary hearing chaired by Christopher Palmer, on the 10th of November 2022. The claimant was not accompanied, but was offered ample opportunity to reschedule the meeting, and declined to do so.
 - 9. Following that ,meeting the claimant was informed that she was dismissed for gross misconduct, at a meeting on the 14th November 2022. On the 23rd November 2022 Mr Palmer wrote to the claimant with details of his rationale.
 - 10. On the 30th of November 2022 the claimant instigated her right to appeal. Her appeal was heard by Kieron Matthewman on the 13th January 2023. The claimant was accompanied to this meeting and the appeal outcome meeting on the 7th February. The decision of the appeal hearing upheld the original findings,

following a period of further investigation, regarding the matters complained of by the claimant.

The Law

11. Section 98 of the Employment Rights Act 1996, deals with the fairness of dismissals. There are two stages within section 98. First, the employer must show that it had a potentially fair reason for the dismissal within section 98(2). The burden of proof rests with the employer to demonstrate the reasons. In this case the respondent relies upon 'conduct' being the potentially fair reason for dismissal.
12. Second, if the respondent shows that it had a potentially fair reason for the dismissal, the Tribunal must consider S98(4), without there being any burden of proof on either party, namely whether the respondent acted fairly or unfairly in dismissing for that reason. I must consider the overall merits and circumstances of the case when balancing this issue.
13. In misconduct dismissals, there is well-established guidance for Tribunals on the approach to fairness in section 98(4). The decisions in **BHS V Burchell 1978 IRLR 379 and Post Office v Foley 2000 IRLR 827** should be applied. The Tribunal must decide whether the employer had a genuine belief in the employee's guilt. Then the Tribunal must decide whether the employer held such genuine belief on reasonable grounds and after carrying out a reasonable investigation. In all aspects of the case, (including the investigation, the grounds for belief, the penalty imposed, and the procedure followed), in deciding whether the employer acted reasonably or unreasonably within section 98(4), the Tribunal must decide whether the employer acted within the band or range of reasonable responses open to an employer in the circumstances. It is immaterial how the Tribunal would have handled the events or what decision it would have made, and the Tribunal must not substitute its view for that of the reasonable employer (**Iceland Frozen Foods Limited v Jones 1982 IRLR 439, Sainsbury's Supermarkets Limited v Hitt 2003 IRLR 23, and London Ambulance Service NHS Trust v Small 2009 IRLR 563**).
14. It is accepted by the claimant that the respondent held a reasonable belief in her misconduct. She does not dispute that there was a potentially fair reason for her dismissal.
15. If the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would still have been dismissed had a fair and reasonable procedure been followed, in accordance with the principles in **Polkey v AE Dayton Services Ltd [1987] UKHL 8; Software 2000 Ltd v Andrews [2007] ICR 825; W Devis & Sons Ltd v Atkins [1977] 3 All ER 40; and Crédit Agricole Corporate and Investment Bank v Wardle [2011] IRLR 604**.

16. Finally, I must consider whether it would be just and equitable to reduce the amount of the claimant's award because of any blameworthy or culpable conduct before the dismissal, as set out in section 122(2) & 123(6) of the 1996 Act, and if so to what extent? The respondent said that if I decided that the claimant was unfairly dismissed, the award should be reduced by 100%.

Issues in dispute

17. The claimant does not dispute the procedural fairness of the investigatory procedure or the physical conduct of the disciplinary meeting or the subsequent appeal.
18. The claimant does dispute that the fairness of the dismissal was compromised by the fact that the respondent had advertised the claimant's job, prior to sending her the written confirmation of her dismissal. Save for this, the physical process and procedures applied, are not argued to have been procedurally unfair.
19. The claimant disputes whether the respondent applied appropriate weight to her mitigation and whether the decision to dismiss her and find the allegations as gross misconduct were outside the band of reasonable responses for an employer to achieve. In effect she argued that had that mitigation been applied, it would have affected the reasonable belief in the claimant's deliberate misconduct, and would have led to a conclusion of negligence, for which a reasonable employer would not have dismissed her.
20. There is no factual dispute regarding the substance of the allegations against the claimant, other than she denies any deliberate attempt to defraud or manipulate the system. She relies on acts of negligent poor decision making, affected by her personal and work stress.
21. It is therefore necessary for me to examine each allegation, and the mitigation offered.

Findings and Analysis

22. I have had the opportunity of hearing from four witnesses through the course of the two day hearing. There was very limited challenge made to Ms Perry regarding the nature of her investigation. Apart from some limited clarification, there was no effective challenge made to the substance or fairness of the investigation. There was in effect no need for the claimant to challenge this aspect of the investigation, based upon the nature of the case she was running. Accordingly, it is not necessary for me to make any findings in respect of Ms Perry's role or conduct, and her evidence was of limited weight and assistance to the overall findings.
23. The majority of the evidence of the claimant and Mr Palmer's evidence, related to the substance of the allegations and the nature of the claimant's mitigation, and what Mr Palmer took into account.

24. In respect of Mr Maththewman, who heard the claimant's appeal, the nature of the challenge to his evidence was the fairness of the dismissal, rather than any criticism of his investigation and process.

Claimant's mental health

25. Mr Palmer was challenged extensively at the outset of the evidence as to what weight he had attached to the claimant's mental wellbeing and her mitigation in relation to the stress that she was suffering from.

26. It became clear to me that the respondent has access to a wellbeing package which could be provided to employees. This was not accessed by the claimant, until after she was suspended. It was accepted that compassionate leave had been provided when required, however regarding the substance of day to day support this was down to the line manager and assistant managers, neither of whom appeared to give evidence.

27. Mr Palmer said that he had taken into account the difficulties, but that the scale of the fraud over a consistent time meant that it did not provide appropriate mitigation. He indicated that he had sympathy and understanding for the difficulties that the claimant had.

28. Having heard from the claimant I was struck by the obvious difficulties she had experienced, with both of her parents suffering life changing and potentially life limiting illnesses within a short period of time. The stress of this was in my finding not to be underestimated. I was struck in Mr Palmer's evidence, as to whether he truly understood the 'fog and confusion' that the claimant was likely to have been experiencing during the course of her day to day life. It was difficult to really distinguish what weighting he had placed upon the claimant's circumstances at that time. I found his perception of what impact stress may have on an individual's ability to perform familiar, or known day to day tasks, to be concrete in its construction, and his assessment of the impact was unrealistic and blinkered. This was a consistent theme and I shall discuss this in more detail below, when I consider each allegation.

Fraud

29. It was clear that Mr Palmer felt the actions of the claimant had committed numerous egregious breaches of policy and were fraudulent. 'Fraudulent' was a word that repeatedly re-appeared in his evidence. I was at pains to clarify the meaning he applied to that word. Although he acknowledged the difference between the criminal law and the internal definitions (referred to as 'forced churn') I was left in absolutely no doubt that Mr Palmer perceived each and every allegation against the claimant to amount to fraud. I am also certain that in his mind he perceived and equated that to a criminal act. When examining whether it was a customer attempting to commit a fraud, or whether it was the claimant who was committing fraud, I found that he did not, and could not, distinguish the two matters in his evidence. It was clear to me that he found the claimant to be equally culpable of fraud, in respect of each of the four allegations.

30. When questioned about how, if it were a fraud the claimant could have benefited, he did not allege direct financial involvement with a criminal, (i.e. that the claimant was being paid to enter fraudulent contract). However, he was clear that the claimant would have benefitted from higher sales performance, via her performance related bonus.

31. When questioned on how that was the case, Mr Palmer was unclear as to the impact that 'forced churn' would have on whether the bonus was paid. In my finding he made the presumption, both in his investigation and in his evidence that it would be paid, and therefore benefit the claimant. He was unable to explain the impact of any marginal sales would have on the payment of such a bonus. He did not have the details to hand as to what the claimant's sales were and whether in effect she needed these transactions to make up the bonus (in the separate months when the transactions occurred). I find that at no point had he reassured himself of this information, during the disciplinary process. This was in my finding a crucial oversight, as it has influenced his view as to the presence of a fraud.
32. I also find that there were further oversights in Mr Palmer's understanding about the bonus provisions. Page 279 of the bundle includes an FAQ document about the bonus provisions. That makes it clear that a failure to follow ID processes would result in a bonus claw back via the validations process and disciplinary action may be taken. In her evidence the claimant was clearly well versed in this provision and it was she who highlighted the claw back provision. I find the claimant was well aware that a flawed sale would in effect be futile, in terms of her performance pay. I also find having heard the claimant's evidence on turnover and her performance, that there was little marginal gain to be obtained by these four transactions (occurring in differing months). No one has been able to address me in respect of the incident on the 2nd of October, as to whether this sale was attributed to the claimant's bonus, or her colleague who processed the contract. The claimant's role was only to verify the identification. However, the fraud and the potential benefit, was attributed by Mr Palmer, to the claimant. He certainly had no basis which he had factually checked, to suggest that the claimant had personally benefitted from this transaction.
33. In discussions as to why the store was placed in special measures, he explained that the claimant's store had noted a significantly higher than acceptable level of 'forced churn'. Although he could not tell me what that figure was. He used an example that his own store only had 2 forced churn events in a similar period of time, yet there were four incidents attributable to the claimant, under investigation.
34. When asked the level of forced churn that would be required to initiate a store wide special measures approach, Mr Palmer could not tell me, as this decision was undertaken by the compliance team. He also could not tell me if any of the other store staff had completed transactions with 'forced churn'. When I asked him whether it was probable that one employee would result in a special measures finding rather than disciplinary action for that employee, or whether it required more than one employee to have transactions which had issues, I found Mr Palmer to be unclear and at points evasive, and his evidence on this issue unconvincing.
35. When pressed on this matter, Mr palmer asserted that a significant number of the 'forced churn' activities at this store were attributed to the claimant. The subtext of his evidence illuded to the fact that there were other questionable transactions completed by the claimant. He told me that there was data about other transactions, but the investigation was about these four. He said there were far higher losses regarding the claimant's codes, than other employees.

36. The evidence in this regard, leads me to make a number of conclusions. Firstly, I considered that Mr Palmer was certainly very concerned that the claimant was engaged in fraud. This supports the earlier findings I have made on this issue. He also had information about losses of the claimant comparative to her counterparts. The nature of his evidence suggested, and I find that he placed at least some reliance on the fact that there were potentially more than just four transactions that were an issue. He also had information of comparisons about losses that was not produced to the claimant in the investigation, nor to me in this hearing. This immediately calls into question, what matters were relied upon by the respondent. I find that at least in part this tainted the analysis the respondent placed on the issue of fraud, and consequently what weight was applied to the claimant's mitigation.

Special Measures

37. The other conclusion I must draw from the evidence is that; there must have been other staff in the claimant's store who had issues with 'forced churn'. The suggestions that the claimant's were higher, than colleagues, infers that there were issues with more than one member of staff. If it were just the claimant, I could imagine that disciplinary action would have been the only necessary action, as per the connections policy at 279. However, the store was placed in special measures, because of multiple staff having failings, in my finding.

38. This is supported by the evidence of Ms Perry in her investigation, of the claimant at page 83. I take this to mean that other employees at the store had also made mistakes [emphasis added]:

- *"alright Liz calm down, we're asking u questions, we're not going to make any decisions we just need to ask u the questions about it, your not going to be the only person right, all the special measures, we need to find out the reasons why this is happening, why your completing it like this? This is your time to openly say why this is happening, why are we in this situation? "*

39. Everything I have heard about the role of special measures, is to provide extra training and support for staff, to ensure that they are applying the correct policies and procedures, to reduce the issues with 'forced churn'. It is implicit in that, there must be other incidents across the business where there are issues with policy compliance and implementation by other stores and staff. I was told regionally there were around four stores in special measures. It must follow therefore that other staff, must also be making errors in the policy application, which are the subject of retraining, rather than disciplinary action. The vague way in which the respondent has approach this rationale, calls seriously into question, how they have analysed the claimant's conduct, comparative to her peers. Mr Palmer told me that each and every allegation was fraudulent, he attached weight to the claimant committing fraud. There is an evidential burden on the respondent to explain its rationale, and how it has formulated the weight to attach to the evidence before it. In this regard there are substantial deficits, in the explanation provided, and obvious flaws in the assumptions that Mr Palmer has applied to the alleged conduct. I find that this thought process must have materially influenced the weight attached to his findings in respect of each incident.

Mitigation

40. Mr Palmer was taken to the evidence of the claimant's mitigation. Whilst having heard the claimant' it appears that she may have been struggling in silence about her own mental health and stress, she has had three periods of compassionate leave, to care for her parents. The respondent's conduct here was not in question. Certainly at the time of the incidents, there was some available information to her colleagues that the claimant would have been under stress. Her line manager knew about her father's stroke and her mother's cancer and she had been granted a number of weeks paid leave. Within the disciplinary and appeal process it was clear that the claimant would have been struggling, and she has produced medical evidence to that effect. It is the central limb of the claimant's case that she struggled with the totality of her caring responsibilities and this affected her performance.
41. Nobody disputed that until 2022 the claimant had performed to a high standard and was a valued employee. She had a clean disciplinary record to this point and had been nominated by various managers as someone worthy of progression within the business. The incidents were clearly out of character. I struggled in Mr Palmer's evidence to truly understand what weight he had attributed to this.
42. When questioned on the impact of stress upon the respondent, and whether that would affect her thought process, so that she would make mistakes, he rejected that suggestion. When the allegations were broken down for him, he in effect attributed each and every allegation as fraudulent worthy of a misconduct finding.

The Allegations.

43. Turning to consider the specific allegations, I shall take these somewhat out of order, and group allegations A, C and D together as they cover similar issues. I will deal with allegation B last.

Allegation D – 2nd of October 2022

44. In particular I was struck regarding the incident on the 2nd of October 2022. The claimant's evidence (which is consistent) is that she simply didn't check the date of birth issue, or overlooked the minor discrepancy in the date. Mr Palmer inflated this to a major lapse that could not be accounted for by the claimant's stress.
45. An individual (as was the case for the claimant) suffering with stress or anxiety, may well experience a range of symptoms, but fatigue, and a reduced ability to focus on day to day tasks, are an obvious starting point. Allowing for such a possibility, a margin for human error in respect of this incident appears to be obvious. It is not even clear whether in fact the error, was the claimant's colleagues', in inputting the incorrect date on the system. There seemed to be no mechanism to correct that error (if it were system based).
46. Mr Palmer had formed a view based on the collective assertion of fraud (based on notions that were ill informed and misguided – as I have found above). He failed to look at the individual circumstance's, in detail. Had he done so he would have observed some of the matters that I have done above. It should also be noted that this was at a time when

special measures had been implemented and everyone was at heightened stress levels. A deliberate act of fraud in these circumstances would have been foolish.

47. To deduce that there was no margin for error here and to consider it fraudulent, is unreasonable. I cannot see that when viewing this incident objectively (taking account of the acknowledged stress) that a reasonable employer could hold a reasonable belief that this was deliberate misconduct. The grounds to base the misconduct finding on are not reasonable and dismissal for this allegation alone is outside the band of reasonable responses for an employer to consider in my view. I do not believe that the respondent can establish (evidentially) that this was misconduct, over and above an oversight or mistake.

Allegation A – 2nd of June 2023

48. Turning then to consider allegation A. This related to a change in the amount of time an individual was said to have been resident at a particular address from 3 months to 3 years.
49. I have heard evidence about the footfall of the claimant's store. I have also heard that on average one to two contracts would be entered into by each worker at a minimum during a working day. The claimant's store had a busy footfall. The claimant was then interviewed in October and November about a transaction completed some 4 – 5 months prior to investigation. Human memory is not infallible. The transaction in question, involved a change to the length of time someone had been at an address. I question how anyone could reasonably be expected to remember the specific circumstances, of what was a mundane or routine transaction.
50. It is also apparent (and entirely understandable) that the general public sometimes do not remember how long they have lived at a specific address. There is also no accounting for human error again in an input which may have been incorrect and only spotted after the first credit check was declined. In interview with Mr Palmer the claimant said at 129 " I cannot remember exactly what I did."
51. This was the first of the transactions to come off the back of the claimant's good record. There are a range of variables that may have played out, leading up to the transaction details being changed. I can easily understand why the claimant could not remember the events, an in those circumstances it is hard for her to defend herself, or even recall the specifics. However, for Mr Palmer to make the leap to a finding of fraudulent activity, is to ignore and miss out some fundamental steps on the way. I cannot see that in his rationale at 146 of the bundle, Mr Palmer considers that the claimant simply may not recall the details. Instead he states that he has seen evidence of a repeated change of address details. However, the information I have been shown, shows one change of address duration.
52. Mr Palmer in his rationale refers to the Domino system not including the same address. I have not been shown this, during this hearing, and I do not believe the claimant was challenged about the distinction between her actions on the Domino and EiV system. It is permissible within the company policy to try for a second time for an identity check once

the system has rejected the first check. It seems logical that this is designed where there has been some error or oversight in the first check, or to allow for further information to be added. However, there is no analysis provided as to this or any of the points I have observed. I consider that as he dealt with this allegation last (although it came first in time) he had presumed the transactions were fraudulent by this stage.

53. I cannot see, then in the context of the difficulties I have observed about special measures and extra training on policies that were in place that there were grounds to find that this amounted to gross misconduct, even if the allegation was capable of being made out. I consider that in these circumstances a reasonable employer, would not have concluded that the allegation was capable of being made out, once all of the variables were taken into account. The reasonable belief in her guilt, as I have found above, was tainted by the overall approach to fraud which Mr Palmer applied.

Allegation C – 28th September 2022

54. The incident on the 28th of September, involves a system application error. The claimant scanned an ID document and the system indicated this to be a 'refer' code. It is clear from the evidence I have heard that there were routine issues scanning ID on the scanner and the positioning of the document was key. I understand that the logic is that this system is designed to ensure that the ID provided is not fraudulent or fabricated. The impression I formed was that the system was not without its faults.
55. It is said that the claimant was experienced and would have come across the 'refer' code before. In her mitigation, she indicated that she spoke with the assistant manager at the store, who advised her to ring IT. It was not possible for any party to verify this account, as the assistant manager had been made redundant by the respondent prior to this investigatory process.
56. However, I note that at 131 of the bundle, during the investigation, the claimant, does not discuss this, but is given little opportunity to do so, by the questioning. The claimant confirms that she believed that she had to telephone IT, if the ID would not scan and that is what 'refer' means. However, she also confirmed that she had had the policy explained to her by Ella from the compliance team, when she was last in. It is not clear whether this pre-dated or post dated the incident. The timing of this can't have been clear to Mr Palmer either on this account.
57. I have considered the investigation report of Ms Perry and again the opportunity for challenge here is limited. There is reference to the policy framework and the fact that the claimant should have asked for alternative ID if it would not scan. The document in question is a driving licence. At no point has anyone suggested to me that this document was a forgery or a fabrication. The claimant explains to Ms Perry at page 85:

"D – and why would we get a reference number for a refer

L - The photo doesn't work, so look at the picture, u can even ask BAL about this, she came in and the driver's license wouldn't scan, and when she came back in the next day, and BAL said to me u should've turned the drivers license over flipped over facing me and it worked

D – So if we check that id, we'd find that id scan yeah?

L – Yes u can check it, the next day it went through when she came to collect the watch .”

58. Ms Perry then concludes the investigation by explaining that the discussions have shown that numerous policies have been breached. There is no obvious follow up to this point and Mr Palmer doesn't deal with this issue either. Instead Mr Palmer concluded that the policy had been deliberately breached. He stated: *“I believe you called the IT helpdesk to circumvent the ID scan process and complete a PAYM connection despite receiving a REFER decision.”* He does not deal anywhere with the claimant's case that prior to completing the sale that the ID was successfully scanned, or whether this negated the need for further ID. The customer connections policy makes reference at 144 to both rescanning ID that is not clear (which the claimant did) and Referred cases where the ID cannot be validated and the transaction must not be continued with, if alternative ID cannot be provided. The policy also makes reference to suspected fraud and how to deal with it.
59. Mr Palmer's rationale does not explain how he has determined the claimant's actions fraudulent, rather than an incorrect interpretation, or confusion of the policies. He makes a presumption of the claimants understanding based on her service, but does not consider that the store is in special measures because, presumably the employees at the store are getting policies wrong . He also does not explain why this is misconduct, or whether he accepted that a management colleague had advised her to ring IT.
60. What is clear to me in this process is that there does exist a system for logging IT issues with the scanner, in order to allow a transaction to proceed where the technology does not scan the ID properly. This is not covered in the policy Mr Palmer refers to. There exists a legitimate opt out to circumvent the process. He does not deal with the circumstances or situations that the use of this should be limited to. He also did not know whether IT had access to the scanner and could see the error code.
61. I accept the claimant's account that she had spoken to a colleague who had suggested moving of flipping the ID to get it to scan. It is not hard to imagine troubleshooting occurring with such technology.
62. There exists a burden upon the respondent, to link the claimant's actions, to a breach of policy and demonstrate how her behaviour is said to have amounted to misconduct. It is not clear in reaching this conclusion that any allowance has been made for the claimant's mitigation, or whether the ID scan the following day was processed. It may well be the case that the claimant should have known to ask for alternative ID, but equally I can see from the claimant's perspective that when presented with seemingly valid ID, which will not scan that she or her colleagues presumed this was an IT issue. I accept the claimant's narrative that her colleague also advised her to speak to IT. No consideration was given by Mr Palmer, to the possibility that a management colleague had (incorrectly) advised the claimant what to do. The store was in special measures after all. As I have said the analysis Mr Palmer applied was tainted by his presumption of fraud.
63. I have seen no account of any conversation with IT, and whether the claimant mentioned the 'refer code', or whether IT could see this. I find that the respondent has not discharged their burden of proof in respect of evidencing the misconduct alleged in respect of this allegation. This store was put into special measures, because too many incidents of policy

implementation were not being followed by the staff, at this store. It has not been explained, why this particular action is over and above any errors her colleagues may have committed, or when the retraining was issued. I consider that the belief in the claimants misconduct in this regard was not arrived at on reasonable grounds and the finding of gross misconduct in respect of this incident was outside of the range of reasonable responses as a finding.

Allegation B - 26th of August 2022

64. Finally I turn to what is the main allegation within these proceedings, which is that there was an incident on the 26th of August 2022. This involved the claimant creating two BAN's for a customer. This is essentially, the customer account that any customer should have. In essence if a customer seeks to purchase multiple products, they should be grouped and sold under a single BAN. The prohibition on multiple BANs is plain and clear and appears in at least two of the policy documents I have been referred to. It is also clear to me that the claimant was well aware of this condition. There is no suggestion that she has ever created two accounts for a single customer previously. However, I can imagine that it would be foreseeable that existing customers may attempt to open a new account, which makes the logic of a single BAN understandable, for commercial risk management.
65. I have been shown a number of still photographs of CCTV capture which show this transaction. I approach these with the utmost caution. I say this because these stills are chosen by the respondent. They are also annotated with commentary by the respondent, as to what it is alleged to show. I attach no weight to that commentary. This is a subjective commentary, from the respondent's perspective. I have not seen the actual CCTV footage, just the images selected by the respondent. To place an over reliance upon this, could potentially be misleading.
66. However, it is useful to the extent that it shows that the claimant is initially dealing with a single customer, who over time acquires a gradually expanding male entourage, amounting to a total of 7 individuals, who are crowded around the claimant, including viewing her screen. It does not require me to see the motion CCTV to accept that this could be an intimidating environment for the claimant.
67. The claimant in her interviews and indeed in her oral evidence, said that it was common for customers of this particular nationality to come in a large group. She found their conduct to be intimidating. It is clear from the investigations that she felt these situations to be overwhelming and that she has said that she wished to stop serving customers of this nationality, who behaved in this way.
68. On the day in question, the claimant was serving another customer, whom she immediately left, in order to deal with 'customer G'. I accept the claimants evidence that the customer she was serving was undertaking a sim data transfer, which takes time, and they could be left to it. At no point has anyone addressed with me what happened to these customers at the end of the transfer. I attach limited weight to the suggestion that the claimant was wrong to leave them, in particular as it may well have been that they simply left the store at the end of the process, without the need for further assistance.

69. However, the claimant started her evidence by stating that 'customer G' approached her stating that he had been recommended to speak to her. This in and of itself should have struck the claimant as unusual, in my view.
70. I am told that there were then some issues with the verification of customer G's identity. However, the claimant then completed a second check which verified his ID. It is not entirely clear whether this is alleged misconduct, but it certainly seems unchallenged, that it is permissible to do two checks, as a maximum. The transaction then progresses to its conclusion. I am told that this was for a £90 a month contract.
71. It was not entirely clear, on the papers why the claimant had set up a second BAN, as it read that this was to evade the credit check. However, in oral evidence this was clarified. It then appears that immediately following this transaction, the claimant then processed a second contract for another mobile phone for the same customer. In doing so she set up a second BAN and used a different address for the credit check. That transaction also completed and the customer effectively purchased two phones. Those contracts were later categorised as 'forced churn' as the customer failed to pay, but has retained the devices.
72. It is suggested that the claimant, did not get up or hand the first phone to the claimant at any point. A matter which is not disputed and the bag is seen at her feet in the CCTV footage. She then immediately completed the second transaction.
73. The claimant has accounted for her actions saying that the pressure that these customers present is extreme and that she gets tunnel vision and forgets things. This is at a time when the claimant had been suffering with the complex pressures which her home life created. I have already made findings which have given the claimant the maximum allowance for the impact of her home stress. This transaction also falls at a time when she will have been suffering with those symptoms. I have therefore afforded the same allowance to the claimant when reaching my findings in respect of this allegation.
74. In discussing the various allegations, it has been suggested that the special measures were deployed by a team of two individuals from the compliance team. One of whom was 'Ella.' The claimant has said in respect of this allegation that she had a conversation with Ella on the day in question, immediately following this transaction, because she found the behaviour of the group intimidating. It is also suggested that Ella recommended that the claimant take some time off as she was making poor decisions. Ella, was not spoken to as part of the investigation, and she did not provide any evidence for this hearing. Her absence was unfortunate as she alone could perhaps have shed some light on the events of the day and indeed, the other observations I have made about the role of the compliance team.
75. It has not been disputed that Ella informed the claimant to take some time off because of her poor decision making. It is not clear if Ella was the person who escalated concerns around this incident or whether she was of the view that it was simply a mistake. It is also not clear if the compliance team categorised this as a mistake or misconduct. The absence of this clarifying evidence must weigh adversely against the respondent, when I consider how they formulated their decision making, and I make due allowance for this.

76. Whilst it may be understandable for an individual to proceed with a transaction, where their personal safety is threatened and they judge that to do so may preserve their safety. For example; in circumstances akin to a robbery. However, it is notable that at no stage has the claimant alleged anything coming close to this. She mentions intimidation, but at no stage has she flagged that she felt forced into the transaction by means of coercion or threat, and I find that she had immediate opportunity to do this with Ella, had this been the case.
77. When I asked the claimant to explain how; having completed the first transaction, the circumstances then arose where customer G requested a second sale, and why she processed this afresh, instead of accessing the first BAN, the claimant could not provide an explanation.
78. Even making due allowance for the claimant's stress and wellbeing, this was a situation which must have raised significant suspicions. In this respect I agree with Mr Palmer's assessment that the transactions showed evidence of multiple red flags. I did not perceive any evidence of malicious intent by the claimant, and although intimidated, she did not flag, via any formal process that she had been threatened into completing a transaction. I assessed some naivety in the claimant's presentation in respect of her assessment of the behaviour of groups of individuals coming into the shop, as a cultural issue rather than raising a flag of suspicious behaviour. Taking all of these matters into account there is still a significant gap in the explanation as to why the claimant proceeded in the manner she did.
79. There has not been any debate that the creation of two BANs was not permitted and this appears to be a core pillar of the respondent's business. The circumstances where a second BAN may be created are perhaps foreseeable where there is confusion, or an oversight regarding an old or previous customer account. However, the circumstances where that would arise in respect to a transaction which was ongoing, are unfathomable. Let alone the fact that the claimant had just completed a transaction for a different address, and both BAN's confirmed that the customer had lived at both addresses for three years.
80. Mr Palmer considered whether there were mitigating circumstances, in his findings. Although I have made generalised findings above, regarding the concrete way Mr Palmer treated the impact of the claimant's stress, regarding this particular allegation, he, like me was unable to reconcile the explanation (or lack of explanation) and mitigation, with the facts that were presented to him.
81. Based upon all the evidence before me, I can entirely see why he upheld the findings that the policy had been breached, and the mitigation was an inadequate explanation. I find that the claimant had committed an egregious breach of the customer connections policy. I find her explanation inadequate. However, I stop short of finding that this was a deliberate fraud. Everything I have seen in the claimant's presentation and evidence suggests an individual suffering from acute stress and shame as to the situation she has found herself in. My assessment is that she has blocked out the events of that day, and she is not yet ready to discuss the true circumstances. Without such an explanation, the findings that Mr Palmer arrived at in respect of this allegation, were in my view entirely reasonable, based

reasonably upon the evidence before him. In my finding this allegation alone was (in and of itself) sufficient to find gross misconduct had been committed.

Appeal Process

82. Finally I heard evidence from Mr Matthewman regarding the appeal process. Although he investigated the difficulties the claimant had experienced in being accompanied to the initial disciplinary meeting, this ultimately was not pursued by the claimant at today's hearing. However, what is of note is that when speaking to the store manager, he offered the view that he "*said to the claimant that he did not feel she had the mental capacity to sit in the meeting due to her family issues at the time.*" This should perhaps have been a red flag to the respondent about the process and the claimant's vulnerability. Although Mr Palmer confirmed that the claimant's presentation in the meeting was as to be expected. I accept that the claimant wished to continue with the process and that she was fit enough to do so.
83. It was further asserted that the advertising of the claimant's job, prior to the conclusion of the disciplinary process was unfair. I do not criticise the respondent for this. Everything I have heard suggested that staffing at the claimant's store was an issue. It had by this stage reached the decision to dismiss the claimant and was perfectly entitled to advertise for her position and that to do so did not prejudice her appeal process. I have seen ample evidence that Mr Matthewman approached the issue with diligence and impartiality, and I have seen nothing to suggest that the dismissal decision was in any way influenced by the decision to advertise the position.
84. Finally the suggestion that Mr Palmer had not considered sufficiently the claimant's mitigation formed the final limb of the appeal. I have seen evidence that Mr Matthewman investigated the concerns.
85. The interview with Mr Palmer discusses a number of areas regarding the process. Mr Palmer considered that the trust and confidence had been broken, and that had there been fewer occasions, the length of good service may have made a difference to the outcome. The interview also noted that the issue of intimidation had been discussed at the disciplinary meeting, and that it appeared to him that no help was sought, via the store manager.
86. On balance, it appears that the appeal process was procedurally robust and did not identify any material deficits in the process. I do not criticise Mr Matthewman for the decision he reached. From his perspective the process was followed correctly and he received adequate weighting from Mr Palmer. Nothing that was revealed in the evidence before me, suggested that there was anything other than a diligent and balanced appeal process. Whilst I have identified many flaws in Mr Palmer's approach, the finding regarding the 26th of August 2022 was in my view robust, and the dismissal decision logical to Mr Matthewman, regarding that matter alone. Even if the appeal had been upheld on the other three allegations, nothing would have changed in respect of the outcome from the fourth allegation.

Conclusion

87. There is no dispute that there has been a breach of policy by the claimant on four separate occasions.
88. I have considered that there was a flawed approach undertaken by Mr Palmer in respect of three of the four allegations. He has limited knowledge of certain aspects of the claimant's conduct and his approach to her mitigation was lacking. On balance, having considered the evidence, I was of the view that the decision to dismiss the claimant for three of the allegations was materially misguided, and insufficient weight and consideration was applied to the mitigation.
89. Mr Palmer failed to view these allegations individually and was clouded by his perception that the claimant had committed a fraud. If the dismissal had been solely in relation to these three matters, I would have no hesitation in declaring the dismissal as unfair.
90. However, just because certain aspects of the process were flawed, does not necessarily render the entire process unfair. The evidence presented in respect of the claimant's breach of the BAN policy is clear and irrefutable and the mitigation offered is limited and the explanation totally lacking.
91. Mitigation offers an explanation for an event, but it does not excuse it. Even the most trying circumstances does not excuse a claimant from culpability for all of their conduct. It is still possible for an individual to make a catastrophic error of judgment, which in and of itself amounts to misconduct, and breaches the trust and confidence provisions of a contract.
92. Even taking the claimant's case at its highest, and allowing for all the mitigation, I consider that it falls well within this latter category, and that it was entirely open to the respondent, to find that the trust and confidence was breached, meriting the dismissal. Even with my findings regarding the flaws in respect of the other allegations, the investigation and evidence was sufficiently comprehensive in respect of this aspect of the dismissal.
93. It is clearly open in those circumstances for a reasonable employer to consider a range of reasonable responses, including dismissal. It is not for me to substitute my decision for the respondents, as to what I would have done in the circumstances. I have been concerned at points that is in effect what the claimant is asking me to do. The nuance of her case has come very close to this at points. However, I cannot see that a dismissal decision would be off the table in this scenario. Mr Palmer knew he had a choice and chose to dismiss rather than a lesser sanction, despite the claimant's record. It was open to him and a reasonable outcome in the circumstances.
94. I find that the dismissal decision was for a fair reason within S98(4) of the Employment Rights Act 1996, namely the claimant's conduct.
95. It follows therefore that I find that the claimant's case is not well founded and her claim for unfair dismissal fails.

96. As I have found the dismissal to be fair, accordingly there has been no breach of contract. The respondent was entitled to dismiss the claimant without notice in the circumstances and I dismiss the claim for wrongful dismissal.

Employment Judge Codd

02.11.2023