EMPLOYMENT TRIBUNALS

Claimant: Michael Whyte

Respondent: Coca-Cola Europacific Partners Great Britain Limited

Heard at: Reading Employment Tribunal (by video)

On: 11 and 12 November 2024

Before: Employment Judge Annand

Representation
Claimant: Mr Whyte, representing himself
Respondent: Ms Berry (Counsel)

RESERVED JUDGMENT

1. The Claimant's complaint of unfair dismissal is well-founded. The Claimant was unfairly dismissed.

2. There is no chance that the Claimant would have been fairly dismissed in any event.

3. The Claimant caused or contributed to the dismissal by blameworthy conduct, and it is just and equitable to reduce the compensatory award payable to the Claimant by 10%.

REASONS

Introduction

1. This matter was listed on 11 and 12 November 2024 for a two-day final hearing to determine the Claimant's claim of unfair dismissal. The Claimant was employed by the Respondent on 1 February 2020, initially as a Sales Representative but he later moved to the role of Merchandiser. He was summarily dismissed for gross misconduct on 1 December 2023 following a 'customer review' which had taken place on 8 November 2023.

2. I was provided with a witness statement from the Claimant, and witness statements from Ms McPhun and Ms Walker on behalf of the Respondent. I heard oral evidence from all three witnesses. I was provided with a joint bundle of documents which ran to 717 pages.

3. I indicated to the parties at the outset of the hearing that it was likely that I would only have time to reach a decision on liability within the two day listing, however it was agreed that I would also make decisions regarding *Polkey* and contributory fault. In other words, it was agreed that if I were to find that the Claimant was unfairly dismissed, I would then consider the questions of whether the Claimant may have been fairly dismissed in any event if a fair process had been followed, and whether the Claimant's blameworthy conduct contributed to his dismissal, and if so, to what extent.

4. On the first day of the hearing, I asked Mr Whyte if he had prepared some questions for the Respondent's witnesses. As he had not, it was agreed that I would take 1 hour and 30 minutes for reading time, and this would allow Mr Whyte some time to write down the questions he had for the Respondent's witnesses. When the hearing recommenced shortly before noon, Ms Berry drew to my attention that on Friday 8 November 2024 Mr Whyte had sent an email to the Tribunal to make an application to amend his claim to add a claim for disability discrimination. As I did not have the relevant paperwork that had been sent to the Tribunal regarding the application, it was agreed that we would take an early lunch break so I could obtain the emails, and this additional time would allow Mr Whyte to finish writing down his questions for the Respondent's witnesses. Over the lunch break, I was able to obtain the Claimant's email to the Tribunal, the documents he had attached to the email, and the Respondent's response to his email.

5. When the parties re-joined after the lunch break, I heard Mr Whyte's application to amend his claim to add a claim of disability discrimination. Ms Berry opposed the application. I took some time to consider my decision and informed the parties that I had decided to refuse the Claimant's application. I gave oral reasons for that decision at the time. If either party wishes to receive those reasons in writing, they should request written reasons within 14 days from the date on which this judgment is sent to the parties.

6. After dealing with the Claimant's application to amend his Claim Form, we proceeded to hear the evidence in the case. At the end of the evidence. I heard submissions from both sides. There was not time for me to give an oral judgment within the two day listing, and I reserved my judgment. I apologise for the delay in sending this judgment to the parties, which was in large part due to a period of ill health.

The facts

7. The Claimant was employed by the Respondent as a Sales Representative on 1 February 2020.

8. Whilst working for the Respondent, the Claimant was also undertaking a business management degree. The Claimant was finding it difficult to carry out both his Sales Representative role and study for his degree. As a result, it was agreed the Claimant would move into a Merchandiser role in early 2023. The Merchandiser role was described by the Respondent's witness, Ms McPhun (who was employed by the Respondent as a Senior Manager, Field Sales, Grocery at the relevant time) as being an entry level position and as a less demanding role than that of Sales Representative.

9. Both the Claimant and Ms McPhun gave evidence that the Claimant had been given 1 week of training for the Merchandiser role, whereas those recruited directly into the role would be given 6 weeks of training.

10. Ms McPhun gave evidence that the Merchandiser role is largely autonomous. The team is 'field based'. They work remotely and report to their Team Leader remotely. A Merchandiser role involves going into supermarkets which stock the Respondent's products, checking the displays and stock levels of the products to ensure that the products are available, priced correctly and properly displayed.

11. The Merchandisers are responsible for checking, filling and tidying the displays, checking the available stock of the Respondent's products in stores and checking book stocks (a store's computerised accounts of what stock is held within the store). The Merchandiser is expected to refill the shelves with any of the Respondent's products, using any stock that is available within the store, also refilling and replenishing both national and locally agreed displays, as well as filling up the fixture shelves with stock from the stock room. They are required to make sure any of the Respondent's fridges within the store and any of the store's own fridges or coolers were filled 'to plan'.

12. Each Merchandiser is assigned approximately 10 stores in total. They are sent a list of stores which they should visit on a particular day. They are normally required to visit between 4 to 6 stores on an average day.

13. The Merchandisers are required to work with an Account Executive, who is assigned to the area. The expectation is that a Merchandiser and an Account Executive will work together closely and speak at least once a week. They are also expected to work together to put together a "mega", which is when there is a big promotion that requires a display. The Claimant's Account Executive was Ruth Wallace.

14. When a Merchandiser attends a store, they are expected to spend around 65 minutes in the store. They are also required to make records about their visits on the Respondent's internal system called Red1. For example, they are required to mark if a product is "available". The definition of available in the first quarter of 2023 required there to be at least 6 of the items on display. There are points available to the Merchandisers depending on their answers to the questions which are recorded on Red1 on each visit. For example, the Merchandiser receives 10 points if all OSP's are maintained and 5 points if all OSP's are correctly priced. OSP stands for Off-Shelf Presence, namely where there is a display of a product that is not in its normal location, for example a promotional display

at the entrance of a store. The score generated by Red1, based on their results, then feeds into the Merchandiser's short-term incentive payment. This is a bonus paid each quarter if a Merchandisers score is within the top 50% of the scores of all the Merchandisers.

15. The Claimant's evidence was that he had not been told about this incentive/bonus scheme. When the Claimant moved from the role of Sales Representative to Merchandiser, he was not given a new contract of employment. The Respondent did not put forward any evidence that showed the Claimant had been made aware of the incentive/bonus scheme for Merchandisers. It was confirmed by Ms McPhun in her oral evidence that if a Merchandiser was eligible to receive the bonus payment, it would be paid quarterly. The Claimant's pay slips in the bundle did not show he had previously received a payment for a bonus.

16. The Claimant's Line Manager was Emily Ogilvie. Her role was Team Leader, Merchandising – GB Grocery.

17. In November 2023, Ms Ogilvie received a complaint from a Tesco Extra store that the Claimant had been distracting a store employee by talking to them.

18. On 6 November 2023, Ms Ogilvie held a meeting with the Claimant about the complaint. The meeting took place remotely and notes were taken. The Claimant was told at the outset it was an "informal investigation meeting". The Claimant was told a concern had been raised "around unwanted attention towards a female colleague in Tesco Extra" (p143). The Claimant was asked if any of the managers from Tesco Extra had raised this with him previously. The Claimant said one of the managers had spoken to him about not talking to members of staff for too long and not distracting them, but they had not spoken to him about giving a female "unwanted attention". The Claimant was read the email which had been sent to Ms Ogilvie and he accepted he had been spoken to by two managers about not distracting the member of staff. The Claimant apologised and said he did not realise that speaking to the member of staff was having this kind of impact. The meeting was adjourned for approximately 20 minutes, and afterwards, Ms Ogilvie said to the Claimant "You need to be aware of the seriousness of this allegation." She told the Claimant that she had decided not to progress the matter to a formal meeting but would be issuing the Claimant with counselling. The Claimant was directed not to talk to the member of staff in question.

19. After the meeting the Claimant was issued with a document titled "Counselling and Action Plan" (p173-174). In the Action Plan, the Claimant's Development Areas were not to contact the colleague highlighted in the complaint, correct the amount of time he spent in each store, and listen to customer feedback.

20. Following the meeting, the Claimant felt that he had been accused of sexual harassment. Even though those words had not been used, the use of the words, "unwanted attention to a female colleague", had caused him to believe it was being suggested he had behaved inappropriately.

21. The following day, on 7 November 2023, the Claimant called the Respondent's Employee Assistance Program (EAP) and asked for a therapy session, which took place that day. The Claimant explained in the session that he had been the subject of a complaint from a female colleague, but he had not been told what he had said or done to warrant the complaint. He said he had not crossed any boundaries and so he was confused. He explained he had lost motivation for his work, and he did not know what to do. He reported feeling low in mood, feeling disengaged from work, and lacking motivation. On a scale of 1-10 (10 being the highest), the Claimant was asked to give an indication about how he felt about various matters. The scores varied considerably but he rated his personal well-being as a 1 and he rated his overall general sense of well-being as a 2. He disclosed having thoughts of wanting to harm himself. He reported having fleeting thoughts, but no intent to act on them. The Claimant was given some advice by the clinician he spoke to including advocating for himself to change store since the current store was causing him significant discomfort.

22. On the following day, 8 November 2023, the Claimant went to work. On that day, Ms Ogilvie undertook a "customer review". The Claimant was not aware of this.

23. Ms McPhun's evidence was that because the Merchandiser role is an independent role, Team Leaders regularly undertake unannounced 'customer reviews' to ensure the Merchandiser is conducting their duties properly and that the customer is happy with the service provided and to ensure that the Respondent's products are available to the consumer. The Merchandiser's manager visits the stores very shortly after the Merchandiser has undertaken his or her inventory at the store and checks the accuracy of the information reported against the displays, as well as obtaining feedback.

24. Ms McPhun said in her witness statement that Ms Ogilvie had decided to undertake the review given the complaint about the Claimant, and because of some concerns that Ruth Wallace had raised previously with Ms Ogilvie.

25. In an email sent from Ms Wallace to Ms Ogilvie on 24 October 2023, Ms Wallace had set out some concerns about the Claimant. Ms Wallace and the Claimant had been due to meet in a Morrisons to do a Halloween mega (a 'mega' is a big promotional display for a one-off event that is rolled out across the stores). Although they had arranged to meet, the Claimant had left before Ms Wallace arrived, and when they spoke by phone the Claimant said he had not been able to find the stock or POS for the mega. Ms Wallace had then subsequently entered the store and found both. Additionally, Ms Wallace had noticed some other issues with the replenishment of stock, and she noted, "I feel he is struggling to understand what products go on what meal deal" (p646). She noted in her email that what she had found that day was happening on a regular basis. She also referred to receiving feedback from a few store managers that the Claimant did not really know what he was doing and that he was not adding value to their stores.

26. Ms Ogilvie did not give evidence, but it was not in dispute that the Claimant had not been made aware of Ms Wallace's concerns at the time they were raised with Ms Ogilvie. Ms Walker, in her evidence, said the correct approach would have been for Ms Ogilvie to have had a "coaching conversation" with the Claimant about the issues that had been raised. However, that did not take place.

27. The customer review that was undertaken by Ms Ogilvie on 8 November 2023 raised some issues about the Claimant's performance that were of concern to the Respondent. As a part of the customer review, Ms Ogilvie visited two Morrisons, and an Asda, which the Claimant had attended earlier in the day.

28. The following day, 9 November 2023, the Claimant was asked to attend an investigation meeting with Ms Ogilvie. The Claimant was provided with a copy of Ms Ogilvie's customer review report which included photographs. In the report, not all the photographs were from 8 November customer review, some were photographs which had been provided by Ms Wallace on a previous occasion. Ms McPhun said in her witness statement that these additional photographs, which related to other dates, were included in the customer review report "for background information."

29. In the customer review documents, regarding the first Morrisons that was visited, it was alleged the Claimant had erroneously indicated on Red1 that Smart Water was available when it was not. The Claimant noticed in the Tribunal hearing that some bottles of Smart Water could be seen in the cooler in one of the photos. Ms Berry pointed out that that there were fewer than 6 bottles and so it should have been marked as not available on the Red1 system. Ms Ogilvie also noted that there were also other products like Dr Pepper in the warehouse that could have been topped up, the checkout till tops were "a bit messy with mismatched products on top" and there were some missing labels at the bottom of the fridges. She noted the Claimant had spent an additional 20 minutes in the store.

30. In respect of the second Morrisons that was visited, it was noted that the cooler light was broken, and the Claimant had erroneously indicated that 2 litre bottles of Dr Pepper were "unavailable" when in fact they were available. The 2 litre bottles of Dr Pepper were not on the shelf, but on an MU (a Merchandising Unit) at the end of the aisle. Ms Ogilvie explained that the Fanta 18 pack was 'off sale' (i.e. not available to buy) in the aisle, but it had been on a nearby stack. The Diet Coke Merchandising Unit (i.e. stock that comes in already packed and is used to wheel out into a fixture or put on the shop floor as an extra display) had been missing, point of sale (POS, i.e. signage) and pricing was also missing. Ms Ogilvie also found the aisle had been left messy and there had been rubbish left on the displays.

31. Ms Ogilvie believed one of the lights in the checkout fridge had been broken and asked the Claimant in the meeting on 9 November 2023, if he had reported this. He replied he had not. Although it subsequently transpired the light was not in fact broken.

32. In respect of the Asda store, Ms Ogilvie noted that the Claimant had marked 'all OSPs maintained' on Red1, however the 'zero sugar' Monster was nearly empty, the displays of Monster were broken and had 'things dumped on them'. Ms Ogilvie also found that there were four other products that were all out of stock but that the Claimant had ticked 'all non-OSA lines available in cooler'. There was a further broken light which the Claimant had not reported. Ms Ogilvie considered the area had been left messy, without any order and with products in the wrong place.

33. The final page in the customer review report showed before and after photographs that Ruth Wallace had taken and sent to Ms Ogilvie regarding displays which she had replenished when the Claimant had failed to do so on dates prior to 8 November 2023.

34. In the meeting on 9 November 2023, Ms Ogilvie told the Claimant that the meeting was an informal investigation meeting to discuss feedback from the customer review and some feedback given by Ms Wallace. She said she had some positive feedback from the review but also had some questions about what she had found.

35. When asked if he understood the questions he had to complete on Red1, the Claimant said he thought he did. It was pointed out to him that regarding Morrisons, he had indicated on Red1 that Smart Water was available, and it should not have been ticked. The Claimant responded, "Yes I know I shouldn't have ticked that as I'm aware they weren't in" (p163). The Respondent argued that this answer indicated that the Claimant was aware, at the time that he was completing the questions on Red1, that he knowingly put in the wrong answer. The Claimant argued that what he meant in the meeting was that he could see from the photographs he was being shown at that time by Ms Ogilvie that he accepted he should not have ticked that the Smart Water was available.

36. With regards to the First Morrisons, the Claimant was asked why he had taken an hour and 20 minutes in the store, and what he had done with the extra time there. At first then Claimant could not recall, and then he remembered that they had new planograms in store and so he had moved products so that they were "to plan".

37. With regards to the second Morrisons, it was suggested to the Claimant that 2 litre bottles of Dr Pepper were available, "It was offsale on shelf but was actually on an MU at the end of the aisle", and the Claimant had indicated on Red1 they were not available. The Claimant admitted this was an error in the meeting and noted, "Oh that's my fault as I actually set up that MU myself, I think that was next to signing in at front of store".

38. The Claimant was asked if he had missed seeing the Dr Pepper 2 litre bottles and the Fanta 18 pack on his store walk. He responded, "I honestly don't know. I know this week I have not felt great after Monday's meeting and I have called EAP" (p164). Ms Ogilvie did not ask anything further about his call to EAP.

39. In respect of the Asda, the Claimant explained that there was an issue with the warehouse being really messy. He explained he stopped to speak

to the manager, and he could not be certain that he had been to the back of the store. Ms Ogilvie said she had spoken to the manager who had mentioned the warehouse was struggling and that it was quite difficult in the store.

40. In the meeting, Ms Ogilvie showed the Claimant a photograph and is recorded as saying, “This Schweppes gondola end was really low/oos and the stock was easily accessible in the warehouse, the displays like these mu’s of monster were broken and had things dumped on them. This one the zero sugar monster was also nearly empty and wouldn’t be classed as maintained. But you had ticked “all OSPs maintained” on red1.” The Claimant said they were all over by the frozen section which he had not gone to as he had been speaking to a manager.

41. Ms Ogilvie then raised some other matters including that various Monster drinks were out of stock on the fixture but were on the capping shelf. The Claimant explained they were too high for him to take down and that the store uses a ladder, and they were too high for him to reach. He said he had spoken to a member of staff about it.

42. When asked about whether he remembered ticking that the 1.25 litre bottles of Coke were available, he had responded, “No, I’m not sure. I don’t remember why I ticked it, I rang EAP as I was feeling down.” Ms Ogilvie asked if the Claimant had called EAP while he was in the store, and he said no, he had called them later. Ms Ogilvie did not ask him anything further about this.

43. Ms Ogilvie then moved on to discuss the untidiness of the store. The Claimant said he could recall broken packs on the floor, but he did not remember any other of the issues regarding tidiness that she had raised. When asked why he left the store that way, he again referred to what had happened on Monday and the fact he had called EAP. He later again said, “You asked me if this was normal and its not. The only thing I can think is that this week hasn’t been normal as id been feeling down after Mondays investigation because I wasn’t expecting it and normally my work is really accurate” (p166).

44. After the Claimant made this comment, Ms Ogilvie adjourned the meeting. When she returned, she asked if the Claimant had thought that Monday’s meeting had affected his work. The Claimant said it had. He was asked why he thought he had made erroneous entries on Red1 regarding Asda, and he said he did not walk the Frozen aisle and in respect of the others, he could not remember.

45. At no point in the meeting was it suggested to the Claimant that he had purposely falsified the records on Red1 to try to increase his points to make him eligible for an incentive or bonus payment. In fact, it was not suggested to the Claimant that there was a concern he had “falsified” the records, and he was not asked whether he had made the errors intentionally.

46. On 22 November 2023, the Claimant was sent an invitation to a formal meeting under Step 3 of the Respondent's disciplinary policy. He was informed he faced three allegations:

    1. "It is alleged that on 8th November 2023, you were dishonest and negligent in your performance of duties by inputting falsified and inaccurate measures in RED1.
    2. It is alleged that on 8th November 2023, you failed to complete core merchandiser tasks relating to product availability.
    3. It is alleged that on 8th November 2023, you demonstrated poor time management and prioritisation."

47. In the letter the Claimant was informed that the allegations could amount to a potential act of gross misconduct, and it was noted that the Respondent took the allegations very seriously. He was informed he could be dismissed. The Claimant was not suspended but was advised he should try to work normally.

48. On 27 November 2023, the Claimant obtained an email from Jason Depledge, who was the manager at the Asda store on 8 November 2023 that the Claimant said he had spoken to. In the email, Mr Depledge referred to the Claimant having attended on a really bad day. Some staff had called in sick the night before and so they had to turn the Claimant away as they could not get to any of the stock on the racking. In addition, he noted that all of the top stocking equipment was either buried or being used by other colleagues at the time the Claimant visited. He said that when Ms Ogilvie had attended the store, he had praised the Claimant and said how hard he worked when in the store. He referred to the fact that some cardboard had been dumped around the store throughout the day, but this was no reflection on the Claimant as it was not his role to tidy up after them.

49. On 29 November 2023, the Claimant's disciplinary hearing was re-scheduled to 1 December 2023, and the Claimant was told that it would be held by Senior Manager, Ms McPhun. In her witness statement, Ms McPhun said she was asked to hold the meeting because she was impartial. She said the Claimant's Senior Manager was Simon Dunkley and as he worked closely with the Claimant, Mr Dunkley had felt too close to hear the case. In her witness statement, Ms McPhun referred to the steps she had taken in advance of the disciplinary hearing to prepare for the hearing. She did not refer to having spoken to Mr Dunkley about the Claimant.

50. During her oral evidence, I asked Ms McPhun if she had spoken to Mr Dunkley about the Claimant before the disciplinary meeting. She said she had. I asked what he said about the Claimant. She said she could not recall. I asked if the feedback about the Claimant had been broadly positive or negative. Ms McPhun said Mr Dunkley had concerns about the Claimant's behavior and conduct. When I asked what the concerns were, she said they related to the complaint that had been made and the feedback from Ms Wallace. I asked Ms McPhun if she felt that Mr Dunkley's feedback had influenced her decision to dismiss the Claimant, and she replied she did not, but she did not seem entirely sure of the

answer she gave. She was quite hesitant, and she gave the impression that she had in fact taken Mr Dunkley's opinion into account but did not want to admit this. As noted above, Ms McPhun had not referred to this conversation with Mr Dunkley in her witness statement.

51. In the disciplinary meeting, when the Claimant was asked about the first allegation, and why he had inputted information incorrectly into Red1, the Claimant responded by explaining what had happened on 6 November 2023, when he had been asked to attend a meeting regarding giving unwanted attention to a female colleague. The Claimant explained he was really upset by the allegation and that he had understood the complaint to have a sexual aspect to it. He said he felt really down after the meeting and felt he had been accused of something. He said he contacted the Employee Assistance Program because he had felt awful and was considering ending it all. He explained he did not go into the stores intending to put the wrong figures into the system.

52. Later in the meeting, the Claimant was asked why he did not let Ms Ogilvie know how he was feeling. He said that Ms Ogilvie was new, and he had only met her twice before. He said he had called the Employee Assistance Program and had he had thought they would inform his managers so they would understand the position. He was asked if he saw his doctor, to which he replied that he had not. He was asked why he carried on working, to which he replied that the advice from EAP was to continue to socialise. He said he lived alone and so the best way to socialise was to attend work and interact with other people. The Claimant pointed out in the meeting that he had spoken to EAP *before* he had been audited.

53. Later in the meeting, the Claimant was asked why he did not contact anyone else to say his work was affecting his performance. The Claimant responded by saying that mental health is not an easy thing to talk about. Ms McPhun said to the Claimant, "You don't need to disclose all or any of the details, you could have contacted someone for advice, if you had you we would not be in this situation." She is also recorded as saying, "As a result of you not informing anyone or calling in sick you have made these errors" (p205). These comments suggest that in the hearing Ms McPhun accepted that the Claimant was struggling with his mental health on 8 November 2023 and that his low mood on 8 November 2023 had affected his performance.

54. The meeting was adjourned at 11.50am and resumed at 4pm. Before the adjournment, Ms McPhun did not suggest to the Claimant that he had falsified the records to gain additional points so that he would be more likely to be eligible for a bonus. The incentive scheme and the bonus were not discussed with the Claimant at all.

55. After the adjournment, the Claimant was informed of Ms McPhun's decision. In respect of allegation 1 ("It is alleged that on 8th November 2023, you were dishonest and negligent in your performance of duties by inputting falsified and inaccurate measures in RED1"), Ms McPhun is recorded as having said:

"During today's meeting you have articulated and explained to me the responsibilities of a merchandiser and you have demonstrated that you understand the role. I don't feel you have provided me with enough evidence or any reason why despite how you were feeling you would proceed to consciously input measures incorrectly knowing the importance of this. You do however, remember a lot of other details about the store visits and why things were the way they were. The role of a merchandiser is based on trust and we give you the autonomy to conduct your role. On the three occasions you have visited stores in question you have knowingly inputted the incorrect information."

56. There was no reference to the Claimant having falsified the records in order to try to obtain a bonus. Ms McPhun's reasoning in respect of Allegation 1 suggested that, after the adjournment, Ms McPhun did not accept that the Claimant had provided enough evidence that his low mood on 8 November 2023 had been the reason for his poor performance.

57. In respect of the second allegation, ("It is alleged that on 8th November 2023, you failed to complete core merchandiser tasks relating to product availability"), Ms McPhun is recorded as saying:

"There were products available and stock which could have been brought out into the store, specifically in Asda Chapeltown where Oasis, Monster Ultra White and Dr Pepper were accessible as shown during the investigation (detailed in the photographic evidence provided to you). You have not been able to articulate why you were unable to do this. Equally you have marked products as not available when they were, again you have not been able to convince me of a good enough reason as to why you did this."

58. Ms McPhun told the Claimant that she had considered his mitigation regarding his mental health following the meeting on 6 November 2023. She said she could understand that it would be upsetting, but she felt the onus was on him to inform his line manager that he was not fit for work. These comments also indicated Ms McPhun accepted that the Claimant's low mood on 8 November 2023 had affected his performance, but that she did not consider it was a sufficient explanation to justify his poor performance because he had not told his line manager at the time. There was no reference to the fact that the Claimant had told EAP before the customer review and no explanation as to why that was insufficient, and why he had to have told a manager.

59. Ms McPhun noted that even if he did not feel comfortable speaking to Ms Ogilvie, the Claimant could have spoken to someone else in the Respondent's organisation. She noted, "Instead you came to work and knowingly falsified the measures which has resulted in a breakdown of trust." Ms McPhun said she had considered all options but had decided the most appropriate outcome was dismissal. She did not explain why she considered it was the most appropriate outcome and there was no mention of Allegation 3 ("It is alleged that on 8th November 2023, you demonstrated poor time management and prioritisation").

60. When Ms McPhun gave evidence, I asked her if considered if any lesser sanction would have been sufficient. She said she did consider that. When I asked her to explain why she had decided it would not have been sufficient, she said she would not have been comfortable with that outcome because there had been other cases of a similar nature, and those other individuals had been dismissed for gross misconduct, although the Respondent did not provide any evidence regarding other cases of a similar nature.

61. On 8 December 2023, Employee Relations Business Partner, Lee Davis, sent an email to Ms McPhun noting that he had reviewed the paperwork following the formal hearing and he had produced a first draft of the outcome letter. He noted he could not see that she had provided a conclusion to Allegation 3. He asked her to reach a conclusion regarding Allegation 3. He then noted he had highlighted a section of the letter which he said read as though it was accepted that the Claimant was unfit for work on 8 November 2023 and this "weakens the decision to dismiss". Mr Davis asked Ms McPhun to consider replacing the paragraph with a different paragraph which noted, "While I considered this as mitigation to all 3 allegations made against you, I was unable to conclude whether this was the true reason for the concerns identified during the Customer Review carried out on 8th November in the absence of you providing me with any evidence to support your claim. Nevertheless, when reviewing the evidence that was available for me to consider, it has proven that you came to work and knowingly falsified measures which I believe has resulted in a fundamental breakdown of trust in you."

62. On 11 December 2023, Ms McPhun responded to Mr Davis and noted that she was happy with the proposed changes, despite the fact that this seemed to considerably change her position. In the meeting, Ms McPhun's comments indicated she accepted the Claimant's low mood had affected his performance, but the outcome letter the Claimant was sent said Ms McPhun was "unable to conclude whether this was the true reason".

63. Ms McPhun added in some comments to the draft outcome letter regarding the third allegation ("It is alleged that on 8th November 2023, you demonstrated poor time management and prioritisation.). The comments added to the letter by Ms McPhun were:

    "You have been unable to convince me that you prioritised effectively on 8th November, spending too long in call, but not actually fulfilling the core tasks in your role like filling availability gaps, fulfilling full store walks, prioritising workload and missing stock that was available both in store and in the warehouse."

64. At some point prior to 19 December 2023, the Claimant appealed the decision to dismiss him.

65. Before the appeal hearing, the Claimant obtained a copy of his clinical records from the Employee Assistance Program. The clinician he had spoken to on 7 November 2023 wrote up a report which contained the information referred to above at paragraph 21.

66. The Respondent's Samantha Walker was assigned to hear the Claimant's appeal. At that time, Ms Walker's role was Director, Field Sales.

67. On 3 January 2024, Ms Walker was sent the relevant paperwork by Mr Davis. The appeal hearing was due to take place on 9 January 2024.

68. On 8 January 2024, Ms Walker responded to Mr Davis by email noting, "Thanks for sending this over, I have read through all the notes. A couple of things I wanted to follow up on. He has not submitted much additional information in the 'Grounds for Appeal' form, is there any additional documentation that I am missing? He refers to evidence from EAP, do we have this available and if not, when will I receive this information. I don't think we can go ahead with out it." Employee Relations Business Partner, Richard Flandrin, responded suggesting they discuss the matter further.

69. On 9 January 2024, Mr Flandrin sent an email to Ms Walker noting the Claimant had asked to put the appeal hearing date back as he was trying to get details from EAP. Mr Flandrin noted:

    "I am going to reply with an early date in February as the only/last suggestion for him as a face-to-face. Are you in Leeds anytime in February? If not, then I will also give him a suggestion of Virtual as well, or Uxbridge. So if this suits you, just let me know these dates as well. If he doesn't have the required documents he is seeking, this meeting will be taking place either way. Ultimately I would like to get this wrapped up no later than mid Feb."

70. On 18 January 2024, the Claimant was invited to an appeal hearing on 30 January 2024.

71. On 30 January 2024, the appeal hearing took place. The Claimant explained that he had felt that the conversation he had with Ms Ogilvie on 6 November 2023 had related to allegations of a sexual nature. He explained he had felt worried and suicidal after the meeting and had contacted EAP on 7 November 2023.

72. Ms Walker asked if the Claimant had raised his poor mental health on 8 November 2023 with anyone at the Respondent. The Claimant responded that he had raised it with his manager on 9 November 2023. Ms Walker asked if he had raised it with anyone before 9 November 2023. He said he had spoken to EAP. He was asked if he thought EAP would share confidential information with anyone. He said no. He was then asked, why, if he was feeling mental stress and this was having a great impact on his ability to think clearly, he did not tell someone. He replied by asking a question about whether they would have done something. He noted when he told Ms Ogilvie on 9 November 2023, she did not offer him any further help. Ms Walker responded saying that if he had told someone prior to it happening, "it could be taken as mitigation in advance and would have been taken into consideration on any errors made. When you mention after, then it's not the same. Afterwards it could potentially it could be an excuse once the errors are made."

73. When Ms Walker gave oral evidence, I asked her about the fact that the Claimant had raised it with someone before 8 November 2023 because he had called EAP on 7 November 2023. Although the Claimant had not told his manager, Ms Walker had been presented with evidence at the appeal hearing of what he had said to EAP, which included him telling the clinician that his motivation had been affected and that he was having thoughts of self harm. I asked Ms Walker what difference it made if it was raised with EAP and raised with a manager, Ms Walker replied she saw it as the difference between needing a little support, whereas the errors the Claimant had made on 8 November 2023 were so basic, she would have expected to see high levels of distress to explain it. This did not explain why for the Respondent to have accepted it was valid mitigation, the Claimant needed to have told a manager before 8 November 2023, rather than telling EAP.

74. As with Ms McPhun, Ms Walker also put in her witness statement that six of the errors made in terms of the records, had gone in the Claimant's favour (in terms of gaining points that could assist the Claimant with being eligible for a bonus) and one had gone against. She said in her oral evidence that this was part of her reasoning for thinking the Claimant had falsified records. As with Ms McPhun, this was not however a matter that Ms Walker discussed with the Claimant at any point during the appeal hearing.

75. On 31 January 2023, the Claimant was informed his appeal was unsuccessful. Ms Walker's witness statement said she wrote a draft of the outcome letter with input from Richard Flandrin.

76. The parts in bold were added by Richard Flandrin to the first draft:

> "You confirmed that you contacted EAP on 7th November 2023 and have included the report from this interaction as part of your appeal. You confirmed that you did not seek any further support for your mental health, either through EAP or outside work. You dismissal on the 1st December 2023 was due to inputting inaccurate measurements & falsified results, failure to complete the core tasks of the merchandiser role and poor time management & prioritisation. Significant issues where founds across all 3 store visits which were under review, which constitutes a serious dereliction of duties. **You have provided no medical evidence that you were incapable of recording accurate data.**
>
> If your mental health might have an impact on your performance at work I believe the onus was on you to inform your line manager. You contacted EAP on 7th November 2023 to seek support, but did not inform your manager until after the customer reviews, at the investigation meeting on the 6th November 2023. You have stated that you informed EAP, however EAP are a service provider to support your wellbeing and not part of the CCEP management process. **Through your appointment, they have detailed that you were feeling in a low mood, however they never suggested anything around medical capability to do the role in hand.**"

77. On 28 February 2024, the Claimant contacted Acas for early conciliation purposes. An early conciliation certificate was issued on 10 April 2024. The Claimant submitted a claim to the Employment Tribunal on 28 April 2024.

The issues to be determined

78. In this case, I had to determine the following issues:

a) What was the reason or principal reason for dismissal? Was it a potentially fair reason? The Respondent said the Claimant had been dismissed for gross misconduct.
b) Did the Respondent genuinely believe the Claimant had committed misconduct?
c) Were there reasonable grounds for that belief?
d) At the time the belief was formed, had the Respondent carried out a reasonable investigation?
e) Had the Respondent otherwise acted in a procedurally fair manner?
f) Did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant?
g) Did dismissal fall within the range of reasonable responses?
h) If the dismissal was procedurally unfair, might the Claimant have been dismissed if a fair process was followed?
i) Did the Claimant's blameworthy conduct contribute to his dismissal? If so, to what extent?

The relevant law

79. Section 94 of the Employment Rights Act 1996 ("ERA 1996") gives employees the right not to be unfairly dismissed.

80. Section 98 of ERA 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). Second, if the employer shows that it had a potentially fair reason for the dismissal, the Tribunal must consider, without there being any burden of proof on either party, whether the respondent acted fairly or unfairly in dismissing for that reason.

81. It is for the employer to show the reason for dismissal and that it was a potentially fair one. A 'reason for dismissal' has been described by the Court of Appeal in *Abernethy v Mott, Hay and Anderson* [1974] ICR 323, CA as "a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee'."

82. Misconduct is a potentially fair reason for dismissal under section 98(2)(b) of ERA 1996, which refers to a reason that 'relates to the conduct of the employee'. In *Philander v Leonard Cheshire Disability* EAT 0275/17 the EAT held that misconduct can be deliberate or inadvertent. Gross negligence, as well as deliberate wrongdoing, can amount to misconduct and can constitute repudiatory conduct even where the behaviour is not wilful, or even blameworthy.

83. In *British Home Stores Ltd v Burchell* [1980] ICR 303, EAT, the EAT set out a three-fold test. The Tribunal must consider -
    a) if the respondent believed the employee was guilty of misconduct
    b) it had in mind reasonable grounds upon which to sustain that belief, and
    c) at the stage at which that belief was formed on those grounds, it had carried out as much investigation into the matter as was reasonable in the circumstances.

84. In *Singh v DHL Services Ltd* EAT 0462/12, His Honour Judge McMullen QC indicated that it is only the first of the three aspects of the *Burchell* test that the employer must prove. The burden of proof in respect of the other two elements of the test is neutral.

85. The type of behaviour that will amount to gross misconduct will depend on the facts of the individual case. However, it is generally accepted that it must be an act which fundamentally undermines the employment contract. It must be repudiatory conduct by the employee going to the root of the contract - *Wilson v Racher* [1974] ICR 428, CA.

86. A conduct dismissal will not normally be treated as fair unless certain procedural steps have been followed. In *Polkey v AE Dayton Services Ltd* [1988] ICR 142, HL, Lord Bridge itemised the procedural steps as follows:
    a) a full investigation of the conduct, and
    b) a fair hearing to hear what the employee wants to say in explanation or mitigation.

87. When assessing whether the employer adopted a reasonable procedure, tribunals will use the range of reasonable responses test that applies to substantive unfair dismissal claims. As Lord Justice Mummery said in *J Sainsbury plc v Hitt* [2003] ICR 111, CA: “The range of reasonable responses test (or, to put it another way, the need to apply the objective standards of the reasonable employer) applies as much to the question whether the investigation into the suspected misconduct was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss for the conduct reason.”

88. 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).

89. In *Strouthos v London Underground Ltd* [2004] IRLR 636, CA, the Court of Appeal comment at paragraph 12: “It is a basic proposition, whether in criminal or disciplinary proceedings, that the charge against the defendant or the employee facing dismissal should be precisely framed, and that evidence should be confined to the particulars given in the charge.”

90. At paragraph 38 the Court of Appeal commented: “…it does appear to me to be basic to legal procedures, whether criminal or disciplinary, that a

defendant or employee should be found guilty, if he is found guilty at all, only of a charge which is put to him. What has been considered in the cases is the general approach required in proceedings such as these. It is to be emphasised that it is wished to keep proceedings as informal as possible, but that does not, in my judgment, destroy the basic proposition that a defendant should only be found guilty of the offence with which he has been charged" and later in the judgment noted, "…it does appear to me quite basic that care must be taken with the framing of a disciplinary charge, and the circumstances in which it is permissible to go beyond that charge in a decision to take disciplinary action are very limited. There may, of course, be provision, as there is in other Tribunals, both formal and informal, to permit amendment of a charge, provided the principles in the cases are respected. Where care has clearly been taken to frame a charge formally and put it formally to an employee, in my judgment, the normal result must be that it is only matters charged which can form the basis for a dismissal." (paragraph 41).

91. In *Taylor v OCS Group Ltd* [2006] ICR 1602, CA, the Court of Appeal further stressed that a tribunal's task under section 98(4) of ERA 1996 is not simply to assess the fairness of the disciplinary process as a whole but also to consider the employer's reason for the dismissal, as the two impact on each other. It stated that where an employee is dismissed for serious misconduct, a tribunal might well decide that, notwithstanding some procedural imperfections, the employer acted reasonably in treating the reason as sufficient to dismiss the employee. Conversely, where the misconduct is of a less serious nature, so that the decision to dismiss is nearer the borderline, the tribunal might well conclude that a procedural deficiency had such impact that the employer did not act reasonably in dismissing the employee.

92. There is no burden of proof on either party and the issue of whether the dismissal was reasonable is a neutral one for the tribunal to decide (*Boys and Girls Welfare Society v Macdonald* [1997] ICR 693, EAT).

93. In *Brito-Babapulle v Ealing Hospital NHS Trust* [2013] IRLR 854, EAT, the EAT held that dismissal for gross misconduct will often fall within the range of reasonable responses, but this is not invariably so. The EAT noted that the tribunal's approach gave no scope for consideration of whether mitigating factors rendered the dismissal unfair, notwithstanding the gross misconduct.

94. In *East of England Ambulance Service NHS Trust v Sanders* EAT 0319/15 the EAT emphasised that Brito-Babapulle is not authority for the proposition that tribunals must look at mitigating factors not identified by the respondent. It was simply saying that a tribunal must not jump from a finding that dismissal was for gross misconduct to a finding that the dismissal is therefore fair. The EAT observed that dismissal for gross misconduct will usually be fair (whatever the circumstances) but that, in a 'small number of cases', the mitigating factors could be such that no reasonable employer would have dismissed.

Polkey principle

95. Compensation for claims of unfair dismissal is made up of a 'basic award' and a 'compensatory award'. The basic award is calculated by applying a formula based on the employee's age, length of service and weekly pay. The compensatory award is based on the amount the Tribunal considers just and equitable for the loss which the employee has suffered because of the dismissal.

96. Where the employer has dismissed for a substantively fair reason but has failed to follow a fair procedure, the compensatory award may be reduced so long as it can be shown that a fair procedure would have resulted in a dismissal anyway. It is possible to make a reduction of 100 per cent on the basis that any procedural failure that served to render the dismissal unfair made absolutely no difference. The outcome would have been the same even if a fair procedure had been adopted, meaning that the employee would have been fairly dismissed on the same date as he or she was unfairly dismissed.

Contributory conduct

97. Section 123(6) of ERA 1996 states that: 'Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.'

98. For conduct to be the basis of a finding of contributory fault, it must have the characteristic of culpability or blameworthiness. The words 'culpable' and 'blameworthy' are synonyms. Culpable just means 'deserving of blame' (*Sanha v Facilicom Cleaning Services Ltd* EAT 0250/18).

99. In *Hollier v Plysu Ltd* [1983] IRLR 260, EAT, the EAT suggested that the contribution should be assessed broadly and should generally fall within the following categories: wholly to blame (100 per cent); largely to blame (75 per cent); employer and employee equally to blame (50 per cent); slightly to blame (25 per cent).

100. However, a finding that an employee's conduct is the sole cause of his or her dismissal will not inevitably result in a nil compensatory award. In *Lemonious v Church Commissioners* EAT 0253/12 the EAT said that even where a tribunal finds no reason for dismissal other than the employee's conduct, it might still have to modify the percentage reduction in light of what is just and equitable.

Conclusions

What was the reason or principal reason for dismissal? Was it a potentially fair reason?

101. The Respondent dismissed the Claimant on the basis that he had committed gross misconduct. The allegations which the Claimant faced were that he had been "dishonest and negligent" in the performance of his duties by inputting "falsified and inaccurate" measures in Red1 (Allegation 1), he had failed to complete the core merchandising tasks

(Allegation 2), and he had demonstrated poor time management and prioritisation (Allegation 3). I accept that the Respondent's findings in respect of Allegations 1 and 2 were the principal reason for the Claimant's dismissal.

102. As explained below, I do not consider the Respondent's findings in respect of Allegations 1 and 2 were the only reasons for the Claimant's dismissal. I found that Ms McPhun also took into account other matters, namely the previous allegation that the Claimant gave unwanted attention to a female colleague and Ms Wallace's feedback, even though they did not form the basis of any of the charges the Claimant faced. However, I accept that Ms McPhun's conclusions regarding Allegations 1 and 2 were the principal reason for the dismissal, and therefore there was a potentially fair reason (conduct) for dismissal.

Did the Respondent genuinely believe the Claimant had committed misconduct?

103. I accepted Ms McPhun's evidence that at the time she dismissed the Claimant she genuinely believed the Claimant had committed misconduct in respect of Allegations 1 and 2. Allegation 3 was not dealt with as a part of the disciplinary hearing and the Claimant was only informed of the outcome of Allegations 1 and 2 when he was dismissed. Allegation 3 was not mentioned and was not decided upon until after the Claimant was dismissed.

Were there reasonable grounds for that belief?

Allegation 1

Allegation 1: "It is alleged that on 8 November 2023 you were dishonest and negligent in your performance of duties by inputting falsified and inaccurate measures in Red1."

104. The Respondent did not have reasonable grounds to believe the Claimant had been dishonest or had falsified measures in Red1. There was no dispute that the Claimant had answered some of the questions on Red1 incorrectly. However, there were not reasonable grounds to believe that this was done dishonestly or deliberately.

105. The Respondent argued that it could be inferred it was done deliberately because the incorrect entries went "in his favour" on six out of seven occasions, and that this meant he would be allocated points for the answers he had given, which made it more likely he would be eligible for a bonus. The Claimant's evidence was that he did not know this, and that no one at any point in the whole disciplinary process discussed this with him. The Claimant suggested that the Respondent had come up with this explanation afterwards because they felt they had to find a motive for why he would be dishonest or falsify the answers. I accepted the Claimant's argument. Both Ms McPhun and Ms Walker suggested they firmly had in mind that the results went in the Claimant's favour, when concluding the Claimant had acted deliberately, yet neither could satisfactorily explain why if they had this in mind at the time they did not ask the Claimant about

this, why it was not referred to when the Claimant was informed of his dismissal at the end of the disciplinary hearing, or why this was not mentioned in the outcome letters sent to the Claimant. Nor was it mentioned in the Grounds of Resistance. I concluded that the Respondent's witnesses did not have this issue in mind at the time because if they had it would have been raised with him.

106. The Respondent also argued that it had reasonable grounds for the belief the Claimant had been dishonest or had falsified measures in Red1 because he admitted he had knowingly inputted inaccurate data because when it was pointed out to him by Ms Ogilvie in the investigation meeting that he had indicated on Red1 that Smart Water was available, and it should not have been ticked, the Claimant responded, "Yes I know I shouldn't have ticked that as I'm aware they weren't in" (p163). The Respondent argued that this answer was an admission of guilt, and that it indicated that the Claimant was aware, at the time that he was completing the questions on Red1, that he was knowingly putting in the wrong answer. The Claimant argued this was wrong, he did not knowingly put in the wrong answer at the time he did it, and that what he meant was that he could see from the photographs he was being shown by Ms Ogilvie in the meeting that he should not have ticked that the Smart Water was available. When the Claimant attended the meeting with Ms McPhun, he denied that he had intended to put in the wrong figures, yet Ms McPhun did not explore this point with him further. I did not consider that this one sentence, particularly in the wider context of all that was said by the Claimant in the investigation meeting and the disciplinary meeting, could reasonably be construed as an admission of having knowingly put in false data.

107. Allegation 1 was however widely framed and refers to the Claimant having been "dishonest *and negligent*" in the performance of his duties by inputting "falsified *and inaccurate*" measures. There were reasonable grounds upon which the Respondent was able to conclude the Claimant had been negligent in the performance of his duties and that he had inputted inaccurate measures. It was not disputed by the Claimant that he had made mistakes on 8 November 2023, as set out in the customer review report, and that his performance had fallen short of what was expected of him.

Allegation 2

Allegation 2: It is alleged that on 8 November 2023 that you failed to complete core merchandiser tasks relating to product availability.

108. There were reasonable grounds for the Respondent's belief that the Claimant had committed misconduct by failing to complete core merchandiser tasks relating to product availability. The evidence was documented in the customer review report, and the Claimant accepted that most of the matters raised by Ms Ogilvie were valid, and that he had failed to complete some of the key merchandiser tasks relating to product availability.

Allegation 3

Allegation 3: It is alleged that on 8 November 2023, you demonstrated poor time management and prioritisation.

109. In the disciplinary hearing, Ms McPhun did not ask the Claimant any questions about Allegation 3, and when she announced that he was to be dismissed in the disciplinary hearing and the reasons for it, she made no mention of it. It was only a week later, when it was pointed out by Employee Relations Business Partner Mr Davis that she had not reached a conclusion on Allegation 3, that she confirmed that the allegation was also upheld. In the draft dismissal letter, Ms McPhun added a paragraph which noted, "you have been unable to convince me that you prioritised effectively on 8 November, spending too long in call, but not actually fulfilling the core tasks of your role…"

110. For the Tribunal hearing, Ms McPhun wrote in her witness statement: "Finally, in respect of Allegation 3 (that he had demonstrated poor time management and prioritisation), given my findings in respect of Allegations 1 and 2, it followed that this allegation was also upheld. I was not satisfied that Michael had prioritised his duties effectively. He had spent a long time on some calls but not completed core duties, including not filling availability gaps, not completing store works and missing stock despite it being available in the store and the warehouse."

111. As the Respondent did not ask the Claimant any questions about this matter in the dismissal hearing and did not set out in the dismissal letter how the Claimant was said to have demonstrated poor time management and prioritisation and did not set out what conclusions were reached on this point, it is difficult to understand the details of this allegation of misconduct. It is not clear if the Respondent found that the Claimant spent too long on each of the three calls that day, and it is not clear if the explanation he gave to Ms Ogilvie about why he had taken longer for one of the calls was accepted or not, and if not, why not. As it is not clear what the Claimant was alleged to have done wrong, it is difficult to conclude that the Respondent had reasonable grounds for believing he had committed misconduct.

112. In any event, Allegation 3 was forgotten about at the time of the Claimant's dismissal. Therefore, at the time the decision was made to dismiss the Claimant, the Respondent did not have a genuine belief he had committed misconduct by failing to demonstrate poor time management and prioritisation, and that belief was not based on reasonable grounds, because at the time the decision was made, this allegation simply was not in Ms McPhun's mind.

At the time the belief was formed, had the Respondent carried out a reasonable investigation?

113. Prior to the Claimant's dismissal, the Respondent had produced a report which provided him with the details of what he was alleged to have done wrong in respect of Allegations 1 and 2. The Claimant had attended a disciplinary investigation meeting and a disciplinary hearing, and he was asked questions about what he was alleged to have done wrong in

respect of Allegations 1 and 2. Therefore, in respect of these allegations, at the time the Respondent formed a belief that the Claimant was guilty of misconduct, the Respondent had carried out a reasonable investigation.

Had the Respondent otherwise acted in a procedurally fair manner?

114. I found that the Respondent had not acted in an otherwise procedurally fair manner.

115. Firstly, Ms McPhun claimed to have reached the decision to dismiss the Claimant on the basis of the Claimant's performance on 8 November 2023, (i.e. just based on the allegations that he faced), but I did not accept that was the case. I found that in reaching her decision, Ms McPhun also took into account the allegation that had been made about the Claimant giving a female colleague unwanted attention (which was not a charge that he faced) and Ms Wallace's prior feedback which raised concerns about the Claimant's performance in October 2023 (which was also not a charge that he faced).

116. One of the reasons why I concluded that Ms McPhun did take Ms Wallace's feedback into account when deciding to dismiss the Claimant is because Ms McPhun wrote in her witness statement: "There was a discussion in the disciplinary hearing around the Halloween 'mega'. A mega is a big promotional display for a one-off event that is rolled out across the stores. Michael's AE, Ruth, had reported to Emily that she was supposed to meet Michael to build the Halloween mega but he had already left when Ruth arrived, and he had claimed that he could not find the point of sale for the Mega. However, Ruth then found it straight away. Michael had not undertaken a thorough check or store walk. Whilst this point was not one of the allegations against Michael (and predated the 8 November 2023 customer review), it did paint the picture to me of someone who was not conducting themselves to CCEP standards and this did undermine the mitigation he sought to rely on in respect of his conduct on 8 November".

117. I do not accept that Ms McPhun only took this matter into account as evidence which undermined the Claimant's mitigation. The sentence "it did paint the picture to me of someone who was not conducting themselves to CCEP standards" indicates she took this matter into account more broadly, despite this not being one of the allegations the Claimant faced. In addition, the Claimant was not told in the disciplinary hearing that Ms McPhun thought that Ms Wallace's feedback undermined his mitigation and so the Claimant was not able to put forward his response to this.

118. I have also concluded that it was procedurally unfair for Ms McPhun to have taken Ms Wallace's feedback into account when deciding to dismiss the Claimant because firstly, that feedback had not been passed on to the Claimant at the time and he had not been given a coaching conversation as Ms Walker said he should have been. Secondly, the feedback itself indicated there was an issue with the Claimant's understanding of aspects of the role. In other words, a performance issue, rather than a conduct issue. Thirdly, the Claimant had only one week of training in the role, and

normally Merchandisers would receive 6 weeks of training. Feedback about the Claimant's performance was taken into account when deciding to dismiss him for gross misconduct, despite the fact he had not been informed of the feedback, or given a coaching conversation, and he was not given a chance to improve.

119. I concluded that Ms McPhun also took into account the complaint made about the Claimant giving a female colleague unwanted attention because Ms McPhun wrote in her witness statement, "I also considered that Michael had said he had been speaking to the store manager and therefore had not checked the frozen section. There appeared to be a pattern of Michael being quite a chatterbox and distracting staff and not fulfilling his duties, given the issue Emily had discussed with him on 6 November which had led to his informal counselling." At no point in the disciplinary hearing did Ms McPhun say to the Claimant that she was taking into account the previous allegation and she did not allow him the opportunity to respond to her conclusion that he was "a chatterbox" who distracted staff.

120. Ms McPhun also admitted in her oral evidence that she had spoken to the Claimant's Senior Manager, Mr Dunkley, prior to the decision to dismiss and he provided negative feedback about the Claimant. Ms McPhun confirmed that Mr Dunkley was concerned about the complaint that was received about unwanted attention and he was concerned about Ms Wallace's feedback. Ms McPhun did not tell the Claimant she had spoken to Mr Dunkley and did not give him an opportunity to comment on the negative feedback that his Senior Manager had given. I do not accept that Ms McPhun did not take Mr Dunkley's view into account when deciding to dismiss the Claimant, particularly as she did not disclose it to the Claimant or refer to it in her witness statement.

121. I also find the fact that Ms McPhun had this conversation with Mr Dunkley and failed to disclose that to the Claimant undermines her assertion that she was independent and impartial. Ms McPhun wrote in her witness statement that Mr Dunkley did not feel that he was able to hold the hearing because he was too close to the Claimant whereas she was impartial. In those circumstances, it was not appropriate for Ms McPhun to have discussed the matter with Mr Dunkley, heard his negative views of the Claimant, and then failed to disclose to the Claimant that she had that conversation, and allow him to respond to the concerns raised by Mr Dunkley.

122. In addition, I found that it was procedurally unfair for the Respondent to have upheld Allegation 3 against the Claimant in circumstances where the allegation was not explained to the Claimant, he was asked almost no questions about it, it was not properly explored with him in the disciplinary hearing, and where even by the time of the Tribunal hearing it was still not clear exactly what the nature of the charge was.

123. In this case, the evidence came across in a manner which suggested the dismissing officer had a predetermined mindset that the Claimant would be dismissed. Both Ms McPhun and Ms Walker appeared to want to minimise the Claimant's mitigation. They both suggested it was

problematic that the Claimant had not raised how he was feeling on 8 November 2023 in advance *with a manager*. Although, as I have already set out above, neither could explain why that was an important distinction, when he had raised it with EAP. If the Claimant had not told anyone that he had been feeling in a low mood, was having thoughts of self harm, and was lacking motivation until after he had been informed that he was facing allegations, that may have given the Respondent cause to be sceptical. However, by the time of the appeal, there was documentary evidence that the Claimant had told EAP the day before the customer review. This was evidence that supported his explanation as to why he performed poorly on the day of the review, but the Respondent's witnesses gave the impression that they had not given any real consideration to his mitigation. Instead, they only sought to explain why it was insufficient.

Did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant? Did dismissal fall within the range of reasonable responses?

124. I did not find that the Respondent acted reasonably in all the circumstances in treating their decision that the Claimant was guilty of misconduct in respect of Allegations 1 and 2 as a sufficient reason to dismiss the Claimant. I have not taken into account Allegation 3 as that was not decided upon until after the Claimant was dismissed.

125. As noted above, I did not find the Respondent had reasonable grounds on which to believe the Claimant had acted dishonestly or had deliberately entered false results. I did find that the Respondent had reasonable grounds to believe the Claimant had been negligent and that the results had been inaccurate. However, the allegations related to the Claimant's failings *on one day*. It was not disputed he failed to reach the standards expected of him in a number of ways at three stores *on that one day*. However, it is very difficult to see how these findings amounted to "gross misconduct".

126. In the Respondent's disciplinary policy, examples of misconduct include "serious or repeated instances of carelessness, resulting in minor loss to CCEP". Examples of gross misconduct include much more serious allegations such as disorderly or indecent conduct, fighting, physical violence, wilful damage or serious misuse of CCEP equipment or property, dishonesty or deliberate falsification of charges, and theft. Negligence is not listed, although it is not an exhaustive list. The Claimant failed to correctly complete the answers to questions on Red1. He also made a number of other errors at three locations on one day, such as not replenishing stock when he should have done, not leaving the products or areas as tidy as they should have been, or failing to report what was thought to be a broken lamp in a fridge, but none of the failings could be categorised as serious. Even taken together, they still relate to poor performance on just one day.

127. As set out by the Court of Appeal in *Wilson v Racher* [1974] ICR 428, CA it is generally accepted that the type of behaviour that will amount to gross misconduct must be an act which fundamentally undermines the employment contract. It must be repudiatory conduct by the employee

going to the root of the contract. The Claimant's actions on 8 November 2023, when he negligently failed to put in the correct measures to Red1 and failed to complete core merchandiser tasks relating to product availability, was not repudiatory conduct that went to the root of the contract, his actions did not fundamentally undermine the employment contract, were not sufficiently serious to amount to gross misconduct, and were not sufficiently serious to justify dismissal.

128. Under the Respondent's disciplinary policy, repeated instances of carelessness are categorised as misconduct and not gross misconduct. The policy recommends a first level warning for "minor offences, or if your misconduct, performance or attendance does not meet the acceptable standards". In the policy, dismissal is warranted "if your conduct is sufficiently serious; if a sustained improvement in your conduct, performance or attendance does not follow". The policy clearly envisaged a warning was a suitable sanction in these circumstances.

129. I am mindful of the fact that there is a range of reasonable responses open to an employer, and that I must not substitute my views for that of the employer, but I have concluded the decision to dismiss was outside the band of reasonable responses. No reasonable employer would have dismissed the Claimant in these circumstances, particularly when their disciplinary policy indicates the allegations were misconduct and that a warning was warranted. This is particularly true in light of the Claimant's mitigation, which the Respondent seemed determined not to take into account but instead looked to find reasons to discount or undermine. In the appeal outcome letter, the Claimant was told that there was "a lack of medical evidence which showed the Claimant was incapable of recording accurate data", which suggests the Respondent was determined to set an unrealistically high standard of what was required to prove his mitigation. Often people go to work when they are feeling in a low mood and anxious, and this can affect their ability to perform their duties. It is unusual to suggest falling short of the required standards on one day justifies dismissal for gross misconduct.

If the dismissal was procedurally unfair, might the Claimant have been dismissed if a fair process was followed?

130. As I am of the view that the Claimant's dismissal was substantively and procedurally unfair, I do not find that the Claimant would have been fairly dismissed even if a fair process had been followed.

Did the Claimant's blameworthy conduct contribute to his dismissal? If so, to what extent?

131. It was not disputed that the Claimant's work standards on 8 November 2023 fell below what was reasonably expected of him. There were various errors at the three stores. His mitigation was that his mental health had been affected by the meeting he had attended on 6 November 2023, and this was corroborated by what he reported to EAP on 7 November 2023 about how he was feeling. In these circumstances, while I accept there was some blameworthy conduct by the Claimant, it was not serious and therefore I have concluded his actions only contributed to his dismissal to

a small extent. Therefore, it is only appropriate to make a small reduction to the compensatory award. I have concluded a reduction of 10% is appropriate.

Next steps

132. As the Claimant's claim for unfair dismissal has succeeded, the matter will be listed for a preliminary hearing to set directions for a remedy hearing.

Approved by:

Employment Judge Annand

17 January 2025

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

17/01/2025

FOR EMPLOYMENT TRIBUNALS

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Recording and Transcription

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/