EMPLOYMENT TRIBUNALS

Claimant: **Ms P Connelly**

Respondent: **MYCITYDEAL Ltd**

Heard at: **East London Hearing Centre (via CVP)**

On: **5th and 6th February 2025**

Before: **Employment Judge Lambert**

Representation:
Claimant: Mrs Forsyth, solicitor
Respondent: Mr Qureshi, counsel

JUDGMENT

1. The Claimant was unfairly dismissed by the Respondent.

2. The Claimant is awarded a basic award of £2,507.70. This has been adjusted to take into account an 80% reduction due to her contributory conduct under Section 122(2) of the Employment Rights Act 1996 ("the **ERA**").

3. The Claimant is awarded a compensatory award of £1,227.50. This has been adjusted to reflect the following adjustments:

    3.1 an 80% reduction in the compensatory award for unfair dismissal under the principles in **Polkey v A E Dayton Services Limited [1987] UKHL 8;**

    3.2 an uplift of 10% for the Respondent unreasonable failure to comply with the ACAS Code of Practice 1: Disciplinary and Grievance Procedures published on 11th March 2015 (the "**ACAS Code**"), Section 207A of the Trade Unions and Labour Relations (Consolidation) Act 1992;

    3.3 a further reduction of 80% to recognise her contributory conduct in accordance with Section 123(6) of the ERA.

4. The Claimant's complaint of breach of contract is not well-founded and is dismissed.

REASONS

Introduction

1. The Claimant, Ms Connelly, was employed by the Respondent, MYCITYDEAL Ltd as a Senior Merchant Development Consultant from 1st June 2010 until her dismissal, without notice, on 27th March 2024.

2. The Claimant complains that her dismissal was unfair within the meaning of Section 98 of the ERA. She also complains that the Respondent breached her contract of employment by failing to give her the requisite notice to terminate that contract.

3. The Respondent denies these complaints. It says that the Claimant was fairly dismissed for gross misconduct due to dishonesty and falsification for artificially inflating her call time to merchants to improve her performance against a KPI and for making derogatory comments about the Respondent. These were acts of gross misconduct, so it was entitled to terminate her employment without notice.

4. The Respondent relied upon 3 witnesses, Mrs V Shields, HR Country Parker, UK & Ireland; Ms A Skilton, Local Sales Manager; and Mr B Dhillon, Head of Sales, UK & Ireland. The Claimant gave evidence herself and all witnesses provided statements. The parties relied upon an agreed bundle of documents running to 152 pages. In addition, all of the audio files of the calls and a video that the Claimant presented to the disciplinary hearing were available at the Tribunal hearing itself.

The Issues

5. The issues the Tribunal was required to determine were:

   <u>Unfair Dismissal</u>

6. What was the reason for dismissal? The Respondent asserted that it was conduct due to the Claimant's actions by (i) making what it described as fake calls to artificially inflate her average call time; and (ii) making derogatory comments about the Respondent in calls, which could have been heard by a merchant. Conduct is a potentially fair reason for dismissal under section 98(2) of the ERA.

7. Did the Respondent act reasonably in all the circumstances in treating the Claimant's behaviour as a sufficient reason to dismiss the Claimant? The Tribunal will need to decide, in particular, whether:

   7.1 Did the Respondent adequately investigate the concerns raised?

   7.2 Was the decision to dismiss a fair sanction, that is, was it within the range of reasonable responses open to a reasonable employer when faced with these facts?

7.3 Did the Respondent adopt a fair procedure?

7.4 The burden of proof is neutral on this point, but it helps to understand the Claimant's challenges to the fairness of the dismissal in advance. They are said to be that the Respondent:

7.4.1 failed to conduct a reasonable investigation into matters;

7.4.2 failed to hold an investigation meeting with the Claimant, produce an investigation report or appoint an investigation officer;

7.4.3 put a vague allegation to the Claimant in the disciplinary invite letter meaning she could not understand the nature of the case against her;

7.4.4 failed to provide the Claimant with a minimum of 48 hours between being made aware of the allegation and the disciplinary hearing, in breach of its own Disciplinary Procedure;

7.4.5 failed to review the evidence provided by the Claimant;

7.4.6 relied upon evidence that was not provided to the Claimant during the disciplinary hearing, meaning she had no opportunity to comment upon it;

7.4.7 failed to hold an appeal hearing after the Claimant appealed and in breach of its own Disciplinary Procedure;

7.4.8 dismissed the Claimant, which when taking into account her mitigating circumstances, long service, unblemished record and high performance, was outside the band of reasonable responses.

7.5 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; **Polkey v A E Dayton Services [1987] UKHL 8.** The Respondent asserted that the Claimant would have been dismissed in any event and any award should be reduced 100%. The Claimant contended that if a fair and reasonable procedure had been adopted she would not have been dismissed.

7.6 If the dismissal was unfair, would it be just and equitable to reduce the amount of the Claimant's basic award and compensatory award because of any blameworthy or culpable conduct on her part before the dismissal, in accordance with Sections 122(2) and 123(6) of the ERA, and if so, to what extent? The Respondent said that I should reduce any award by 100%.

Breach of contract (Wrongful Dismissal)

8. It was agreed that the notice the Claimant was entitled to receive 12 weeks' notice to terminate her contract of employment.

9. Did the Claimant fundamentally breach her contract of employment by committing an act of gross misconduct? This requires the Respondent to prove that the Claimant committed an act of gross misconduct.

10. The complaint of unfair dismissal focuses on the reasonableness of the Respondent's decisions under section 98(4) of the ERA. It is immaterial what decision I would have made myself but upon the band of reasonable responses. However, for the breach of contract complaint, I have to decide whether the Claimant was guilty of conduct serious enough to entitle the Respondent to terminate the Claimant's employment without notice.

Findings of Fact

11. I make the following findings of fact based on the balance of probabilities. Where I have had to resolve any conflicts of evidence, I indicate how I have done so at the relevant point. All page references in this judgment are references to pages contained within the trial bundle. The headings are included to assist the reader but do not form part of the judgment. Any wording in [square brackets] has been inserted by me to assist with the understanding of any quote.

12. The Respondent is a UK subsidiary company of Groupon Inc., which operates a well-known online platform providing a marketplace between the general public and the Respondent's customers or "merchants", as they were referred to during the hearing. It trades under the name Groupon.

13. The merchants are third party businesses which sell their products and services on Groupon's online platform, usually at a discounted rate, with Groupon receiving a commission from the merchants for the sales.

14. The Claimant was employed by the Respondent from 1st June 2010 until her dismissal on 27th March 2024. Immediately prior to her dismissal, she held the position of Senior Merchant Development Consultant. The Respondent accepts that it dismissed the Claimant and it asserts that it did so due to her conduct. This is a potentially fair reason for dismissal.

15. The Claimant's role was to manage approximately 300 – 400 merchants for the Respondent. This involved managing existing merchants and also attracting new merchants. The Claimant's duties were broad. She was required to spend time telephoning merchants, with a view to increasing sales from existing merchants; encourage new sales from potential merchants or to manage the administration around this. This included dealing with queries, drafting contracts and ensuring appropriate compliance with Groupon's rules around signed contracts.

16. It was agreed that the Claimant was a strong performer in terms of delivering revenue for the Respondent and that she had an unblemished record, up until the discovery of matters pertinent to this claim.

17. The Respondent operates a number of electronic systems, including SalesForce, client relationship management software which records interactions between the Respondent's employees and its merchants. It also uses Natterbox, which records the audio of the telephone conversations made by the Respondent's employees to a merchant. This creates audio files which can be reviewed. The Claimant was required to use Natterbox when making calls to merchants.

18. The Respondent operates various KPIs and required the Claimant and members of her team to spend at least 60 minutes per day on the telephone to merchants and prospective merchants. The rationale for this, as explained by Ms Skilton and Mr Dhillon, was that the more time spent speaking to merchants and potential merchants would increase market intelligence, build relationships and hopefully increase sales.

19. The Claimant was aware of these KPIs. They had been varied from 30 minutes a day, up to 90 minutes a day but at the material time, was set at 60 minutes. The KPI was not linked directly to any financial incentive.

Discovery of Calls

20. On 8th March 2024, Mrs Vanessa Shields, HR Country Partner, UK and Ireland, received an email from Ms Sarah Neligan (former Head of New Business UK) (p.47 – 48). The email raised concerns that the Claimant was making a large number of calls to one particular merchant, The Double Tree Hilton in Glasgow. The email stated that those calls started from October 2023 through to 8th February 2024. Ms Neligan was alerted to these calls by SalesForce and was able to listen to the calls using Natterbox.

21. This email was headed "Fake call time being logged". It also states:

> *"I have uncovered that Pauline Connelly has been calling the same merchant and staying on hold to log fake call time to artificially increase her performance against the company KPI's."*

22. Ms Neligan explained that she had listened to the 23 calls listed in that email. Links to the audio files of the calls were included within the email so they could be listened to. There was also a short description of the calls prepared by Ms Neligan.

23. Ms Neligan's concerns were two-fold: (i) the Claimant had been calling the same merchant and staying on hold to log fake call time to artificially increase her performance against a call time KPI ("**False Calls**"); and (ii) that during the calls the Claimant made derogatory comments about the Respondent ("**Derogatory Comments**").

24. Ms Neligan categorised the False Calls into calls where the Claimant rang the merchant and simply remained on hold without selecting an option; calls where the Claimant remained on hold without selecting an option but was having a conversation with someone in the background; and one call where the Claimant left a message for the merchant. Her conclusion, as set out in that email, was that 99% of the calls were fake.

25. Mrs Shields' evidence was that she spoke with Ms Neligan either on the day that she received the email or within a day or so. Ms Neligan confirmed to Mrs Shields that one of the Derogatory Comments included the Claimant saying that the Respondent company could go and "*fuck themselves*". The Claimant was also recorded speaking to a work colleague and informing them that she was contacting merchants to inflate her call time, essentially admission that she was making the False Calls. Mrs Shields explained that they discussed what to do and quickly agreed that the Claimant should attend a disciplinary hearing.

26. Mrs Shields accepted in evidence that there wasn't a formal investigation as such, an investigating officer was not appointed and no investigation report was prepared. Mrs Shields confirmed she listened to the False Calls and agreed with the view expressed by Ms Neligan that the Claimant was guilty of making False Calls to artificially increase her performance against the call time KPI. She also agreed that the Claimant had made the Derogatory Comments.

Disciplinary Hearing

27. Mrs Shields identified that Ms Anita Skilton, Local Sales Manager, had rejoined the Respondent recently and requested that Ms Skilton chair the disciplinary. Ms Skilton agreed.

28. On 25th March 2024 at 10:11am, Mrs Shields sent a draft disciplinary invite letter ("the **Invite Letter**") to Ms Skilton, requesting Ms Skilton to fill in the blanks (p.50). Mrs Shields' evidence, which I accept on this point, was that the only missing information related to the date and time of the hearing. Mrs Shields drafted the allegation contained within the Invite Letter which was:

> *"Allegation 1: Suspicious Account Activity (phone call logs) made between the 8th of January 2024 - 14th of March 2024"*

29. Ms Skilton completed the Invite Letter, confirming the date for the disciplinary hearing as 27th March 2024 at 10am (p.56). She then emailed the completed Invite Letter to the Claimant at 10:34am on 25th March 2024 (p.55). It contained information about the Claimant's right to be accompanied and whilst it did not indicate that the allegation could be deemed to be gross misconduct, it did record that one potential outcome could be dismissal.

30. No supporting documentation was attached to the letter. Ms Skilton sent a copy of the Respondent's Disciplinary Procedure to the Claimant at 13:07 that day (p.55, 97 – 103).

31. The Disciplinary Procedure (which is non-contractual) contained the following statements:

> ***Disciplinary Hearings***
>
> *In all cases, before any disciplinary action (including warnings) is taken they will receive a minimum of 48-hours advance written notice of the date of the disciplinary hearing.*
>
> ***Appeals Process***
>
> *…*
> *On receipt of the employee's appeal, Groupon will invite the employee to attend an appeal hearing and they must take all reasonable steps to attend.*
>
> ***Appeals Hearings***
>
> *At the appeal hearing, the employee will be given the opportunity to explain the grounds of appeal….*
> *…*
> *The employee should note that an appeal hearing is not intended to repeat the detailed investigation that lead (sic) to or formed part of the disciplinary hearing, but to review any specific factors that they feel have received insufficient consideration, such as:*
>
> - *An inconsistent/inappropriate harsh sanction*
> - *Extenuating circumstances*
> - *Bias of the disciplinary chair*
> - *Unfairness of the disciplinary hearing*
> - *New evidence subsequently coming to light"*
>
> [Underlining is my emphasis]

32. At 14:42 on 25th March 2024, the Claimant responded to Ms Skilton querying why the meeting was not an Investigation Meeting, rather than a Disciplinary Meeting. This email was responded to by Mrs Shields at 17:31 on 25th March 2024, stating that the Disciplinary Procedure allows the Respondent to bypass the investigation stage where there is sufficient evidence to proceed to a disciplinary hearing.

33. The Claimant responded at 17:33 that she:

> *"…can't prepare for a meeting and have documentation prepared by tomorrow if I don't know what the meeting is about."*

34. Mrs Shields responded at 17:46 by email providing audio links to the False Calls to the Double Tree Hilton in Glasgow, which also contained a brief description of each of the calls (p.53). This email contained a further 8 calls, making 31 in total, dated from 14th March 2024 until 22nd March 2024. Ms Skilton confirmed that she identified these additional calls through her own interrogation of the SalesForce and Natterbox systems prior to the disciplinary hearing. These were added to the original 23 calls identified by Ms Neligan.

35. On 26th March 2024, the Claimant emailed a video of her using Natterbox to contact the merchant ("the **Video**"). The Video (which I also viewed) showed the computer screen used by the Claimant whilst she dialled the merchant's number. The call connected and the merchant's automated script could be heard, advising the caller which number to select to be connected to various departments within the merchant, before requesting which option the caller required. The Claimant selected option 4 several times before being connected to someone at the merchant. The Claimant asserted that this showed that there were issues with the Natterbox system not operating properly because she had to select option 4 several times.

36. Ms Skilton's evidence on this point was that the Video actually showed the Claimant connecting to someone at the merchant. During the Video, when the Claimant selected option 4, a loud audible beep could be heard. In her view, this showed how the Claimant should have conducted a call. This was in contrast to the False Calls when the Claimant did not select an option at all and simply remained on the line whilst the automated script played again and again until the Claimant terminated the call.

37. On this point, I preferred the evidence of Ms Skilton. It was clear from my own observations of the Video, as compared to the various audio files of the False Calls that both parties requested that I listen to, that no loud audible beep could be heard in the False Calls. This was completely consistent with Ms Skilton's evidence that the Claimant was not selecting an option and simply allowing the call to run, without intending to speak with anyone. In the Video, the Claimant managed to speak with someone at the merchant when she selected an option. Again, this was entirely consistent with Ms Skilton's evidence and did not show that there were any significant issues with Natterbox.

38. The Disciplinary Hearing took place on 27th March 2024 at 10am via Google Meet. It was not in person. The Claimant, Ms Skilton and Mrs Shields attended, with Mrs Shields taking notes. Whilst not verbatim, the content of those notes were not in dispute, except for the timings of the hearing itself (p.71-77). It was common ground between the parties that the hearing commenced at 10:00am and was adjourned at a later point, possibly 10:40am. Whilst the notes record that the hearing was reconvened at 11:15am and ended at 11:30am, it was agreed that this should read 13:45 and approximately 14:00.

39. Those notes record at the outset of the Disciplinary Hearing, that Ms Skilton asked the Claimant:

> *"Do you know why this disciplinary hearing is taking place?"*
>
> *Well, I think so.*
>
> *Have you received details of the allegations in writing?*
>
> *Yes I did.*
>
> *Do you understand the nature of the allegation which has been made against you?*

> *I understand the allegations, but I do not know why I am here…*
>
> *Do you understand that this disciplinary hearing could potentially result in a dismissal or a disciplinary sanction being imposed as per Groupon's Disciplinary Policy?*
>
> *Yeah."*

40. The Claimant challenged Ms Skilton (p.73) at the hearing, complaining that she felt she was being singled out and requested how this issue had come about. Ms Skilton responded that a review of the account was carried out when SalesForce flagged the increase in calls to this particular merchant. The Claimant responded with:

> *"I cannot remember if I pressed the option, Do you think it's to increase my call time? I'm one of the worst on the team. I have a good contract but this merchant is hard to get hold of. I cannot get through to the client's mobile, she doesn't answer her calls. I'm at a loss as to why you think I would remain on hold on purpose."*
>
> [Underlining is my emphasis]

41. From those notes, I am satisfied that as at the commencement of the disciplinary hearing, the Claimant understood that the case against her was that she was attempting to artificially increase her call time.

42. During the hearing, Ms Skilton asked the Claimant various questions (p.76). One was whether the Claimant had specifically raised an issue with her line manager or IT about Natterbox being temperamental? The Claimant answered "No". Ms Skilton's evidence on this point was that whilst there could be issues with Natterbox, these were usually resolved with the user simply switching off their computer and restarting. If this did not resolve the issue, users would contact IT. By answering no to this question, Ms Skilton was satisfied that the Claimant was not encountering consistent issues.

43. Ms Skilton also asked the Claimant whether, if the options did not work, was this the only account that the Claimant had issues with? The Claimant answered "maybe". Ms Skilton also asked if the Respondent was to check other accounts would the same issue arise? The Claimant answered "maybe". Ms Skilton explained that if there was an issue, she expected the Claimant to raise it. From her own review of the audio of the calls, the Claimant's observations and answers to her questions, she was satisfied that if there was an issue with Natterbox, it was not a generalised issue that would explain the Claimant's actions in failing to select an option in response to the automated script.

44. I find that Ms Skilton did consider the issues raised by the Claimant about Natterbox, but concluded that the Claimant's explanations did not explain all of the False Calls. I consider this was a reasonable conclusion to draw.

45. Ms Skilton played each call individually at the hearing and asked the Claimant for her response. Ms Skilton specifically asked the Claimant why she did not

press an option when prompted by the merchant's automated script. The Claimant accepted in evidence that the explanations she provided were:

45.1 that the options do not always work;

45.2 that she could often be guilty of multi-tasking, by this she meant carrying out other work related tasks whilst on a call;

45.3 that it can take ages to get through;

45.4 she could not remember all of the calls as it was some time ago; and

45.5 in response to approximately 10 of the calls played to her, she provided no response.

46. Ms Skilton referred to the Video and noted that when an option was selected off the keypad, a noise was heard. Ms Skilton asked why, in reference to the audio of the calls, no similar noise can be heard. The Claimant could not explain why this was the case. After hearing all of the calls and listening to the Claimant's responses, the hearing was adjourned.

47. During the adjournment, at 13:36 the Claimant sent an email to Ms Skilton and Mrs Shields attaching messages that were sent on the Respondent's internal messaging system. These were comments from the UK team and MD team about issues with Natterbox that the Claimant said were occurring during Jan, Feb and March ("the **Messages**"). This was the period where the False Calls occurred. The Messages were from approximately 6 individuals on different dates in February 2024 commenting upon technical issues with Natterbox. The Claimant asserted that this demonstrated the issues that were affecting Natterbox.

48. Ms Skilton's evidence was that she reviewed the Messages but felt it added nothing to the answers already provided by the Claimant. In response to her questions about any generalised issues with Natterbox, I find that this was a reasonable conclusion to draw.

49. In evidence, Ms Skilton accepted that during the adjournment she also reviewed other calls made by the Claimant to other merchants. She concluded that these were further examples of the Claimant deliberately increasing her call time against the call time KPI ("the **Additional Calls**"). Ms Skilton accepted that she did not make the Claimant aware of her investigation into the Additional Calls and the Claimant had no opportunity to respond to these Additional Calls.

50. The disciplinary hearing resumed at 13:45. Ms Skilton explained that in the adjournment she had re-listened to the calls, considered matters including the evidence provided by the Claimant but decided that the Claimant had committed acts of gross misconduct. She had decided to dismiss the Claimant with immediate effect due to dishonesty and falsification of

information. She considered that the acts were so serious that she did not consider any alternative sanction short of immediate dismissal.

51. A letter confirming the outcome of the disciplinary was prepared by Ms Skilton (p.78 – 80) and emailed to the Claimant on the same day (p.81) ("the **Outcome Letter**"). The Outcome Letter confirmed that Ms Skilton had reviewed and taken into account, as part of her decision to dismiss the Claimant, the Additional Calls. The Outcome Letter confirmed the Claimant's right to appeal within 7 working days of receipt of the letter.

52. On 28th March 2024, the Claimant emailed Mrs Shields and requested a copy of the contract of employment and the recording where she apparently said *"Groupon can go fuck themselves"*. Mrs Shields responded the same day to these requests.

Appeal Hearing

53. The Claimant exercised her right to appeal by letter dated 9th April 2024 (p.106). In her appeal, the Claimant challenged on these grounds (my categorisation):-

    53.1 the period of time she was provided between being required to attend the disciplinary hearing and the hearing itself was less than the minimum time of 48 hours contained in the Respondent's own Disciplinary Procedure;

    53.2 the fact that there was no investigation stage or meeting;

    53.3 that this was a breach of the ACAS Code;

    53.4 that the sanction was too harsh because she had struggled to adapt to a call centre model;

    53.5 this was her first disciplinary offence; and

    53.6 no account was taken of her long service, unblemished record and her high performance.

54. The Claimant's appeal was acknowledged by email from the Respondent's Taylor Bassett, HR Delivery Partner on 10th April 2024. Ms Bassett's email attached an appeal form with a request for the Claimant to complete. It was not completed although no issue was taken by the Respondent over this.

55. On 15th April 2024, Taylor Bassett emailed the Claimant to confirm that the Claimant's appeal would be addressed in accordance with the Respondent's policies and UK employment law. This email set out that the appeal would be reviewed by the team and if deemed necessary, the Claimant may be offered a hearing to present her case, and the decision of the appeal would be notified to her in writing.

56. Mr Dhillon's evidence was that he had reviewed the Claimant's appeal letter and felt that she was simply challenging on the basis that the decision to

dismiss her was too harsh. She was not offering any new evidence. As a consequence, he did not consider it necessary to hold an appeal hearing with the Claimant because he had all of the information he required. Mr Dhillon checked this with Ms Bassett. She advised him that this was permissible. He reviewed the information and felt that the decision to dismiss was appropriate.

57. On 22nd April 2024, Ms Bassett emailed the Claimant (p.112) and attached an appeal outcome letter dated 22nd April 2024 from Mr Dhillon, dismissing her appeal. This was on the basis that the Claimant had not provided any new evidence and based upon her own admission, which I have taken as a reference to the False Calls (the letter says "omission" but this is an obvious typo) and slandering of the company, the Derogatory Comments, this constitutes dishonesty, lack of integrity and falsification.

58. In evidence, Mr Dhillon conceded that he did not consider all of the Claimant's grounds of appeal, including the period of time between the Invite Letter and the disciplinary hearing. However, he suggested that this was not really an issue because it was only 34 mins short of the minimum 48 hours.

59. In cross examination, Mr Dhillon accepted that the Disciplinary Procedure contained the wording under the headings Appeals Procedure and Appeals Hearing (set out in paragraph 31 above) and that it was reasonable to assume that an appeal hearing would take place.

60. Importantly, during her evidence the Claimant accepted that:

    60.1 the statement recorded in the notes of the Disciplinary Hearing that she had the worst, by which she meant lowest, call time in her team against the 60 minute KPI.

    60.2 she had deliberately made some False Calls and remained on hold in order to increase her call time against that KPI.

    60.3 she had made the Derogatory Comments.

61. However, she did not understand, nor was she made aware, that Natterbox recorded all audio, not simply audio between herself and the merchant. She did not appreciate that Natterbox was recording her conversations with other individuals she was having using her mobile phone, whilst making the calls. She felt this was a breach of her privacy.

62. In response to questions put to her by Mr Qureshi (and as clarified by me), she accepted that a reasonable employer could consider her actions to be dishonest and worthy of dismissal. However, she advanced her case on the basis that in her particular circumstances, when taking into account her unblemished record, high level of performance and this KPI was not tied to a bonus, that something less than dismissal was appropriate.

Relevant Law:

63. Section 94 of the ERA confers on employees the right not to be unfairly dismissed, if they can satisfy certain conditions, including that they were

dismissed and had 2 years' qualifying service at the date of termination. The Respondent accepted that the Claimant met those conditions.

64. Where the Respondent accepts that the Claimant was dismissed, it has the burden of establishing a potentially fair reason for dismissal, Section 98(2) of the ERA. The Respondent relies upon conduct as the reason due to the Claimant (i) making the False Calls; and (ii) making the Derogatory Comments.. The Claimant did not dispute that this was the reason relied upon by the Respondent for her dismissal.

65. If the Respondent can establish a potentially fair reason for dismissal, then the Tribunal must consider, without there being any burden of proof on either party, whether the Respondent acted fairly or unfairly in dismissing the Claimant for that reason.

66. Section 98(4) of the ERA deals with fairness generally and provides that the determination of the question of whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and shall be determined in accordance with equity and the substantial merits of the case.

67. In misconduct dismissals, there is well established guidance on how a Tribunal should consider fairness in this context in the decision of **Burchell v BHS Stores [1978] IRLR 379** and subsequent cases such **as Post Office v Foley [2000] IRLR 827**, and **Sainsbury plc v Hitt [2003] ICR 111, CA**.

68. The Tribunal must be satisfied that:

    68.1 the employer had a genuine belief in the employee's guilt.

    68.2 that belief was held on reasonable grounds; and

    68.3 prior to reaching that decision the employer had carried out a reasonable investigation into matters.

69. In all aspects of the matter, including investigation, the grounds for belief, the penalty imposed and the procedure followed, the Tribunal must decide whether the employer acted within the band of reasonable responses open to an employer faced with those circumstances.

70. It is important to note that it is not for the Tribunal to determine how it would have handled matters or what decision it would have made. The Tribunal must not substitute its own view for that of the reasonable employer. This means that one employer might reasonably take one course of action, such as issuing a final written warning, whilst another employer facing the same circumstances might reasonably dismiss. This is the band of reasonable responses. Only when a Tribunal considers that the employer adopted a course of action outside of the band of reasonable responses can it conclude that the action was not that of a reasonable employer**: Iceland Frozen Foods Ltd 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.

71. Mrs Forsyth and Mr Qureshi provided me with oral closing submissions which I have considered and refer to where necessary in reaching my conclusions.

Unfair Dismissal: Conclusion

Reason For Dismissal: Section 98(1)

72. From my finding of facts set out above, I am satisfied that the Respondent held a genuine belief that the Claimant was guilty of gross misconduct. Its witnesses were all very clear about the reasons why she was dismissed, for making False Call and the Derogatory Comments. Mrs Forsyth did not challenge the genuine belief in the Claimant's guilt held by the Respondent. The Claimant accepted that she deliberately made some False Calls to increase her time for the purposes of improving her position against the call time KPI and made the Derogatory Comments. I consider it was reasonable for the Respondent to hold this genuine belief.

Reasonableness: Section 98(4)

73. Mrs Forsyth contended that the procedure adopted by the Respondent was fundamentally flawed.

74. Firstly, she says the Respondent did not appoint an investigating officer. It relied upon the calls identified by Ms Neligan in the email she provided to Mrs Shields, where she referred to the Claimant's actions as making fake calls at least 3 times in this email. Mrs Forsyth says that there is no doubt that Mrs Neligan had a closed mind to the allegations. This tainted the process moving forward as guilt was assumed from this point onwards. Additionally, Ms Skilton carried out further investigations after receiving Ms Neligan's email which contained 23 calls. This increased to 31 call due to Ms Skilton's investigation. This meant that she was an investigator whilst also chairing the disciplinary. This makes the decision of Ms Skilton unfair.

75. Secondly, the Respondent failed to provide the Claimant with a minimum of 48 hours' notice of the disciplinary hearing, in breach of its own Disciplinary Procedure. What made this breach more significant was the vague allegation contained within the Invite Letter. "Suspicious activity" is vague and bears little resemblance to the reasons put forward by the Respondent for the Claimant's dismissal, namely the False Calls and the Derogatory Comments. This meant that the Claimant did not understand the allegations against her. It was only when she requested further information and was provided with the evidence in support, some 7 hours after the Invite Letter was emailed to her that she understood.

76. Thirdly, Ms Skilton took the Additional Calls into account when deciding to dismiss the Claimant. The Claimant was never made aware of these Additional Calls until after she received the Outcome Letter.

77. Fourthly, the Respondent failed to properly consider the Claimant's evidence.

78. Fifthly, it failed to hold an appeal hearing, another breach of its Disciplinary Procedure. The Respondent did not take into account the Claimant's unblemished record, that this was her first disciplinary issue and her high performance. If it had done so, it would not have dismissed the Claimant.

79. Mrs Forsyth raised the point that the Respondent had acted in breach of the Information Commissioner's Office guidance in failing to make the Claimant aware that Natterbox recorded all conversations when it was in use, rather than only recording any conversations between the user and the merchant. Due to this failure, the Claimant was unaware that her discussions with other colleagues and individuals was being recorded by Natterbox when she was using the system to artificially inflate her call time. She considered that the Respondent should have made the Claimant aware and this failure also made her dismissal unfair. In response to a question from me, Mrs Forsyth accepted that this was not raised as part of the Claimant's formal case as pleaded in her Claim Form.

80. In relation to the breach of contract complaint, Mrs Forsyth says that the Claimant's conduct did not meet the threshold of gross misconduct and this amounts to a breach of contract. Mrs Forsyth suggested that this is obviously an unfair dismissal and the Respondent's breaches were significant. Therefore, I should consider increasing any compensation by 25% in the light of the Respondent's unreasonable failure to comply with the ACAS Code.

81. Mr Qureshi, for the Respondent, asserted that the law requires a reasonable investigation to be carried out. Considering the nature and strength of the evidence that the Respondent had discovered, there was really nothing that a fuller investigation would provide. The evidence spoke for itself. He accepted that Ms Skilton carried out further investigations after receiving Ms Neligan's email but the Claimant was aware of the 8 calls added by Ms Skilton to the original list and she was provided with an opportunity to respond to these calls. The Additional Calls were really more of the same and had no real impact upon the decision to dismiss, although he accepted that the Claimant was not provided with an opportunity to comment on the Additional Calls.

82. In response to the failure to provide the Claimant with the 48 hours between the Invite Letter and the disciplinary hearing, Mr Qureshi says this was of no consequence. The Claimant accepted that she understood the allegations raised against her, understood the evidence and was able to respond to those allegations at the hearing itself.

83. Similarly, the Claimant's appeal letter was comprehensive and there was nothing to be gained by holding an appeal hearing because all of her grounds were set out there. In essence, if there were breaches, these were minor and were not sufficient to fall outside the band of reasonable responses. He urged me to find that the dismissal was fair.

84. However, he suggested that if I should find that the dismissal was unfair, the Claimant's actions were such that she would have been dismissed in any event and any compensation awarded should be reduced by 100%.

Similarly, if I find that there were any breaches of the ACAS Code, these were minor and I should not increase any compensation awarded.

85. In respect of the breach of contract, Mr Qureshi asserted that the Claimant had admitted to the acts of gross misconduct and I should find that there was no breach of contract because the Respondent was entitled to summarily terminate the employment contract.

86. Mr Qureshi asked me to disregard any issues of privacy raised by Mrs Forsyth in closing submissions. The Claimant was aware that Natterbox recorded calls and it was disingenuous to suggest that she was not so aware. It also never formed part of the Claimant's case.

Conclusions (S.98(4))

87. It is a requirement for an employer to carry out a reasonable investigation into matters prior to issuing a disciplinary sanction. The Respondent accepted there was no investigating officer and no investigation report was prepared, but it says there was no need to because the evidence spoke for itself. Whilst I accept that the evidence against the Claimant was strong, the purpose of any investigation is to establish the facts, not to prove misconduct. There is no rule of law that says that an employer must hold an investigatory meeting before a disciplinary hearing, but if it fails to do so, it runs the risk that it will miss something and an otherwise fair dismissal may become unfair. I find this is what has happened in this case.

88. In this case, the failure to hold an investigatory meeting was not the only issue. The Respondent failed to identify an investigatory officer. Here, Ms Neligan reviewed the initial 23 calls, but Ms Skilton, who chaired the disciplinary hearing also carried out an investigation, leading to a further 8 calls being added. The Claimant was provided with these 8 additional calls and was able to comment upon them at the disciplinary. However, Ms Skilton went further and carried out further investigations of the Additional Calls without providing the Claimant with an opportunity to comment upon these. As confirmed in the Outcome Letter, Ms Skilton took these Additional Calls into account. It is a fundamental principle of fairness that an employee is given an opportunity to review the evidence and comment upon it before any disciplinary sanction is imposed. Relying upon the Additional Calls that were uncovered in the adjournment and which was never put to the Claimant is a clear breach of that principle.

89. The ACAS Code recommends that the roles of the investigating officer and the disciplinary officer are held by different individuals to avoid the risk that the person becomes a judge in their own cause. I am satisfied that Ms Skilton conflated her role as chair of the disciplinary with that of the investigating officer.

90. The disciplinary allegation was vague and bore little relation to what the Claimant was dismissed for. I am satisfied that the Claimant did not understand the nature of the allegations against her until she had received the evidence, some time after the Invite Letter. However, it was clear that the

Claimant was aware of the true nature of the case against her before the disciplinary hearing.

91. Additionally, the Respondent failed to invite the Claimant to an appeal hearing to discuss her appeal. This was a further breach of the Respondent's own Disciplinary Procedure and the ACAS Code.

92. I am satisfied that Ms Skilton took into account the Video at the disciplinary hearing because it is referred to in the notes of the hearing. I am also satisfied that she took into account the Claimant's explanation that Natterbox could be unreliable. She considered that even if the Claimant's explanation was correct, it would not explain that frequency of the False Calls. I agree that this was a reasonable position to adopt. Overall, I consider that Ms Skilton reviewed the grounds the Claimant raised at the disciplinary hearing and reasonably formed the view the Claimant's explanations were not sufficient to explain or mitigate her actions.

93. However, I do not consider the Respondent's failings to be minor or mere technical breaches. They are significant failures and I no hesitation in finding that these failures mean that the Respondent unfairly dismissed the Claimant by reason of these procedural failings. I consider that the Claimant's conduct amounted to gross misconduct. She accepted in evidence that she was attempting to artificially inflate her call times against the call time KPI and had made the Derogatory Comments. This is dishonest conduct.

94. For completeness, I do not consider there is any merit in the Claimant's assertions that she was not aware that Natterbox would record any conversations she was having, rather than simply recording any conversation between the user and the merchant. She was aware Natterbox recorded conversations and she had activated the system whilst engaging in alternative conversations, sometimes with her headset on. It was not a credible assertion that the Claimant had a reasonable expectation that any conversation she was holding, after she had activated Natterbox, in working hours would be private.

Polkey

95. With this finding and in accordance with the **Polkey** principles, I have to assess what may have happened if a fair procedure had been adopted and whether it was inevitable that the Claimant would have been dismissed. Whilst I consider it highly likely that the Claimant would have been dismissed, it is possible that if a fair appeal hearing had been conduct, with the Claimant presenting her case and taking into account her length of service and high performance, there was a chance that the dismissal could have been overturned and a final written warning imposed. Having considered matters, I conclude that a Polkey reduction of 80% should be made to any compensatory award.

Contributory Fault

96. The Tribunal may reduce the basic or compensatory awards for culpable or blameworthy conduct applying the slightly different tests in Section 122(2) and 123(6) of the ERA.

97. Section 122(2) provides:

> *"Where the Tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce that amount accordingly."*

98. Section 123(6) provides:

> *"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."*

99. As I have found as a fact above, I consider the Claimant committed acts which can properly be described as gross misconduct. There is an aggravating factor that the Claimant was recorded in one of the False Calls explaining to one of her colleagues exactly what she was doing – artificially increasing her call time. I have no hesitation in finding that this conduct was blameworthy and that it contributed to her dismissal.

100. I am aware that this KPI was not directly linked to any financial incentive and the Claimant was otherwise a high performer. I have considered whether the Claimant's contribution should be 100% but consider in all of the circumstances that it is just and equitable to reduce the basic and compensatory awards by 80% to reflect her blameworthy conduct.

Breach of Contract (Wrongful Dismissal)

101. I have already made a finding that I consider the Claimant's actions to amount to gross misconduct. It follows that the Respondent was justified in dismissing the Claimant without notice and her complaint of breach of contract is dismissed.

102. I accept Mr Dhillon's explanation that the Claimant was a remote worker, she was in a trusted position and he had lost trust in her. He considered that whilst she had long service, she ought to know better and even though she was a high performer, he felt that he was not prepared to continue to employ an employee whom he was satisfied had been dishonest. He was also concerned about the Derogatory Comments.

ACAS Code

103. An award for compensation can be increased or reduced by up to 25% if either the employer or employee has unreasonably failed to comply with the

ACAS Code. This is the effect of Section 207(A) of the Trade Unions and Labour Relations (Consolidation) Act 1992.

104. In **Rentplus v Coulson [2022] EAT 81** the EAT suggested an approach for Tribunals to take when considering making an award for unreasonable failure to comply with the ACAS Code. This requires the Tribunal to decide the following questions:

    104.1 Is the claim one which raises a matter to which the ACAS Code applies?

    104.2 Has there been a failure to comply with the ACAS Code in relation to that matter?

    104.3 Was the failure to comply with the ACAS Code unreasonable?

    104.4 Is it just and equitable to award an uplift because of the failure to comply with the ACAS Code and, if so, by what percentage, up to 25%?

105. The ACAS Code applies to disciplinary situations of misconduct and is applicable to this situation. From the findings and conclusions I have made above, including the failure to make the Claimant aware of the Additional Calls and provide her with an opportunity to put her case in respect of these calls; and its failure to hold an appeal hearing were failures to comply with the ACAS Code. I consider these failures were fundamental to the fairness of the process. If the Respondent had simply followed its own Disciplinary Procedure it was likely to have avoided these failures. I can see no reason why the Respondent did not do so and I find that such failure was unreasonable.

106. As for what uplift is just and equitable, I consider that 10% is the appropriate percentage taking into account my findings about the Claimant's conduct and the fact that if a fair process had been adopted it was highly likely that she would have been dismissed.

Calculation of Compensation

107. The Claimant produced a Schedule of Loss (p.44 – 46). Helpfully, the figures contained in that Schedule were agreed by the Respondent.

Basic Award

108. The Basic Award was calculated as £12,538.50 (19.5 multiplier x £643).

109. This was subject to a contributory contribution of 80%. The Claimant is entitled to receive £12,538.50 * 0.2 = £2,507.70.

Compensatory Award

110. The weekly wage during the Claimant's employment with the Respondent was agreed to be £1,389 gross and £1,000.00 net.

111. The Claimant gave evidence that she made a number of job applications through LinkedIn and also via an employment agency. She was not successful. In May 2024, she set up her own company and started trading. Her earnings were much lower than her wages with the Respondent. This did not go as well as she expected and on 5th September 2024, she commenced an engagement as a self employed agent as a card payment specialist, Payment Sense Limited. She has earned £2,096.85 to date.

112. I consider that when the Claimant took a decision to set up her company, this impacted upon her search for alternative employment because she was rightly concentrating on her new venture. In September 2024, she sought a new engagement. Looking at the Claimant's skills and experience in sales, I believe a suitable period of time for her to secure employment at the same or similar earnings as she enjoyed with the Respondent, if she had taken all reasonable steps to mitigate her losses, would be 26 weeks.

113. Based on her earnings with the Respondent, this would have equated to £1,000.00 net per week, or £26,000. From this amount, she must give credit for her earnings of £427, so £25,573.00.

114. The correct order of adjustments for compensatory awards is:

    114.1 Calculate losses suffered by the Claimant;

    114.2 Deduct any earnings which has mitigated the Claimant's loss;

    114.3 Apply any **Polkey** deduction;

    114.4 Apply any increase/decrease to reflect an unreasonable failure to comply with the ACAS Code;

    114.5 Apply any reduction for contributory conduct;

    114.6 Gross up (if appropriate).

115. The amount of £25,573 has been arrived at after applying the first 2 steps. From this amount a Polkey deduction of 80% is applied: £25,573 * 0.2 = £5,114.60. Increase by 10% for unreasonable failure to comply with ACAS Code: £6,137.52 and finally applying a contributory conduct reduction of 80% = £6,137.52 * 0.2 = £1,227.50.

116. I understand that I can apply different percentages for contributory conduct applicable to the basic award and compensatory awards respectively and also any Polkey reduction. However, I am satisfied that these are the appropriate reductions. I have looked at the overall award and also consider that this is just and equitable in all of the circumstances.

117. I have not awarded any loss of the loss of statutory rights because I do not consider it is just and equitable to do so in circumstances, where I have found that the Claimant committed acts of gross misconduct.

The Claimant is entitled to receive:

Award	Adjustment	Total
Basic Award	£12,538.50 @ 80% reduction for contributory conduct = £2,507.70	£2,507.70
Compensatory Award	26 weeks @£1,000 (net) = £26,000.00 less £427.00 = £25,573.00	
Less Polkey reduction of 80%	£25,573.00 @ 80% = £5,114.60	
Failure to comply with ACAS Code, increase of 10%	£5,114.60 increased by 10% = £6,137.52	
Contributory conduct reduction of 80%	£6,137.52 @ 80% = £1,227.50	£1,227.50
Total Award	Basic + Compensatory	**£3,735.20**

Approved on:
14 February 2025
Employment Judge Lambert