EMPLOYMENT TRIBUNALS

Claimant: Jacob Neat

Respondent: J D Weatherspoon PLC

Heard at: CVP **On:** 7 and 8 April 2025

Before: Employment Judge Winfield

Representation

Claimant: In person
Respondent: Nicholas Bidnell-Edwards, 42BR Barristers (Counsel)

JUDGMENT

The judgment of the Tribunal is as follows:

1. The Claimant's claim for unfair dismissal is not well founded and is dismissed.

REASONS

Claims and Issues

2. Mr Jacob Neat (the 'Claimant') was employed by JD Weatherspoon PLC ('the Respondent') as a Shift Manager based at the Red Lion, Petersfield. The Claimant was employed from 11 February 2019 until 20 February 2024.

3. The Respondent operates within the leisure and hospitality industry owning a large and well-known chain of pubs and hotels throughout the UK. It employs approximately 42,000 employees.

4. The Claimant was dismissed summarily by reason of gross misconduct on 20 February 2024. The Respondent states the allegations are as follows:

    a. On 28 January 2024, the Claimant incorrectly processed staff discount at 50% (Allegation One); and

    b. On 2 February 2024, the Claimant incorrectly processed staff discount at 50% in a separate incident on 5 October 2022 (Allegation Two).

5. The Claimant asserts that both events did not amount to unfair dismissal and therefore asserts that he was unfairly dismissed.

6. The Claimant is seeking compensation. It was established at the hearing that the Claimant was not seeking reinstatement or re-engagement, even though this was referred to in his ET1 Claim Form.

Procedure, Documents and evidence heard

7. There was no agreed List of Issues produced by the parties or any preliminary hearing relating to case management. Case management orders were issued on 25 September 2024, which accompanied the notice of the hearing. Those orders required that:

    a. A bundle was produced that was limited to 100 pages; and

    b. Written statements of the Claimant shall be limited to 3,000 words in total and of the Respondent 5,000 in total.

8. I note that the Tribunal granted a request for the Respondent's word count to be increased to 10,000 words in total. The Claimant originally sought to call eight witnesses and the Respondent three witnesses. The Respondent then applied for an extension of time beyond the two-day hearing. By way of correspondence from the Tribunal on 3 April 2025, parties were encouraged to focus on the specific issues relating to the unfair dismissal on the grounds of gross misconduct. It was very helpful that on the day of the hearing, the Parties gave this due consideration and only six witnesses were called for the actual hearing itself (including the Claimant).

9. There was a final hearing bundle (known hereafter as the Bundle) of 116 pages, plus three witnesses and associated witness statements from the Claimant, with three witnesses and associated witness statements on behalf of the Respondent (which resulted in a separate Witness Statement Bundle for the Respondent, or WS Bundle). Those witnesses were:

    a. Jacob Neat, Adam Thompson and James O'Connell on behalf of the Claimant; and

    b. Rianne Duncan, Stuart Laurence and Jennifer Cresswell on behalf of the Respondent.

10. This claim for unfair dismissal was heard over two days. I have heard oral evidence from the Claimant and from the Respondent. I have seen written submissions from the Respondent and the Claimant. Both parties gave oral closing submissions. I also heard evidence on the principle of remedy at this stage, rather than the quantum. I have carefully considered the documentary evidence provided, together with the parties' oral evidence and any written closing submissions.

11. I was provided with a summary of the employment record of Tim Bower during the hearing at my request. I was also provided with the Claimant and Respondent's written skeleton arguments to accompany their closing submissions. Points were clarified by both parties orally as and when required.

I took full notes of the parties' submissions throughout and have read all materials.

12. I explained at the beginning of the hearing process to all parties that I had to have regard to the Equal Treatment Benchbook (that includes the Overriding Objective) and the Employment Tribunal Procedure Rules 2024 (the 2024 Rules), to ensure that the case is dealt with, amongst other things, fairly, and that parties are on equal footing.

13. I made clear that the parties could request a break at any point and if they had any additional needs or requirements, they could simply ask the Tribunal.

Claims and List of Issues

14. The Claimant was (a) an employee as a shift manager at the time his employment was terminated; (b) in employment for in excess of two years continuously; and (c) legally dismissed by the Respondent. There was a minor amendment to the start date of the employment as set out on the ET1 Claim Form but this was not contested or indeed a material issue.

15. The Claimant contacted ACAS on 9 April 2024, and his certificate was issued on 15 April 2024. By means of an ET1 dated 15 April 2024 the Claimant has brought a sole claim of Unfair Dismissal. There is therefore jurisdiction to consider this Claim and this does not need to be considered further.

16. The remaining issues for me to therefore consider are outlined below. I have summarised the appropriate legal tests for me to consider as key issues (which I will explain in more detail later), alongside the submissions made in that agreed list of issues:

    a. Was the Claimant dismissed for a reason related to conduct, which is a potentially fair reason for dismissal under s. 98 (2) of the Employment Rights Act 1996?

    b. Did the Respondent:

        i. hold a genuine belief in the Claimant's misconduct on reasonable grounds; and

        ii. following as reasonable an investigation as was warranted in the circumstances?

    c. 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?

    d. Did the Respondent adopt a fair procedure?

    e. If an unfair dismissal case is found here, I then need to consider remedy. Particularly, in looking at remedy in the round – rather than specific quantum – at this stage, I need to consider:

        i. Whether the Claimant is requesting re-engagement or reinstatement as a primary remedy;

ii. If the Respondent did not use a fair procedure, would the Claimant have been fairly dismissed in any event and/or to what extent and when?;

iii. If the dismissal was unfair, did the Claimant contribute to the dismissal by culpable conduct? This requires the Respondent to prove, on the balance of probabilities, that the Claimant actually committed the misconduct alleged; and

iv. To what extent has the ACAS code been followed.

Facts Identified – the actions relating to the alleged Gross Misconduct

17. I have made the following findings of fact on the balance of probabilities having heard the evidence and considered the documents. These findings of fact are limited to those that are relevant to the issues listed above, and necessary to explain the decision reached. Where there is any disagreement between the Parties on matters relating to fact, I explain the evidence I prefer below and the reasons for this.

18. The Claimant's terms and conditions of employment are set out in his Shift Manager contract of employment. A copy of this was provided in the Bundle at pages 73 and 74. This states the following:

DISCIPLINARY PROCEDURE

A high standard of conduct and work performance is required at all times. Should your standards of work fail to meet those expected by the Company, or should you be involved in any misconduct, the Company, where appropriate, shall seek to follow the non-contractual disciplinary procedure set out in the Employee Handbook, a copy of which can be obtained via myJDW. These Procedures do not form part of your Contract of Employment. The disciplinary procedure may be varied by the Company from time to lime. The Company reserves the right to suspend you from work during a period of investigation which may lead to disciplinary action.

APPEAL PROCEDURE

If you are dissatisfied with any grievance or disciplinary decision taken in respect of you then you may appeal to the Personnel Director at the Wethercentre. Further details of the Company's appeal procedures are set out in the Employee Handbook.

IMMEDIATE TERMINATION

The Company is entitled to terminate your employment with immediate effect as detailed in the Employee Handbook and without any notice or Payment in Lieu of notice if:
a) You are guilty of Gross Misconduct (full details are in the Employee Handbook or can be obtained from the Personnel & Training Department);
b) You are convicted of a criminal offence for which you are sentenced to a term of imprisonment, whether immediate or suspended;
c) You commit any serious breach or persistent breaches of the terms of your employment;

d) You become bankrupt or make any arrangements or composition with or for the benefit of your creditors;
e) You cease to be eligible to work in the United Kingdom;
f) Some other substantial reason requiring the immediate termination of your employment.

19. The Respondent's disciplinary and dismissal policy and procedure (non-contractual) is set out from page 82 onwards in the Bundle. Page 85 onwards lists Gross Misconduct offences. It states this list is non exhaustive. It further states that "dishonesty in the course of duties" could amount to a gross misconduct offence, which includes: *"abuse of 'employee discount' policy or 'complimentary food at work' policy".*

20. The Employee Discount Policy (non-contractual) as it applied at the time is set out from page 95 of the Bundle onwards. This states:

Employees are entitled to an employee discount on all food, drinks and accommodation at Wetherspoon hotels, as follows:

On-duty discount (pub-based employees only)

- *This benefit is in addition to the 'complimentary meal at work' policy (non-contractual).*
- *A 50%* discount on all food (including meal deals) and non-alcoholic drinks, when working (on duty), including orders taken up to 60 minutes either side of your shift's start and end – the discount is not available on any items to take away.*
- *The discount applies to items which can be reasonably consumed by that employee on that shift.*
- *The discount applies to that employee only. It cannot be used to purchase items for other employees, friends or family, including during breaks.*
- *Side orders and additions, such as an extra burger, are included, but only as an addition to a meal.*
- *Food and drinks must be rung through the till, and paid for, before consumption.*

21. The Respondent uses a system called IntelliQ, which is a solution provider enabling clients to efficiently analyse data from multiple sources to swiftly identify instances of fraud, loss or failure of procedural compliance. It was flagged via IntelliQ that the Claimant had processed two transactions giving 50% discount on food and drink to two different employees on two separate occasions (pages 44 and 45 of the Bundle).

22. Pages 115 and 116 of the Bundle contains a "Management Action Pack". This is a weekly summary of relevant items sent to all employees with manager status across the Respondents' company. This additional element of the bundle

was added shortly before the hearing commenced. The Claimant had received this and did not raise any concerns regarding its late inclusion. It reads:

Employee discount - When on duty, a 50% discount on all food (including meal deals, sides and additions to a meal) and non-alcoholic drinks is available to employees only. Despite recent communications to management and employees, there continues to be mis-use of this discount identified through our IntelliQ reporting. The on duty discount is not available for employees to buy multiple items to take away and must not be used for friends or family. Abuse of employee discounts will be treated as a breach of the discount policy and theft from the company, both of which are gross misconduct offences and may result in disciplinary action being taken, up to and including dismissal. It is the responsibility of the authorising manager to ensure these transactions are compliant with the Employee discount policy.

23. I will consider the specific facts of these two Allegations in more detail below.

Allegation One

24. On 28 January 2024, the Claimant processed a 50% staff food and drink discount, when this should have only been a 20% staff discount for another staff member off duty with their family. The Claimant submits this was simply an honest mistake and had not happened previously in his time employed by the Respondent. The Claimant's mitigating circumstances – which are not disputed factually by the Respondent – is that:

    a. it was a busy shift and a pub quiz was being held that night; and

    b. he had never made such an error before.

25. The receipt (page 45 of the Bundle) shows that originally a 20% discount was applied, then this was taken off and a 50% discount was applied instead.

Allegation Two

26. On 2 February 2025, another member of staff, Tim Bower, processed a 50% discount for two pizzas and a large garlic doughbread. Mr Bower then took the food order offsite to consume it, in breach of the Employee Discount Policy.

27. The Respondent submits that the Claimant authorised the 50% discount for Mr Bower (paragraph 28 of the witness statement of Rianne Duncan). The Claimant submitted at the hearing in oral evidence and in his witness statement (page 29 and 30 of the WS Bundle) that Mr Bower was able to authorise his own staff discounts as he held manager status and that the responsibility for authorising that discount did not rest with the Claimant. In reviewing both the Claimant and Respondent's evidence, I find in favour of the Respondent in relation to this point. I make this finding of fact because:

    a. the Claimant admitted to authorising the transaction in the notes of the investigation with Ms Rianne Duncan (page 48, 50 and 51 of the bundle);

    b. Mr Bower confirmed that the Claimant authorised the transaction;

c. Ms Rianne Duncan confirmed in her evidence that she considered it was the Claimant's role to review, manage, train and where necessary authorise the 50% discounts for other more junior members of staff.

Further findings of fact – the Investigation, Disciplinary and Appeal Process

The investigation

28. The Respondent carried out an investigation in relation to Allegation One and Allegation Two. The Claimant was not suspended whilst this was undertaken. This investigation was carried out by Rianne Duncan. Regarding Allegation One, *"it was flagged via IntelliQ that the Claimant had processed a transaction giving 50% discount for a larger than normal amount of food items breaching the Respondent's employee discount policy"* (paragraph 15 of the WS Bundle).

29. Ms Duncan confirms she met with the Claimant on 5th February 2024 to discuss the first allegation against him (pages 46 to 48 of the Bundle).

30. In those meeting notes, which are an accurate record of the meeting that took place, Ms Duncan asks the Claimant *"Do you know any possible reason you may have put the 50% instead of the 20% because it doesn't look like a mistake when you've put the 20% on and then swapped it for 50%"*. The Claimant replied that *"I do it every week as it's Alex's family and they have dinner at the quiz and it is always 20%"* and *"I'm just trying to think why I put 50%. I think I am just going to have to be a bit more careful".*

31. Ms Duncan, as part of her investigation, separately met with Mr Bower (page 49 of the Bundle). In relation to the latter interview with Mr Bower, the following points of fact were discussed:

    a. Mr Bower maintained the food was for personal consumption but he was not aware at the time that the discount policy prohibited taking food offsite for the said consumption;

    b. Upon review of the CCTV by Ms Duncan, Mr Bower clarified that Mr Bower called the Claimant over to authorise the food discount. Mr Bower states "*yes I asked him to check I was doing it correctly as I knew I wasn't allowed to process a 50% without a manager checking".*

    c. Upon being asked, Mr Bower said that he thought the Claimant *"said it would be fine put it through as 50%. I already had it all loaded up on my key when he came over".*

    d. Mr Bower and the Claimant did not read the employee discount policy together;

    e. The Claimant was aware that the food being consumed was for takeaway.

32. Ms Duncan met with the Claimant again on 9th February 2024 to discuss Allegation Two, which had been flagged again by IntelliQ after the initial investigation meeting had taken. A copy of the meeting notes can be located on pages 50 to 51 of the Bundle.

33. I have extracted below the key points directly from those meeting notes, which are agreed between the parties:

"RD: Tim [processed] a 50% discount for pizzas and a garlic bread. And you were stood with him. Do you remember this?

JN: Yea, we looked it up [unintelligible] 50%. We both stood there reading it and it was very vague regarding number of meals you can have.

RD: Did you tell him he could do 50%?

JN: We both looked it up and from my understanding it was within the hour after so yes. But I didn't know it was to takeaway.

RD: Did you read the bit about it being for personal consumption only?

JN: Yea we did read through it but I can't remember what bit I read.

RD: Did Tim call you over to authorise the discount?

JN: Yes, he has done a few times, including this one.

RD: After we spoke the other day do you understand the policy?

JN: Yes I understand it a lot better than I did before.

RD: Now you understand it properly would you have authorised that?

JN: No.

RD: Did you want to add anything else?

JN: I will check before authorising or putting through things."

34. Rianne Duncan completed the investigation with the Claimant on 5th February 2024 and again on 9th February 2024. She decided, based on the investigation findings, that the Claimant would be required to attend a disciplinary hearing.

<u>*Disciplinary hearing*</u>

35. A letter was sent to the Claimant on 12th February 2024, inviting him to a disciplinary hearing on 20th February 2024 (pages 52 and 53 of the Bundle). The Allegations were set out in this letter as follows:

    a. On 28th January 2024, you incorrectly processed staff discount at 50%; and

    b. On 2nd February 2024, you incorrectly authorised staff discount of 50%.

36. The letter then states that such actions could amount to *"dishonesty in the course of duties – abuse of the employee discount policy"* and *"conduct resulting in a fundamental breakdown in trust and confidence".* The letter explained that *"this allegation is considered gross misconduct, which may result in formal disciplinary sanction being imposed, up to and including summary dismissal from the company".*

37. The investigation meeting meetings, alongside the Intelli-Q report and timesheets were enclosed with that letter. The letter also provided a link to the employee discount policy.

38. The Disciplinary hearing was held on 20th February 2024 and was chaired by Stuart Laurence, Pub Manager and Jana Hanuskova, Kitchen Manager was present as the Company witness. Notes were made of the disciplinary meeting. Both the Respondent and the Claimant countersigned the meeting notes to confirm they were true and accurate. This is set out in pages 54-60 of the Bundle.

39. The notes are handwritten in the Bundle but are mostly legible. I have extracted below the key points directly from those meeting notes regarding Allegation One:

"SL: In minutes said you took if off to add another item.

JN: That's what I thought I done.

SL: Are you aware how the company is really hard with the discount?

JN: Yes.

So far as you are concerned it was a general [note – this was corrected as being "genuine" in Examination of the witness at the hearing] mistake?

JN: Yes. I think I wasn't concentrating as they are next to each other."

40. In relation to Allegation Two, the following notes have been extracted from the Disciplinary hearing:

"JN: Team Leader asked me for the discount. I can't remember about it too much but we did go on MyJDW before we processed it.

SL: And he took it home with him?

JN: Yes. It is in policy you can't. I missed that.

SL: Did it cross your mind it was too much meal for one person?

JN: I didn't look at what he was putting through?

SL: You said he called you a few times?

JN: Yes he asked me the first time. Then he called me to the till.

SL: Was it a bit negligent on your side?

JN: Yes, I should of look[ed].

…..

SL: Do you want to add anything?

JN: I should of look[ed] through the order before [unintelligible] discounts. The other one was negligence".

41. The decision was taken by Stuart Laurence to summarily dismiss the Claimant after the meeting was adjourned, taking into account the Claimant's knowledge of the Respondent's policies and procedures specifically the employee discount policy.

42. A letter was sent to the Claimant on 22nd February informing him of the decision to dismiss on the grounds of gross misconduct (Bundle pages 61 and 62). Specifically, that letter stated that the Claimant was being summarily dismissed on the grounds of gross misconduct. Mr Laurence stated that his reasons for the dismissal were as follows:

    a. *On 28th January 2024 you had initially applied a 20% discount, but removed this to apply a 50% discount. Even if this was down to negligence, I do not believe negligence constitutes valid mitigation on this occasion*

    b. *On 2nd February 2024, negligence led to a breach of policy but again, I do not believe is valid mitigation given the recent emphasis the company has put on processing discounts correctly.*

43. Mr Laurence also went on to state that "*I have listened to everything you have said and reviewed all of the evidence, and have decided that your actions amounted to:*

    a. *Dishonesty in the course of duties: Abuse of the employee discount policy*

    b. *Conduct resulting in a fundamental breakdown in trust and confidence".*

44. The letter informed the Claimant of the right to appeal the decision.

The Appeal Hearing

45. The Claimant appealed his decision in an email to the personnel department on 22nd February 2024. The Grounds of appeal were set out in an email (Bundle pages 63 and 64) and then were established in more detail during the appeal hearing itself. To summarise, those grounds of appeal were:

    a. The Claimant felt that his dismissal was unfair as it was a mistake and he had never breached the policy before; and

    b. The Claimant felt that the second allegation was not his fault as he was not the transaction holder – Tim Bower put through the transaction himself.

46. The appeal hearing was conducted on 27th March 2024 by Jennifer Cresswell, Pub Manager and Leah Joyce, Kitchen Manager, was present as the Company witness. The appeal meeting notes are set out in pages 65-70 of the Bundle.

47. Ms Cresswell states the following at paragraph 26 of her Witness Statement:

"I asked the Claimant why Mr Bower had requested authorisation of the discount when he himself was a Shift Leader and had a cash holders key. The Claimant said that this was one of the reasons of why his dismissal was really harsh because he should not have to authorise a Shift Leader putting his food through who had gone through the SOP".

48. Ms Cresswell adjourned the appeal hearing to consider Claimant's points of appeal. She rejected the Claimant's appeal. Miss Cresswell found no reason to overturn the original decision. In the meeting notes, Ms Creswell states: *"You had been with the company for 5 years, 3.5 with cash responsibility, however breaching the discount policy, a gross misconduct office, is dismissible therefore we feel that the sanction given on the 20/02/2024 is to be upheld".*

49. A letter was then sent to the Claimant (page 71 and 72 of the Bundle) by Ms Creswell detailing her findings (dated 27th March 2024 – pages 72 and 72 of the Bundle). She states:

"Your first allegation, you authorised the sale of 50%, breaching the discount policy. You explained that it was a busy Sunday night due to the Pub Quiz. You applied the 50% discount, reducing the total amount by £18.15, still not rectifying your mistake when payment was made. You placed 20% on the transaction first, removed and applied 50%. The negligence shown on this occasion isn't valid mitigation

Your second allegation, you admitted in your disciplinary that you had authorised the 50% discount that Tim put through. Upon appeal meeting, your mitigation had changed and you disclosed that you showed Tim the discount policy at the gantry, he was asking you over the bar about the discount he was applying to which you didn't give your full attention to as it was a busy time for the pub. Given that the company focus on the Discount policy wasn't taken seriously, and that you either didn't read it properly or didn't advise properly, the policy was still breached with you being a small part as to why.

You also disclosed that you thought your sanction was harsh and unfair due to other employees, that you know, committing the same breach of policy but given a different sanction. I explained that regardless of other employee's sanctions, you still breached the discount policy, committing gross misconduct, therefore it was irrelevant mitigation.

I understand that you feel that the sanction is too harsh; however, the disciplinary policy states that it is possible to offer A First and Final Written Warning or Dismissal for incidents of gross misconduct and the decision falls within these boundaries. Based on all of the above considerations, I have found, no reason to overturn the decision to Dismiss you.

I understand that you feel that you feel aggrieved regarding the situation.

Based on all of the above considerations, I have found that the sanction of Dismissal given to you on the 20/02/2024 is upheld. No new evidence was bought to light and some mitigation changed from what you said and signed in your disciplinary meeting. There is a clear breach of the Discount policy therefore Dishonestly in the course of duties. You were in a responsible position as a cash holder, shift manager and showed little remorse as to the breach of policy you committed.

The Law

50. Section 94 of the Employment Rights Act 1996 ("ERA") confers on employees the right not to be unfairly dismissed: *"An employee has the right not to be unfairly dismissed by his employer".* They can enforce that right by complaining to the Tribunal. The employee must show that they were dismissed by the employer under section 95. This states: *"For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) . . . , only if) - (a)the contract under which he is employed is terminated by the employer (whether with or without notice)".*

51. Section 98 of the ERA provides that on a complaint of unfair dismissal it shall be for the employer to show what the reason for dismissal was and that it was one of the reasons set out in s.98(2). These relevant sections of statute state:

    In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

    (a)the reason (or, if more than one, the principal reason) for the dismissal, and

    (b)that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

    (2)A reason falls within this subsection if it—

    (b)relates to the conduct of the employee,

52. Section 98(4) provides that where the employer has shown what the reason for the dismissal was, then: *"...the determination of the question whether the dismissal was fair or unfair, (having regard to the reason shown by the employer)- (a) depends 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 (b) shall be determined in accordance with equity and the substantial merits of the case*".

53. The duty of the Tribunal where an employee has been dismissed because the employer suspects or believes that he has committed an act of misconduct is expressed by Arnold J., in the case of *British Home Stores Ltd v Burchell [1978] IRLR 379, 380* (Burchell), as follows:

    "What the Tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question ... entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time ... First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief and … thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate on the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. It is the employer who manages to discharge the onus of

demonstrating those three matters, we think, who must not be examined further."

54. The burden of proof is neutral. This was made clear in *British Leyland (UK) Ltd v Swift [1981] IRLR 91* that the Tribunal must not substitute its own view for that of the employer. In particular it is not for the Tribunal to ask whether a lesser sanction would have been reasonable, but rather whether or not a reasonable employer might dismiss the employee (judgment at [11]). Moreover, conduct of an employee after an offence was discovered/alleged is a relevant consideration for an employer to take into account in deciding whether it is reasonable to dismiss (judgment at [12] and [22]):

"If no reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might reasonably have dismissed him, then the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which one employer might reasonably take one view: another quite reasonably take a different view. One would quite reasonably dismiss the man. The other would quite reasonably keep him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair: even though some other employers may not have dismissed him".

55. It was held in the case of *Iceland Frozen Foods Ltd v Jones [1982] IRLR 439* that: *"it is the function of the [employment tribunal] to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within that band, the dismissal is fair. If the dismissal falls outside the band it is unfair."*

56. The case of *J Sainsbury plc v Hitt [2003] IRLR 23* held that when considering whether an employee has been unfairly dismissed for alleged misconduct, the 'band of reasonable responses' test applies as much to the question of whether the employer's investigation into the suspected misconduct was reasonable in all the circumstances as it does to other procedural and substantive aspects of the decision to dismiss the employee for a conduct reason. It also applies to sanction, as stated in the case of In *Vaultex UK Ltd v Bialas [2024] EAT 19*; [2024] IRLR 495 at [18]-[19]. The ACAS Code of Practice on Disciplinary and Grievance Procedures 2004 provides guidance which the Tribunal must take into account when considering whether a dismissal is fair or unfair (*Lock v Cardiff Railway Co Ltd [1998] IRLR 358*).

57. With respect of the range of reasonable responses to the issue of investigation into misconduct, the matter is judged as a whole when assessing the reasonableness of the investigation and Burchell does not require each line of defence to be investigated: *Shrestha v Genesis Housing Association Ltd [2015] EWCA Civ 94*; [2015] IRLR 399 at [23].

58. A 'reason for dismissal' has been described 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" — Abernethy **v** Mott, Hay and Anderson 1974 ICR 323, CA*. Ordinarily, when identifying the employer's reason for dismissal, courts need generally look no further than the reasons given by the appointed decision-maker. Indeed, in *Orr v Milton Keynes Council 2011 ICR 704, CA* — a case

concerned with the question of the reasonableness of dismissal rather than the reason for it — the Court of Appeal held that it is the person deputed to carry out the employer's functions whose knowledge or state of mind counts as the employer's knowledge or state of mind.

59. *Hewston v Ofsted 2023 EAT 109* illustrates the importance of forewarning employees of the types of conduct that might attract dismissal, particularly for a single offence, either through a clear disciplinary policy or through guidance and training. *Hodgson v Menzies Aviation (UK) Ltd EAT 0165/18* also makes clear that summary dismissal on a first offence not amounting to gross misconduct may be justified in specific situations.

60. I also note the following salient points of law relating to sanction:

    a. if the dismissal for misconduct (whether it be with or without notice) fell within the 'band of reasonable' responses the claim of unfair dismissal must fail – this applies even if the employee was summarily dismissed for gross misconduct in cases where an Employment Tribunal find his dismissal should have been with notice: *Weston Recovery Services v Fisher UKEAT/0062/10/ZT* at [11]-[16];

    b. there is no legal principle that dismissal has to be a last resort before it can fall within the range of reasonable responses (*Quadrant Catering Ltd v Smith UKEAT/0362/10* at [16]) and a Tribunal should not find a dismissal unfair on the basis that it would have been reasonable to impose a lesser sanction, that some employers would have imposed a lesser sanction (Vaultex UK Ltd v Bialas [2024] EAT 19; [2024] IRLR 495 at [19]);

    c. where there are several charges of misconduct for which an employee is dismissed at a disciplinary, a Tribunal must consider whether the employer treated each as separate (standing alone) or as being cumulative. In the former situation, all charges require separate consideration by the Tribunal and dismissal could result from one only, even if the fairness of another is called into question: *Tayeh v Barchester Healthcare Ltd UKEAT/0281/11/LA* at [34]-[38];

    d. where there are several allegations of misconduct found to have occurred, arguments that individually they do not amount to gross misconduct are irrelevant as one needs to consider the totality of the misconduct found. Then it needs to be determined if dismissal falls within the reasonable band of responses and this represents the totality of this misconduct. There is no need for the acts individually to amount to gross misconduct (or acts for which one could individually dismiss): *Beardwood Humanities College Governors v Ham UKEAT/0379/13* at [11]-[12] and [16]-[17].

61. Regarding consistency of treatment, Section 98(4)(b) Employment Rights Act requires tribunals to determine the reasonableness of a dismissal *"in accordance with equity and the substantial merits of the case"*.

62. One of the leading cases in considering consistency of treatment is *Hadjioannou v Coral Casinos Ltd 1981 IRLR 352, EAT* . The EAT there recognised the importance of consistency of treatment but placed more

emphasis on the employer's ability to be flexible in such matters. The EAT accepted the argument that a complaint of unreasonableness by an employee based on inconsistency of treatment would only be relevant in limited circumstances. Through more recent case law, those limited circumstances relevant to this Claim is that of irrationality i.e. that no reasonable employer would ever have accepted that reason for dismissal (see, for example, *Kier Islington Ltd v Pelzman EAT 0266/10*).

Submissions of the parties

63. The Claimant submits that a fair process was not followed and that he was not fairly dismissed. In summary, the Claimant maintains – and as set out in his closing submissions at the hearing:

Allegation One

64. This was a genuine mistake and the first breach of the policy relating to this in five years.

65. There is clear intent to apply the 20% discount originally. A mistake was then made when taking off the 20% in relation to a food item and then adding back the 20%. This was mistakenly put through the till as a 50% discount.

Allegation Two

66. This Allegation is not the Claimant's transaction, Tim Bower was the authorising manager and/or he had the authority to put through the transaction.

General procedural unfairness

67. The Claimant has been treated differently to other members of staff.

68. The investigation and disciplinary procedures were not full and fair as they were missing key evidence.

69. The discount policy had changed less than a week after the Claimant's dismissal. The cost to the company was £11 in five years.

70. The Respondent submits that the decision to dismiss the Claimant was within the band of reasonable responses available to the Respondent for the Claimant's conduct. In the circumstances, the Claimant's dismissal was fair, both procedurally and substantively. The Respondent formed a reasonable belief in the Claimant's guilt of gross misconduct based upon a reasonable investigation. The Respondent acted reasonably in treating the reasons for dismissal as sufficient reasons for dismissing the Claimant.

Conclusions

1. The issues were determined as follows.

Was the Claimant dismissed?

2. The Respondent accepts that it dismissed the Claimant, and it asserts that it was for a reason related to conduct, which is a potentially fair reason for dismissal under s. 98 (2) of the Employment Rights Act 1996.

3. It is not contested between the parties whether the Claimant was dismissed. I find that the Claimant was dismissed.

4. I find that there is a potentially fair reason pursuant to s.98(2)(b) ERA – by virtue of the fact the Claimant (i) On 28 January 2024 the Claimant incorrectly processed staff discount at 50%; (ii) On 28 January 2024 the Claimant incorrectly processed staff discount at 50%. There is no other evidence available from the Claimant or elsewhere that this was not a conduct-based reason.

   Did the Respondent hold a genuine belief in the Claimant's misconduct on reasonable grounds

5. I found that the Respondent had a genuine belief in the Claimant's misconduct. I make this finding because:

   a. Allegation One and Allegation Two came to the attention of Rianne Duncan via Intelli-Q. This is an online system that flags potential abuses of the Respondent's systems, including its till transactions. As this information was reported, Rianne Duncan investigated this in accordance with the Respondent's policy and procedures (this is explained in paragraph 16 of Ms Duncan's witness statement). The Intelli-Q system is simply a factual recording of what has happened.

   b. Ms Duncan reviewed the relevant evidence associated with the Intelli-Q, alongside the employee discount policy and disciplinary policy in order to understand the nature of the potential misconduct. Mr Laurence did the same at the disciplinary hearing (he states "*As I do with all disciplinaries that I chair, when I received the documents, I read through the papers and familiarised myself with the case*", para 45 of his witness statement), as did Ms Creswell ("*In preparation for the hearing, I read through the Claimant's appeal email in addition to the disciplinary paperwork. In terms of process of dealing with an appeal, I would read through the relevant papers first and then meet with the individual who submitted the appeal to obtain further details. If needed, I would adjourn the hearing go into the relevant pub to collect any other evidence on the file and then interview any relevant witnesses before I reach a conclusion*" – para 16 of the witness statement):

   c. When Ms Duncan approached the Claimant with the information outlined in (a), the Claimant admitted that they had processed and authorised the transactions that constituted Allegation One and Allegation Two.

   d. The result of the investigation and the disciplinary process was the belief that the Respondent had breached the policy by giving a 50% discount on two separate occasions, which should not have been applied (as explained in paragraph 45 of Mr Laurence's witness statement).

   Was the decision to dismiss following as reasonable an investigation as was warranted in the circumstances?

6. The matter must be judged as a whole when assessing the reasonableness of the investigation and Burchell does not require each line of defence to be investigated – I am going to break this down for completeness but for the

avoidance of doubt I am not considering them in any form of isolation: *Shrestha v Genesis Housing Association Ltd [2015] EWCA Civ 94*; [2015] IRLR 399 at [23].

7. The Respondent is a large leisure business. Given the range of resources available and at the Respondent's disposal, I would expect them to carry out a robust process and to undertake a comprehensive investigation. In reviewing the Bundle and hearing the oral evidence, it is clear to me that such a reasonable and comprehensive process was undertaken. I find this because:

    a. Ms Rianne Duncan obtained the following information as part of the investigation (explained at paragraph 32 of her witness statement):

        i. IntelliQ reports for both 28th January 2024 and 2nd February

        ii. till receipts for both 28th January 2024 and 2nd February 2024;

        iii. pub rotas and timesheets; and

        iv. relevant policies (employee discount policy);

    b. Ms Duncan interviewed the Claimant twice and Tim Bower once during the course of the investigations. These meetings were minutes and signed by both Ms Duncan and the Claimant;

    c. CCTV footage was reviewed in relation to Allegation Two; and

    d. Ms Duncan filled in an investigation meeting checklist and minutes (pages 46 to 47 of the Bundle).

8. It is difficult to overcome the fact that in both the investigation meetings and the disciplinary hearing, the Claimant admits to fault in Allegation One and, in respect of Allegation Two, confirms that he authorised a transaction and, in any event, the actions amounted to negligent behaviour. This is the information before the Respondent that they had to consider when conducting their investigation. At the appeal, the Claimant did not provide any new information that could serve to mitigate those conclusions (*Orr v Milton Keynes Council 2011 ICR 704, CA*).

9. The Claimant submitted that there was not a reasonable investigation, particularly relating to the fact that the Respondent failed to obtain relevant CCTV footage. I do not find that on this specific basis, this means that the investigation undertaken was unreasonable. I find this because Ms Rianne Duncan confirmed under re-examination that there are a number of CCTV cameras, that the principle camera was reviewed and that obtaining additional CCTV footage would not have made a difference to her decision to proceed with a disciplinary hearing. Particularly, Ms Duncan concluded that of the approximately 50 cameras at the premises, she reviewed the CCTV relevant to the transaction at the till. In her view, the quality of the CCTV would not have vindicated or verified the Claimant's submission that this would have altered the conclusion of the investigation. Ms Duncan concluded that if she had reviewed different CCTV footage, *"it would have just showed Jacob showing his phone to Tim, not what they would have looked at."* I make a finding of fact here that reviewing additional CCTV footage in a different part of the bar area

would not have shown to the Respondent the specific conversation had between the Claimant and Mr Bower.

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?

10. I cannot substitute my view for the view of the employer (*British Leyland v Swift*; paragraph 6 above). Equally the issue is not whether a lesser sanction would have been reasonable. I am persuaded here by the submissions of the Respondent.

11. The test I need to consider is the band of reasonable responses on the sanction. It is reasonable that one employer may dismiss an employee in these circumstances and another one might not.

12. find dismissal is a fair sanction because:

    a. The Allegations fell within a gross misconduct classification or a classification that could result in summary dismissal which had been notified to the Claimant beforehand – this is very clearly set out in the Respondent's employment policies.

    b. I also find that the breaches of the staff discount policy was a material issue and it had been clearly and repeatedly flagged to managers that breaching this policy was likely to result in dismissal. Mr Laurence stated during re-examination at the hearing: *"these kind of incidents, were getting flagged all over the place, [we] implemented a zero tolerance stance on it, on the back of so many incidents coming to light and was classed as theft. Hundreds of incidents comes at a big cost to the business. There were a number of gross misconduct dismissal".*

    c. The Respondent operates a large business where margins of profit are extremely important. For example, if every employee misused the policy once area year for roughly the same amount as the Claimant had done (which for the purposes of the discussion was agreed between the parties to be £12), this could amount to yearly losses in excess of £12m. I find that this principle of the margins of profit was taken into account by the Respondent as part of the decision of whether to dismiss. This was explained in the hearing by Mr Laurence as forming part of his consideration in the reason to dismiss – these concerns led to the production of such warnings in the management action pack (pages 115 and 116 of the Bundle) as stated above.

    d. The decision to dismiss was taken upon review of both breaches of the discount policy i.e. that there were two separate instances of what was found to be misconduct constituting dismissal – submissions were clearly made during the hearing that it was the conduct in its totality that resulted in the dismissal.

    e. The Respondent sent out the Management Action Pack to its employees that held manager status. This very clearly explained that breaching the 50% employee discount policy could result in dismissal by way of gross misconduct.

f. In this instance, whilst the Claimant did not deny the allegations, neither did he show any remorse for his actions and this was considered a relevant factor by the Respondent. This fact was noted by Mr Laurence (paragraph 50 of the witness statement*, "the Claimant also did not show any remorse for his actions"*) and Ms Cresswell in her appeal letter (page 72 of the Bundle, *"You were in a responsible position as a cash holder, shift manager and showed little remorse as to the breach of policy you committed".*

g. The Claimant had worked for the company for five years and did not have a previous disciplinary record. However, in addressing the decision to dismiss, whilst this was taken this into account, neither Mr Laurence nor Ms Cresswell considered that this outweighed the severity of the breaches of the policy. Mr Laurence states at page 58 of his witness statement: *"I fully appreciated that the Claimant had been a dedicated employee during his time with the Respondent and he also had a clean disciplinary record. However, in my opinion, this did not negate his actions".*

13. The Claimant also put to the Respondent that the sanction was unreasonable in relation to consistency of treatment between himself and other members of staff. This was set out in the Witness Statement of James O'Connell at page 38 of the WS Bundle, where he stated that another member of staff, Jason Brown, used the 20% staff discount to provide drinks for his friends whilst working behind the bar. In response to this, Ms Duncan confirmed that the referenced incident was investigated and did go to a disciplinary hearing. This was not questioned further by the Claimant. I make a finding of fact here that the incident referenced by Mr O'Connell in his witness statement was investigated and did go to a disciplinary hearing.

14. I do not consider that example of Jason Brown provided by Mr O'Connell creates an inconsistency of treatment between the Claimant and other employees. The incidents are not truly parallel and there is no evidence available that the cases are comparable, particularly noting:

a. Mr Brown processed a 20% discount, not a 50% discount; and

b. The Claimant committed two separate breaches of the policy.

Did the Respondent adopt a fair procedure?

15. I have reviewed the fact that whilst a disciplinary policy does not need to contain an exhaustive list of misconduct actions, in this situation the actions alleged are clearly set out in that policy. I also have had regard to the fact that for this specific business, there was a Management Action Plan, which was sent to Managers on a weekly basis and warned of the consequences of breaching the staff discount policy, which includes dismissal.

16. With respect to procedure, it was fully in accordance with the requirements of the ACAS Code of Practice 1 Disciplinary and Grievance Procedures (2015) (the "ACAS Code"): (i) the Claimant was informed of the allegations and the need to attend a disciplinary meeting at which the problem was discussed, with the Claimant having ample opportunity to respond to the case against him (ACAS Code paras 9-12). (ii) the Claimant was offered the opportunity to be

accompanied at the disciplinary hearing (ACAS Code para 13); (iii) the Claimant was informed of the decision to dismiss and his right to appeal (ACAS Code para 21).

Conclusions

17. My task, however, is to consider if the employer's actions, taken in their totality, and in accordance with the Burchell test, fell within the band of reasonable range of responses.

18. The Respondent is a large leisure business. Their policies are extensive and I have seen what is in the Bundle. Whilst to some, it may seem "harsh" to take this approach, I find the Allegations are clear breaches of policy that could amount to misconduct resulting in dismissal. I find that this was within the range of reasonable responses. I find that the Respondent genuinely believed the allegations took place. I find the Respondent properly investigated the allegations. I find that the sanction is within the reasonable range of responses for all of the reasons I have set out above. The procedure was fairly undertaken and it was extensive. I have considered the Respondent's behaviour in its totality, whilst also being mindful of each aspect of the process.

19. For all of the reasons I have explained above, the complaint of unfair dismissal is not well founded and is dismissed.

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Approved by

Employment Judge Winfield

Date: 25 June 2025

Sent to the parties on
26 June 2025

Jade Lobb
For the Tribunal Office

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