Case Number: 1801290/2025

EMPLOYMENT TRIBUNALS

Claimant: **Mr J Wainwright**

Respondent: **Asda Stores Ltd**

Heard at: **Leeds (By Video)** **On:** **12th September 2025**

Before: **Employment Judge S Edwards**

Representation
Claimant: **Mr F Levay (Counsel)**
Respondent: **Ms A Akers (Counsel)**

RESERVED JUDGMENT

1. The complaint of unfair dismissal is well-founded. The claimant was unfairly dismissed.

2. There is a **25**% chance that the claimant would have been fairly dismissed in any event.

3. The respondent unreasonably failed to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015 and it is just and equitable to increase the compensatory award payable to the claimant by **15**% in accordance with s 207A Trade Union & Labour Relations (Consolidation) Act 1992.

4. It is just and equitable to reduce the basic award payable to the claimant by **50**% because of the claimant's conduct before the dismissal.

5. The claimant caused or contributed to the dismissal by blameworthy conduct and it is just and equitable to reduce the compensatory award payable to the claimant by **50**%.

6. The complaint of breach of contract in relation to notice pay is well-founded.

REASONS

Introduction and Issues

1. The claimant, Mr Jordan Wainwright, made complaints that he was unfairly and wrongfully dismissed by the respondent. The respondent accepted that

they dismissed the claimant summarily on 9th October 2024.

2. The issues, were agreed at the outset of the hearing as follows:

Unfair dismissal

a. What was the reason or principal reason for dismissal? The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.

   (i). The respondent says the reason was that the claimant had committed an act of gross misconduct, namely, misuse of personal or business information, including using or sharing such information for personal gain or sharing with a third party without permission. The claimant says that the reason for dismissal was that he facilitated a complaint being made about a member of staff directly to Asda House, as opposed to going through his supervisor.

b. If the reason was misconduct, did the respondent act reasonably or unreasonably in all the circumstances, including the respondent's size and administrative resources, in treating that as a sufficient reason to dismiss the claimant? The Tribunal's determination whether the dismissal was fair or unfair must be in accordance with equity and the substantial merits of the case. It will usually decide, in particular, whether:

   (i). there were reasonable grounds for that belief;
   (ii). at the time the belief was formed the respondent had carried out a reasonable investigation;
   (iii). the respondent otherwise acted in a procedurally fair manner;
   (iv). dismissal was within the range of reasonable responses.

Remedy for unfair dismissal

c. If there is a compensatory award, how much should it be? The Tribunal will decide:

   (i). What financial losses has the dismissal caused the claimant?
   (ii). Has the respondent proven that the claimant failed to take reasonable steps to replace their lost earnings, such as by failing to take reasonable steps to find another job?
   (iii). For what period of loss should the claimant be compensated?
   (iv). Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
   (v). If so, should the claimant's compensation be reduced? By how much?
   (vi). Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
   (vii). Did the respondent or the claimant unreasonably fail to comply with it?

(viii). If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?
(ix). If the claimant was unfairly dismissed, did they cause or contribute to dismissal by blameworthy conduct?
(x). If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?
(xi). Does the statutory cap of fifty-two weeks' pay or £115,115 apply?

d. What basic award is payable to the claimant, if any?

e. Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

Wrongful dismissal / Notice pay

f. What was the claimant's notice period?

g. Was the claimant paid for that notice period?

h. If not, was the claimant guilty of gross misconduct?

3. It was agreed that, in respect of remedy, the following issues would be addressed at a subsequent remedy hearing; c(i) – c(iii), c(xi) and d.

Evidence

4. I had the benefit of a witness statement from the claimant and witness statements from Ms Mistry and Mr Charlston on behalf of the respondent. I heard oral evidence from the claimant, Ms Mistry and Mr Charlston and there was a joint hearing bundle running to 215 pages.

5. After the hearing I received written submissions from Ms Akers on behalf of the respondent and from Mr Levay on behalf of the claimant.

Findings of Fact

6. This judgment does not seek to address every point about which the parties have disagreed. It only deals with the points which are relevant to the issues that the tribunal must consider in order to decide if the claims succeed or fail. If I have not mentioned a particular point, it is not because I have overlooked it, it is simply because it is not relevant to the issues.

7. The claimant was employed by the respondent from 23rd May 2018 as an Optical Adviser at the respondent's Killingbeck store. The claimant and his colleagues wear name badges containing their first names as part of their uniform. The claimant attended induction training on 23rd May 2018, which included training on the data protection act. It is not known what was included in that training. The claimant had not received any training on data protection since his induction. Between his induction and the incident that resulted in his dismissal, new data protection laws had come into force in the form of the Data Protection Act 2018 and the General Data Protection Regulation (GDPR). The claimant was not provided with training on those

new provisions or any update training on changes to the respondent's data protection policy.

8. On 6th September 2024, two customers asked the claimant's manager, Mr Marshall, how to give positive feedback about the claimant. Mr Marshall provided the customers with instructions and wrote down the claimant's full name on a piece of paper alongside the email address and telephone number for Asda House, the respondent's head office.

9. The same two customers then approached the claimant and informed him they wanted to make a complaint about the member of staff that had completed their initial order but they did not know the name of the employee. The customers informed the claimant that they wanted to make the complaint direct to Asda House and did not want to speak to an in-store manager.

10. The claimant checked the respondent's computer system to find the name of the colleague that had completed the customer's order. The claimant provided the first name and a description of the colleague named on the computer system. The customer said that the name was not the correct name of the person that completed the order and provided a description of the person that had done so. The claimant said he thought the description matched that of his colleague Mandy. The claimant used his personal mobile phone to search for Mandy on Facebook and showed the customer Mandy's Facebook profile picture. The claimant was not 'friends' with Mandy on Facebook and he did not have access to the contents of Mandy's Facebook profile; he only showed the customer her publicly available profile picture and her name.

11. On 6th September, the claimant's colleague, Becky Swain, reported to, Kalid Cook, Foodhall Trading Manager, that the claimant had shown the customers a photograph of Mandy on Facebook. The claimant was suspended from work on full pay on 6th September, to allow a full investigation to take place.

12. The respondent wrote to the claimant to confirm the suspension and invite him to attend an investigation meeting. The meeting was rescheduled on two occasions because the claimant's Trades Union representative was not available to attend. The investigation meeting took place on 16th September 2024. It was chaired by Abdul Sheraz, Customer Trading Manager, and the claimant was accompanied by his Trades Union representative Michelle Hunt.

13. The claimant was informed that the meeting was to investigate a breach of GDPR. The respondent relied upon the contents of their disciplinary policy, dated January 2024, which states:

    a. The range of sanctions will depend on the seriousness of the misconduct. The final decision on the level of sanction must be made by the disciplinary manager.
    b. Gross misconduct will usually result in immediate dismissal without notice or payment in lieu of notice, however the sanction may be reduced at the disciplinary manager's discretion.
    c. That mitigating factors include that the colleague was unaware of

proper policy or procedure and would not have reasonably been aware.

d. That an aggravating factor could include the actions being deliberate or deceitful.
e. That the "*potential level of misconduct*" for misuse of personal information was gross misconduct.
f. All aspects of the allegation, and any mitigation must be investigated, considered, and responded to as part of the disciplinary process.

14. The claimant had not been provided with a copy of the new disciplinary policy in January 2024, had not been provided with any training on the contents, and had not been provided with any training on the corresponding provisions of the data protection policy since his induction in 2018.

15. The claimant was shown CCTV footage of the incident. The claimant confirmed that he had shown a public Facebook profile picture of Mandy to the customers. He stated that all his colleagues had deleted him from Facebook so he did not share any personal details, only the profile picture, which is publicly available. He informed Mr Sheraz that he wanted to identify the correct colleague so the wrong person did not get into trouble.

16. The claimant admitted that he had written "*the name*" of the two colleagues that had completed the customers' order on a piece of paper. He wrote the names on the same piece of paper on which Mr Marshall had written the details for Asda House and the claimant's name. The claimant was asked "*do you understand this can go against policy?*", to which he replied "*to be fair I wasn't sure. I wanted to make sure the right colleagues were given so others didn't get into trouble.*"

17. The claimant was informed that sharing personal information to a third party without consent can be seen as gross misconduct and asked "*do you not see this as being something that could go against policys [sic] such as the social media policy and data protection*". The claimant said "*I do agree, I admit I was in the wrong but I did it for the right reasons*". The claimant asked whether Mr Marshall providing the customers with his details would be the same and he was informed that Mr Sheraz could not comment without further investigation. The claimant said that he now understood the implications of his actions, that it was done with good intentions, he had learned his lesson, it would not happen again and apologised.

18. The claimant was asked whether he would normally deal with complaints himself or go to Mr Marshall. The claimant said he would normally go to Mr Marshall but this was the first occasion that a customer had wanted to complain direct to Asda House and they had said they did not want to speak to a manager.

19. In the adjournment summary, Mr Sheraz said "*Jordan does not come across as remorseful but has apologised. Beginning of meeting Jordan didn't seem concerned what so ever*."

20. On 17th September an investigation meeting took place between Mr Sheraz and Mr Marshall. Mr Marshall confirmed that he had written down the email address and phone number for Asda house and that he may have written the claimant's name down as well so that the customers could provide

positive feedback about the claimant.

21. Mr Sheraz chaired a second investigation meeting with the claimant on 30th September. The claimant was accompanied by his Trades Union representative, Ms Hunt. At the meeting Mr Sheraz informed the claimant that he would be passing the matter to a disciplinary manager to make a decision about the outcome of the allegation that the claimant had breached data protection. Mr Sheraz's summary stated "*Jordan well and truely [sic] believes he made the right decision to share info even though he doesn't normally do it this way. Jordan was apologetic but did not realise or show remorse to the serious nature of allegation*."

22. On 7th October 2024 the respondent wrote to the claimant inviting him to attend a disciplinary meeting on 9th October 2024. The letter informed the claimant that the allegation was gross misconduct, namely misuse of personal or business information, including using or sharing such information for personal gain or sharing with a third party without permission. It did not provide a description of the incident that was alleged to have amounted to gross misconduct but it did refer to the date of an incident on 6th September.

23. The letter informed the claimant of the date, time and location of the meeting, that Ms Sian Mistry would conduct the meeting and be accompanied by a note taker. It indicated that relevant documents were enclosed with the letter. It informed the claimant that the allegation was gross misconduct and that "*any formal disciplinary action that may be taken against you at this meeting may mean that your employment with Asda is ended*." It did not inform the claimant that his employment could terminate without notice. It did inform the claimant that he could be accompanied to the meeting.

24. The disciplinary meeting took place on 9th October 2024 and the claimant was accompanied by Ms Hunt. At the outset of the meeting it was identified that the claimant had not been provided with copies of the witness statements taken during the investigation. The meeting was adjourned and the claimant was provided with copies of the statements.

25. During the meeting, Ms Mistry alleged that the claimant had shown the customers the Facebook profile pictures of two colleagues and written down the names of two colleagues on the same piece of paper that Mr Marshall had written the claimant's details on. The claimant accepted the allegations.

26. The claimant confirmed that he would normally refer customers to Mr Marshall when they made complaints but he wanted to try to help as much as he could. He said he had learned his lesson and he shouldn't have done what he did. The claimant confirmed that all his colleagues, except one, had deleted him from Facebook. When asked why, the claimant's Trades Union representative said that there had been a previous incident which was the catalyst for this incident. The claimant explained that he felt his colleagues had targeted him because of his sickness absence and described an incident that had occurred on 4th September, when his colleague, Carol, had shouted and sworn at him at work.

27. The claimant admitted that he had shown the customers the Facebook

profile picture of a colleague and that he had given them the colleague's name. The claimant said that the name can be seen on the name badge and the customer had already seen what the colleague looked like. The claimant reiterated that Mr Marshall had provided the claimant's name to the customer. Ms Mistry said "*so that's fine that Gary gave a name but its different to show a picture from your personal mobile phone*." The claimant stated that the Facebook profile picture was publicly available and not a private picture but also stated "*Despite this I can admit that I was in the wrong to which I am truly sorry and it will not happen again*." The claimant confirmed that he had taken the action he did in order to ensure that the wrong colleague did not get into trouble.

28. The claimant was asked whether he was aware of the respondent's social media policy. The claimant indicated that he was aware there was one but did not know what was in it. Ms Hunt requested a copy of the claimant's training records. Ms Mistry indicated that she would try to obtain a copy. Ms Mistry did not take steps to locate the claimant's training records or provide a copy of the records to the claimant prior to making her decision to dismiss him.

29. Ms Mistry did not ask the claimant whether he had shared only the first name of his colleagues, or the first and last name of his colleagues. Ms Mistry assumed the claimant had given the customers the first and last names of his colleagues because she believed that Facebook profiles always contain the first and last name of an individual. Ms Mistry did not investigate what information was actually available to the public on Facebook. Ms Mistry did not ask the claimant whether Mr Marshall had given the customers the claimant's first and last name or just his first name.

30. Whilst that was a question that was not put to the claimant during the disciplinary meeting, or indeed during the investigation or appeal meetings, the claimant accepted in evidence that when referring to "the name" during those meetings, he understood the respondent to be referring to the full names of his colleagues, and not just their first names. He did not challenge Ms Mistry regarding the names used during the disciplinary process. On the issue of the sharing of the claimant's name by Mr Marshall, Ms Misty's finding, as outlined in the disciplinary outcome letter, was that Mr Marshall had shared only the claimant's first name with the customers. The claimant disputes that finding and his evidence was that he saw the piece of paper and that it contained his full name. Ms Mistry accepted in oral evidence that she did not know and there was no evidence either way to confirm what Mr Marshall wrote on the piece of paper. I find that Mr Marshall shared the claimant's full name with the customers and not just his first name. The customers already had the claimant's first name as he was wearing a name badge.

31. Following an adjournment of 119 minutes, Ms Mistry informed the claimant that she had made the decision to terminate his employment without notice for gross misconduct. The notes of the disciplinary meeting state "*After reviewing the allegation you have admitted to giving the colleagues names and showing their profile pictures on Facebook you have admitted that this wasn't normal and you have admitted you should have raised this to a manager. On reviewing the CCTV you have shown the customers the pictures discreatly [sic] and you had your back towards colleagues while*

showing the pictures. You've said you are really sorry you shouldn't have done it and my decision is that this is gross misconduct on the basis that this is missuse [sic] of personal or business information including using or sharing such information for personal gain or sharing with third party without permission. Therefore my decision is to dissmiss [sic] without notice based on the fact I believe you have shared colleagues personal information to a customer without that colleagues permission which is a breach of personal information."

32. In the adjournment summary Ms Mistry states the following:

    a. "*Jordan had no mitigation for his actions and admitted all the allegations*."
    b. "*Jordan is fully aware that no personal information including pictures should never [sic] be shared with colleagues or customers as this forms as part of the training in the optical department*."
    c. "*MH states Gary shared Jordans Christian name to customers involved although this was for a positive reason and wanted to praise Jordan*."
    d. "*Abdul telephoned Jordan about investigation to discuss dates. Abdul did use his mobile as he needed a time stamp as it had been difficult to confirm time with Jordan and his rep*."

33. The respondent wrote to the claimant on 14th October 2024 to confirm the decision to dismiss. The letter summarised Ms Mistry's findings as follows:

    a. "*You admitted showing the customer pictures of two colleagues from Facebook and wrote down the names on a piece of paper.*
    b. You realise that this was wrong and that you should have spoken to your manager about this customer complaint.
    c. You were aware that any information of this nature should not be shared with colleagues or customers as this is an integral part of training within the Optical department.
    d. Your Christian name was shared to a customer by your manager, but this was for a positive reason, and no additional details were shared.
    e. *I believe this incident to be a misuse of personal information by sharing details to a third party without permission*"

34. The claimant was informed that his dismissal was without notice and his employment terminated on 9th October 2024. The claimant was informed that he had a right to appeal the decision within 7 calendar days of receiving the letter.

35. In reaching her decision to terminate the claimant's employment without notice, Ms Mistry also took into account her opinion that the claimant's actions in sharing his colleagues' information were done discreetly, were malicious and in order to sabotage his two colleagues. The claimant was never given an opportunity to answer those allegations in the disciplinary meeting and Ms Mistry did not inform the claimant that she had taken that opinion into account in reaching her decision.

36. The respondent's appeal policy allows an appeal against a disciplinary outcome if it is based on a breach of procedure, dispute of the facts, or the severity of the sanction. It states "*All grounds for the appeal must be*

investigated, considered, and responded to as part of the appeal process. This would include any mitigating factors for disciplinary appeals. New evidence can be submitted and should be investigated if required and in the case of disciplinary appeals, colleagues should be given the opportunity to review it."

37. On 21st October the claimant wrote to Ms Mistry to appeal the decision and stated "*I disagree with the way disciplinary action was taken and I feel the outcome was too harsh*".

38. Mr Kevin Charlston, the respondent's Operations Manager, wrote to the claimant on 22nd October and informed him that his grounds of appeal were not clear and outlined that he had the right to appeal on the basis of procedure, fact or severity. Mr Charlson asked the claimant to resubmit his appeal outlining the specific grounds of the appeal, within 7 days.

39. The claimant responded to Mr Charlston's letter by email on 25th October and stated "*I am appealing on procedure and severity*". Mr Charlston was not satisfied with the claimant's response and invited the claimant to attend a meeting in the week commencing 13th November 2024 to discuss the information he expected to see in an appeal letter.

40. During the meeting the claimant was informed that the contents of his appeal letters of 21st and 25th October were not good enough. He was informed that he needed to provide dates, times and names relating to any grounds of his appeal that he wanted Mr Charleston to consider and provided with an example. The claimant was given a further 7 days to send a final appeal letter.

41. Following the meeting, the claimant wrote a third letter of appeal dated 18th November and stated the reasons for the appeal were that he disagreed with the way the disciplinary action was taken, he felt the outcome was too harsh and that the reason it was too harsh was because two colleagues had also "*broke the gross misconduct policy*" but remained in employment.

42. On 19th December 2024 the claimant was invited to attend an appeal meeting with Mr Charlston on 6th January 2025, almost three months after the date of dismissal.

43. Mr Charlston believed his role as appeal officer was to listen to the claimant's appeal and make a decision as to whether the original decision should be upheld or not. He believed that he was only required to take into consideration new evidence provided by the claimant and decide whether that new evidence was good enough to change the decision. Mr Charlston did not consider it his role to determine whether the sanction applied by Ms Mistry was too severe, unless new evidence, not previously discussed in the disciplinary process, was provided, which was sufficient to change the decision. Mr Charlston's view was that if there was no new evidence then an appeal could not succeed and the disciplinary decision would not be overturned.

44. The appeal meeting took place on 6th January 2025 and the claimant attended with his Trades Union representative, Sandee Harrison. At the outset of the meeting Mr Charleston indicated that he was unhappy with the

contents of the appeal as it had no specifics. Mr Charlston said "*I wanted dates times but you still sent this.*"

45. During the appeal meeting Mr Charlston ensured the claimant had an opportunity to explain his grounds of appeal. The claimant raised the following points:

    a. That the decision to dismiss him was too harsh and the outcome should have been no more than a written or final warning.
    b. He had admitted his actions throughout and apologised.
    c. He was good at and enjoyed his job.
    d. He had never had any training about social media.
    e. The information on Facebook is publicly available information and his colleague could have been found simply by searching their name.
    f. That two colleagues had also breached data protection with no consequences. Specifically;
        (i). That on the same day Gary Marshall had also given the claimant's full name to a customer without permission; and
        (ii). That Abdul Sheraz had called the claimant from his personal mobile phone in his car.
    g. That he was struggling with his mental health at the time due to his father's ill health, of which is manager was aware.

46. During the meeting Mr Charlston pointed out to the claimant that he had admitted to an allegation of gross misconduct and that he knew that what he was doing was wrong but he did it anyway. The meeting was adjourned until 17th January to allow Mr Charlston to investigate the points raised by the claimant.

47. Mr Charlston interviewed Ms Mistry on 10th January 2025 but only asked Ms Mistry about the discussion that took place in the week commencing 13th November regarding the basis of the appeal. The notes of the meeting do not record any discussion regarding the reasons why Ms Mistry made the decision to dismiss, rather than issue any lesser sanction.

48. On 13th January 2025 Mr Charlston wrote to the claimant to inform him that there would be a delay in reconvening the appeal meeting as he needed to make a subject access request as part of his investigations. The subject access request was to obtain details of the occupational health referrals for the claimant.

49. On 7th March 2025 the respondent wrote to the claimant to reconvene the appeal meeting for 13th March.

50. On 10th March Mr Charlston interviewed Mr Marshall. Mr Marshall outlined what had happened on 6th September. Mr Charlston asked Mr Marshall about the claimant's health and sickness absence record. Mr Marshall indicated that he was not aware of any occupational health referrals regarding recent mental ill health but he was aware of historic sickness absence issues, which may have resulted in occupational health referrals.

51. The reconvened appeal meeting took place on 13th March 2025. This was a significant delay of 5 months since the claimant's dismissal. The reasons for the delay were multiple, including Mr Charlston's repeated requests for

additional information regarding the grounds of appeal, the appeal being required during the respondent's busiest trading period, Mr Charlston's decision to request occupational health records for the claimant, Mr Charleston's annual leave, the annual leave of the respondent's preferred note taker and a period of jury service.

52. Mr Charlston outlined that purpose of the meeting was to discuss any new evidence if there was any. Mr Charlston then went on to ask a number of questions regarding the claimant's mental health, historic sickness absence and occupational health records. He then stated that the meeting is about new evidence and asked if the claimant had any new evidence. The claimant responded "nope".

53. During an adjournment, Mr Charlston contacted the respondents employee relations team for advice. In that discussion it was indicated that Mr Marshall could have committed an act of misconduct by sharing the claimant's name and that Mr Sheraz could have committed an act of misconduct by using inappropriate methods of communication. Those allegations were never investigated by Mr Charlston or any other employee of the respondent. In any event, Mr Charlston decided there was no case to answer for either Mr Marshall or Mr Sheraz and also concluded that the misconduct of other employees did not mitigate the claimant's actions.

54. Mr Charlston then stated that:

    a. The claimant had admitted to the allegation, which was a gross misconduct offence and thanked the claimant for his honesty from the outset;
    b. The customers already knew the claimant's name before it was provided to them by Mr Marshall and that he did not believe the conduct of any other party mitigates the claimant's conduct;
    c. That Abdul's conduct was not gross misconduct as the information that he accessed had been voluntarily added to the respondent's system and was used by Abdul for work purposes.
    d. That he was upholding the original decision to dismiss as the points raised were not strong enough.

55. The adjournment summary indicates that the reasons for Mr Charlston's decision to uphold the decision to dismiss were:

    a. That the claimant admitted to a gross misconduct offence,
    b. No new evidence was brought forward; and
    c. The points he raised were not strong enough to overturn the original decision.

56. Mr Charlston confirmed his decision in writing on 13th March 2025. The letter confirmed that Mr Charlston's findings were that the claimant had admitted to gross misconduct, he had not made the respondent aware that he had felt unsupported in respect of his mental ill health and that Mr Adbul's use of information on Workday was not the same as sharing information from social media.

57. In reaching his decision to uphold the decision to dismiss the claimant, Mr Charlston also took into account and agreed with Ms Mistry's opinion that

the claimant's actions were malicious and designed to get his colleagues into trouble. Mr Charlston did not put that allegation or opinion to the claimant in the appeal meeting and did not offer the claimant the opportunity to respond to that allegation. Ms Mistry's opinion was not contained in the disciplinary meeting notes, in the disciplinary outcome letter, or in the notes of the investigation meeting between Mr Charlston and Ms Mistry.

Law

Unfair Dismissal

58. **s.98 Employment Rights Act 1996 (ERA)**

(1) 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,

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is 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.

59. The burden of proof is on the employer to establish the reason for dismissal and that it was a potentially fair reason pursuant to s.98(1) and (2). **Gilham and ors v Kent County Council (No.2) 1985 ICR 233, CA**: "The hurdle over which the employer has to jump at this stage of an inquiry into an unfair dismissal complaint is designed to deter employers from dismissing employees for some trivial or unworthy reason. If he does so, the dismissal is deemed unfair without the need to look further into its merits. But if on the face of it the reason could justify the dismissal, then it passes as a substantial reason, and the inquiry moves on to S.98(4), and the question of reasonableness."

60. **Associated Society of Locomotive Engineers and Firemen v Brady 2006 IRLR 576, EAT -** it is for the employer to show, on the balance of probabilities, that the principal reason was one of the potentially fair reasons, and it is then open to the employee to adduce some evidence that

casts doubt on whether the reason put forward by the employer was indeed the real reason for dismissal. If this happens, the employer will have to satisfy the tribunal that its proposed reason was in fact the genuine reason relied on at the time of dismissal. **London Borough of Brent v Finch EAT 0418/11**, the EAT emphasised that if an employee wishes to cast doubt on an employer's seemingly fair reason for dismissal, he or she must adduce some evidence in this regard.

61. In misconduct dismissals, there is well-established guidance on fairness within section 98(4) in the decisions in **Burchell 1978 IRLR 379** and **Post Office v Foley 2000 IRLR 827**. The Tribunal must decide whether the employer had a genuine belief in the employee's guilt. Then the Tribunal must decide, without there being any burden of proof on either party, whether the employer held such genuine belief on reasonable grounds and after carrying out a reasonable investigation. In all aspects of the case, including the investigation, the grounds for belief, the penalty imposed, and the procedure followed, the Tribunal must decide whether the employer acted within the band or range of reasonable responses open to an employer in the circumstances. It is immaterial how the Tribunal would have handled the events or what decision it would have made, and the Tribunal must not substitute its view for that of the reasonable employer (**Iceland Frozen Foods Limited v Jones 1982 IRLR 439, Sainsbury's Supermarkets Limited v Hitt 2003 IRLR 23,** and **London Ambulance Service NHS Trust v Small 2009 IRLR 563**).

62. **Hope v British Medical Association [2022] IRLR 206** - Whether dismissal by reason of conduct is fair or unfair within s.98(4) depends not on the label or characterisation of the conduct as gross misconduct, but on whether, in the circumstances (including the employer's size and administrative resources), the employer has acted reasonably in treating it as a sufficient reason for dismissing the employee.

63. **Sandwell and West Birmingham Hospitals NHS Trust v Westwood UKEAT/0032/09** - As well as an employer's reasonable belief that an employee had committed misconduct, a finding of gross misconduct justifying dismissal required that the conduct alleged was capable of amounting to gross misconduct. The conduct had to be a deliberate contradiction of the contractual terms or had to amount to gross negligence. I have given particular consideration to paragraphs 108 – 113 of that judgment.

64. **Eastland Homes Partnership Ltd v Cunningham EAT 0272/13** - In determining the reasonableness of a summary dismissal, the tribunal must have regard to whether the employer had reasonable grounds for its belief that the employee was guilty of gross misconduct.

65. **Hewston v Ofsted 2025 EWCA Civ 250, CA** - illustrates the importance of forewarning employees of the types of conduct that might attract dismissal. However, **Hodgson v Menzies Aviation (UK) Limited UKEAT/0165/18** the EAT rejected the notion that, for disciplinary rules to be compliant with the ACAS Code, they must contain an exhaustive list of possible offences. An employer is entitled to look at the conduct as a whole and in the round in reaching its conclusion.

66. **Brito-Babapulle v Ealing Hospital NHS Trust 2013 IRLR 854, EAT** - A finding of gross misconduct did not automatically mean that a dismissal would be justified as a reasonable response. An employer should consider whether dismissal would be reasonable after considering any mitigating circumstances.

67. **Hadjioannou v Coral Casinos Ltd 1981 IRLR 352** - Treatment of other employees in similar circumstances is relevant:

    a. if there is evidence that the dismissed employee was led to believe he would not be dismissed for such conduct;
    b. where the other cases give rise to an inference that the employer's stated reason for dismissal is not genuine; or
    c. if, in truly parallel circumstances, an employer's decision can be said to be unreasonable in a particular case having regard to decisions in previous cases.

68. **Securicor Ltd v Smith 1989 IRLR 356, CA** - the question of consistency is subject to the 'range of reasonable responses' test.

69. **Wilko Retail Ltd v Gaskell and anor EAT 0191/18** – 'provided the assessment of the similarities and differences between different cases was one which a reasonable employer could have made, the employment tribunal should not interfere even if its own assessment would have been different'.

Polkey

70. **Polkey v AE Dayton Services Ltd [1987] UKHL 8, Software 2000 Ltd v Andrews [2007] ICR 825; W Devis & Sons Ltd v Atkins [1977] 3 All ER 40; and Crédit Agricole Corporate and Investment Bank v Wardle [2011] IRLR 604 –** where a tribunal finds that a claimant was unfairly dismissed, it may reduce the compensatory award to reflect the likelihood that an employee could have been dismissed at a later date or if a fair procedure had been followed.

71. **Hill v Governing Body of Great Tey Primary School [2013] IRLR 274 -** the tribunal needs to consider both whether the employer could have dismissed fairly and whether it would have done so. Furthermore, the enquiry is directed at what the particular employer would have done, not what a hypothetical fair employer would have done.

ACAS Code

72. **Section 207A(2) of the Trade Union and Labour Relations (Consolidation) Act 1992** provides where it appears to the employment tribunal that the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies, the employer had failed to comply with the Code in relation to that matter, and the failure was unreasonable, the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase the award it makes by no more than 25%.

Contributory Fault

73. **S.122(2) ERA** - “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”.

74. **S123(6) ERA** – “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.”

75. In **Nelson v BBC (No.2) 1980 ICR 110, CA**, the Court of Appeal said that three factors must be satisfied if the tribunal is to find contributory conduct:

    a. the conduct must be culpable or blameworthy
    b. the conduct must have actually caused or contributed to the dismissal, and
    c. it must be just and equitable to reduce the award by the proportion specified.

Wrongful Dismissal

76. A contract of employment may be terminated by giving reasonable notice. The common law principle is subject to the statutory minimum period of notice set out in s.86 ERA.

77. **S.86 ERA** –

    (1) The notice required to be given by an employer to terminate the contract of employment of a person who has been continuously employed for one month or more-

        (b) is not less than one week’s notice for each year of continuous employment if his period of continuous employment two years or more but less than twelve years

    (6) This section does not affect any right of either party to a contract of employment to treat the contract as terminable without notice by reason of the conduct of the other party.

78. **Laws v London Chronicle (Indicator Newspapers) Ltd 1959 1 WLR 698, CA.** repudiatory breaches by employees will justify summary dismissal. in order to amount to a repudiatory breach, the employee’s behaviour must disclose a deliberate intention to disregard the essential requirements of the contract.

79. **Neary and anor v Dean of Westminster 1999 IRLR 288,** Special Commissioner (Westminster Abbey), where Lord Jauncey asserted that the conduct ‘must so undermine the trust and confidence which is inherent in the particular contract of employment that the employer should no longer be required to retain the employee in his employment’.

Conclusions

What was the reason or principal reason for dismissal?

80. The respondent's case was that the claimant was dismissed for "*misuse of personal or business information, including using or sharing such information for personal gain or sharing with a third party without permission,"* which, under the respondent's disciplinary procedure, was categorised as gross misconduct. For the remainder of this judgment when referring to the respondent's allegation I will simply refer to "misuse of personal information".

81. The claimant's claim was that he was not dismissed for misconduct but for another reason. The claimant's claim is that he was dismissed for facilitating a customer to make a complaint about a member of staff directly to Asda House, as opposed to going through his supervisor.

82. The complaint against the claimant that was made by his colleague to his manager on 6th September was that the claimant had shown the customers Mandy's Facebook profile. The claimant was informed that he was being investigated for "a breach of GDPR." Throughout the investigation and disciplinary process, including the appeal, the respondent was consistent that the allegation against the claimant was misuse of personal information.

83. During the investigation, disciplinary and appeal meetings, the claimant was asked about the normal process for dealing with customer complaints and why, on this occasion, he had not followed normal procedures. In the disciplinary outcome, Ms Mistry does say that the claimant admitted that he should have raised the customer's complaint with his manager. In the appeal outcome, Mr Charlston says that the claimant was aware that the way he dealt with the customer's complaint was wrong. In oral evidence, Mr Charlston did state "*If Mr Wainwright had dealt with the situation correctly and had the customer gone to see his manager who in the building at the same time the whole situation wouldn't have arisen*." By that comment, Mr Charlston meant that, if the claimant had followed due process, he would not have needed to share the data that he did, as the responsibility to address the complaint, and identify the relevant colleague, would have fallen to his manager.

84. The failure to follow due process for dealing with the customers' complaint, was a factor that was taken into account when the respondent reached the decision to dismiss the claimant. However, I do not find that it was the principal reason for the claimant's dismissal.

85. From the evidence and as confirmed in Ms Akers' written submissions, the reason the claimant was dismissed, was not solely the provision of the names of his colleagues and showing a Facebook profile picture to the customer. The reason for dismissal was that the respondent believed the claimant had maliciously provided the names of his colleagues and shown the profile picture to the customers to get his colleagues into trouble. The principal reason for the claimant's dismissal was therefore, conduct, namely, maliciously misusing personal information to get his colleagues into trouble.

Did the respondent have a genuine belief in the claimant's misconduct?

86. The respondent alleged that the claimant's misuse of personal information amounted to gross misconduct. Whilst I do not, at this stage, need to make findings as to whether the claimant's misconduct did or did not amount to gross misconduct, in this case I do need to consider whether the claimant's conduct was capable of amounting to gross misconduct.

87. In the words of HHJ Hands at para. 111 of **Sandwell** "*Gross misconduct justifying dismissal must amount to a repudiation of the contract of employment by the employee…So the conduct must be a deliberate and wilful contradiction of the contractual terms.*"

88. It was alleged that the claimant shared the first and last name of two of his colleagues and the Facebook profile picture of one of his colleagues, with two customers. The purpose of sharing that information was to assist the customers in identifying which of his colleagues had completed their order and against whom they wished to make a complaint. That is not conduct that is deliberate wrongdoing. Particularly in circumstances where Ms Mistry accepted that the claimant may not have known that his conduct could have resulted in dismissal.

89. However, the respondent, both through Ms Mistry and Mr Charlston, has been clear that a key factor in their decision that the claimant's conduct was gross misconduct, was their finding that he had shared the names and Facebook profile picture of his colleagues maliciously, in order to get his colleagues into trouble. That is conduct that is deliberate wrongdoing.

90. I find that the allegation against the claimant that he maliciously misused personal information, could be capable of amounting to gross misconduct and that the respondent had a genuine belief in that misconduct. The respondent's disciplinary policy states that the misuse of personal information is potentially gross misconduct. The claimant admitted sharing the information with the customers, that it was personal information and accepted that he should not have done so. The sharing of first and last names of colleagues and sharing information contained on their personal social media accounts has the potential to create safety and security issues for those colleagues and may be a breach of data protection laws. Further, if, as the respondent's believed, the claimant was seeking to get his colleagues into trouble in retaliation for deleting him as a friend on Facebook, that indicates behaviour that was deliberate wrongdoing.

<u>Was that belief held on reasonable grounds and after carrying out a reasonable investigation?</u>

91. In forming the belief that the claimant was guilty of gross misconduct, Ms Mistry indicated that the following factors were taken into account:

    a. That the claimant admitted his actions and that his behaviour was wrong;
    b. That the claimant had received training on the respondent's data protection policy and knew that he should not share his colleagues personal details without their permission;
    c. That he had shared the full names of his colleagues in order to assist a customer to make a complaint, whereas Mr Marshall had shared only the claimant's first name in order for the customer to provide

positive feedback;

d. That whilst he apologised for his actions he showed no remorse;
e. There was no mitigation for his actions;
f. That on the CCTV the claimant showed the customers the Facebook profile discreetly;
g. That the claimant was acting maliciously to get his colleagues into trouble because they had removed him as a friend on Facebook.

92. Both Ms Mistry and Mr Charlston were clear that the two key factors in forming their belief that the claimant's actions amounted to gross misconduct were that he admitted conduct that the disciplinary policy categorises as gross misconduct and that his behaviour was malicious.

93. At no point during the investigation meeting, disciplinary meeting or appeal meeting was the claimant given an opportunity to comment on the allegation that his behaviour was malicious and deliberately designed to get his colleagues into trouble because they had deleted him as a friend from Facebook. That finding was not included in the disciplinary outcome letter and the claimant was not aware that it was a key element in the decision to categorise his behaviour as gross misconduct or the decision to dismiss him until he received Ms Mistry's witness statement as part of these proceedings. Ms Mistry reached that conclusion because she considered that the claimant was showing the customers his phone, discreetly and because the claimant's Trades Union representative had made reference to difficult relations with his colleagues being a catalyst for the allegation.

94. Whilst the claimant was given an opportunity to view the CCTV footage of the incident, the claimant was not given the opportunity to respond to the allegation that he was deliberately showing the customers the Facebook profile discreetly. Further, he was not asked how relations with his colleagues had influenced his actions.

95. In oral evidence, Ms Mistry accepted that if she had asked the claimant about the allegation that he was acting maliciously, he could have said something that changed her mind and made a difference to her decision.

96. The claimant was not asked or given any opportunity to clarify whether he had shared just the first name or the first and last name of his colleagues, it was an assumption made by Ms Mistry based on her mistaken belief that Facebook profiles always contain the first and last name of the person whose profile it is. Facebook profiles can contain just one name or a pseudonym. Ms Mistry did not investigate what Mandy's publicly available Facebook profile showed.

97. Ms Mistry's finding that the claimant had received training on the data protection policy and was aware that he should not share the names or social media profiles of his colleagues was made without reviewing the claimant's training records and without giving the claimant an opportunity to view his training records or comment on what training he had or had not received. When asked about the data protection policy and disciplinary policy, Ms Mistry accepted that the policies were confusing. Ms Mistry also accepted that the claimant may not have been aware that his conduct could have resulted in dismissal because it had been six years since his induction.

98. Ms Mistry accepted in oral evidence that if she had asked the claimant about whether he had shared the first or last names of his colleagues, or whether Mr Marshall had shared his first and last name with the customers, the claimant could have said something that might have changed her mind, although that was unlikely.

99. Given the importance placed on these factors in reaching the conclusion that the claimant's actions amounted to gross misconduct, it was unreasonable for the respondent to fail to put these allegations to the claimant and provide an opportunity for him to respond to them.

100. As a result of the failure to investigate significant factors that could have made a substantive difference to the respondent's belief that the claimant's actions amounted to gross misconduct, the genuine belief in his gross misconduct was not held on reasonable grounds.

Did the respondent act in a procedurally fair manner?

101. The claimant was invited to attend two investigation meetings with Mr Sheraz, at which the allegations were put to him. He was given an opportunity to respond to the allegations and admitted his actions.

102. The claimant was informed of the respondent's decision that there was a case to answer and invited to attend a disciplinary meeting with reasonable notice. The disciplinary invite letter informed him of his right to be accompanied at the meeting. The letter failed to inform the claimant that the outcome could be summary dismissal. The letter did indicate that dismissal was one possible outcome, but did not indicate such a dismissal could be without notice. This was a breach of paragraph 9 of the ACAS Code of Practice on Disciplinary and Grievance Procedures ('the ACAS Code').

103. A number of documents were sent with the disciplinary invite letter but these did not include the witness statements taken as part of the initial investigation. The claimant was provided with copies of the witness statements at the start of the disciplinary hearing, but was, consequently, not given an opportunity to consider whether he had questions for those witnesses which would require them to be present at the disciplinary meeting or to whom questions could have been put in writing.

104. There were significant failures in the investigation carried out by Ms Mistry, which I have outlined above. The disciplinary outcome letter failed to inform the claimant of the full reasons for the decision to terminate his employment, particularly the significance placed on his malicious intentions. This was a breach of paragraph 22 of the ACAS Code, particularly "*The employee should be informed as soon as possible of the reasons for the dismissal*."

105. The claimant was afforded the opportunity to appeal the decision to terminate his employment but was required to write to Ms Mistry in order to do so. Whilst not ideal, I do find that it was Mr Charleston that ultimately conducted the appeal process and was the decision maker in the appeal.

106. Mr Charleston required the claimant to send three appeal letters and attend a meeting at which Mr Charlston outlined what he would want the claimant

to include in an appeal letter before he was prepared to invite the claimant to an appeal meeting. I accept that it was not Mr Charlston's intention to delay or deter the claimant from appealing and the purpose was to obtain a more detailed explanation of the reasons why he felt the decision was too harsh.

107. There were significant delays in dealing with the claimant's appeal. The claimant sent his first appeal letter on 21st October 2024, but did not receive the outcome of his appeal until 13th March 2025. That said, whilst such a delay is undesirable, it is unlikely to have made any difference to the outcome.

108. However, the claimant's grounds of appeal were not given due consideration. The claimant did and was entitled to appeal on the basis that the sanction of summary dismissal was too severe. However, Mr Charlston was clear in his evidence that he did not believe that the severity of the sanction was a matter he needed to consider unless new evidence was presented. Ultimately, Mr Charlston did not consider whether Ms Mistry's decision to summarily dismiss was reasonable in the circumstances as he took the view that it was not his role to interfere in her decision unless he was provided with new evidence. This was in direct contravention of the respondent's appeal policy and the purpose of the appeal process generally.

109. Mr Charlston stated in evidence that he agreed with Ms Mistry's finding that the claimant acted maliciously in sharing his colleagues' information. This was a finding that, as outlined above, Ms Mistry had not given the claimant the opportunity to comment on. Mr Charlston was clear that a key element of his decision was the intentions of the claimant in providing the information, but he did not offer the claimant any opportunity to comment on that finding in the appeal meetings. The failure to properly consider the claimant's appeal against the severity of the sanction and the acceptance of Ms Mistry's findings when those findings had not been recorded or discussed with the claimant or properly investigated by Mr Charlston was a breach of paragraph 27 of the ACAS Code, which requires "*the appeal should be dealt with impartially*".

Was dismissal within a range of reasonable responses?

110. The respondent's disciplinary policy states that misuse of personal information is a "potential gross misconduct." It states "the range of sanctions will depend on the seriousness of the misconduct." It states that common sanctions for gross misconduct is dismissal without notice or a final written warning live for 12 months. It also says "Gross misconduct will usually result in immediate dismissal without notice or payment in lieu of notice, however, the sanction may be reduced at the Disciplinary Manager's discretion." The policy indicates "Aggravating / mitigating factors may warrant more or less severe accountability. This document is for guidance only and the decision as to the level of sanction applied is at the discretion of the Disciplinary Manager.

111. The disciplinary policy provides a list of mitigating and aggravating factors to take into account in reaching a decision about the severity of the misconduct and the sanction to be applied. These included the following,

which are relevant to this case:

a. Mitigating factor: The colleague was unaware of proper policy or procedure and would not have reasonably been aware;
b. Aggravating factor: The actions of the subject were deliberate.

112. Whilst the respondent's disciplinary policy identifies that misuse of personal information is "potential" gross misconduct, one possible sanction for which is summary dismissal, it does not automatically follow that a finding of gross misconduct must result in summary dismissal. An employer should consider whether dismissal would be reasonable after considering any mitigating circumstances.

113. In the adjournment summary of the disciplinary meeting held by Ms Mistry on 9th October, she states "*Jordan had no mitigation for his actions and admitted all the allegations*." However, in her witness statement she says "*At this stage I considered the mitigating factors put forward by Jordan, namely his remorsefulness throughout the investigation and disciplinary process, and admitting his actions. I also considered Jordan's 6 years of service with ASDA as well as his employment record*." Ms Mistry's witness statement contradicts her notes and findings that were made contemporaneously during the disciplinary procedure. Further, there is no reference to consideration of any mitigating factors within her verbal decision communicated to the claimant on 9th October or in the disciplinary outcome letter dated 14th October. Consequently, I find that Ms Mistry's record that there were no mitigating factors to consider is the most likely approach that she took. The mitigating factors that she later outlines in her witness statement are the factors that should have been taken into account in reaching her decision to dismiss summarily in October 2024.

114. In addition, it is relevant whether the claimant could reasonably have been aware that his conduct may result in dismissal. The claimant received training on "the data protection act" during his induction in 2018. However, neither the claimant nor the respondent knew what that training entailed and did not know whether the claimant would have been informed that sharing the names or public social media profiles of colleagues was misconduct or a breach of data protection rules. The disciplinary policy which identified the misuse of personal information as an act of gross misconduct was dated January 2024 and no evidence was presented to indicate that the claimant had been provided with a copy of that policy or provided with any training on the contents. The respondent indicated that policies are located on their internal HR systems, but there was no evidence that any notification of policy updates had been sent to the claimant when the policy was amended. In any event, Ms Mistry accepted in evidence that even if the claimant had seen the policies, he may not have known that his conduct could have amounted to gross misconduct or resulted in dismissal for a first offence because his training was six years ago and the policies were themselves confusing.

115. On the issue of remorse, Ms Mistry states in her witness statement that she took the claimant's remorse into account as a mitigating factor. However, she also states "his apologies did not feel sincere, particularly his attitude following the disciplinary hearing, which suggested he believed he would face no consequences for his actions." During cross examination, Ms Mistry

was unable to explain why she did not consider the apologies made by the claimant, on multiple occasions during the investigation and disciplinary process, to be sincere or a demonstration of remorse. Ms Mistry's witness statement indicates that she took into account events that took place after she made and communicated her decision to dismiss to explain why she did not feel the claimant's apologies were sincere. This is information that only became available after the decision had been made and could not have formed part of Ms Mistry's decision making at the relevant time. There is no reference to taking the claimant's apologies and his admission of his actions into account as a mitigating factor before making her decision. In fact, she states there were no mitigating factors. On balance, I find that Ms Mistry did not take into account the claimant's apologies as a mitigating factor when forming her view that the claimant's actions amounted to gross misconduct and in reaching her decision to dismiss summarily.

116. The claimant had 6 years' service with the respondent and a clean disciplinary record.

117. The claimant has sought to establish that the sanction of summary dismissal was outside the range of reasonable responses by comparing his conduct with that of Mr Marshall and Mr Sheraz. The claimant claimed that Mr Marshall and Mr Sheraz also breached data protection and the disciplinary policy but were not disciplined.

118. Mr Sheraz accessed internal systems to obtain the claimant's personal phone number and called the claimant, from his personal mobile phone and from his personal vehicle, to arrange the investigation meeting. The claimant had voluntarily put his personal mobile phone number of the system understanding that it could be used to contact him regarding work related matters. Mr Sheraz's contact with the claimant was for a work related reason. It was perhaps unwise for Mr Sheraz to use his own personal mobile phone to contact the claimant and to do so from his vehicle; however, this set of circumstances is not sufficiently similar, or truly parallel to the claimant's circumstances. As identified by Mr Charlston during a call with his employee relations advisers, Mr Sheraz's contact could have been classified as misconduct and a breach of the data protection and disciplinary policy, but for different reasons.

119. Mr Marshall wrote down the claimant's full name and gave it to customers, in the same manner as the claimant. Mr Marshall provided the claimant's full name to allow the customers to provide positive feedback regarding his customer service. The customers already knew his first name as the claimant was wearing a name badge. It was unclear from Ms Mistry's evidence why she considered Mr Marshall's behaviour to be different to that of the claimant. During the disciplinary meeting she indicates that the difference is that Mr Marshall had positive intentions. However, in evidence she indicated that intentions, and whether the name was provided for positive feedback or a complaint, didn't matter. Ms Mistry was asked whether it would make a difference whether the names provided to the customer were just first names or first and last names. Ms Mistry indicated that it wouldn't matter as it was still a name and a breach of data protection. It is therefore unclear why Mr Marshall's actions were not considered to be misconduct but the claimant's were.

120. However, the claimant did not only provide the name of his colleagues, he also showed the Facebook profile picture of his colleague to the customer. That is the key difference between the two sets of circumstances. Whilst Ms Mistry was not able to clearly explain or identify that difference in evidence, in the disciplinary meeting Ms Mistry did identify the key difference when she said "*So that's fine that Gary gave a name but its different to show a picture from you personal mobile phone*". Further, Ms Mistry has indicated that the key difference was that the claimant was acting maliciously to get his colleagues into trouble, but Mr Marshall was not. The provision of a name to a customer is not materially different, however, the wider circumstances, particularly the provision of a picture from social media and Ms Mistry's belief that the claimant's intentions were malicious, distinguishes the two situations so that they are not sufficiently similar and the decision to treat Mr Marshall and the claimant differently was within a range of reasonable responses.

121. I must determine whether, in the particular circumstances of this case, the decision to dismiss the claimant fell within the band of reasonable responses which a reasonable employer might have adopted. In doing so, I must not substitute the tribunal's decision for that of the employer.

122. I find that the sanction of summary dismissal was not within a range of reasonable responses. The respondent made the decision to summarily dismiss for two key reasons;

    a. the claimant had admitted his actions and, in their view, the policy said his conduct was gross misconduct, the sanction for which was dismissal; and
    b. the claimant had acted maliciously to get his colleagues into trouble.

123. In respect of the first point, the respondent's policy is clearly stated to be "guidance" and provides the disciplinary manager with the discretion to assess whether the conduct amounts to gross misconduct and whether the appropriate sanction is summary dismissal. It is clear from the policy that the sanction of a final written warning is also an option available where there is a finding of gross misconduct. The respondent failed to apply their mind to any assessment of whether the claimant's conduct was sufficiently serious to warrant summary dismissal, other than with reference to the claimant acting maliciously which I shall come to in a moment. They failed to consider any mitigation before concluding that the summary dismissal must be the appropriate sanction because the claimant had admitted conduct that the policy indicated was potential gross misconduct.

124. In relation to the finding that the claimant had acted maliciously, and his conduct was therefore gross misconduct warranting summary dismissal, I find that, on the information available to them at the time of dismissal, no reasonable employer would have found that the claimant was acting maliciously. There was no evidential basis for that finding; particularly when the claimant was given no opportunity to respond to the allegations that he was acting maliciously and had shown the customers his phone discreetly.

<u>Conclusion</u>

125. The respondent unfairly dismissed the claimant. The respondent's belief in

the claimant's gross misconduct was not reasonably held, the respondent failed to carry out a reasonable investigation, the respondent's procedure was not fair and reasonable and the decision to dismiss for the alleged gross misconduct was not within a range of reasonable responses which a reasonable employer would have adopted.

Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason? If so, should the claimant's compensation be reduced? By how much?

126. As recorded earlier, I agreed with the parties at the start of the hearing that if I concluded that the claimant had been unfairly dismissed, I would consider whether any adjustment should be made to compensation on the ground that if a fair process had been followed by the respondent in dealing with the claimant's case, the claimant might have been fairly dismissed, in accordance with the principles in **Polkey**. I turn to this issue now.

127. Ms Akers, on behalf of the Respondent submits that, had the respondent followed a fair procedure, the claimant would have been dismissed fairly in any event at the same time. Mr Levay on behalf of the claimant submits that the claimant would not have been dismissed had the respondent followed a fair procedure and would, instead, have been issued with a final written warning.

128. In undertaking this exercise, I am not assessing what I would have done; I am assessing what this employer would or might have done. I must assess the actions of the employer before me, on the assumption that the employer would this time have acted fairly though it did not do so beforehand.

129. In order to have followed a fair procedure, the respondent would have needed, as a minimum, to have done the following:

    a. Given the claimant the opportunity to comment on the allegation that he was acting maliciously;
    b. Given the claimant the opportunity to comment on the allegation that he was showing the customers his phone discreetly;
    c. Asked the claimant to clarify whether he had provided the full or just the first names of his colleagues;
    d. Investigated whether the claimant had seen the data protection and disciplinary policies and/or received training on those policies, including whether he did or ought to have known that his actions could result in dismissal for a first offence;
    e. Considered any relevant mitigation including the claimant's length of service, clean disciplinary record and the fact he had apologised and recognized that his actions were wrong;
    f. Properly considered the claimant's appeal against the severity of the decision.

130. There were other procedural failings that lead to my finding that the dismissal was unfair, but where they are not outlined above, I find that the remedy of such failings would not have made any difference to the outcome. The respondent gave relevant evidence relevant to points a-d and f above. Ms Mistry stated in evidence that if she had given the claimant such an opportunity, he could have said something that would have changed her

decision.

131. The claimant said that he did not act maliciously. His intention was to assist the customers and to ensure that the correct colleagues were identified so the wrong person didn't get in to trouble. He had not dealt with a complaint to Asda House before and the customers had said that they did not want to speak to an in-store manager. Whilst he did have an altercation with a colleague, Carol, a few days before the incident, this was not the colleague's name he gave to the customers. All his colleagues bar one had deleted him as a friend on Facebook. The names he gave were the names of the colleagues that had assisted the customers and against whom they wished to make a complaint. He did not give false information. Ms Mistry reached her conclusion that the claimant had acted maliciously because he had shown the customer's his phone discreetly. The claimant denied acting discreetly and Ms Mistry was unable to explain why she had reached this conclusion.

132. The claimant said in evidence that he had understood the reference to "names" in the disciplinary proceedings to mean full names. Had Ms Mistry asked the claimant to clarify, he would have confirmed that he provided the full names of his colleagues which was in line with the assumption made by Ms Mistry.

133. Ms Mistry accepted in evidence, after reviewing the claimant's training records, that the claimant may not have understood that his actions could have resulted in a dismissal for a first offence because the policies were confusing and his training on data protection had been 6 years ago.

134. Mr Charlston said that there would have needed to be a lot of mitigation to avoid a dismissal in the circumstances. The claimant had shared personal information with customers, which was a gross misconduct offence.

135. In reaching a decision as to the chance that the claimant would have been fairly dismissed in any event, I must consider both whether the respondent could have dismissed fairly and whether it would have done so.

136. I find that, if the respondent had carried out a fair procedure and taking into consideration mitigating factors, they could have fairly dismissed the claimant. The starting point is that the misuse of personal information could be a gross misconduct offence, with one possible sanction being summary dismissal. The claimant admitted that he shared the last names and a Facebook profile picture of his colleagues, which was personal information, that he did not have consent to share. This could have created a safety and security issue for his colleague, particularly in circumstances where the customer has indicated that they wish to make a complaint. Summary dismissal would have been a reasonable option available to a reasonable employer in such circumstances, even with the explanations and mitigation outlined above.

137. I also find that there is a chance that the respondent would have dismissed in the circumstances. Whilst Ms Mistry indicated that the claimant could have said something that changed her mind, there remains a chance that it would not. Ms Mistry and Mr Charlston were clear that there was little that would have made much difference to their decision and the mitigating would

have needed to be significant.

138. Taking into consideration all of the factors outlined above, the claimant's explanation for his actions, the mitigation available, I find that there was a 25% chance that he would have been fairly dismissed in any event. This takes into consideration to overall circumstances, but including, Ms Mistry's indication that the claimant could have said something that might have changed her mind had she put relevant allegations to him and the fact he did admit that his actions were wrong.

Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

139. In this case, which concerns a complaint of unfair dismissal arising from the claimant's dismissal for misconduct, the relevant ACAS Code of Practice is the Code of Practice 1 on discipline and grievance procedures.

Did the respondent or the claimant unreasonably fail to comply with it?

140. I find that there were breaches of paragraphs 9, 22 and 27 of the Code of Practice as outlined at paragraph 94-102 of this Judgment.

141. I find that the failure to follow the Code of Practice was unreasonable. It was unfair and unreasonable for the respondent to reach conclusions regarding the claimant's conduct without affording him the opportunity to respond to those allegations. It was also unreasonable for the respondent to fail to properly explain the reason for the respondent's conclusion that his conduct amounted to gross misconduct, which justified summary dismissal in the disciplinary letter. It also arose because of the respondent's unreasonable belief that the claimant's appeal against the severity of the sanction could not succeed unless new evidence was presented, otherwise the original decision would not be scrutinized.

If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

142. I find that it is just and equitable to increase the compensatory award by 15%. (By section 124A of the 1996 Act, the increase applies only to that award.) The procedure followed by the respondent was unfair for the reasons outlined above. This is not a case where no procedure was followed, the respondent did conduct investigation meetings, a disciplinary meeting, an appeal meeting and write to the claimant at appropriate times. They gave the claimant the right to be accompanied to those meetings and provided the majority of the information required ahead of the meetings that took place. However, the respondent is a large employer with employee relations support.

If the claimant was unfairly dismissed, did they cause or contribute to dismissal by blameworthy conduct?

143. I also agreed with the parties that if the claimant had been unfairly dismissed, I would address the issue of contributory fault.

144. The Tribunal may reduce the basic or compensatory awards for culpable conduct in the slightly different circumstances set out in sections 122(2) and 123(6) of the Employment Rights Act 1996.

145. I adopt a systematic approach when considering a deduction to the basic or compensatory award: first, identify the conduct which is said to give rise to possible contributory fault; second, decide whether that conduct is blameworthy; third, under section 123(6), ask myself whether the blameworthy conduct caused or contributed to the dismissal to any extent; and fourth, decide to what extent it is just and equitable for the award should be reduced.

146. Ms Akers invites me, on behalf of the Respondent, to find that the claimant wholly contributed to his own dismissal due to his actions as admitted and that the basic and compensatory awards should be reduced by 100%.

147. Ms Akers submits that the relevant conduct is the claimant using his personal mobile telephone to identify his colleagues, showing photographs from social media to customers, and providing their details to the customers whilst knowing that this was not the correct process and he was very clear on what the process was. Ms Akers further submits that it would be just and equitable to reduce the compensatory award by 100% because of the claimant's intention to breach the process to avenge himself, which contributed to the dismissal.

148. Mr Levay, on behalf of the respondent, invites me to find that the respondent has not produced evidence upon which the Tribunal can make a finding that the claimant's conduct was culpable or blameworthy. Mr Levay submits that it is unclear on what basis the respondent argues that the claimant was trying to get his colleagues into trouble, that it is more likely than not that the claimant shared only first names of his colleagues and that the claimant gave cogent evidence regarding his motivation for his actions. Mr Levay submits that it would not be just and equitable to reduce the claimant's basic or compensatory award.

149. I find that the claimant's conduct is providing customers with the last names of two of his colleagues and showing the customers the Facebook profile picture of one of his colleagues was culpable and blameworthy conduct. He accepted throughout the investigation and disciplinary procedures that his actions were wrong and could have caused safety and security concerns for his colleagues and upset them. Further, I find that the claimant's actions in not following the respondent's complaints procedure and referring the customers' complaint to his manager was also culpable and blameworthy conduct.

150. However, I do not find that his actions were carried out maliciously to get his colleagues into trouble. His intention was to assist the customers and to ensure that the wrong colleague did not get into trouble. The colleague with whom there had been an incident a few days before his actions was not the same colleague whose name he provided to the customers. The names he provided were accurate and were not falsely provided to get them into trouble. The customers had already indicated that they wished to make a complaint and the claimant was facilitating them to do so.

151. In relation to the compensatory award, I find that the claimant's conduct did contribute to the dismissal. If he had not shared the information with the customers and had followed the respondent's complaints procedure, an investigation would not have been necessary.

If so, would it be just and equitable to reduce the claimant's basic and/or compensatory award? By what proportion?

152. The basic and compensatory awards should be reduced by 50%. The claimant's blameworthy conduct was the reason why disciplinary action was taken and a significant factor in the reason for dismissal. However, as his actions were not malicious or deliberate the respondent were equally as responsible for the dismissal as a result of their unreasonable process and decisions.

Wrongful Dismissal

153. The claimant was dismissed without notice. He brings a breach of contract claim in respect of his entitlement notice.

154. The respondent says that it was entitled to dismiss him without notice for his gross misconduct in maliciously misusing personal information. I must decide if the claimant committed an act of gross misconduct entitling it to dismiss without notice.

155. In distinction to the claim of unfair dismissal, where the focus was on the reasonableness of management's decisions and, in that respect, it is immaterial what decision I would have made about the claimant's conduct, I must decide for myself whether the claimant was guilty of conduct serious enough to entitle the respondent to terminate the employment without notice.

156. The claimant did breach data protection and the respondent's policies by sharing the full names and public Facebook profile picture with customers. All employees wore name badges containing their first name, indicating that such information is acceptable to share and it would not be a breach of data protection to do so. The conduct became misconduct when the claimant shared the last names and Facebook profile picture of the colleagues, which was information that was not available to customers.

157. The claimant did so in order to assist a customer and provide good customer service in circumstances where they were already unhappy and had expressed a desire to complain. The claimant wanted to make sure the wrong colleague did not get into trouble and sought to identify the individual against whom the customers sought to complaint. They had indicated that they did not wish to speak to an in-store manager to raise the complaint and wanted to write to Asda House directly. This was the first occasion that a customer had indicated they did not wish to engage with the in-store complaints process and the claimant acted in order to help. He did not act maliciously in providing the information about his colleagues.

158. The claimant apologised for his actions throughout the process, recognising that he was at fault and that he would not take the same action again. The claimant had not been provided with training or the policies that would have

made him aware, before the incident, that his actions might be misconduct or result in a dismissal for a first offence.

159. I find that the claimant's actions were not deliberate wrongdoing or gross negligence. His conduct was not sufficiently serious to amount to a repudiatory breach of the claimant's contract of employment such as to justify summary dismissal.

160. Consequently, he was wrongfully dismissed, in breach of contract, when his employment was terminated without notice by the respondent. The amount of notice to which the claimant was entitled is an issue to be decided at a subsequent remedy hearing.

Approved by:

Employment Judge Edwards

9th October 2025

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

Notes

All judgments (apart from judgments under Rule 51) and any written reasons for the judgments are published, in full, online at *https://www.gov.uk/employment-tribunal-decisions* shortly after a copy has been sent to the claimants and respondents.

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

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