EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Miss D Husbands- Brown **V** **Marks and Spencer PLC**

Heard at: London Central **On**: 26 and 27 September 2019

Before: Employment Judge Joffe

Representation

For the Claimant: Ms V Ejimofor, FRU representative

For the Respondent: Mr S Sanders, counsel

RESERVED JUDGMENT

1. The claim for unfair dismissal is not upheld.
2. The claim for wrongful dismissal is not upheld.
3. The claims for arrears of pay and other payments are dismissed on withdrawal.

REASONS

Claims and issues

1. The issues were discussed with the parties at the outset and agreed as follows:

<u>Unfair dismissal</u>

1.1 What was the reason for dismissal? The respondent asserts that the dismissal was for misconduct.

1.2 Was the reason a substantial reason of a kind which could justify dismissal?

1.3 Did the respondent act reasonably or unreasonably in treating it as a sufficient reason for dismissing the claimant, taking account of the band of reasonable responses? As part of that:

1.3.1 following the 3 stage test in *British Home Stores v Burchell* [1978] IRLR 379

1.3.1.1 did the respondent genuinely believe the claimant was guilty of misconduct?

1.3.1.2 did the respondent hold that belief on reasonable grounds?

1.3.1.3 did the respondent carry out a reasonable investigation?

1.3.2 Was dismissal a fair sanction?

1.4 The Tribunal will take into account any relevant provision of the ACAS Code on Disciplinary and Grievance Procedures in deciding the fairness of the dismissal.

Particular concerns the claimant raised about procedure and fairness were set out in her own list of issues provided at the outset of the hearing and were considered by the Tribunal under the headings above.

1.5 If the dismissal is unfair on procedural grounds, what is the chance that the respondent would still have dismissed the claimant had it followed fair procedures, and when would the dismissal have taken place?

1.6 Should there should be any reduction in the compensatory award because the claimant caused or contributed to her dismissal and/or in the basic award because of the claimant's conduct prior to dismissal and if so, to what extent?

<u>Wrongful dismissal (notice pay)</u>

2. The parties agreed that the claimant was summarily dismissed and had a contractual notice period of twelve weeks. Accordingly, the live issue was as follows:

2.1 Did the claimant fundamentally breach the contract of employment? This requires the respondent to prove, on the balance of probabilities, that the claimant actually committed gross misconduct – misconduct which was sufficiently serious that the respondent was entitled to dismiss her without giving her notice

Remedy

3. Other issues of remedy were left until after the decision on liability. The claimant indicated at the outset of the Hearing that she was seeking re-engagement if she succeeded in her unfair dismissal claim.

Fact findings relevant to the issues

4. The claims were heard over two days. The Tribunal heard evidence from the claimant, and, for the respondent, from Ruhul Choudhury, section manager at the respondent's Pantheon store, and Greg Gaby, who was at the relevant time commercial and operations manager at the respondent's King's Road store. The claimant also submitted a statement from Chante Hemans, a former colleague of the claimant. Ms Hemans did not attend to give evidence. The respondent did not object to the statement being admitted and the Tribunal giving it such weight as was appropriate in the circumstances.

5. There was an agreed trial bundle of 252 pages. There was a DVD of CCTV footage available, but the parties agreed that p 52 of the bundle was an adequate summary of the CCTV material and that it was not necessary for me to watch the DVD. I was additionally provided with a schedule of alleged breaches of the respondent's policies, which was agreed between the parties.

6. The claimant confirmed that she had received payments outstanding on termination of her employment and withdrew the claims on her claim form for 'arrears of pay' and 'other payments'; these were dismissed on withdrawal.

7. The claimant was employed by the respondent at the respondent's Pantheon store in Oxford Street as a customer service advisor. Her employment started on 19 November 1995. At the time of her dismissal she worked on the second floor on the customer service desk ('CSD'). She had worked there for about five or six years and had previously worked in the food department. Amongst other tasks which took place at the CSD, items of merchandise reserved by customers for later purchase would be stored 'backstage', behind the desk and off the shop floor.

The respondent's policies

8. The Tribunal was referred to two relevant policies:

   8.1 The Customers and Staff Reservations Policy GM and Foods ('the reservations policy') which was last updated in July 2011. The relevant provisions of this policy so far as the facts of this case were concerned were:

   8.1.1 full price merchandise may only be reserved for a maximum of two days

   8.1.2 sale merchandise may not be reserved

8.1.3 employees may only make reservations for products for themselves in their own time, e.g. during a lunch or tea break
8.1.4 a manager's authorisation is required to extend the period of reservation
8.1.5 'backstage stock' i.e. items not available on the shop floor may not be reserved

The policy states ' Abuse of this policy will be taken seriously and may lead to disciplinary procedures'.

8.2 Computer User Agreement (undated). The passages said to be relevant to this case were: 'You should not use someone else's ID and password, and the use of shared passwords is not permitted unless formal business case has been expressly authorised by the Head of Information s/security and compliance' and 'You should not attempt to use another User's password, privileged system access or a System administrator's account.'

9. Reference should also be made to the respondent's Disciplinary Policy which provides that various types of conduct may be considered to be gross misconduct, including 'Dishonest behaviour and fraudulent acts with the intention of obtaining money, assets or services.'

Dissemination of policies

10. There was a dispute between the parties as to the extent to which the claimant in particular had been informed about the content of the reservations policy and as to whether practice in the CSD deviated from the terms of the reservations policy and the Computer User Agreement in some respects.

11. I had to make findings of fact about the claimant's knowledge of the policies in order to reach conclusions on her wrongful dismissal claim. In relation to my findings on unfair dismissal, I was concerned with what view Mr Choudhury and Mr Gaby formed as to the claimant's knowledge of the policies and the grounds for their views.

12. The claimant disputed that she knew that sale items should not be reserved. The claimant's evidence to the disciplinary hearing was that "over the years the policy has changed. I wasn't aware sale [items] couldn't be reserved. I thought it was end of the day or 24 hours, which is known to be done." I heard evidence and was satisfied that the reservations policy predated the claimant's transfer to the CSD and did not change in the time she was employed on the CSD.

13. The Tribunal heard limited evidence about how the policies are disseminated to staff.

14. Mr Choudhury said that the reservations policy was on a notice board on the third floor of the store next to the third floor admin office and changing room.

He said staff members had to pass through that area to get to their departments and that staff briefings were carried out in this area. He said that staff would be briefed on the reservations policy when they started on the CSD and that there was a folder containing the relevant policies including the reservations policy which was kept at the CSD.

15. Mr Choudhury said that the policy would from time to time also be discussed in daily briefings which were held at the store at 8:45 for staff on early shifts, at 10 am for later starters and then in the early afternoon for those on afternoon shifts. There were whole store briefings and briefings for individual departments. His account was that some of these briefings covered the reservations policy over the period when he had worked at the Pantheon store, which was from 2014. Mr Choudhury was not on the CSD so would not have attended CSD briefings. He said that staff were encouraged to look at the noticeboard.

16. There appeared to be no written record of these briefings nor of what was discussed at particular briefings. The claimant's evidence in her witness statement and cross examination was that she was not regularly updated on changes in policies because staff briefings had stopped. This appeared to have occurred, on her account in her witness statement, when she changed her hours in April 2018 although she said in oral evidence that she could not recall any staff briefing after 2017. Mr Choudhury disputed that staff briefings had stopped.

17. Ms Hemans in her statement said "after Donna's dismissal posters of the reservations policy were put on display in the lifts and in the lingerie department. There is now one at the back of the customer service desk. This happened around July 2019." Ms Hemans' statement does not mention whether there were posters of the reservations policy elsewhere in the store prior to that date nor does Ms Hemans say what training she had on the reservations policy or whether she attended briefings about the policy. Mr Choudhury in his evidence denied that the policy had only been displayed after the claimant's dismissal and Ms Hemans did not attend tribunal so that her evidence could be tested.

18. In her evidence to the Tribunal under cross examination, the claimant suggested that she was unaware there was any written policy at all about reservations. This was not an assertion she made in her witness statement, the tenor of which was that she had a misunderstanding of the policy, in particular the policy in relation to reservation of sale items, in part caused by the practices of managers and other staff. Nor had the claimant said as part of the internal proceedings that she was unaware that there was a formal / written policy. In the disciplinary hearing, she said that "over the years since I have been here the policy has changed". In her disciplinary appeal she said, "in my experience with regard to reservations both management and staff members often reserve sale items as this is common practice throughout the store, as well as items being handed to us to reserve but not knowing whether the items were for customers or themselves as the customers have not been present. The items I've been accused of reserving were for customers with the (exceptions of the candle and socks) however

staff members are not updated of any policy changes and this has become a culture due to the fact that the policy is not being enforced."

19. I considered that it was unsatisfactory that there was a lack of clear evidence backed up by records as to when staff had been trained on the reservations policy; if such records existed, they were not produced to the Tribunal. However, taking into account Mr Choudhury's evidence, what the claimant had said during the course of the disciplinary and appeal processes (in which she seemed to be saying not that she was not aware that there was a policy but that it had changed and that the practice in some respects deviated from the policy) and her evidence to the Tribunal, I concluded that the claimant was aware that there was a written reservations policy which was available in the store, that she would have been briefed on its contents when she commenced working on the CSD and that it was likely she had attended briefings at which it was referred to thereafter. I noted in particular that there were many aspects of the policy which the claimant did not dispute that she was aware of.

Practice in relation to reservations and till usage

20. The claimant also said that there were aspects of the policies which were not in any event followed. In particular she said that it was common practice for managers and staff to reserve sales items, and to manually extend reservation dates. She was not able to give any examples of these practices in her evidence to the Tribunal and she did not provide any examples when asked to do so during the disciplinary hearing.

21. The claimant also said that it was common practice for staff to use other staff members' till login ID e.g. when an individual member of staff was locked out of his or her till. Mr Gaby and Mr Choudhury in their evidence denied that these breaches of policy were common practice, but neither was able to speak in general terms about practices on the CSD at the Pantheon store. Ms Hemans in her witness statement also said that it was common for staff to use the till logins of other staff members when the store was busy and sometimes for managers to use a till logged into by a member of staff. So far as reserving sale items was concerned, Ms Hemans recounted an occasion when Veronica Brydson reserved some sale underwear and was subsequently disciplined for doing so. In an email dated 18 February 2019 to the disciplinary appeal, an employee named Vanessa Bello Belancur stated that she had witnessed staff, including section leaders and managers, reserve sale items although she gave no examples.

22. My conclusion from this evidence was that there were occasions when staff on the CSD used each other's till logins but, in the absence of any examples apart from that of Ms Brydson, that I was not persuaded that there were occasions when sale items were reserved, apart from the occasion involving Ms Brydson, for which she was disciplined.

23. The claimant referred in evidence to occasions prior to her dismissal when she had some issues with her direct section manager, Aisha Malik, and with Mr Choudhury. She alleged that Mr Choudhury was 'close friends' with Ms

Malik and was biased against her. It was not suggested to Mr Choudhury in evidence that he had been improperly influenced either by other managers or by any previous dealings with or perceptions of the claimant, so it was not necessary for me to make any findings about the alleged incidents. The alleged incident with Mr Choudhury, in which the claimant said he had reprimanded her for drinking water whilst not on break, in any event seemed neither significant nor likely to have contributed to any ill will on the part of Mr Choudhury towards the claimant.

Facts leading to the Claimant's dismissal

24. On 28 December 2018, the claimant asked a colleague, Mohammed Hussain, to reserve a candle for her. The candle was in the respondent's post-Christmas sale at a price of £6.25. Reserved items were placed in an area off the shop floor behind the CSD. They were kept in a number of crates or on a hanging rail. The till generated a deadline for purchase of the candle of two days, ie 30 December 2018. For all reservations the respondent's tills generate a two-day reservation date. The claimant did not purchase the candle by 30 December, which was a Sunday.

25. On Monday 31 December 2018, the claimant extended the reservation period by one day manually, i.e. in pen, on the existing reservation slip. She did not get authorisation from a manager and she carried out the transaction during her working hours. She wrote 'DO NOT REMOVE' at the top of the slip. She did not purchase the candle on that date.

26. On 4 January 2019, the claimant reserved two cashmere scarves in the name of 'Smith'. She used a till which had been logged onto by a colleague named Stephane without changing the till to her login details. The CCTV footage showed that no customer was present when this transaction occurred and Stephane was not present. The CCTV footage additionally showed that the claimant had walked past Stephane's till twice whilst he was using it, holding the scarves, and that there was a free till nearby. Electronic journal reports showed the claimant had used her own till shortly before and shortly after this transaction.

27. On 21 January 2019, at 11:50 am, the claimant re-reserved the candle, which was still behind the CSD, this time in the name of 'Lynch'. The price had been reduced to £3.12 pursuant to the respondent's sale policy of making incremental reductions. She also reserved at the same time some socks which were also behind the CSD as they had been returned by a customer. Neither item was on the shop floor. The socks were also in the sale at a price of £1.25. The claimant reserved the items during working hours and she intended to purchase the items for herself.

28. On 22 January 2019 at 11:03 am, the claimant reserved some boots in the name of 'Smith'.

29. On 28 January 2019, the claimant purchased both the candle and the socks, which were now on sale at £1.99 and £0.49 respectively.

30. On 29 January 2019, the claimant re-reserved the same boots which she had previously reserved on 22 January 2019 again in the name of 'Smith'. She used a till which had been logged on by a colleague named Vanessa when Vanessa was not present. The claimant had used her own till both before and after the re-reservation of the boots.

31. Also on 29 January 2019, the claimant was asked to see Ms Malik and Ms Fiona Higbee another section manager at the Pantheon store. She was told that an investigation was being conducted to determine where she had a case to answer for misconduct. Two further investigation meetings were held with the claimant on 31 January 2019 and 1 February 2019 and notes of these meetings, which were signed by the claimant as being a true and accurate record of the relevant interviews, were included in the bundle. No other witnesses were interviewed but the investigators looked at electronic journals of till activity and reservation slips for the relevant transactions. CCTV was reviewed. Neither Ms Malik nor Ms Higbee attended the Tribunal to give evidence and Mr Choudhury did not have a clear recollection of how the issues had come to the attention of management and led to a disciplinary investigation, although he told the Tribunal that issues of this sort would be raised at a cost meeting.

32. It is clear that there were inconsistencies in and issues with the claimant's accounts to the investigators of her dealings with the candle and socks and her actions in relation to the scarves and the boots. I do not set out all of the issues with the claimant's account but they included the following: inconsistencies as to whom the candle was being reserved for, as to whether she could remember reserving the candle at all and as to why she had re-reserved the candle in someone else's name. There were aspects of the account which lacked plausibility, e.g. that the claimant asked a friend called 'Lynch' to collect the candles and socks for the claimant and so reserved the items in the name of Lynch, despite the fact that Lynch did not work at the Pantheon store and the claimant did. The claimant's account of why she wrote "DO NOT REMOVE" on the reservation slip for the candle did not really provide a plausible alternative explanation to displace the inference that she wrote on the slip to ensure the candle remained behind the desk beyond the expiry date of the reservation.

33. In relation to the use of other colleagues' logins, the claimant suggested she might have done this because the department was busy and she used the first available till or that she had been locked out of the till she was logged into. Activity on the claimant's own till as evidenced by the electronic journals showed that the latter had not

been the case in relation to the reservation of the scarves or the boots and the CCTV footage showed that the claimant had twice walked past Stephane's till whilst he was working on it, holding the scarves, when there was an available free till. Although the claimant said to the investigators that the available till did not always work, the CCTV footage did not show her attempting to log on to that till.

34. The claimant did not identify any further witnesses for the investigators to speak with. The claimant was shown all of the documentary evidence and CCTV footage during the investigation interviews. She admitted that she knew she should not have used other employees' till logins and that it was misconduct to do so.

35. The claimant was invited to a disciplinary hearing by a letter dated 2 February 2019 from Ms Higbee. The allegations which were being considered were contained in an attached investigation report. The report detailed the allegations (which covered the transactions relating to the candles, socks, boots and scarves) and said that the scope of the investigation was "to establish whether Donna Husbands-Brown has misused the company reservation policy for personal gain. To establish whether Donna Husbands-Brown has been reserving items during their contracted working hours. To establish whether Donna Husbands-Brown has used colleagues till log on."

36. The report then set out the details of the transactions relating to the candle, socks, boots and scarves described above. The letter informed the claimant that dismissal could 'be a potential outcome' of the disciplinary hearing and notified of her right to be accompanied by a colleague or trade union representative or a member of the Respondent's employee forum, BIG.

37. The disciplinary hearing took place on 6 February 2019 in front of Mr Choudhury. There was also a note taker, Lucy Rajkumar. The claimant was accompanied by a colleague, Yvonne Lewis. There were handwritten notes of the hearing in the bundle and the claimant signed each page of these to indicate that they were a true and accurate account. The claimant's account at the hearing of what had occurred in relation to the events the subject of the charges was in summary as follows:

    Reservation of candle and socks. She had initially reserved the candle in her own time with the intention of purchasing it herself. She did not have the money to purchase the candle on 31 December and so she extended the reservation manually. There was no 'initial reason' why she wrote 'DO NOT REMOVE' but 'people do that all the time'. She then forgot about the candle until she noticed it was still behind the desk on 21 January 2019 and re-reserved it, adding the socks. She accepted this reservation 'was not done in the correct way' but she 'really wanted the candle'. She made the reservation in the name of her friend Lynch as she herself was 'really forgetful'. She was asked by Mr

Choudhury why she did not purchase the items instead of re-reserving them on 21 January and said, 'there was no particular reason'. She said that she told her friend Lynch after the reservation that she had reserved the items for Lynch to pick up. Lynch did not collect the items and the claimant herself bought them when she came in on 28 January. She said that it was not her fault that the items had not been returned to the shop floor as it was the responsibility of everyone on the CSD to return expired reservations.

Reservation of scarves and boots: The claimant said that she knew the policy was that she should only use her own login. She said that she had used the first available till when reserving the boots. In relation to the scarves, when asked "Were there no other tills available on either side of Stephane's till?", She said "I'm not saying there was no other till, not all of our tills work. The reservation was made not thinking about it. I didn't do it deliberately but I would always inform my colleague if I was doing a transaction on their number."

38. So far as knowledge of the policies was concerned, the claimant said that she was not aware that sale items could not be reserved and that she thought they could be reserved until 'end of the day or 24 hours'. She said that she was aware of managers reserving sale items, but she did not provide any examples of the practice. The claimant accepted that she knew the policy in relation to logging in and out of tills. She said 'I'm aware of this. It [i.e. using another staff member's login] is not something I do often and I inform my colleague if this happens." As to other aspects of the reservations policy, the claimant admitted that she knew she should only make reservations for herself in her own time and that only items available to buy on the shop floor should be reserved.

39. Mr Choudhury adjourned the hearing for about 45 minutes and then dismissed the claimant summarily. He said that he had taken into consideration factors including the claimant's length of service and the fact that she was not on any current live sanctions. He said he had considered as a mitigating factor that she had been honest around the mistake she made in reserving an item for herself during working hours. However, he said that, looking at all the evidence and the mitigation and the claimant's responses in the hearing, the claimant's actions in relation to the reservation and re-reservation of the candle and socks had included dishonest behaviour in order to receive personal gain. He also took into consideration the claimant's breach of policy in using other members of staff's till logins.

40. Mr Choudhury confirmed the dismissal in a letter dated 11 February 2019. Amongst his findings was a finding that "I believe due to the length of service and experience within the CSD Donna would be aware of the policy regarding not being able to reserve sale [items]." He recounted the claimant's purported understanding of the sale reservation policy i.e. that "you are able to reserve until the end of the

day or 24 hours" and commented that she had breached her own understanding of the procedure on her own account of events.

41. It was clear from Mr Choudhury's evidence that the core reason for the claimant's dismissal was his conclusion that, in relation to the reservation of the candle and the socks, the claimant's overall course of conduct had been "fraudulent and dishonest". He felt that the claimant could not be trusted. Although the sum involved was small, the loss of trust was significant. He said in his witness statement: "I believe that in changing the name on the re-reservation of the Winter 3 Wick candle and socks from "Brown" (the Claimant's surname) to "Lynch" and carrying out reservations under other colleagues' till logins the Claimant was attempting to disguise her actions."

42. The claimant submitted an undated appeal containing a number of grounds of appeal, including an assertion that managers were biased against her and that the sanction was excessive. She said she was remorseful for what she had done. She said that she purchased the candle and socks at a reduced price by accident, having intended to buy them at the original price. She said that it was common practice for managers and staff to reserve sale items, that staff were not updated about policy changes and that the reservations policy was not enforced. She said that the policy as to staff using their own logins was also not enforced. She also said that there was a failure by the respondent to comply with its equal opportunities policy, but this was not an assertion she pursued or particularised at the appeal hearing and there were no allegations of discrimination before the Tribunal.

43. The appeal was heard by Mr Gaby on 22 March 2019.

44. At the hearing the claimant was again accompanied by a colleague. I was referred to notes of the appeal. The claimant presented new evidence in the form of written statements from three colleagues; these were emails which were included in the bundle.

45. As indicated above, there was an email dated 18 February 2019 from Vanessa Bello Belancur. Ms Belancur stated that she had witnessed staff including section coordinators and managers reserving sale items and that it has "now become the norm to do so". She believed that sometimes the reservations were made for the manager or section coordinator.

46. There was an email dated 22 March 2019 from Shante Hemans in which she stated that she had witnessed managers reserving items or asking other employees to reserve items without the customer actually being present. Ms Hemans also said, "our logins are also used to M&S.com orders by many members of staff (including management) and we are sometimes asked to leave login details for others to use if we are really short of staff."

47. There was an email dated 18 February 2019 from Veronica Brydson. Ms Brydson recorded that she had purchased some sale items and been called to an investigation meeting. She had undergone a disciplinary meeting and been given a written warning.

48. Mr Gaby decided not to interview the members of staff who provided the emails. He did speak with Ms Higbee and with Mr Choudhury on the telephone although these conversations were not documented. He explored with them whether the decision to dismiss had been influenced by Ms Higbee and this was "vehemently denied" by both managers. He says he also discussed with Ms Higbee and Mr Choudhury issues raised in the staff emails which had been produced.

49. So far as Veronica Brydson was concerned, at the time of the appeal hearing, he says that he was told the circumstances were different so the outcome might be different. He was not given details of the case in relation to Ms Brydson at the time.

50. He said in oral evidence that the manager subsequently told him about the different set of circumstances leading to a different outcome in Ms Brydson's case. He said he was happy that it was "not the same crime".

51. So far as the alleged practice of reserving sale items was concerned, he said that he followed that up with Ms Higbee and Mr Choudhury who told him that it was not the practice. He accepted their account, he said, because he had no reason to doubt their integrity and he knew that this was a significant issue within the business. He said it was a very well documented policy, at least in the seven stores he had worked in in central London (which did not include the Pantheon store). Although neither Ms Higbee nor Mr Choudhury managed the claimant's department, he said that he felt they would have knowledge of the practice in the Pantheon store given the limited number of managers at their level, which was about twelve. In questioning about why he did not speak with Ms Belancur or Ms Hemans, he said that they would have reiterated what was in their statements, which he had already taken into account. It was suggested to him that they might have been able to give him concrete examples which could have persuaded him to accept their accounts rather than those of Ms Higbee and Mr Choudhury as to the culture and practice. He said that he was concerned about complying with the timescales for responding to the appeal and that making further enquiries would have made it difficult to comply with those timescales but went on to say "if I felt it had really needed digging into, I would have."

52. Mr Gaby decided not to uphold the claimant's appeal. Mr Gaby said he considered whether there had been a thorough investigation and whether Mr Choudhury's decision was reasonable. He said it was not for him to re-investigate the allegations but to look at the new evidence and to consider whether Mr Choudhury's decision had been reasonable and logical. He concluded that it was well thought out and

considered and that the new evidence adduced by the claimant did not cast it in doubt. Mr Gaby wrote to the claimant in an undated outcome letter.

53. In respect of the new statements produced on appeal, Mr Gaby said in his outcome letter that "I am hesitant to start commentating on other cases or decisions made regarding those cases without knowing the facts or being involved in the process. I did however follow up on the comments and statements alleging other reserve sale items, including section coordinators and managers. However, I have been unable to secure evidence to corroborate these statements therefore this additional information which has come to light since the action was taken, I don't believe could have affected the original decision had it been seen."

54. Mr Gaby rejected the claimant's contention that the hearing manager's decision was improperly influenced by the investigating manager or other managers within the store and he said "I cannot find any evidence to suggest that any inappropriate behaviour or bullying tactics occurred during this process. Based on my findings, I also do not believe the investigational hearing managers did not "follow equal opportunities and equal rights regardless of age, race or gender" as you've stated in your appeal."

55. Mr Gaby said that for him it ultimately came down to whether the decision was correct given the level of misconduct and the claimant's length of service. His evidence was essentially that "due to the personal gain and dishonest behaviour', he felt the finding of gross misconduct and the decision to dismiss summarily were appropriate.

Submissions

56. Both representatives made oral submissions and provided me with written submissions. Mr Sanders also provided me with a helpful schedule of alleged breaches and another document entitled Summary of Material Available at Each Stage and Respondent's Case in Relation to Reasonable Investigation and Grounds. I have carefully taken into account all of the parties' submissions but refer to them below only insofar as is necessary to explain my conclusions.

Law

57. The test for unfair dismissal is set out in section 98 of the Employment Rights Act 1996. Under section 98(1), it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal, and that it is either a reason falling within subsection (2), eg conduct, or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

58. Under s98(4) '… the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) 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 shall be determined in accordance with equity and the substantial merits of the case.'

59. Tribunals must consider the reasonableness of the dismissal in accordance with s98(4). However, tribunals have been given guidance by the EAT in British Home Stores v Burchell [1978] IRLR 379; [1980] ICR 303, EAT. There are three stages:
(1) did the Respondent genuinely believe the Claimant was guilty of the alleged misconduct?
(2) did the Respondent hold that belief on reasonable grounds?
(3) did the Respondent carry out a proper and adequate investigation?

60. Tribunals must bear in mind that whereas the burden of proving the reason for dismissal lies on the respondents, the second and third stages of Burchell are neutral as to burden of proof and the onus is not on the respondents (Boys and Girls Welfare Society v McDonald [1996] IRLR 129, [1997] ICR 693).

61. Finally, tribunals must decide whether it was reasonable for the respondents to dismiss the claimant for that reason.

62. I have reminded myself that the question is whether dismissal was within the band of reasonable responses open to a reasonable employer. It is not for me to substitute my own decision.

63. The range of reasonable responses test (or, to put it another way, the need to apply the objective standards of the reasonable employer) applies as much to the question of whether an investigation into suspected misconduct was reasonable in all the circumstances as it does to other procedural and substantive aspects of the decision to dismiss a person from his employment for a conduct reason. The objective standards of the reasonable employer must be applied to all aspects of the question whether an employee was fairly and reasonably dismissed. (Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23, CA)

64. In reaching their decision, tribunals must also take into account the ACAS Code on Disciplinary and Grievance Procedures. By virtue of section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992, the Code is admissible in evidence and if any provision of the Code appears to the tribunal to be relevant to any question arising in the proceedings, it shall be taken into account in determining that question. A failure by any person to follow a provision of the Code does not however in itself render him liable to any proceedings.

65. I also had regard to the case of Hadjioannou v Coral Casinos Limited [1981] IRLR 352 in which the EAT said that a complaint of

unreasonableness based on inconsistency of treatment might arise in the following circumstances:

a) where an employee has been led by an employer to believe that certain conduct will not lead to dismissal
b) where the evidence that other cases have been dealt with more leniently supports a complaint that the reason stated for dismissal by the employer was not the real reason
c) where decisions made by an employer in truly parallel circumstances demonstrate that it was not reasonable for the employer to dismiss.

Conclusions

66. I now apply the law to the facts to determine the issues. If I do not repeat every single fact, it is in the interests of keeping these reasons to a manageable length.

Unfair dismissal

67. I find the reason for the dismissal was misconduct.That was a substantial reason of a kind which can justify dismissal. Reminding myself of the 'band of reasonable responses' test, I find the dismissal was not unfair. The reasons for this are as follows.

Genuine belief

68. It was not suggested to Mr Choudhury that he acted out of personal dislike of the Claimant or was influenced by the alleged animosity of the investigators; furthermore the one matter referred to by the claimant in her witness statement relating to Mr Choudhury himself did not seem to me a likely basis for any such animosity. Mr Choudhury said that his relationship with the investigator, Ms Higbee, was friendly but professional and that they did not socialise outside of work. He said the only conversations he had with Ms Higbee about the claimant's case were when she asked him to conduct the hearing and briefed him on the contents of the investigation bundle. They did not have any further conversation or discussions about the case during the hearing. I accepted Mr Choudhury's evidence that he had not been influenced by Ms Higbee or by any personal animosity towards the Claimant and that he formed a genuine belief that she was guilty of the acts of misconduct he found to have been proven.

Reasonable grounds

69. So far as the dealings with the candle and socks were concerned, Mr Choudhury concluded that there had been multiple breaches of the reservations policy, some aspects of which the claimant accepted she

was are of. The claimant had reserved sale items. The claimant had manually altered the expiry date of the reservation without authorisation from a manager. The claimant had written “DO NOT REMOVE” on the reservation slip. The claimant had reserved items for herself during work time. The claimant had reserved for herself items which were not available on the shop floor. Most importantly, Mr Choudhury concluded that the claimant had breached the policies in order ultimately to keep items off the shop floor over a sufficient period to enable her to benefit from a significant reduction in the price of the items.

70. So far as the dealings with the scarves and boots were concerned, there were deliberate breaches of the policy on using other staff’s login details which were not found to amount to dishonesty.

71. Having regard in particular to the inconsistencies and inadequacies in the claimant’s explanations during the investigation and at the disciplinary hearing which I have set out above, I concluded that Mr Choudhury did have reasonable grounds for concluding that the Claimant had been guilty of misconduct and in particular that her actions in relation to the socks and candle were dishonest. Even if her account that she believed sale items could be reserved for a limited period of up to 24 hours was accepted, her own actions were significantly in breach of that understanding and her explanations for the dealings with these items over the period between 28 December 2018 and 28 January 2019 were inconsistent and implausible.

72. Mr Choudhury also had reasonable grounds for concluding that the claimant had breached the policy about using tills under other staff members’ logins in circumstances where she was aware of the correct policy and the evidence from CCTV and electronic journals did not bear out her explanations that she was either locked out of her own till or using the first or only till available.

73. At the appeal stage, Mr Gaby had the additional evidence of the emails produced by Ms Brydson, Ms Belancur and Ms Hemans. In the light of this new evidence, I considered whether the respondent still had reasonable grounds for concluding that the claimant was guilty of the relevant misconduct.

74. I concluded that there were reasonable grounds. The email from Ms Brydson did not cast any light on the facts and circumstances of the claimant’s case. Mr Gaby rejected the evidence of Ms Belancur and Ms Hemans that reservation of sale merchandise and the use of other employee’s logins was common practice. I had some reservations as to whether it was reasonable for him to simply accept the evidence of the managers, Ms Higbee and Mr Choudhury, on this point and reject that of Ms Hemans and Ms Belancur, however, as I explain at paragraphs 76 – 78 below, I concluded that a reasonable appeals manager could have decided not to make further enquiries with Ms Hemans and Ms Belancur and that there would have been reasonable grounds for

concluding the Claimant was guilty of the misconduct alleged even had the evidence of Ms Hemans and Ms Belancur been accepted.

The investigation

75. I concluded that the initial investigation was reasonable. Ms Higbee looked at the available materials in the form of CCTV, electronic journals and reservation slips and conducted detailed interviews with the claimant over three separate occasions. At the disciplinary hearing, Mr Choudhury reviewed all of this material and gave the claimant the opportunity to make further representations and provide further evidence. The claimant did not point to further avenues of enquiry Mr Choudhury could reasonably pursue; she named no potential witnesses.

76. I had more concerns about the appeal stage because it did seem to me that some employers might have interviewed Ms Belancur and Ms Hemans to test their evidence that (Ms Belancur) sale items were reserved by section coordinators and managers, in Ms Belancur's belief sometimes for themselves, and (Ms Hemans) that staff sometimes did use other staff's login details.

77. However, my ultimate conclusion was that it was within the band of reasonable responses not to make those further enquiries. In the case of Ms Belancur's evidence it seemed to me that, even if Mr Gaby, on the basis of further enquiries, accepted that on occasions others had breached the policy by reserving sale items, that would not undermine the conclusion which Mr Choudhury came to that the whole course of events relating to the reservation of the candle and the socks involved dishonesty by the claimant. Mr Choudhury concluded that the claimant acted in knowing breach of her own understanding of the reservations policy as it related to sale items, had acted in knowing breach of other aspects of the reservations policy which she admitted she was aware of (e.g. that backstage stock should not be reserved and that employees should reserve any items for themselves in their own time), and acted deliberately to keep items off the shop floor until she was able to purchase them at a much reduced price. Evidence of more minor breaches of the reservation policy in relation to sale items would not materially have changed those findings nor the seriousness with which they were regarded.

78. In the case of Ms Hemans' evidence, the fact that, as she said, members of staff might be asked to use others' login details in cases where there was a real shortage of staff, did not undermine the findings that the claimant knew the respondent's policy on the use of other staff members' logins (and that breach of that policy was considered to be misconduct, as the claimant had admitted during the investigation) and that the CCTV footage and electronic journals demonstrated no necessity for her to breach the policy. This was in any event the lesser of the two charges.

Procedure

79. Procedurally, the respondent followed the ACAS Code of Practice and I was satisfied the procedure overall was one which a reasonable employer would have followed in the circumstances.

Was it reasonable to dismiss in the circumstances?

80. I concluded that it was within the band of reasonable responses for the respondent to dismiss the claimant, despite her long service and clear conduct record. Although the amount the claimant benefited by financially (and accordingly which the respondent lost) in removing the candle and socks from the shop floor whilst their prices dropped was small, it is clearly reasonable for employers in the retail sector to require a high degree of honesty from staff in relation to their dealings with merchandise and to take the view that where there has been deliberate dishonesty in relation to merchandise, the employee cannot be trusted to carry out her duties in future. The transactions with the candle and socks involved, on Mr Choudhury's findings, deliberate breaches of policy over a sustained period rather than a single impulsive action.

81. The issues with using other employees' logins, would not of themselves, in my view, have entitled a reasonable employer to dismiss but they clearly contributed to the lack of trust.

Disparity of treatment

82. I went on to consider whether my conclusion as to the dismissal falling within the band of reasonable responses was altered by a consideration of the cases of other employees whom the Claimant said were in similar circumstances.

Veronica Brydson

83. Ms Brydson's evidence in her email of 18 February 2019 was that she purchased some sale items in the last week of January 2019; she was called to a disciplinary hearing and found to have misused company time and been in breach of the sales reservation policy. She was given a written warning. Mr Gaby's evidence was that Ms Brydson had received a written warning for reserving sale items for herself, but had not changed dates to reserve the items for longer to get the lowest price, reserved items in other names, or used a colleague's ID to reserve items.

84. On the basis of that evidence, it did not seem to me possible to say that Ms Brydson's circumstances were truly parallel to those of the

claimant and, accordingly, I did not find that Ms Brydson's case cast any light on the reasonableness of the claimant's dismissal nor did it suggest that the claimant's misconduct was not the genuine reason for her dismissal.

85. Additionally, because Ms Brydson's misconduct came to light at about the same time as the claimant's it could not be said that the treatment of Ms Brydson had in any way led the claimant to believe her own conduct would be treated more leniently than it was.

Emmanuel

86. The claimant also gave evidence that she was aware of an investigation of another colleague she called 'Emmanuel' who had used a manager's login for personal gain. She said that the respondent had lost thousands of pounds because of Emmanuel's actions. She did not give any evidence as to how Emmanuel's case was handled, there was no evidence from the respondent and there was no questioning of the respondent's witnesses about this individual and how his case was dealt with. In the circumstances, there is simply no evidence on the basis of which I can conclude that there was any relevant disparity of treatment between the claimant and Emmanuel.

87. For these reasons, I conclude that the claimant's dismissal was not unfair.

Wrongful dismissal

88. In relation to this claim, unlike the unfair dismissal claim, I need to consider the evidence myself and decide whether the claimant was guilty of gross misconduct. On the balance of probabilities, I find that she was, in relation to her course of dealings in respect of the candle and the socks. The inconsistencies and implausibilities in the accounts she gave to the internal proceedings were repeated and amplified in her evidence to the Tribunal. One example of this was when the claimant suggested that a reason she might have asked Lynch to collect items on her behalf rather than simply purchasing them herself at the end of her shift was that she had to rush off collect her daughter form school to attend an after-school activity. The claimant's shift ended at 2 pm and her daughter's school day ended at 3:30. The claimant said that the journey from her workplace to the school took half an hour. The claimant was unable to explain why, given those timings, she would have needed to rush off to collect her daughter rather than taking time to purchase items which she had reserved.

89. The number of inconsistencies and implausibilities persuaded me that these were not simply the result of confusion or poor memory but that the claimant had deliberately pursued a course of conduct in relation to the acquisition of the candle and the socks which was in deliberate

breach of some provisions of the reservations policy and was designed to enable the claimant to acquire the items at a much discounted price when she might not otherwise have been able to do so.

90. Although the amount was small, I did conclude that deliberate dishonesty of this sort was a repudiatory breach of the claimant's contract of employment. I therefore concluded that the claimant was dismissed in circumstances where the respondent was entitled to dismiss her summarily and she is not entitled to notice pay.

_____

Employment Judge Joffe
London Central Region
7 October 2019

Sent to the parties on:

7 October 2019

.....

For the Tribunals Office