EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4105611/2020

Final Hearing Held by Cloud Video Platform (CVP) on 26, 27, 28 and 29 July 2021

Employment Judge: Russell Bradley

Mr David Milne	**Claimant** **Represented by:** **R Russell** **Solicitor**
Sky Retail Stores Limited	**Respondent** **Represented by:** **M Leon** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the claimant was unfairly dismissed. The respondent is ordered to pay to the claimant: -

1. A basic award of FOUR THOUSAND FOUR HUNDRED AND THIRTY EIGHT POUNDS AND FIFTY PENCE (£4438.50)

2. A compensatory award of TWENTY THOUSAND ONE HUNDRED AND TWELVE POUNDS AND SEVENTY NINE PENCE (£20,112.79)

The Employment Protection (Recoupment of Job Seeker's Allowance and Income Support) Regulations 1996 apply. The monetary award is £24,551.21. The prescribed element is £16,788.22. The dates to which that prescribed element apply

are 4 June 2020 to 29 July 2021. The monetary award exceeds the prescribed element by £ 7,762.99.

REASONS

Introduction

1. In an ET1 presented on 19 October 2020 the Claimant maintained the single claim of unfair dismissal. It was resisted. In accepting that it dismissed the claimant the respondent relied on "*conduct*" as its reason. The case was listed for a four-day final hearing to consider merits and if appropriate remedy. The claimant sought compensation.

2. An indexed bundle of 296 pages was lodged before the start of the hearing. In the course of the evidence, the respondent sought to add a further four pages being an email exchange in the period 2 February to 3 March 2020 between two of its employees. The application was opposed. After argument, I allowed them. They became pages 297 to 300. I gave reasons at the time for doing so. As it turned out, nothing material depends on their content. Later in the hearing Mr Russell sought an order requiring the respondent to produce an exchange of emails between David Holmes (who heard an appeal) and a third party. I refused his application on the basis that Mr Leon had made enquiries of the respondent and as a result was satisfied that in the time available they could not be obtained. In my view, nothing material turns on the fact that they were not part of the evidence.

The issues

3. The issues for determination were:-

    1. Did the respondent have a genuine belief in the guilt of the claimant in respect of the four allegations which resulted in his dismissal?

    2. Did the respondent have reasonable grounds upon which to sustain that belief?

3. At the stage at which it formed that belief on those grounds, or at least by the final stage at which it formed that belief on those grounds, had it carried out as much investigation into the matter as was reasonable in all the circumstances of the case? In particular, had it carried out as much investigation into each of the four allegations as was reasonable so as to sustain its belief?

4. In all the circumstances of the case was the decision to dismiss the claimant fair in the context of section 98(4) of the Employment Rights Act 1996?

5. In the event that the claimant was unfairly dismissed to what compensation is he entitled? And in particular to what extent should any of that compensation be reduced to reflect ***Polkey*** and/or any contributory conduct?

Evidence

4. Evidence was heard from Adam Wickson, dismissing officer, Mr Holmes and the claimant.

Findings in Fact

5. From the evidence and the Tribunal forms, I found the following facts admitted or proved.

6. The Claimant is David Milne. His employment with the respondent began on 1 June 2009. It ended summarily on 4 June 2020. On the date of his dismissal, he was employed as a sales adviser. By that time, his place of work was at a stand occupied by the respondent within St John's Shopping Centre, Perth. The stand was located between shop premises occupied by Primark and JD Sports. It is a busy location. The respondent usually had two or three staff on duty there. The stand had 3 televisions located at it. One was used for "*live*" demonstrations.

7. The claimant had previously worked as a store manager for the respondent. As a result of a restructure sometime in 2018, his role had been "*downgraded*"

to sales adviser. In that role at the stand, his duties included dealing with new sales, billing, and problem-solving for existing customers.

8. By June 2019, the claimant's line manager (team leader, SC02) was Debbie Masson. She had responsibility for various sales outlets including at Perth. The claimant's impression of his meetings with Ms Masson was that they were never positive. In June 2019, he raised a grievance about her.

9. Also in June 2019, the claimant attended his general practitioner. Symptoms of severe depression were diagnosed. They required the prescription of antidepressant medication. At that time the claimant reported to his GP that he had been experiencing significant stress due to difficult situations at work. His GP recommended a period of sick leave. The claimant was absent from work. He returned about the end of September 2019. In the period of his absence he made it clear to the respondent that he was "*long term sick*." He asked the respondent not to contact him until he was fit to return. Notwithstanding, Ms Masson attempted to make contact with him during the period of his absence.

10. The claimant was familiar with the respondent's absence policy (**pages 76 to 79**). It refers to various types of support offered by the respondent in the event of an absence. The claimant was familiar with the respondent's Conduct Policy (**pages 80 to 83**). On or about 27 January 2020, the claimant indicated that he had read and understood the respondent' "*How We Work*" Guidelines (**pages 39 to 75**). He did so by clicking on a "*link*" and confirming by email that he had done so.

11. On Wednesday 18 December 2019 at 12.46 the claimant emailed Ms Masson saying, "*My overtime was yesterday 9 - 5:30 and James done overtime Monday 9 - 5:30.*"

12. On Wednesday 5 February 2020, the claimant attended a meeting with Janice Smith retail team leader SC07. A note of it was prepared (**pages 94 to 100**). The note records that it was an investigation meeting. On questions to do with overtime on 17 December 2019, the note records; the claimant's confirmation

that on 18 December he emailed Ms Masson with overtime hours of 9.00 to 17.30; and his understanding that Ms Masson added it to the respondent's portal. In answer to a concern about him leaving work at 14.44 that day the note records the claimant explaining that; Ms Masson was aware that a lot of his overtime was for shorter days; leaving at that time meant he had in fact left late; Ms Masson knew that; his "*other half*" worked shifts; Ms Masson had told him that overtime was unlimited but he had told her he would not be able to do full shifts because of his partner's working hours; on another review of his email, and in answer to a question on what it said about his hours if his shift in fact finished at 14.00, he explained that he took his hours from RMS (Rota Management System) without thinking; and he does not click the hyper link to check the accuracy of overtime that has been added; in answer to a challenge about leaving at 14.44 when he had claimed for the whole day, he explained that as far as he was aware he completed what he thought was his shift. In answer to a question about leaving early on 6 January to go to his GP, the claimant explained that; it was possible that he had done so; and if the stand was manned he did not see the point in reporting his exit to Ms Masson because she had previously told him that he could go because employees were permitted 1 hour and 30 minutes for such appointments. In answer to a question on accessing customer accounts when a customer is not present the claimant said; he had read the new "*How We Work*"; a customer could present in person or on the phone; and the guide did not actually say "*in person*"; his understanding was that he could access a customer's account without the customer being at the stand but no changes could be made to it. The note records Ms Smith asking the claimant about a particular telephone conversation with a customer the previous Friday, 31 January. She reminded him that Ms Masson had been there at the time. In the noted exchange, the claimant said; the customer confirmed her name and address over the telephone; and he had accessed her account without a correct form of identification because he did not understand the ways of working, which was his fault. Ms Smith advised the claimant that a witness statement had been taken. In answer to a question based on that statement about the claimant accessing his iPad and what he was doing the claimant

explained to Ms Smith that Ms Masson had asked him "*what was he doing opening a customer's account*?" he had told her that he was just giving the customer some information. He further explained that Ms Masson had told him to check the ways of working (meaning the "*How We Work*" guide) and he told her that he had done so. The note also records Ms Smith's reference to a witness statement which reported that the claimant had said "*ya fuckin arsehole*" and when Ms Masson had asked him "*what did you say*" he replied that she was "*a jobsworth*". The claimant explained that he did not use that kind of language. The note also, earlier, records Ms Smith's reference to three previous occasions when the claimant was said to have left early (being 4 December at 17.03, 11 December at 17.00 and 20 December at 17.02). It also records the claimant's reference to the obtaining of CCTV footage before any reference to it is made by Ms Smith.

13. On Friday 31 January and so prior to the meeting on 5 February, Ms Masson had conducted an investigation meeting with Chris Smith. A note of it was prepared (**pages 87 to 89**).Mr Smith was a work colleague of the claimant's. He worked at the St John's Shopping Centre stand. In answer to a question about anyone nipping away and not returning to the stand, Mr Smith said "*David has said a few times, I am just away to nip away and he's not returned. He's never directly told me he's not coming back*." In answer to Ms Masson's question as to when this occurred he said, "*Yesterday 30/1 but he returned – Wednesday 29/1 left for a while when you called him and he returned. Nipped away again 5.05 – 5.25*." The note records Ms Masson's questions on the subject of her exchange with the claimant following his telephone call with the customer that day. It records his answer to the question about his understanding of the situation at the stand that morning involving herself and the claimant as being "*I just heard you asking David what did you say? As I was standing next to*" Ms Masson. It is not clear if Ms Smith had seen the note of this meeting by the time of her meeting on 5 February with the claimant.

14. On Thursday 6 February, Ms Smith held a second investigation meeting with Chris Smith. A note of it was prepared (**pages 101 to 104**). It records that he was initially unsure if he recalled his conversation with Ms Masson on 31

January. This was a reference to the noted meeting with her. The later note records that on the earlier one being shown to him, he recalled the earlier meeting. When asked about anyone leaving the stand early, the note records Mr Smith as saying; there had been days when the claimant had not returned, just saying "*I'm away to go*"; those times are usually 4 or after; and while he would not report those incidents to Ms Masson, if she called the stand to ask for the claimant and he was not there, he told her.

15. On Thursday 6 February, Ms Smith also held an investigation meeting with Alistair Paterson. A note of it was prepared (**pages 105 to 107**). Mr Paterson was also a work colleague of the claimant's. He also worked at the St John's Shopping Centre stand. The note records his answer to a question about anyone leaving the stand early as being "*Not to my knowledge, I don't always know everyone's shift time, for example last Friday 31 January David* [the claimant] *was starting late and I was in at 9 and didn't know where he was until he came in. We are not always aware of what shifts people are doing and you can't always rely on the rota as this can change*."

16. On 6 February the claimant was suspended from his duties with immediate effect. He remained suspended until his dismissal.

17. On 26 February Ms Masson provided a written signed statement. It is headed "*Date of concern Friday 31st January 2020.*" In it she recorded; she arrived at the stand around 9.55am the same time as the claimant; he had a half day holiday, it having been arranged that he would work 10am-2pm; she was catching up with the team working (the claimant, Mr Paterson and Mr Smith); the phone rang; Mr Smith answered it; he gave the handset to the claimant; Mr Smith then came back towards her; she asked him who was on the telephone; he shrugged his shoulders; while she was talking to Mr Smith she heard the claimant say "*what's your postcode again*"; that made her perk her ears up and look over towards the claimant; she saw him on his iPad but could not be sure what was going on; the claimant then left the stand for a short time still on the phone beside Primark; When he returned to the stand, he said something like "*well that was a waste of time*"; she then went towards

him and said "*what happened there*?" As she said this the claimant pressed his ipad; as he did that, she saw an account open; the claimant did not answer; straightaway she said, "*David you're in a customer's account*"; He replied "*yes but I didn't put anything on*"; she replied "*that's not the point we are not allowed to enter a customers' accounts without them being present, you know this you have just recently signed the how we work*!"; she then said "*we will pick this up later*" and went to move back to the other side of the stand; as she turned around she heard " *you fuckin arsehole*"; she replied "*excuse me, what did you just say?*"; there was no reply; she said "*David you can't talk like that to me nor at the stand*" he then replied "*nothing but a jobs worth*"; once again she replied "*David I will pick this up with you later*"; she did not feel that then was the right time to take him away; in addition she had a meeting booked at 10am with the centre manager.

18. On 4 March Margaret Kerr, regional manager, held an investigation meeting with James East. A note of it was prepared (**pages 114 to 117**). The note records that; he could not recall anyone in his team leaving early, but there had been one time when the claimant had left to go to the doctors; Ms Masson had rung and asked to speak to him and he (Mr East) had told her where he was; he could not recall when it was other than late afternoon; after being reminded that he had told Ms Masson that the claimant had left early on 6 January and in answer to what time that had been, he said he didn't recall the date but all he could remember was that he had said to Ms Masson that he had gone to a doctor's appointment

19. On 4 March Margaret Kerr held a second investigation meeting with Alistair Paterson. A note of it was prepared (**pages 110 to 113**). The note records that; he could not recall with any detail a time when the claimant had come to work late; and he could not recall any member of his team leaving work early.

20. On 12 March Margaret Kerr held a third investigation meeting with Chris Smith. A note of it was prepared (**pages 126 to 131**). The note records that in answer to a question about the dates previously discussed at the earlier investigation meetings about the claimant leaving early Mr Smith said; he was

unsure when those occasions occurred; they were the previous year; they may have been once a fortnight; the last time he saw the claimant leave early it was to do with his child's pram, which occasion had been in the previous year.

21. On 27 March Margaret Kerr held an investigation meeting with Debbie Masson. A note of it was prepared (**pages 133 to 137**). The note records that Ms Masson said; in November 2019 she had requested CCTV footage because she had been advised that an agent had been leaving early and she wanted to check if that was correct; she had not obtained the footage but had viewed a selection of dates on which she had queries, having been shown them by the shopping centre manager; they were dates she had called the stand when the claimant was known to be at work but he had not called her back; she was not aware that she needed permission to obtain the footage; she did not recall saying to the claimant that he could go to doctor's appointments but she had told the team that the respondent could look to arrange and support them on those occasions depending on circumstances; and she had never okayed the claimant to take breaks at the end of his shift.

22. On 19 April Margaret Kerr held a second investigation meeting with the claimant. A note of it was prepared (**pages 139 to 148**). The note records that the claimant said that; the respondent risked a fine if its staff did not adhere to its data protection modules; he believed it was acceptable to access a customer's account albeit they were on the telephone because on his interpretation of the words "*in person*" they could include being on the telephone to the respondent; and he had done so.

23. On 8 May Margaret Kerr held another investigation meeting with Debbie Masson. A note of it was prepared (**pages 151 to 154**). The note records that Ms Masson confirmed that the dates and times on which she had queries about the claimant and about which she had seen CCTV footage were 4 December 2019 when he left at 17.03pm; 11 December when he left at 5pm; 17 December when he left at 2.44pm but claimed overtime to 5.30pm; 19 December when he left at 1.47pm but returned at 4.06pm; she described 20

December at 17.02pm as a time at which she had a query but did not appear to have viewed footage; 6 January was a time when she called the stand and he was not there.

24. By letter dated 18 May 2020 the claimant was invited to attend a conduct meeting fixed for Wednesday, 20 May 2020 at 1pm. It was to take place by Skype. The letter listed 21 bulleted enclosures. It also enclosed the respondent's conduct policy. It was sent by Margaret Kerr. The letter listed the following allegations:-

    1. Unauthorised absence, specifically that you breached Sky's Absence Policy by failing to notify your manager when leaving work early or seek permission to be absent before the end of your shift on 4 December, 11 December, 17 December, 19 December, 20 December 2019 and 6 January 2020.

    2. You falsely claimed and received of overtime payment for hours that you did not work on 17 December 2019.

    3. On 31 January 2020, you failed to comply with the 'Sky Retail Stores: How we work guidelines' by accessing a customer's account without them being present at the store.

    4. Unacceptable behaviour, specifically that in response to a challenge regarding a compliance breach, you used foul and abusive language to Debbie Masson (Retail Team Leader) on 31 January 2020.

25. The meeting was re-scheduled. It took place on Thursday 4 June 2020. It began at 10.00am. The letter re-scheduling it was sent by Adam Wickson, Regional manager for southwest England and Wales. In all material respects the letter mirrored that of 18 May. A typed note from the meeting was prepared (**pages 173 to 195**). The meeting was chaired by Mr Wickson. Prior to the meeting, he had reviewed a "*pack*" which contained all of the statements and the allegations. He had also thought about questions to ask the claimant. The claimant was accompanied by a work colleague, Angela Thompson. The

substance of the discussion was set out in a table which attributed verbatim comments to the participants. In answer to the first allegation the notes record that; the claimant denied leaving on any of the occasions alleged; he queried Ms Masson's evidence that her enquiries dated back to November 2019; he queried the inclusion of 19 December; he had written evidence from the company that ran the shopping centre that no CCTV footage had been disclosed; he had evidence that Mr Smith was lying in his statement albeit Ms Thompson could not support that evidence; on one of the alleged incidents (to which a witness James East had provided a statement) the claimant returned to the stand; Mr Wickson accepted the claimant's right to decline consent to the CCTV footage being viewed, albeit he questioned the claimant as to that position when to have done so would "*clear it up*". Mr Wickson did not read Ms Masson's reference to her enquiries about the footage dating back to November as meaning that when he read it. In his view, the only plausible explanation for the claimant withholding consent to the release of the footage was that he knew it would prove that he left early. He accepted that Ms Masson had not got consent to access the footage. He accepted that she should not have seen it. Mr Wickson's recollection was that the claimant explained that on 6 January he had left the stand for a doctor's appointment but had not got the message to call Ms Masson back.

26. On the second allegation, the notes record that the claimant explained that; he made a genuine mistake in emailing Ms Masson to say that on 17 December his overtime was 9 to 5.30pm; he checked the overtime for his colleague Chris Smith using the RMS system and he queried that if he was trying to "*scam the company*" why would he have done it on one occasion only.

27. On the third allegation, the notes record the claimant's explanation that; he had accessed the account of the customer in question; but in his view the "*How We Work*" guide does not say that what he did should not be done.

28. On the fourth allegation, the notes record him denying that he had used foul and abusive language to Ms Masson on the day in question; and that he did not say anything to her at the point of time alleged.

29. The notes also record the claimant referring to; his three month period of absence with stress "*because of*" Ms Masson which he took just to get away from her; his grievance against her; and his claim to have two emails from shopping centre workmen which confirmed that the CCTV footage had not been disclosed to Ms Masson which he kept in his back pocket if "*this*" went to court or a Tribunal.

30. At 12.15pm the meeting was adjourned. It reconvened at 4pm. At that time, Mr Wickson advised that he fully upheld all of the allegations against the claimant. On the first allegation he said that; there was evidence from a number of sources; they were Ms Masson's evidence from having viewed the CCTV footage, testimony from Chris Smith and comment from James East. He recognised the claimant's right to decline access to the footage, but that decision lead him to believe that there was a reason doing so, and that reason is that it could have proved that the claimant did leave. On the second allegation he said that; upholding the first allegation suggested a pattern of behaviour of leaving early; there were a number of later "*touch points*" which if he had made a mistake could have jogged his memory and that while "*just a few hours*", it was still dishonest and potentially defrauding the respondent. In the disciplinary hearing the claimant was not asked about touch points as a possible way that he could have checked and rectified the error of claiming the overtime in question. Mr Wickson believed that it had been claimed and paid fraudulently. The third allegation was upheld on the basis of what Ms Masson had seen and the claimant's acknowledgment that it had occurred. Mr Wickson contrasted the understanding of others, including Ms Thompson's. He believed that the words "*present at the store*" in their context ("*We follow the correct DPA and ID&V process and only access existing customers accounts with their permission and while they are present at the store*") mean physically present as opposed to on the telephone. The requirement was there to ensure that the respondent dealt with the correct

person as customer, to protect customer data and to comply with data protection rules. On the fourth allegation, Mr Wickson said that it was difficult to conclude on. He noted that the claimant had been categoric in his denial. He said; "*You stated that the event did not take place at all but your colleague on the store can recall Debbie challenging you. So even if it was someone else that maybe made the response something did happen and I believe she did challenge you. You must have offended Debbie and she has no reason to say so if not but obviously you have a reason to not be true with it because obviously because of the allegation. So therefore based on the inconsistencies in your response I have to balance the probabilities of what happened and based on that I do believe that you said something that did cause offence to your Team Leader and therefore I uphold this allegation*."

31. Mr Wickson did not take account of the claimant's length of service in deciding on the sanction of dismissal. He did not take account of his "*clean*" disciplinary record. Nor did he take account of the claimant's mental health in deciding sanction.

32. Albeit not recorded in the contemporaneous material, Mr Wickson's evidence was that in deciding that the fourth allegation was well founded, he relied on what he called a pattern of dishonesty based on his findings on the first three allegations.

33. By letter dated 9 June, Mr Wickson confirmed his decision. It confirmed that the claimant had been dismissed on the basis of the four allegations. It advised him of a right of appeal. It did not repeat his rationale for concluding his decision on the allegations.

34. By email on 8 June the claimant advised Mr Wickson of his wish to appeal on three grounds being:-

    1. new information to disclose

    2. the overall decision was too harsh based on the evidence used

3. his belief that the evidence used result in the final judgement was inconsistent.

35. On 25 June the appeal was considered by David Holmes, then Director of Retail Operations at a meeting held by Teams. A typed note from the meeting was prepared (**pages 214 to 233**). The note appears to be a verbatim script of what was said at the meeting, prefaced with pro forma prompts to the chair. The discussion was set out in a table which attributed verbatim comment to the participants.

36. On the first ground of appeal and under reference to various emails sent by the claimant to Mr Holmes prior to the appeal meeting, the claimant asserted his belief that Ms Masson; had not seen the CCTV footage; had lied about seeing it and argued that she had a grudge against him as a result of his grievance against her; that if she had seen it, the shopping centre had broken the law; that it was particularly important for Mr Holmes to find out if the shopping centre showed Ms Masson the footage; that under reference to ICO advice such footage could only be kept for 30 days; the footage she said she saw should have been overwritten; that it was possible because of a grudge arising from a previous incident, the centre manager may have been monitoring the claimant and then told Ms Masson of his belief that he was leaving early. Separately, the claimant alleged that Ms Kerr had fabricated evidence. Separately yet still he referred to an email from James East to him which advised that he was present when he was told to take 1.5 hours for a doctor's appointment and if you need it "*just take it*." He undertook to request a copy of the GP records of dates and times of visits.

37. On the second ground of appeal, and in particular on the second allegation; it was caused by human error on his part; and he disputed Mr Wickson's conclusion that he had several touch points to correct that error. On the third allegation the claimant explained that based on his understanding of the "*ways of working*" he was permitted to access a customer's account where he made no changes to it.

38. Separately, the claimant argued that there was no evidence to support the fourth allegation against him.

39. The claimant accepted that he would have been happy with a warning in relation to his mistake on the claim of overtime. He also accepted that he would take a warning on how he had interpreted the "*How We Work*" guide.

40. On the issue of the claimant's health and in answer to questions, he advised Mr Holmes that he had not used any of the respondent's support resources. Instead he relied on advice from his GP.

41. On 14 July Mr Holmes emailed Ms Masson. He asked her to confirm the date she was shown the CCTV footage by the centre manager, his name and whether the December dates were ones shown to her. She replied that day. In her reply, she said amongst other things; Ken is the name of the centre manager; she could not recall the date the footage was shown, but it was the same date that the claimant had accessed the customer's account; she gave all of the dates to "*MJ*"; and the dates she viewed were random except 1.

42. On 20 July Mr Holmes met with Mr Wickson. A typed note from the meeting was prepared (**pages 238 to 244**). The note appears to be a verbatim script of what was said at it. The note recorded; Mr Wickson's explanation of his conclusion and rationale on accessing the footage; his questioning of the claimant's motives in declining his consent to releasing it; his rationale for dismissing the claimant's explanation of a mistake on allegation two; on allegation four he said "*It was TL words versus his situation. The other member of staff who was there said something happened but never caught it. I do believe it probably did happen but I couldn't prove that. There is no pattern in the TL behaviour to suggest she would lie about it*"; his view that no mitigation had been provided; and that he was not there to make a judgment on the claimant's mental health *per se* "*more around the actions and outcomes*. *I believe he would have been offered Sky support which what we do. I believe this was declined*."

43. On 20 July Mr Holmes emailed Adrian Bryan senior surveyor, Workman LLP. He did so for further information on the CCTV footage. He asked whether Ms Masson had seen it. On 24 July Mr Bryan replied. In it he explained; the exception to the 30 day rule on deletion; that "*this*" was an example of such an exceptional occasion; the correct documentation for release was never received; the footage was never formally released to Ms Masson or anyone else; and his speculation as to how Ms Masson may have seen it (catching a glimpse while the centre manager was ensuring that it had been saved).

44. On 20 August Mr Holmes emailed a letter to the claimant to advise of the outcome to his appeal. He set out three numbered points. He followed each with his rationale for rejecting each of them.

45. The first was "*You have new evidence to disclose, namely you believe CCTV footage could not have been viewed by Debbie Masson as it is only held for 30 days*." Mr Holmes set out the material that he had considered. He said he formed the belief that Ms Masson had been allowed to see the footage and that it had been kept for longer than 30 days following her request and pending permission. He said that he had concluded that in denying access, he concealed critical evidence which would show evidence of him leaving work on the dates in question.

46. The second was "*You believe you have been treated unfairly throughout and believe decisions have been biased against you*." Mr Holmes set out the material that he had considered and investigation he had done on this ground. He concluded that there was no evidence of bias.

47. The third was "*You feel the decision is harsh and delivered through Adam being aligned to support a colleague rather than on the evidence that existed*." Mr Holmes set out the material that he had considered and the investigation he had done on each of the four allegations against the claimant. On the first, he referred to the basis of Mr Wickson's decision, repeated his view that Ms Masson had viewed the footage, referenced evidence from other advisors at the store that the claimant had left on occasions and noted that despite a request for supporting evidence of GP appointments that had not been

forthcoming. On the second, he was also of the view that "*multiple touchpoints*" had not been used and the circumstance followed a pattern of leaving early. On the third, he noted the claimant's acceptance of being in the account which on his interpretation was permitted. His view was that it was a clear breach of the guidance. On the fourth, his view was that Mr Wickson gave his opinion based on what could be evidenced on the balance of probabilities.

48. Mr Holmes' starting point in considering an appeal is to ask two questions. First; has there been a breach of policy? Second; is there new evidence affecting the original decision? He initially approached the claimant's appeal from that standpoint.

49. On or about 29 March 2021 the claimant began employment with Halfords. He earns on average £346.81 net per week in that employment.

50. In the period between July 2020 and June 2021 the claimant (jointly with his wife) received £9919.82 universal credit. This is what was paid as part of a joint claim made with her. She works part-time, two days per week.

Comment on the evidence

51. Mr Wickson gave the impression that he had genuinely tried to consider the allegations against the claimant as fairly as he could. His evidence was on the whole reliable, albeit prompted by reference to the contemporaneous documentation. On certain aspects his evidence was not credible. On the mitigatory issues of the claimant's service and disciplinary record he was resolute that he had taken them into account prior to his decision to dismiss. The contemporaneous documentation does not support him on this; indeed on one view it suggests the opposite. On the question of what thought he had given to why Ms Masson had had requested CCTV footage as early as November 2019 (because she had been advised that an agent had been leaving early) his answer was unsatisfactory. It did not make sense. On the issue of the claimant's refusal to release the CCTV footage, his evidence was that while he recognised the right of refusal, he nonetheless regarded it as reasonable to rely on that refusal as evidence which supported the allegation.

That is not a credible position. It suggests that Mr Wickson did not understand the relevance of recognising the right in the first place.

52. Mr Holmes was a confident witness. For the most part he spoke freely. On some non-contentious areas he provided more answer than the question necessarily required. On more contentious areas, he repeated that his remit was only to consider the appeal in the context of two areas, (i) whether the respondent followed procedure and (ii) additional information or evidence not discussed as part of the disciplinary hearing. On the issue of the release of the footage, he also did not understand the contradiction between recognising the claimant's right to withhold consent (on the one hand) and holding it against him on the other. In answer to one question at least his evidence was even more confused. It was put to him that he drew an adverse conclusion from the refusal, to which his evidence was that he did not believe that he had done so. It is not possible to reconcile that position with what is said in his outcome letter (**page 251**), "*I do not understand why you would refuse this critical evidence to be provided as part of your case. I have concluded that in denying access, you have concealed critical evidence which would in fact show evidence of you leaving work on the dates in question*." His evidence on Ms Masson's explanation for viewing the footage on particular days was unsatisfactory and not credible. It was suggested to him that there was a contradiction between her position on 27 March (the centre manager showed her footage over a selection of dates on which she had queries) (**page 134**) and her answer to him (**page 236**) "*The dates I viewed were random except 1*". His evidence was that they were not necessarily contradictory, but did not explain his rationale for that view then avoided the question when pressed.

53. The claimant maintained his position on the allegations as it had been in the disciplinary process. I have noted below some areas where his credibility was in issue.

Submissions

54. Mr Leon lodged a skeleton submission to which he spoke. This is a basic summary of it. He invited me to make his proposed findings in fact. He

suggested that the catalyst for the investigation which led to the claimant's dismissal was his interaction with a customer on 31 January then his swearing at Ms Masson. He said that; both of the respondent's witnesses had given evidence that all four allegations were dismissible offences; Mr Holmes had been clear and unequivocal that he would have dismissed for any of them; under reference to Mr Holmes' letter of 20 August the appeal (while technically a review) opened the door to what had been decided by the Court of Appeal in ***Taylor v OCS Group Ltd*** [2006] I.C.R. 1602 (it was inappropriate for a tribunal to attempt to categorise an internal appeal as either a "*rehearing*" or a "*review*", as there was no rule of law that only a rehearing was capable of curing earlier defects); what mattered was whether the overall process was fair, notwithstanding any deficiencies at an early stage; and that, further, the tribunal should consider the fairness of procedural issues together with the reason for the dismissal and decide whether, in all the circumstances the employer had acted reasonably in treating it as sufficient reason to dismiss). He highlighted elements of paragraph 32b of his submission. Its focus was on the circumstances in this case in the context of the "*tests*" from ***British Home Stores v Burchell*** [1980] ICR 303. On the question of consent to access the CCTV footage, he argued that the claimant had no right against self-incrimination. That being so, there was nothing to stop the respondent from drawing an adverse inference from his refusal. It was he said not a credible position for the claimant to adopt. On the issue of Ms Masson's detail on dates and times when the claimant left the stand, he posed the rhetorical question; how else could she have known them if she had not seen the footage? On the third allegation, he emphasised that the claimant had admitted that he had accessed the customer's account in the face of a rule which was "*crystal clear*". On the question of information obtained by Mr Holmes from Adrian Bryan about Ms Masson's access to the footage, the issue is; was it reasonable for him to conclude that she had indeed seen it? And invited me to decide that it was. On *Polkey*, his short point was that it justified a reduction by 100%. On contribution, again his short point was that it justified a reduction by 100%, the relevant question being; did the conduct set out in the allegations occur? If so, then findings to that effect would justify

such a reduction. On the claim for loss of statutory rights he invited me to award £150 in the event that the claim succeeded. On the issue of surveillance at work he referred to the decision of the EAT in the case of ***City and Council of Swansea v. Gayle*** [2013] IRLR 768. He noted that the facts were different from those in this case not least of which being the respondent was a public authority. He highlighted the EAT's comments at paragraph 25 of the report, being the requirement to focus on the question posed by section 98 of the 1996 Act.

55. Mr Russell lodged what he called an outline submission/speaking note, albeit it extended to 17 pages. He also made an oral submission. This is a basic summary of both. About 8 pages of the outline addressed questions to do with data protection. For reasons that will become obvious I have not summarised them. His introduction noted the claimant's personal background, work record, state of health and how "*disgraceful*" had been the way he was treated by the respondent. He also noted it was only in cross-examination that there was evidence from Mr Wickson on the question of sanction. He criticised the credibility and reliability of the respondent's witnesses. In the context of the "*tests*" from ***Burchell*** he levelled various numbered criticisms on each of the four allegations against the claimant. I do not repeat them. In his view, the catalyst for the process and findings by Mr Wickson was allegation 1. In his submission, Ms Masson "*instigated* [the] *process and all evidence turns on her position which is neither credible nor reliable and does not remotely stand up to any scrutiny …*". He submitted that the respondent had not met any of the three tests from ***Burchell***. He submitted that the respondent's failure to take a statement from the centre manager was a crucial failing. He invited a finding that Mr Wickson did not take account of the claimant's length of service, record or health in deciding on sanction and cited ***Strouthos v. London Underground Ltd*** [2004] IRLR 636 on the point. On ***Polkey***, he said that nothing had been put to any of the respondent's witnesses that could permit any finding leading to a ***Polkey*** deduction. On the question of contribution, his primary position was that there was no conduct which could found a reduction. Alternatively, only conduct

within allegation 2 could be relevant justifying at most a reduction of 15%. He cited ***Hollier v. Plysu Ltd*** [1983] IRLR 260.

The law

56. Section 98(1) of the Employment Rights Act 1996 provides that *"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.*" One reason with subsection (2) if it relates to the conduct of the employee.

57. Section 98(4) of the Act provides "*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*."

58. The three-part test which Tribunals and courts apply in cases of alleged misconduct is well known, derived as it is from ***British Home Stores v Burchell*** [1980] ICR 303. "*First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case*." Equally well known and often cited is what was said in ***Iceland Frozen Foods Ltd v Jones*** [1983] ICR 17. The Tribunal "*must not substitute its decision as to what was the right course to adopt for that of the employer*." And "*The function of the*

employment Tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted." The band of reasonable responses applies to the consideration of the investigation by the Tribunal as well as the decision to dismiss (***Sainsbury's Supermarkets plc v Hitt*** [2003] IRLR 23.

59. "*A "**Polkey** deduction" has these particular features. First, the assessment of it is predictive: could the employer fairly have dismissed and, if so, what were the chances that the employer would have done so? The chances may be at the extreme (certainty that it would have dismissed, or certainty it would not) though more usually will fall somewhere on a spectrum between these two extremes. This is to recognise the uncertainties. A Tribunal is not called upon to decide the question on balance. It is not answering the question what it would have done if it were the employer: it is assessing the chances of what another person (the actual employer) would have done*." And "*the Tribunal has to consider not a hypothetical fair employer but has to assess the actions of the employer who is before the Tribunal, on the assumption that the employer would this time have acted fairly, though it did not do so beforehand.*" ***Hill v Governing Body of Great Tey Primary School*** [2013] ICR 691.

60. Section 123(6) provides that where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding. A Tribunal must identify the conduct which is said to give rise to possible contributory fault. Having identified that conduct, it must ask whether that conduct is blameworthy. The Tribunal must ask if that conduct which it has identified and which it considers blameworthy caused or contributed to the dismissal to any extent. If it did then the Tribunal moves to the next question; by what proportion is it just and equitable, having regard to that finding, to reduce the amount of the compensatory award?

61. Section 122(2) provides that 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.

Discussion and decision

62. As was said by the EAT in ***Gayle*** at paragraph 25, "*the statutory question to be asked is whether the employer's actions in treating the reason, here misconduct by taking time off from work during the working day and claiming pay for it, was a sufficient reason for dismissing him. Though in a conduct case that may usually (see* ***Foley v The Post Office*** *[2000] IRLR 827 CA]) involve asking not only whether there is a genuine belief, but reasonable grounds for it based upon a reasonable investigation, the reasonableness of the investigation is to be seen by an employment tribunal within that context. It is whether the investigation leads and lends proper weight to the reasons which inform the belief. There is no separate freestanding right to hold a dismissal unfair because an employment tribunal has a criticism of the way in which or a distaste for the way in which an employer has behaved. It is not evaluating the employer's conduct in a vacuum. It is asking the question in the context of the employer's decision to dismiss*." The comments in the cases of ***Iceland*** and ***Hitt*** as well as the tests from ***Burchell*** are very well known. Mr Leon reminded me that a tribunal must not substitute its decision as to what was the right course to adopt for that of the employer.

63. Both Mr Wickson and Mr Holmes believed in the guilt of the claimant on the four allegations. Their belief appeared genuine. It was not suggested by the claimant that there was any other reason for his dismissal. In my view the first "*test*" from Burchell was satisfied.

64. The first allegation was precise. It concerned 7 dates. Mr Wickson and Mr Holmes genuinely believed Ms Masson that she had seen CCTV footage which showed the claimant leaving the stand on those dates. In their view that was evidence which supported the allegation. They were also of the view that

the allegation was supported by evidence from a number of other sources. That support was significant for them in deciding that the allegation was proved. That was not a view which was open to an employer acting reasonably. No other employee's evidence supported a finding that the claimant had left or been absent from the stand on any of the 7 dates in the allegation. Mr Wickson and Mr Holmes also both relied on the claimant's refusal to the release of the footage. On many occasions in his evidence, Mr Wickson accepted that he had held that against the claimant. Mr Holmes decided that in denying access to it, the claimant had concealed critical evidence. Mr Wickson accepted, however, that the claimant had a right to do so. Mr Leon argued that the claimant had no right against self-incrimination. But for me to accept that as a proposition would be to substitute my view for that of the respondent. In this case, the respondent accepted the claimant's right against self-incrimination (see as an example Mr Wickson's comments on **page 179**). He accepted that the claimant had the right to withhold his consent to its release. But no reasonable employer, having recognised that right, would then have used its exercise as evidence against the employee. This is what the respondent did on this allegation.

65. On the second allegation, the claimant's position in the disciplinary process was that he made a mistake in providing an emailed answer to Ms Masson's question about overtime in circumstances where this was not the only occasion of a claim. The respondent regarded it as fraudulent to have done so. In doing so, it decided that the claimant had had a number of opportunities (touch points) to correct his error. It drew an adverse inference from his failure to do so. It then took account of that adverse inference in determining that he was guilty of a fraudulent act. As the EAT said in the case of ***A v B*** EAT/1167/01 ST in the context of the standard of reasonableness "*Serious allegations of criminal misbehaviour, at least where disputed, must always be the subject of the most careful investigation, always bearing in mind that the investigation is usually being conducted by laymen and not lawyers. Of course, even in the most serious of cases, it is unrealistic and quite inappropriate to require the safeguards of a criminal trial, but a careful and conscientious investigation of the facts is necessary and the investigator*

charged with carrying out the inquiries should focus no less on any potential evidence that may exculpate or at least point towards the innocence of the employee as he should on the evidence directed towards proving the charges against him." Prior to drawing that inference and relying on it, a reasonable employer would have given the claimant an opportunity to comment on the evidence that was being considered in doing so. Mr Wickson did not ask the claimant about any of the touch points that he later considered. He did not suggest to the claimant that any of them might have been a trigger or a reminder that the information which he had provided about overtime was incorrect. He did not give the claimant the opportunity to answer the information which he then used to draw the inference. A reasonable employer in the context of an allegation of falsely claiming pay which it considered fraudulent would have permitted the claimant the opportunity to comment on that evidence.

66. In his ET1 the claimant asserts that there was no evidence against him in respect of three of the allegations. On the third allegation, the most obvious evidence was the claimant's admissions that he had accessed the customer's account. For example at the meeting with Mr Wickman he said "*Yes I did got into he account that's right …*" then offers an explanation by reference to a passage within the guide. Mr Wickson's conclusion was that the particular passage relied on in the allegation was clear and unambiguous. His conclusion that the claimant had failed to comply with the guide was a reasonable one based on his interpretation of it and the claimant's admission.

67. While the fourth allegation does not set out in terms the alleged foul and abusive language used on 31 January, the respondent was clear as to what it was. The claimant was well aware of what language was attributed to him. In circumstances where there were two competing accounts (Ms Masson's and the claimant's) a reasonable investigation would have considered the other information and sources that were available. Mr Wickson concluded that "*something was said*." That conclusion in part was based on the evidence of Mr Smith. However, Mr Smith did not hear the claimant say any of the words attributed to him. No reasonable employer would have concluded that

the particular words were used based on its decision that "*something was said*". Separately, part of Mr Wickson's conclusion was based on his belief that Ms Masson had no reason not to state the facts. That rationale ignored the claimant's position which was that he had previously raised a grievance against her. He told Mr Wickson that as a result of that grievance she had a vendetta against him. Prior to concluding that Ms Masson had "*no reason not to state the facts*" a reasonable employer would have carried out some investigation into the claimant's assertion. On the respondent's case, the catalyst for the investigation which led to the claimant's dismissal was what occurred on 31 January, and which led to allegations 3 and 4. Central to both was Ms Masson. She was also central to allegations 1 and 2. On its own case, the respondent ought to have concluded that Ms Masson was central to all of the allegations against the claimant. A reasonable employer would have at least considered that *a* reason for Ms Masson to have made the allegations that she did was because of the claimant's grievance. A reasonable employer would have carried out some investigation into that allegation by him. The respondent carried out no investigation into it. Separately, in cross examination, Mr Wickson accepted that with hindsight he could have spoken to Mr Paterson. Mr Holmes accepted that it was important to have spoken to him. Yet neither of them did so. Mr Paterson was present at the stand when the comments were allegedly made. A reasonable employer would have sought information from Mr Paterson on this issue. Such an enquiry is not outside the range of responses available to the respondent. It was aware from Ms Masson's statement (26 February 2020) that Mr Paterson was present at the stand. He gave a second statement on 4 March. Yet it did not ask him about the incident. Mr Wickson made no enquiries about what Mr Paterson may have heard at or after the disciplinary hearing. Where in his words it was difficult to determine a conclusion on the allegation, had Mr Wickson acted reasonably he would have asked Mr Paterson for his recollection of what had been said on 31 January.

68. No employer acting reasonably would have upheld three of the four allegations. Mr Wickson's evidence was that he upheld all four of them. Further, his evidence was that he did not rate each one or break them down

in such a way as to decide that each justified summary dismissal. His evidence was that he upheld all four allegations, each of them was potentially gross misconduct but having upheld all four his decision was to dismiss the claimant. He did not decide that had he upheld any one of them the result would still have been the dismissal of the claimant. Mr Holmes went further. Unprompted he volunteered that if only allegation 4 had been upheld he would have had an issue with the fairness of the decision to dismiss the claimant. No reasonable employer would have dismissed the claimant on the basis of allegation 2 alone. In any event the respondent did not suggest at the time of dismissal, in the appeal or in its evidence to the tribunal that a finding on any single allegation would have resulted in his dismissal. The respondent's conclusion that the claimant was guilty of gross misconduct on all four allegations is one that no reasonable employer would have reached.

69. I did not accept Mr Wickson's evidence that he had taken into account any mitigating factors in deciding on sanction. I did so for two reasons. First, there is no record of him having done so at the time. **Pages 196 to 201** is a record of his outcome justification. There is no record there of any mitigation having been considered by him. Allied to that is that on **page 202** on resuming the disciplinary hearing the note records Mr Wickson as saying, "*So to conclude on the allegations I have made the decision to fully uphold all of the allegations that we have discussed today which unfortunately means that the decision is a dismissal for gross misconduct …*" Mr Wickson's conclusion is that the upholding of the allegations meant dismissal. There is no consideration noted there of any alternative. Second, as part of the appeal Mr Holmes asked him if any mitigation had been provided, to which he answered *"no*". On the question of the claimant's mental health which could have been a mitigating factor, Mr Wickson's evidence was that he had no reason to disbelieve that the claimant had suffered. His focus was, however, on the offers of assistance that had been made by Ms Masson and Ms Smith and the various facilities which were available from the respondent. He said that it was up to an individual employee to take up those offers. He said that the claimant had not engaged with any of them. My impression was that rather than giving proper consideration to the possibility that the claimant's mental

health was a factor to be weighed in mitigating his decision on sanction, Mr Wickson's opinion was that the claimant had not helped himself by declining all of the various facilities which were offered by the respondent.

70. Nor did I accept Mr Wickson's evidence that he had taken account of the claimant's service or disciplinary record. There is no contemporaneous record of him doing so which he accepted. In cross examination he maintained that he had done so. He said that he had not taken the decision lightly, echoing the words of the respondent's disciplinary procedure. But given the precision of the contemporaneous notes and the apparent care with which the outcome justification is noted (using pro forma material) had he done so, it is more likely than not that it would have been recorded. Length of service is a factor which can properly be considered in deciding whether the reaction of an employer to an employee's conduct is an appropriate one (***Strouthos***). In this case, it was not considered.

71. The claimant was unfairly dismissed.

72. The question of Ms Masson having viewed the CCTV footage featured prominently both at the time of the disciplinary process and in this hearing. The claimant alluded to a dispute some time in the past to which he (and/or his partner) was party. That dispute appeared to have been with the shopping centre itself. He went as far as to suggest that that dispute may have played a part in the shopping centre manager's willingness to allow Ms Masson to see the footage or provide information to her about it. Within the disciplinary process the claimant was trenchant and adamant that without his consent the respondent could not access the footage. In his ET1, the claimant complained that "*the respondent failed to provide to the claimant the CCTV footage relied upon in dismissing him*." Mr Russell accepted that this complaint did not accurately reflect his position. My summary of his summary of his written submission on the issue is this; the footage did not belong to employer (said to be a key finding); the respondent's actings were in "*complete contravention*" of various parts of relevant legislation; no weight or adverse inference should have been taken even if Ms Masson had seen it; the employees involved in

investigating and disciplining could not have seen it without various permissions which was a fundamental error, and the dismissal was unfair for these reasons alone; there was also an infringement of Article 8 of the European Convention on Human Rights (the right to a private life); a key finding to be made in this hearing was (based on her alleged inconsistent position and contradictory evidence) whether or not Ms Masson saw the footage in question. In my view that question misses the point. In determining the fairness of the dismissal, the question focusses on reasonableness of the respondent's actions. The relevant question is; did the dismissing and appeal officers have a reasonable basis to believe that she had seen the footage? In my view they did. In ***Gayle*** the EAT considered the question of reliance by an employer on clandestinely obtained CCTV footage. In that case, Mr Gayle was seen by a colleague at a sports centre playing squash when he had not clocked-off work for the day. On a later occasion, he was seen again by a colleague at the sports centre and, shortly after, sent a message to the employer saying that he was at work and just finishing. The employer arranged for covert surveillance of him by a private investigator. The resultant video footage showed him at the sports centre on five occasions when he should have been at work. In that case in allowing the employer's appeal the EAT said that "*We do not consider that generally the taking of photographs or the making of observations of individuals in public places will constitute a breach of Article 8 because such individuals will not in those places have the reasonable expectation of privacy*." It also said that "*It is a feature of an employment contract that an employee is subject to the reasonable direction of his employer. An employer is thus entitled to know where someone is and what they are doing in the employer's time. An employee can have no reasonable expectation that he can keep those matters private and secret from his employer at such a time. To do so would be to run contrary to the contract he had entered with his employer.*" Also of note from that case is the EAT's view that an employment tribunal cannot adjudicate upon any freestanding claim of a breach of Article 8. In my view (albeit not strictly relevant) the indoor areas of a shopping centre where the public walks so as to enter and leave the shops within it is a public place.

Remedy

73. The claimant was thirty four years of age as at his effective date of termination. He had by then 11 years' service. It was agreed that his gross weekly wage was £576.92 per week. On that information, a basic award would be £5918.00.

74. On or about 29 March 2021 the claimant began employment with Halfords. His period of unemployment was therefore 42 weeks. His net loss of pay in that period was £20,880.79. In the period between July 2020 and June 2021 the claimant (jointly with his wife) received £9919.82 universal credit. His net pay from 29 March 2021 is £346.81. The net pay differential is £150.35. The claimant's schedule of loss makes a claim for that differential for 10 weeks, being £1503.50 (not £1593.50). He seeks £500 for the loss of statutory rights.

75. Helpfully, other entries in the schedule of loss were agreed as:-

1.	Pension	£2340.84
2.	Private health care	£ 110.04
3.	Broadband package	£1631.88
4.	Share save scheme	deleted
5.	Life Assurance	deleted

76. I have awarded £350 for the loss of statutory rights. Subject the question of contribution, a compensatory award would be £26,817.05.

77. On the question of *Polkey*, I reminded myself that the exercise is predictive. Further, "*If the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for him to adduce any relevant evidence on which he wishes to rely. However, the tribunal must have regard to all the evidence when making that assessment, including any evidence from the employee himself*" (***Software***

2000 Ltd v Andrews [2007] ICR 825). The respondent in this case has not given any relevant evidence. I assessed the evidence as a whole. In my view, it was not possible to predict to any extent that the respondent would have fairly dismissed the claimant or that he would have resigned. I made no reduction to compensation on this basis.

78. In considering the question of contributory fault, a tribunal must identify the conduct which is said to give rise to it. Having identified it, it must ask whether that conduct is blameworthy. The Tribunal must ask that conduct caused or contributed to the dismissal to any extent. If it did so, then the Tribunal moves to the next question; to what extent the award should be reduced and to what extent it is just and equitable to reduce it.

79. In my view, the email from the claimant to Debbie Masson on Wednesday 18 December (**page 86**) is conduct on the part of the claimant that gives rise to the question. It contains information which is admittedly incorrect. The claimant's position is that it was a mistake in making a claim for overtime for a day (9.00am until 5.30pm) when his actual overtime working hours were 10.00am until 2.00pm. I accepted his evidence that one factor which led to the mistake was that he had also been asked for the overtime worked by Mr East. But that is not entirely convincing because the information which he provided for Mr East was to do with Monday (16 December). On the information sought and provided for himself it was the previous day, Tuesday 17. His explanation that he took the information from the RMS system is less convincing than it might have been when he must have been looking at information to do with two different days. His explanation is yet still less credible when the email was sent less than 24 hours after his overtime shift had been worked. In the appeal hearing, the claimant accepted that he had made a mistake. He said there that he would have been happy with a warning. In doing so, he accepted that he was to some extent at fault. In my view, it was a careless mistake. It was blameworthy. It contributed to his dismissal.

80. In my view, in accessing customer information without them being present in the sense of actual physical presence is also conduct on the part of the claimant that gives rise to the question. He admitted that he had done so. The respondent's evidence on its attitude to protecting customer data was not challenged. Nor was its evidence on the potential repercussions in such an event. The claimant's explanation that he interpreted the words "*present at the store*" as including being on the telephone is implausible. The allegation refers specifically to the wording of one reference to the "*How We Work*" Guidelines. In the appeal hearing, the claimant accepted that if he had made a mistake on the guidelines he would "*take a slap of the wrist for it*". He again said there that he would have been happy with a warning. In doing so, he accepted that he was to some extent at fault. In my view, his actions were a clear breach of the guidelines. They were blameworthy albeit there did not appear to be any adverse consequences for the customer. This conduct also contributed to his dismissal.

81. Discretion is limited to considering what is just and equitable having regard to the extent to which the employee's contributory conduct contributed to the dismissal (***British Gas Trading Ltd v Price*** EAT 0326/15). I had regard to the decision of the Court of Appeal in ***Hollier*** and what was said about it by the Scottish EAT in ***Kitsons Environmental Europe Ltd v Hendry*** UKEATS/0002/08/MT to the effect that the Court of Appeal had referred, with apparent approval, to broad guidance that had been set out by the EAT in ***Hollier***. The EAT had divided the cases under the statutory provisions into four general categories. While those categories do not limit a tribunal's discretion they are useful guidance. I see no reason to depart from it. I consider that this case falls into the last of those categories. In my view, compensation should be reduced by 25%. I have reduced the compensatory award to that extent. The compensatory award is therefore £20,112.79.

82. On the basic award, I had regard to the decision of the EAT in ***RSPCA v Cruden*** [1986] ICR 205. There it was held that only in exceptional cases should a tribunal differentiate in the exercise of its discretion under the statutory provisions governing a basic and a compensatory award. This was

not an exceptional case. The basic award is therefore reduced by 25% to £4438.50.

83. The judgement reflects that the claim succeeds and the reduction to both awards. The Employment Protection (Recoupment of Job Seeker's Allowance and Income Support) Regulations 1996 apply given that the claimant has been in receipt of Universal Credit.

Employment Judge : Russell Bradley
Date of Judgment : 24 September 2021
Date sent to parties : 05 October 2021