EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4108028/2020

Held via Cloud Video Platform on 16, 17 and 18 August 2021

Employment Judge Brewer

Ms R MacLeod	**Claimant** **Represented by:** **Ms L Campbell,** **Solicitor**
H&M Hennes & Mauritz UK Limited	**Respondent** **Represented by:** **Ms K Pattullo,** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that:

1. the claimant's claim of unfair dismissal succeeds;

2. the claimant was blameworthy in part and her basic and compensatory awards shall be reduced by 20%.

REASONS

Introduction

1. This case came before me to hear the claimant's claim of unfair dismissal. The evidence was heard over three days and at the end of the hearing I reserved my judgment which I set out here.

2. The claimant was represented by Ms Campbell. She gave evidence on her own behalf. The respondent was represented by Ms Pattullo. Evidence for the respondent was given by Ms Kate MacDonald, Area HR Manager and investigating officer, and Ms Helen Skinner, Area Manager for Scotland, and the dismissing manager.

3. There was before me an agreed bundle of productions, a schedule of loss and an entire copy of the respondent's Employee Handbook which was added to the bundle on day two of the hearing.

4. At the end of the evidence, I heard submissions from both parties, and I have taken those into account, along with the productions and the evidence, in reaching my decision. I gave a short judgment at the end of day three of the hearing and agreed to produce these detailed written reasons.

Issues

5. The issues in the case are as follows.

6. What was the reason or principal reason for dismissal? The respondent says the reason was conduct.

7. The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.

8. If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:

    a. there were reasonable grounds for that belief;

b. at the time the belief was formed the respondent had carried out a reasonable investigation;

c. the respondent otherwise acted in a procedurally fair manner;

d. dismissal was within the range of reasonable responses.

9. In terms of remedy, the issues are:

a. Does the claimant wish to be reinstated to their previous employment?

b. Does the claimant wish to be re-engaged to comparable employment or other suitable employment?

c. Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.

d. Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.

e. What should the terms of the re-engagement order be?

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

i. What financial losses has the dismissal caused the claimant?

ii. Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

iii. If not, for what period of loss should the claimant be compensated?

iv. Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

v. If so, should the claimant's compensation be reduced? By how much?

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

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

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

ix. If the claimant was unfairly dismissed, did s/he cause or contribute to dismissal by blameworthy conduct?

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

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

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

Law

10. The relevant statute law is set out in sections 94, 98, 119, 122, 123, 124 and 124A Employment Rights Act 1996 (ERA). I need not set out the text of those sections here.

11. In terms of case law, the relevant test I have applied is as follows:

a. Did the respondent act reasonably in all the circumstances in treating the claimant's actions as a sufficient reason to dismiss the claimant and in particular:

i. Did the respondent genuinely believe in the claimant's guilt;

ii. Were there reasonable grounds for the respondent's belief in the claimant's guilt;

i. At the time the belief was formed the respondent had carried out a reasonable investigation;

ii. Did the respondent otherwise act in a procedurally fair manner;

iii. Was dismissal within the range of reasonable responses?

(see **British Home Stores Limited v Burchell** [1978] IRLR 379; **Iceland Frozen Foods Limited v Jones** [1982] IRLR 439; **Sainsburys Supermarkets Limited v Hitt** [2002] EWCA Civ 1588).

12. I remind myself that I should not step into the shoes of the employer and the test of unfairness is an objective one.

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

14. Exactly what type of behaviour amounts to gross misconduct is difficult to pinpoint and will depend on the facts of the individual case. However, it is generally accepted that it must be an act which fundamentally undermines the employment contract (i.e. it must be repudiatory conduct by the employee going to the root of the contract) — **Wilson v Racher** 1974 ICR 428, CA. Moreover, the conduct must be a deliberate and wilful contradiction of the contractual terms or amount to gross negligence — **Laws v London Chronicle (Indicator Newspapers) Ltd** 1959 1 WLR 698, CA, and **Sandwell and West Birmingham Hospitals NHS Trust v Westwood** EAT 0032/09.

15. Even if an employee has admitted to committing the acts of which he or she is accused, it may not always be the case that he or she acted wilfully or in a way that was grossly negligent (see **Burdett v Aviva Employment Services Ltd** EAT 0439/13).

16. It is possible for a series of acts demonstrating a pattern of conduct to be of sufficient seriousness to undermine the relationship of trust and confidence between an employer and employee to justify summary dismissal, even if the employer is unable to point to any particular act that,

on its own, amounts to gross misconduct — **Mbubaegbu v Homerton University Hospital NHS Foundation Trust** EAT 0218/17.

17. In relation to allegations, in **Sattar v Citibank NA** [2019] EWCA Civ 2000, [2020] IRLR 104, the Court of Appeal held:

> *"It is obviously the case, however, that it is an elementary principle of justice that the employee should know the case he or she has to meet. It is equally obvious that it is the employer's obligation to put that case so that on a fair and commonsense reading of the relevant documentation, the employee could be expected to know what charges he or she has to address. That duty is not met if the employee has to speculate what may be in issue and what may not."*

18. Informing the employee of the basis of the problem and giving them an opportunity to put their case in response is one of the basic elements of fairness within the ACAS Code:

> *"9. If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification."*

19. In **Spink v Express Foods Group Ltd** [1990] IRLR 320 the EAT went further. The employee was dismissed for failing to visit customers and falsifying reports so that they recorded visits he had not made. The employers deliberately chose not to give him details of the nature and seriousness of the case against him prior to the disciplinary hearing. The EAT held that this was unfair. In the course of its judgment, the court said this:

> *"The meeting of 17 June was not, as it might well have been, a mere fact-finding investigation. It was the start of a formal*

disciplinary procedure. Even if it had been the former, it might have been prudent to have indicated that the enquiry was to be into the accuracy of the weekly report sheets. However, it seems to us to be a fundamental part of the disciplinary procedures that Mr Spink should know the case against him. Circumstances will inevitably vary. Management may be faced with an almost instant decision on the shop floor after violence or in the case of a dishonest act which is actually witnessed, whilst in other cases there may be and should be time for investigation and reflection; thus it is impossible—indeed unwise—to seek to lay down rules because the common law has given us sufficient guidance. However fairness surely requires in general terms that someone accused should know the case to be met; should hear or be told the important parts of the evidence in support of that case; should have an opportunity to criticise or dispute that evidence, and to adduce his own evidence and argue his case. How each such disciplinary hearing is handled will lie very much in the hands of management, there may be more than one hearing, there may be adjournments for one reason or another and outside the basic and fundamental principles of fairness to which we have eluded, there may be many variations. These were discussed in ***Bentley Engineering Co Ltd v Mistry*** *[1978] IRLR 436, [1979] ICR 47…and indeed in other cases."*

20. In relation to investigations, Stephenson LJ in **W Weddel & Co Ltd v Tepper [**1980] IRLR 96 at 101:

"… [employers] do not have regard to equity or the substantial merits of the case if they jump to conclusions which it would have been reasonable to postpone in all the circumstances until they had, in the words of the [employment] tribunal in this case, "gathered further evidence" or, in the words of Arnold J in the Burchell case, "carried out as much investigation into the matter as was reasonable in all the circumstances of the case". That means that they must act reasonably in all the circumstances, and must make reasonable inquiries appropriate to the circumstances.

> *If they form their belief hastily and act hastily upon it, without making the appropriate inquiries or giving the employee a fair opportunity to explain himself, their belief is not based on reasonable grounds and they are certainly not acting reasonably'."*

21. The need for the employer to be aware of any mitigating or extenuating circumstances has often been emphasised. As Browne-Wilkinson J commented in **Sillifant v Powell Duffryn Timber Ltd** [1983] IRLR 91, giving judgment for the EAT, it will be a very rare case where an employer can reasonably take the view that there could be no explanation or mitigation which would cause him to alter his decision to dismiss. These words were expressly approved by the House of Lords in **Polkey**. Furthermore, even in the clearest of cases it is difficult to be certain that a hearing will make no difference. As Megarry J said in **John v Rees** [1970] Ch 345, [1969] 2 All ER 274:

> *"It may be that there are some who would decry the importance which the courts attach to the observance of the rules of natural justice. "When something is obvious", they may say, "why force everybody to go through the tiresome waste of time involved in framing charges and giving an opportunity to be heard? The result is obvious from the start." Those who take this view do not, I think, do themselves justice. As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determination that, by discussion, suffered a change'."*

22. In general, it may not be necessary to do more than permit the employee to give any relevant explanation or justification, but there may be cases where it will be necessary for the employer to go further and investigate the circumstances relating to the mitigation. In **Chamberlain Vinyl Products Ltd v Patel** [1996] ICR 113, [1995], the EAT held that a tribunal was entitled to conclude that an employer had acted unreasonably in failing to explore more fully the employee's claim that his misconduct had been caused by a psychiatric illness. That case of course pre-dated

Sainsbury's and so the question now is in what circumstances a failure to make such investigations may lie outside the range of reasonable responses. This point also arose in **Tesco Stores Ltd v S** UKEATS/0040/19 (1 April 2021, unreported). At [42] the judgment states:

> *"In considering whether a particular line of inquiry into mitigation was so important that failure to undertake it would take the investigation outside the Sainsbury's band, Tribunals require to consider inter alia the degree of relevance of the inquiry to the issue of sanction, whether or not the employee advanced any evidential basis which merited further inquiry, and the extent to which resultant further investigation could have revealed information favourable to the employee."*

Findings in fact

23. I make the following findings in fact (references are to pages in the bundle).

24. The claimant was employed by the respondent from 20 December 2013. She worked exclusively at their store in Perth save for a few months when she was the cover store manager in Dundee.

25. The claimant was regularly promoted and undertook the roles of both department manager and assistant manager before becoming the store manager in Perth on 1 July 2019.

26. The claimant's contract of employment [54] included the following clause [56]:

> *"You are required to work your Working Hours each week (excluding meal breaks) and to make yourself available work the Working Days…The times you are required to work your Working Hours shall vary each week. You will be required to work such times as notified to you in advance by your line manager. It is a condition of your employment that you may be required to work such additional hours as are necessary for the performance of your duties or according to the neds of the business"*

27. I pause to note that the claimant's line manager was Hannah Skinner, Area Manager. As a matter of fact, Ms Skinner did not determine what hours the claimant worked. In practice the claimant was responsible for the rotas in the Perth store. Likewise, I find as a fact that the determination of what "*such additional hours as are necessary for the performance of your duties or according to the needs of the business"* was determined by the claimant.

28. So far as breaks are concerned, these are set out in the Handbook at [285]. The claimant was entitled to a 1 hour unpaid break and a 20-minute paid break.

29. So far as pay is concerned, the claimant was not paid per hour worked. As a Store Manager she was 'salaried' (see [55]).

30. The Handbook also contains further information about timekeeping at [286]. The material parts of this are as follows:

> *"You are required to register in and out of the building at the start and end of your shift. All sales level employees will be paid in accordance with the hours worked as confirmed by signing in sheets, timesheets or individual fobbing in systems…it is your manager's responsibility to ensure these hours are correct…If you fail to register in or out of the building, you will only be paid for hours approved by a manager. No employee or manager may alter changes on the signing in sheet or system without authorisation from the senior manager (i.e. the Store Manager). Any recorded hours amended without authorisation, or any hours falsely recorded at the time, may be treated as gross misconduct…"*

31. The claimant was not in fact entitled to overtime or to take time off in lieu (TOIL).

32. The claimant had not been subject to any previous disciplinary proceedings, nor was she the subject of any grievances, complaints or concerns until the matters which led to her dismissal were raised.

33. As well as the claimant, the Perth store had a management team consisting of Dianne Chen (DC), Department Manager, Tsvetelina Tinkova (TT), Department Manager, and Ellie Nairn (EN), Visualisation Manager.

34. In terms of shifts for staff, these were shown on a report covering the shifts worked each month (see for example [207]). For each staff member, including the claimant, the report shows for each day, the proposed start and finish time of the shift, the number of hours to be worked and the actual number of hours worked. The staff were required to register into and out of the building by swiping in and out. Essentially an electronic clocking system was in use. However, it was not necessary to 'swipe' in order to be able enter the building. If a staff member swiped in and/or out, this was recorded both within the swipe system and on what are referred to as T&A sheets (see example at [206]). In turn the swipe information informed the payroll system of the swipe times so that there was a record of the swipe times against which the employees were paid. If an employee failed to swipe either in and/or out, they were paid according to the rota, i.e. they would be paid for the shift they were due to work.

35. The Perth store was closed because of the national Covid 19 lockdown from March 2020 to around the end of June 2020. At that time the claimant was furloughed.

36. On 3 August 2020, TT was due to be on holiday. She planned to work at the store for about an hour. However, the claimant asked her to work on 3 August 2020, which she did. She swiped in and out. TT was due to work on 4 August 2020 and in the normal course would swipe in and out. However, she sent a text to Hannah Skinner on 4 August 2020 to say that the claimant had asked her not to swipe in or out on 4 August 2020 and she wished to clarify what the position was. Ms Skinner told her that she must swipe in and out.

37. On 4 August 2020 Ms Skinner sent an email to her store managers clarifying several matters [59/60]. This included the following:

*"All Store Manager (*sic*) must clock in and out every shift you complete…If a shift is changed please update Staff Planner…Payroll must be signed off in every store by the SM (unless you are on holiday)…"*

38. On 13 August 2020 both DC and TT sent documents to Kate MacDonald, Area HR Manager, setting out various complaints about the claimant.

39. DC complained about a number of things, but for present purposes the key points from her document [61 – 63] are as follows:

    a. The claimant changes rotas to suit herself and her needs
    b. The claimant sometimes works a 7 – 4 shift instead of 9 – 6 or 8 – 5 but does not change the rota
    c. On many occasions the claimant leaves before her shift end
    d. The claimant frequently works on her days off and then takes time off in lieu
    e. The claimant takes longer breaks than she should
    f. There was a week in September that she did not work her full 39 hours
    g. The claimant does not follow the clocking procedure
    h. Staff morale is low
    i. Staff feel the claimant is not working as part of the team.

40. TT's document is at [64 – 68]. TT also complains about a number of matters. The material points are:

    a. TT had discussed "*everything that bothered me*" with DC
    b. TT has a personal diary in which she kept track of the claimant's attendance
    c. The claimant and EN spend a lot of time together and go on long lunches
    d. Some specific dates/issues are:
        i. 1 July 2019, the claimant left the store at 11.30 am

ii. 11 September 2019 the claimant was planned to work until 6 pm but left "*after 3 pm*". TT says, "*I do not know what time she did start*" (sic)

iii. 14 September 2019 the claimant left at about 1 pm but TT does not know what shift she was supposed to work

iv. 3 October the claimant went out at 11 am and finished work at around 1.45 pm.

41. There are many similar entries and I do not need to set them all out here. Suffice it to say that TT's basic complaints were that the claimant took longer breaks than she ought to have done, that she failed to work the shifts she was due to work as set out in the rota and that she failed to follow the swipe procedure.

42. The store has CCTV showing the entrance/exit with time stamps. CCTV footage is retained for a 4-week period.

43. Having received and considered the complaints and various other documents the claimant was required to attend an investigation meeting which took place, unannounced, on 14 August 2020 at the store.

44. Notes of the investigation meeting start at [69]. It is noted that having received the long and detailed complaints from TT and DC (I note that DC's email is timed as having been sent at 12.53 pm), Ms MacDonald decided that there should be an investigation meeting, went through and annotated the complaints, obtained copies of the Store Manager job role, the respondent's Global Leadership Expectations document, the respondent's Handbook, various T&A reports, a copy of the respondent's value and the email from Hannah Skinner of 4 August 2020.

45. The respondent's pro-forma investigation meeting notes document states that the evidence used must be set out and states that "all evidence listed must be shown during the meeting". Ms MacDonald's evidence was that she did not show the claimant copies of either DC's or TT's complaint. She said she read bits out.

46. The notes show that the claimant was told that the purpose of the meeting was to investigate "*poor time management and potential breaches of procedures and policies*". She was not told which policies or procedures.

47. On 19 August 2020 the claimant emailed Ms MacDonald to respond to "*the allegations about my leadership and performance*" [107].

48. On 21 August 2020 Ms MacDonald wrote to the claimant to say that she was suspended, and that the claimant was required to attend a disciplinary hearing on 26 August 2020. The reason given for the disciplinary hearing were the "*following allegations of misconduct against you: poor timekeeping and breach of policies and procedures*" [110]. The disciplinary hearing was to be chaired by Ms Skinner. The letter goes on to say:

> *"During your suspension the Company will carry out any necessary further investigation into the situation. If there are any further documents or witness statements you wish to be considered at the hearing, please provide copies as soon as possible, and at least 24 hours before the meeting. If you do not have these documents or witness statements, please provide details so that they can be obtained."*

49. The letter advised the claimant that one outcome could be dismissal and of her right to be accompanied to the meeting.

50. On 25 August 2020 the claimant sent a second email to Ms MacDonald again responding to the matters set out in the complaints of DC and TT. Appended to that email was a large number of WhatsApp messages sent between the management team at the Perth store [113 – 135].

51. The disciplinary hearing went ahead as scheduled. The notes of the hearing start at [136]. The claimant was told at the outset that the purpose of the hearing was "*based on an investigation done on the 14/08 due to a breach of company procedures and policies*". There was no specific reference to timekeeping.

52. After the meeting Ms Skinner considered the evidence and delivered her decision on 27 August 2020. This is noted as part of the disciplinary hearing notes. Ms Skinner's decision was as follows:

> "*Due to the severity of the nature & given that you are in a senior leadership position I feel that the trust has been damaged and your integrity has been called and questioned* (sic)
> *So for all of those reasons I consider that a dismissal is fair and appropriate in this case*"

53. The dismissal letter is at [187]. In relation to the reason for dismissal, it states that Ms Skinner found that there had been "repeated breaches of the timekeeping policy" and that:

> "*Due to the severity of the nature & given that you are in a senior leadership position I feel that the trust has been damaged and your integrity has been called into question"*

54. The claimant's employment terminated on 27 August 2020. The claimant chose not to appeal against the dismissal.

55. The claimant undertook early conciliation between 3 November 2020 and 1 December 2020. She presented her complaint to the Tribunal on 30 December 2020.

Observations on the evidence

56. The claimant's responses to the respondent's allegations were consistent across the investigation meeting and the disciplinary hearing as well as at the Tribunal hearing.

57. In essence the claimant said that she could not recollect the precise times she left the store for lunches or when she returned. Many of the dates she was asked about were many months before the either the investigation meeting or the disciplinary hearing. The claimant accepted that she often failed to use the swipe in/out system. She said that this had always been the case.

58. In relation to leaving for lunch early, the claimant's evidence was that she would go out of the store to shop for things for the store which may explain some of the timings. She said that she kept receipts from shopping, and they would be in store. The claimant also said that more often than not she would take no lunch or have it in store.

59. In relation to shift times, the claimant agreed that she would leave at times that may have been perceived as early. However, she explained that if she worked longer than her scheduled hours, she would take TOIL but accepted that she did so without altering the actual hours on the rota so that it looked as though she worked the shift she had been rostered to work. The claimant said that she always discussed shifts with the management team as well as TOIL, that they all operated in the same way and that there was a diary in the store in which this was noted down. The claimant said that she regularly worked longer than her 39 hours per week and that her team were well aware of this. The claimant said that the WhatsApp messages was evidence of her management team's communications about work.

60. The claimant explained that she had always operated in this way, it was how she had been taught to use the system by the Perth store manager (C) when the claimant had been the assistant manager to C. The claimant said that she had not been given any training to the contrary.

61. The claimant made a specific allegation that much of what DC and TT said was fabricated.

62. The respondent's evidence dealt in large measure with the procedure they followed. Ms MacDonald confirmed that other than the documents presented at the investigation meeting and the meeting notes, she undertook no further investigation. Although she said in evidence that she did not simply accept what DC and TT said as true, she did not feel the need to speak to either of them. When pressed further she said it was fair to say that as the dates in TT's email "matched" with the T&A documents, she believed the complaints. As to the claimant, Ms MacDonald said that as she could not recall much, she did not believe her.

63. Ms Skinner's evidence was that she also did not see the need for any further investigation. She said she did not feel the need to speak to anyone else. Under cross-examination Ms Skinner said that she did not believe that the claimant always worked her 39 hours per week or that she worked overtime.

64. Ms Skinner asserted that the claimant failed to engage with the disciplinary process. Her reason for so finding was in relation to a specific allegation that the claimant had left for an early lunch to take a dog for a walk. Initially when asked about leaving early on a specific date the claimant said she could not recall. When prompted she recalled the dog walking incident. This initial failure to recall followed by recollection was, said Ms Skinner evidence of the claimant not engaging with the process.

65. Ms Skinner conceded that the claimant always got positive feedback from the store, which in her role Ms Skinner had visited 6 or 7 times while the claimant had been Store Manager. Ms Skinner said that she did not believe that the claimant's failure to swipe in or out was out of poor habit. When pressed she confirmed that she believed that the claimant was deliberately leaving early, working less than her 39 hours and getting paid for full shifts. In other words, she found that there was fraud or theft by the claimant even though the respondent at no point used these words or put that allegation to the claimant.

Respondent's submissions

66. Ms Pattullo's submissions were that the respondent's witnesses were credible and should be believed. They made appropriate concessions at points in their evidence.

67. Ms Pattullo said that Ms Skinner genuinely believed that the claimant had left the store when she should not have done and cited the T&A records and the CCTV stills in the bundle. She submitted that there was a long investigation meeting and a long disciplinary hearing and from that it was clear that the claimant was following an incorrect swipe in/swipe out procedure. She said that the claimant's evidence changed during the disciplinary hearing.

68. I would point out that there is a difference between a witness giving one version of events and then changing their account to give a different version, which may well adversely impact on their credibility, and a witness who says they cannot recall but who, following further questions and prompting has some recollection, which is what happened during this case. The fact is that the claimant was forced to rely solely on her memory given the absence of the documentation she had referred the respondent to and which they failed to obtain.

69. Ms Pattullo submitted that the claimant had 12 days between the invitation to the disciplinary hearing and the hearing itself during which she could have prepared. However, at that time the claimant was barred from contacting colleagues and from the premises.

70. Ms Pattullo submitted that obtaining the in-store diary would have made no difference because it was completed by the claimant. But that is not correct. The claimant said that the management team's TOIL was in the diary and in any event it would at least be a contemporaneous document which may have shed light on the way the claimant and the team operated.

71. Ms Pattullo submitted that Ms Skinner believed that the claimant was manipulating the system, that Ms Skinner was impartial, and that dismissal was within the band of reasonable responses. Finally, she submitted that the claimant failed to mitigate her losses, that if the dismissal is unfair there should be a 100% reduction for contributory fault, that in any event there should be a reduction of 25% for the failure to appeal and that if there was a procedurally unfair dismissal the claimant would still have been dismissed arguably no more than 2 weeks later than was the case.

Claimant's submissions

72. The claimant's submissions were essentially that the claimant had long service, a clean record and was a senior employee and that both the investigation and the dismissal was not within the band of reasonable responses. She said that the claimant was honest and open and therefore credible. She said that the claimant's evidence had been consistent

Decision

73. Along with investigating the allegations, an employer should carry out a reasonable investigation of any substantive defence or defences raised by the employee. In **Shrestha v Genesis Housing Association Ltd** [2015] EWCA Civ 94, [2015] IRLR 399 Richards LJ put it thus:

> *"To say that each line of defence must be investigated unless it is manifestly false or unarguable is to adopt too narrow an approach and to add an unwarranted gloss to the Burchell test. The investigation should be looked at as a whole when assessing the question of reasonableness. As part of the process of investigation, the employer must of course consider any defences advanced by the employee, but whether and to what extent it is necessary to carry out specific inquiry into them in order to meet the Burchell test will depend on the circumstances as a whole. Moreover, in a case such as the present it is misleading to talk in terms of distinct lines of defence. The issue here was whether the appellant had over-claimed mileage expenses. His explanations as to why the mileage claims were as high as they were had to be assessed as an integral part of the determination of that issue. What mattered was the reasonableness of the overall investigation into the issue."*

74. The present case is notable because the respondent failed to investigate any part of any defence raised by the claimant. I have considered the reason for this. It seems to me that both Ms MacDonald and Ms Skinner had closed minds when they came to their part in the procedure. Both did not see any need to do any investigation beyond in essence accepting that what DC and TT said was true. They took the view that the claimant's inability to recall dates and times of particular lunches was evidence of guilt.

75. It is worth noting what the claimant said and the respondent's views of that.

a. First the claimant said that she accepted that she did not always swipe in or out. The respondent did not dismiss the claimant for that failure.

b. Second, the claimant agreed that she may well have left the store at the times on some of the occasions stated in the complaints. In relation to lunches, the claimant denied taking long lunches. She said that she would have left the store on company business – to shop, for example for PPE post-lockdown. The claimant said that there would be receipts to substantiate this in store. No effort was made to find these receipts. The claimant did accept that she went on one occasion to the hairdressers, and on one occasion to walk a dig, but in the first place she was utilising TOIL and in the other she was still within her break times.

c. Third, in some cases the claimant was said to have gone to lunch early with EN. EN was not spoken to.

d. Fourth, the claimant said that she had been trained by C to operate in the way she did once she became Store Manager. There was no investigation into how the store operated in relation to overtime and TOIL when the claimant was the assistant to C, which will clearly have assisted in assessing this evidence.

e. Fifth, the claimant said that TOIL was discussed amongst the management team and noted in a diary in the store. No effort was made to locate this document.

f. Sixth, the claimant gave reasons why DC's complaint may have been fabricated and asserted that the complaints of TT were untrue. No investigation was made into this. There was no consideration of why TT was keeping a diary. That contemporaneous document was never considered. There was no curiosity about why, not only that despite there having been no complaints about the claimant and having had regularly good feedback given directly to Ms Skinner about the claimant, suddenly on 13 August 2020 both DC and TT wrote to raise similar issues of concern about the claimant.

g. Seventh, the claimant asserted that morale in the team was good. DC and TT say the opposite. There was deemed to be no need to investigate this discrepancy.

h. Eighth, given that CCTV going back 4 weeks was available, no checks were made to see if this could shed any light on the claimant's working times, at least as an exemplar over that short period particularly given that the respondent knew that the claimant had not always swiped in or out over that period.

i. Finally, the claimant said that everyone was aware that she regularly worked beyond her 39 hours but there was no investigation into that.

76. These failing were a failure to carry out a reasonable investigation in this case.

77. As well as failing to reasonably investigate the claimant's defences, Ms Skinner also failed to put to the claimant the real reason why she was considering dismissing her. The stated reason for the investigation and disciplinary hearing was effectively poor timekeeping. Although there is a consistent reference to breach of policies and procedures, those policies and procedures were not identified beyond the reference to timekeeping in the Handbook. As Ms Skinner conceded, the real reason she dismissed the claimant was that she believed the claimant was deliberately not swiping in or out so that she could leave work, not work her full 39 hours and yet still be paid for that. The claimant was never given a chance to answer that specific allegation.

78. It is notable that taking account of both the claimant's contract and the respondent's handbook, one question the respondent should have asked itself was whether Ms Skinner was an appropriate person to undertake the disciplinary hearing. Under the claimant's contract of employment, the claimant may work such hours as are necessary either to perform her duties or as the business requires. Thus, she may have to work overtime, and the claimant said she did. According to the respondent's Handbook [286]:

> "*You are required to register in and out of the building at the start and end of your shift. All sales level employees will be paid in accordance with the hours worked as confirmed by signing in sheets, timesheets or individual fobbing in systems…**it is your manager's responsibility to ensure these hours are correct**…"* (my emphasis)

79. In the claimant's case the reference to "your manager" is to Ms Skinner. Thus according to the Handbook, it was her responsibility to ensure that the claimant's hours were correct. Yet at no point prior to the receipt of the complaints did Ms Skinner take issue with the hours the claimant was, or said she was, working, nor with her failure to regularly swipe in or out despite this information being available to her. In those circumstances the respondent should have considered Ms Skinner's potential culpability for, if nothing else, failing to manage the claimant. That of course would have, and in my judgment should have, ruled her out if hearing the disciplinary hearing. She was not impartial in the sense of being an independent decision-maker. That was a significant failing on the part of the respondent.

80. Considering all of the above, and in relation to the legal test I have to apply, I find as follows.

81. Ms Skinner genuinely believed that the claimant was guilty of gross misconduct. She had convinced herself that in effect the claimant was stealing from the respondent although the case was never expressly put in those terms to the claimant or in the respondent's disciplinary documentation.

82. However, that belief was not reasonably held because of the very significant failings in the investigation as I have set out above.

83. The respondent's disciplinary process was not within the band of reasonable responses. Ms Skinner ought not to have heard the hearing.

84. It follows that dismissal was not within the band of reasonable responses.

85. For those reasons the unfair dismissal claim succeeds.

Polkey and Contributory fault

86. Given that the unfairness is not merely procedural there is no **Polkey** reduction. However, part of the reason for the disciplinary procedure and part of the reason for the dismissal was the claimant's failure to follow the procedure for registering in the building and swiping out. I consider that in accordance with s.122(2) and 123(6) Employment Rights Act 1996 the claimant's basic and compensatory awards shall be reduced by 20%.

Reduction under the ACAS Code of Practice

87. Ms Pattullo submitted that the claimant's failure to appeal should lead to a 25% reduction in her award.

88. As is well known, if the dismissed employee appeals and the appeal is successful, then the employee will be treated as having been suspended pending the outcome of the appeal and will obviously be entitled to receive full back pay for the period of the suspension (see ***West Midlands Co-operative Society Ltd v Tipton*** *1986 ICR 192, HL).* This means also that an employee will not have been dismissed for the purposes of an unfair dismissal claim (see ***Roberts v West Coast Trains Ltd*** *2005 ICR 254, CA).* It is irrelevant that the employee might have had other motives for appealing, such as a wish to clear her name or protect her rights to compensation for unfair dismissal; the purpose of having an appeal process is to enable the employee to ask the employer to reopen a decision to dismiss (see ***Folkestone Nursing Home Ltd v Patel*** *2019 ICR 273, CA).*

89. In this case the claimant's evidence was in essence that she was so unhappy with the way she was treated she no longer wished to work for the respondent and therefore an appeal was futile.

90. Ms Pattullo asserted that if the claimant's appeal was successful, she could have gone to work at another store. However, that was a point only made in submissions, it was never part of the disciplinary process. Ms Pattullo also submitted that the claimant ought to have appealed in order to give the respondent an opportunity to rectify any preceding faults. That is not the purpose, although it may be the effect of an appeal. In my

judgment the respondent's failings were such that the claimant acted entirely reasonably in not appealing given that she felt she could not return to work for the respondent, and I decline to make any reduction under s.124A of the 1996 Act.

Mitigation

91. Finally, Ms Pattullo submitted that the claimant had failed to take reasonable steps to mitigate her loss. Although not submitted by Ms Pattullo, I do wish to deal with one point which is whether the failure to appeal is a failure to mitigate. The EAT in ***Lock v Connell Estate Agents*** *[1994] ICR 983* took the view that as a matter of law the failure to pursue an appeal could never constitute a failure to mitigate.

92. I also note that it is for the employer to show that the claimant has failed to mitigate her loss. In ***Ministry of Defence v Hunt and ors*** *1996 ICR 554, EAT,* the EAT stressed that the employer must adduce evidence in relation to mitigation and that a vague assertion of failure to mitigate unsupported by any evidence is unlikely to succeed. In the first instance, compensation will be assessed on the basis that the claimant took all reasonable steps to reduce his or her loss.

93. The basis of Ms Pattullo's submission was a reference to some store manager jobs which had been advertised. I note that all of these post-dated the claimant obtaining new employment as a care assistant. The claimant said that she had seen no store manager roles prior to her getting her current role. There was no evidence to the contrary provided by the respondent.

94. It has long been held that it may be reasonable for a claimant to seek to mitigate his or her loss by retraining, where he or she has failed to find suitable alternative employment (see for example, ***Orthet Ltd v Vince-Cain*** *2005 ICR 374, EAT,* and ***BMB Recruitment v Hunter*** *EATS 0056/05*).

95. In my judgment the claimant's decision to change career (and indeed to now pursue a career in nursing such that she will be starting her nursing

degree in September 2021) is not a failure on her part to take reasonable steps to mitigate her losses.

Further procedure

96. The Tribunal will contact the parties separately about further procedure in this claim.

Employment Judge: **M Brewer**
Date of Judgment: **20 August 2021**
Date sent to parties: **20 August 2021**