THE EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms A Seebass	**v**	John Lewis Plc

Heard at: London Central **On**: 15-16 February 2017

Before: Employment Judge Baty

Representation:
Claimant: In person
Respondent: Mr P Lockley (counsel)

JUDGMENT

1. The claimant's complaint of unfair dismissal fails.

2. An award of costs of £500 is made, payable by the claimant to the respondent.

REASONS

The Complaint

1 By a claim form presented to the Employment Tribunal on 26 September 2016, the claimant brought a complaint of unfair dismissal. The Respondent defended the complaint.

2 There had been correspondence, which was on the Tribunal file, in which the claimant maintained that a document, which was at page 177 of the bundle for this hearing and was entitled "My Claim Statement", had been annexed to the claim form. The claim form which the Tribunal had and which had duly been sent to the respondent did not include this document. However, the claimant maintained that she had tried to submit it at the same time as the claim form. Mr Lockley said that he was happy for that statement to be included as part of the claim form, which is what the claimant sought, and I therefore agreed that the claim should be amended, by consent, to include that statement.

The Issues

3 At the start of the hearing, I went through the issues of the claim with the parties and we agreed the issues which I would need to determine. These were as follows:-

Unfair Dismissal

1. Did the respondent dismiss the claimant for a potentially fair reason, namely conduct;

2. Did the respondent have a genuine and a reasonably held belief that the claimant committed the misconduct for which she was dismissed, following such investigation as was reasonable;

3. Was the dismissal procedurally fair;

4. Was there any unreasonable failure to follow the ACAS Code;

5. Was dismissal within the reasonable range of responses; and

6. If the dismissal was unfair, should there be any adjustment to compensation, either due to contributory conduct by the claimant or under the principles in Polkey v A E Dayton?

4 I went through the law on unfair dismissal, summarising it for the claimant's benefit as we went through and agreed the above issues.

5 It was agreed that the sixth issue was one in respect of which the findings naturally flowed from the evidence at the liability stage and that I would therefore determine it at the same time as the other issues in relation to liability. Other remedy issues, however, would be dealt with separately under consideration of remedy, if the claimant was successful on liability.

6 The claimant confirmed that, notwithstanding what was set out in the claim form, she was not seeking an order for re-engagement if her unfair dismissal complaint was successful, but was only seeking compensation.

Amendment Application

7 Having agreed the above issues, the claimant then suggested that she wanted to make a complaint of a failure to provide written reasons for dismissal. This was not a complaint which was set out in the claim form (even as amended). An amendment would therefore be required. Mr Lockley opposed the application. I heard submissions from both parties in relation to the application to amend to include this complaint.

8 The law relating to amendments is set out in the case of Selkent Bus Co Ltd v Moore [1996] ICR 836. In determining whether to grant an application to

amend, an Employment Tribunal must always carry out a careful balancing exercise of all the relevant factors, having regard to the interests of justice and to the relative hardship that would be caused to the parties in granting or refusing the amendments. In Selkent, the then President of the EAT, Mr Justice Mummery, explained that relevant factors could include the nature of the amendment; the applicability of time limits; and the timing and manner of the application.

9 I refused the application to amend for the following reasons. Firstly, the application had been made extremely late, on the first day of the hearing. There was no good reason for this; the complaint could have been set out in the claim form but was not. Secondly, it was considerably out of time. The claim was presented to the Tribunal on 26 September 2016 and, even taking into account any adjustments to the time limit as a result of ACAS early conciliation, the application was being made well outside the three month time limit. The alleged failure to provide written reasons would have taken place in June 2016. Furthermore, the complaint, if allowed, would have been a hopeless complaint. The dismissal letter itself set out that the reason for dismissal was "serious misconduct – namely theft". Furthermore, there was a further email in response to an email from the claimant under which Mr McCormack, the dismissing officer, set out further detailed reasons for dismissal. Therefore, there would be no prejudice to the claimant if this application was refused given that it would have been a complaint that was destined to fail. By contrast, although the respondent was equipped to defend the complaint, it would simply have added a modest amount of time at the hearing in terms of evidence and submissions which would be entirely unnecessary. Therefore, on the balance of hardship, I decided to turn down the application to amend.

The Evidence

10 Witness evidence was heard from the following:-

For the respondent:

Mr Anthony McCormack, a Store Manager at the respondent and the dismissing officer; and

Ms Dee Monaghan, a Manager within the Appeals Office at the respondent, who heard the claimant's appeal against dismissal.

For the claimant:

the claimant herself.

11 In addition, a witness statement from a Mr Kevin Sharkey was provided by the respondent. Although this statement had been exchanged with the

claimant at the time of exchange of witness statements, the respondent had decided not to call Mr Sharkey as his evidence related to a grievance by the claimant which the respondent did not consider to be relevant to the issues for this Tribunal concerning her dismissal. The claimant said that she would still like me to read Mr Sharkey's statement, although she did not wish Mr Sharkey to be called as a witness. Mr Lockley was happy for me to read the statement and copies were duly provided and it was agreed that, although he would not come to give evidence, I would nonetheless read his witness statement.

12 An agreed bundle numbered pages 1-221 was provided to the hearing. In addition, the claimant sought to adduce a further document headed "statement questions from claimant". Mr Lockley had no objection to this and it was agreed that this document also formed part of the evidence. Mr Lockley also produced an "opening note".

13 I read in advance the witness statements and any documents in the bundle to which those statements referred and Mr Lockley's opening note.

14 A timetable for cross examination and submissions was agreed between the parties and myself at the start of the hearing and was largely adhered to.

15 The claimant prepared written submissions for the Tribunal which I read and thereafter both parties made oral submissions.

16 I adjourned to consider the decision and gave the decision on liability to the parties with reasons orally at the hearing. The claimant requested that written reasons be provided.

The Law

Unfair Dismissal

17 The Tribunal has to decide whether the employer had a reason for the dismissal which was one of the potentially fair reasons for dismissal within s 98(1) and (2) of the Employment Rights Act 1996 ("ERA") and whether it had a genuine belief in that reason. The burden of proof here rests on the employer who must persuade the Tribunal that it had a genuine belief that the employee committed the relevant misconduct and that belief was the reason for dismissal.

18 The Tribunal then has to decide whether it is satisfied, in all the circumstances (including the size and administrative resources of the employer), that the employer acted reasonably in treating it as a sufficient reason to dismiss the employee. The Tribunal refers itself here to a 98(4) of the Employment Rights Act 1996 and directs itself that the burden of proof in respect of this matter is neutral and that it must determine it in accordance

with equity and the substantial merits of the case. It is useful to regard this matter as consisting of two separate issues, namely:

18.1 Whether the employer adopted a fair procedure. This will include a reasonable investigation with, almost invariably, a hearing at which the employee, knowing in advance (so as to be able to come suitably prepared) the charges or problems which are to be dealt with, has the opportunity to put their case and to answer the evidence obtained by the employer; the employer must also have reasonable grounds, following such reasonable investigation, for its belief that the employee committed the relevant misconduct; and

18.2 Whether dismissal was a reasonable sanction in the circumstances of the case. That is, whether the employer acted within the band of reasonable responses in imposing it. The Tribunal is aware of the need to avoid substituting its own opinion as to how a business should be run for that of the employer. However, it sits to provide, partly from its own knowledge, an objective consideration of what is or is not reasonable in the circumstances, that is, what a reasonable employer could reasonably have done. This is likely to include having regard to matters from the employee's point of view: on the facts of the case, has the employee objectively suffered an injustice? It is trite law that a reasonable employer will bear in mind, when making a decision, factors such as the employee's length of service, previous disciplinary record, declared intentions in respect of reform and so on.

19 In respect of these issues, the Tribunal must also bear in mind the provisions of the relevant ACAS code of practice 2015 on disciplinary and grievance procedures to take into account any relevant provision thereof. Failure to follow any provisions of the Code does not, in itself, render a dismissal unfair, but it is something the Tribunal will take into account in respect of both liability and any compensation. If the claimant succeeds, the compensatory award may be increased by 0-25% for any failures by the employer or decreased by 0-25% for any failures on the claimant's part.

20 Where there is a suggestion that the employee has by her conduct caused or contributed to her dismissal, further and different matters arise for consideration. In particular, the Tribunal must be satisfied on the balance of probabilities that the employee did commit the act of misconduct relied upon by the employer. Thereafter issues as to the percentage of such contribution must be determined.

21 Under the case of Polkey v AE Dayton [1987] IRLR 503 HL, where the dismissal is unfair due to a procedural reason but the Tribunal considers that an employee would still have been dismissed, even if a fair procedure had been followed, it may reduce the normal amount of compensation by a percentage representing the chance that the employee would still have lost her employment.

Findings of Fact

22 I make the following findings of fact. In doing so, I do not repeat all of the evidence, even where it is disputed, but confine my findings to those necessary to determine the agreed issues.

Background

23 The respondent's organisation is known as the John Lewis Partnership and its employees are referred to as "partners". The respondent has two trading divisions, namely its John Lewis department stores and its Waitrose supermarkets. The business is run on co-ownership principles and all partners are eligible to participate in a share of the respondent's annual profits.

24 The claimant was employed by the respondent from 19 December 2012 until 3 June 2016 when she was dismissed summarily. The claimant worked at the Waitrose store in Knightsbridge (the "Branch"). The claimant's role was Supermarket Assistant.

The respondent's policies

25 The claimant's employment was subject to the respondent's rules, policies and procedures.

26 The respondent's partnership handbook, which contains many of these procedures, states as follows:-

> "Any loss to the Partnership is a loss to us all. This is why we have strict procedures about the handling of merchandise, money and Partnership property. We take a very serious view of dishonesty, including theft or wilful damage to stock or property. For example, eating or drinking merchandise that you have not paid for or taking property or merchandise of any description from us, a colleague, a customer or a supplier without permission is regarded as stealing. This applies no matter how small or trivial the item is and whether it has any value to the partnership".

27 The partnership handbook then contains a list of examples which include "concealing and removing from the branch any item that has been "written off" and has no commercial value" and "reducing the price of stock" and it makes clear that:-

> "Failure to adhere to these provisions may result in you losing your job".

28 The partnership handbook confirms that:-

> "In certain cases, your conduct may be considered so serious that you may be dismissed summarily … whether or not you have been warned about such conduct on a previous occasion and regardless of your performance or length of service"

29 The partnership handbook then contains examples of serious misconduct which can result in summary dismissal. These examples include:-

"Dishonest misappropriation of property, services, benefits or money … theft, fraud and deception" and

"serious breach of partnership rules and procedures."

30 It is important that partners do not misuse the privileges that are granted to them by virtue of their position. The partnership handbook confirms that:-

"in the spirit of our co-owned business, you must not use your business relationships (internal or external), position, access or privileges as a partner, for the intended purpose of your own, or anyone else's personal trade, profit or advantage. Neither should you use these to the detriment of the Partnership."

31 The partnership handbook makes it very clear that behaviours that fall short of the partnership's standards may result in dismissal; in particular the handbook states that:-

"Partners are people of outstanding honesty and integrity. Our commitment to integrity is at the core of our co-owned business: we are honest with each other and in all our business relationships. Behaviours that fall short of our high standards are not tolerated and may result in disciplinary action, which could include losing your job".

32 The respondent's policy on reducing (the price of) and disposing of dated stock states that:-

"The aim should be to reduce the products to sell to customers in the first instance, in good time to avoid unnecessary wastage. However, if not sold products must be removed from sale and before the end of their branch life and either:-

- reduced for partner shopping
- used in the dining room

Failing this products must be destroyed"

33 The same policy goes on to state:-

"Any product which has reached its use by date must be recorded as wastage and disposed off. Products which have reached their best before date can be moved to the partner shopping area …"

34 The policy gives specific examples as to how certain items should be treated. In particular, in relation to "damaged dry goods" the policy states that:-

"They must be taped up [and] either reduced and sold to Partners or used in the dining room."

35 The partnership's partner policy on selecting, collating and delivering own goods expressly states that:-

> "No one may: reduce, cut, weigh, price or wrap items which they intend to purchase themselves [or] select items from any preparation rooms or storage areas, except the designated area for Partners shopping."

36 The policy goes on to state that:-

> "If a Partner would like to purchase something they have reduced, the product must be signed for by a Manager."

37 The claimant signed an updated contract of employment on 13 September 2015 in which she acknowledged that she had read and accepted the contents of the respondent's partnership handbook, which contains many of the above policies. The claimant says she was provided with version 6 of the partnership handbook at that time, whereas subsequently a version 7 was in use. However, both versions were in the bundle of documents before this Tribunal and, as the claimant accepted, the relevant provisions are materially the same. The claimant was therefore aware of the policies in the partnership handbook.

38 In respect of reducing and purchasing stock, the Branch has the following rules:-

(a) Partners are only allowed to reduce stock with the authority of a manager;

(b) Partners are allowed to purchase reduced stock during their break or at the end of their shift. If partners purchase reduced stock during their break, they should get the receipts signed by a manager and should store the purchased items either in their lockers or in the chiller in a sealed bag, with the receipt; and

(c) "Use By" stock that has passed the "Use By" date cannot be sold to partners or customers.

39 The rules regarding the purchasing of reduced stock are made clear to every partner during their induction at the branch.

40 Where an item is past its "Use By" or "Best Before" date it can no longer be sold to customers. "Use By" dates are typically found on fridge items and such items must be disposed off once they have passed their "Use By" date. Items past their "Use By" date can never be sold and must be disposed off in the bins in the branch. "Best Before" dates are typically found on fruit and veg, cakes, biscuits, crisps and other ambient products. Although items which have passed their "Best Before" date cannot be sold to customers, in accordance with the respondent's objective of disposing of 0% of food fit for

consumption, it is possible for these items to be moved to the designated partner shopping areas and sold to partners at a discounted rate for a period after the "Best Before" date (typically two weeks). Items which have passed their "Best Before" date are usually reduced by the Duty Partner and then moved to the designated partner shopping area. Partners can then select to buy any of the reduced items at the end of their shift. If an item has not been purchased on the last day of use, an additional discount may be applied. Once purchased, all partners shopping must be bagged, sealed and labelled with the partner's name and the receipt signed by a manager. Details relating to the partner shopping procedures were set out on posters around the branch and in the respondent's partner shopping policy, which can be found on the respondent's intranet. Partner shopping is mandatory in all branch stores of the respondent.

41 Products with a "Best Before" date which are moved to the partner shopping area must be recorded as "wastage" using a handset. However, the term "wastage" does not mean that the products are waste to be disposed of; rather they are manually reduced and then available for sale to partners in the partner shopping area. There is therefore still value in the product as it can be sold to partners.

42 Partners also undergo regular food safety and hygiene training, both when they begin working at the respondent and annually thereafter. The last training the claimant received was on 16 September 2015.

43 In the bundle of documents for this hearing were the slides from recent training given by the respondent. They make clear the rules outlined above regarding labelling and the distinction of "Use By" and "Best Before" dates.

44 The claimant maintained at this Tribunal that these slides were not used at her most recent food safety and hygiene training. However, the evidence of the respondent's witnesses, which I had no reason to doubt, is that these practices have been in place at the respondent for many years. It is highly unlikely therefore that the respondent would run a training course in food safety and hygiene without reference to this distinction. Furthermore, for the reasons below, I have reason to doubt the claimant's credibility. Therefore, for all these reasons, I find that on the balance of probabilities the claimant was trained on this distinction of "Use By" and "Best Before" and that she knew that when a product passed its "Best Before" date, that did not mean it could not be sold; it only meant it could not be sold to customers; but it was however available to be sold to partners in partner shopping.

45 As noted, there were also posters up on the walls in the staff only areas of the branch which explain how partner shopping works (and in particular the difference between "Use By" and "Best Before" dates).

Events of 21 April 2016

46 On 21 April 2016, one of the partners at the Branch identified three coffee and walnut cakes with a "Best Before" date of 20 April 2016 and, in accordance with the usual Branch procedures, moved these cakes over to a small area away from the shop floor, which was not in the designated partner shopping area. As these cakes had passed their "Best Before" date, they were due to be reduced prior to being placed in the designated partner shopping areas. Mr Nick Stower, a Senior Team Manager, was alerted to the fact that one of these three cakes had subsequently been moved and he saw that it had been put on top of the staff lockers. Mr Stower assumed that one of the partners was intending to ask him to reduce the cake in order for them to buy it. Mr Stower later saw the claimant leaving the branch and was suspicious that she may have taken the cake without permission and without paying for it. The claimant was subsequently subjected to a bag search as she left the branch and the cake was found at the bottom of her bag, concealed by clothing items placed on top of the cake. The claimant had not paid for the cake and had not been given permission to take it. Consequently, the claimant was suspended from work pending an investigation.

47 There is no dispute that the claimant took the cake; that it was in her bag and that she had placed clothing over it; that she had not paid for it; and that she immediately admitted, when asked by Mr Stower, that she had not paid for it.

48 Mr Stower wrote a statement of what happened. In that statement are references to Gina, a partner who had asked Mr Stower if he had moved one of the cakes, which is what alerted Mr Stower initially, and to Abu, another partner whom Gina had asked as to whether he had moved the cake. Their involvement, however, in no way impacted on the core facts which are relevant here, and which are not disputed, as set out in the paragraph above.

Investigation

49 The respondent wrote to the claimant confirming her suspension on 21 April 2016. The claimant was invited to attend an investigatory meeting, conducted by Mr Steve Roome, Store Manager, on 29 April 2016. At the investigatory meeting the claimant explained that, at the end of her shift, she had come across the three out of date cakes and had recorded one of the cakes as a wastage item on the Branch's handheld terminal before taking the cake and putting it in her bag. As per the respondent's partner shopping policy, the claimant was not authorised to reduce items which she intended to take for herself and was also not authorised to select any items for purchase by her which were not in a designated partner shopping area. The claimant initially claimed that she did not see taking the cake as theft as she had wasted the item and it could not be sold (albeit she was incorrect in that assertion given that the item had a "Best Before" date). The claimant then went on to say that she had taken the cake with the intention of putting it in a bin outside the branch in order to maintain the health and safety of partners

and customers by ensuring no one could consume the out of date cake. The claimant claimed that she did not take the other two out of date cakes because she could not carry them and because only one of the cakes was damaged (the one she had taken). (She admitted at this Tribunal, however, that she could have carried all three cakes to the internal bins at the Branch to dispose of them had she been so minded to do.)

50 The claimant was unable to provide a satisfactory explanation for why she wanted to dispose of the cake in a bin outside the branch rather than using the branch's rubbish bins, which she had walked past as she left the branch. Her only explanation was that she felt the bin outside the branch was more effective. The claimant confirmed that she understood the partner shopping rules and that it was also her responsibility to ensure that she understood them.

51 Mr Roome sent the claimant the notes of the investigation meeting and asked her to read them to confirm they were a fair representation of the meeting.

52 Having considered the evidence, Mr McCormack, who was designated to hear any disciplinary hearing in relation to the claimant, asked Mr Roome to ask the claimant some further questions about her knowledge of the respondent's procedures and the claimant was subsequently invited to a second investigation meeting on 20 May 2016. At the beginning of the meeting Mr Roome asked the claimant to confirm that she had received the notes of the previous meeting. The claimant advised that she had not received them and Mr Roome gave her another copy and asked her to read them to confirm that they were an accurate reflection of the first meeting. To allow the claimant time to read the notes, the second investigation meeting was postponed to 23 May 2016.

53 At the beginning of the rescheduled second investigation meeting on 23 May 2016, Mr Roome asked the claimant to confirm that she had read the notes and that she was happy that they were a true reflection of what was said, which she did. During this meeting, Mr Roome also asked the claimant further questions in relation to what she would usually do when she found out of date items, whether she had previously taken other items and how the claimant thought her behaviour might be perceived. The claimant confirmed that if she saw someone taking something from the shop floor, she would consider it to be theft but she did not know how she would perceive it if she saw someone taking something from the warehouse. The claimant confirmed during this meeting that she had not previously seen anyone take a "wasted" item without permission or been told that such behaviour was acceptable. The claimant also acknowledged that it was her responsibility to understand the respondent's rules and regulations.

54 Following the meeting, on 27 May 2016, Mr Roome sent the claimant a copy of the notes from that second investigation meeting.

55 Following the completion of the investigation, Mr Roome considered that there was a disciplinary case to answer.

Disciplinary Meeting

56 A letter was sent to the claimant on 31 May 2016 inviting her to attend a disciplinary hearing on 3 June 2016. The claimant was informed that the meeting may result in her dismissal. The reason for the invite to the disciplinary hearing, as recorded in the letter, was "potential serious misconduct – namely theft". The invitation letter enclosed a copy of the investigation pack, including a copy of the respondent's disciplinary procedure and the meeting notes from the investigation stage. The claimant was also made aware of her right to be accompanied. The disciplinary hearing was due to take place on 3 June 2016 and to be chaired by Mr McCormack, a Store Manager from a different branch of the respondent, with an independent note taker present.

57 On 2 June 2016, the claimant wrote to Mr McCormack to confirm that she would not be attending the hearing and enclosing her written submissions. Mr McCormack received the claimant's letter and written representations on the morning of 3 June 2016, shortly before the disciplinary hearing was due to take place at 2.30pm. Mr McCormack considered the claimant's written submissions in her absence and reviewed all of the relevant evidence including documentation gathered during the investigation and the notes of the investigation meetings with the claimant. Mr McCormack clearly carefully considered all of the evidence available to him, as is evident from the detailed notes of his deliberations, put together by the independent note taker.

58 It was clear to Mr McCormack from the notes of the investigation meetings that the claimant understood the correct procedures for dealing with out of date items. In her written submissions, she expressly stated that she had been trained on the food price reduction process and received regular food safety training, which included training on "Use By" and "Best Before" dates and wasting items. Mr McCormack therefore considered that the claimant was therefore aware that when an item had been wasted, it should be thrown in the designated food waste bins if it was not of a "Best Before" nature, in which case it could be put forward for partner shopping. He did not find the claimant's explanation as to why she thought the cake should be thrown in the bin outside the Branch, rather than a designated food waste bin in the Branch, to be credible. The claimant had, as noted, been required to complete mandatory food safety training on an annual basis and that she would have been, in Mr McCormack's opinion, familiar with the rules around "Use By" and "Best Before" and how to dispose of food waste. He noted that she most recently completed the training on 16 September 2015.

59 Mr McCormack also noted that, in her written submissions, the claimant referred to the fact that "out of date" food was sold to partners in partner shopping. To him, that meant that the claimant was also aware that items

past their "Best Before" date could be sold to partners. He noted that there were posters up on walls in the staff only areas of the Branch which explained how partner shopping worked (and in particular the differences between "Use By" and "Best Before" dates) and that the claimant had confirmed during investigation meetings that she was aware of and understood the partner shopping rules. He noted that the claimant told Mr Roome that there were some new rules that she was unsure of but that, however, the new rules related to the fact that partners could now buy a reduced product on the last day of its shelf life at a further reduction and that this therefore had no impact on the claimant's situation in relation to this incident. He noted that, although there was only one date on the cake which the claimant took, it was clear from a picture of the cake, which the claimant herself provided, that this was a "Best Before" date. In the light of this, Mr McCormack did not find the claimant's explanation as to why she took the cake to be credible.

60 He noted that the claimant had enclosed a picture of the cake which she had taken showing a picture of the "Best Before" date of 20 April 2016, which the claimant considered to be the last day on which the cake could be sold. However, he noted that this was, of course, incorrect and that products which have passed their "Best Before" date could still be sold to partners in the designated partner shopping area for a certain period after they had passed their "Best Before" date. He did not find her explanation credible and the picture of the cake which he submitted did not alter that view. Whilst the picture clearly showed the "Best Before" date, this did not mean that the cake needed to be disposed off. It also, in his opinion, did not explain why the claimant had concealed the cake and removed it from the branch.

61 The claimant had stated that she did not consider her actions as theft as she considered the cake did not have any value. She claimed that, as a partner, she felt responsible for the health and safety of her fellow partners and the reputation of the partnership and could not accept food items past their shelf end date, that had not been reduced, left unattended. She had gone on to say that, even if taking the cake amounted to theft, she could not accept that a "one off unimportant, pseudo theft" amounted to serious misconduct. She had explained that she thought that Mr Stower should have considered and let her explain the situation before he had suspended her and she claimed that she never had the intention of stealing the cake.

62 However, Mr McCormack did not find the claimant's explanation as to why she took the cake to be plausible. In particular, there were three things which stood out to him. These were as follows:-

1. The claimant had only taken one out of the three cakes which had passed their "Best Before" date. If the claimant was genuinely concerned about health and safety, Mr McCormack did not understand why she would leave two of the cakes in the same location where she felt they posed a risk to health and safety;

2. There are designated food waste bins in the Branch, which the claimant would have had to walk past, and there was therefore no good reason why the claimant would need to dispose of the cake in a bin outside the branch, even if she thought it needed to be disposed off (which he did not find credible anyway); and

3. The claimant had concealed the cake beneath items of clothing in her bag. If she was genuinely intending to throw the cake away as she believed it was necessary for health and safety reasons, she would have had no need to conceal it.

63 In accordance with the partnership's policies, Mr McCormack did not agree with the claimant's claim that taking the cake did not amount to theft because the cake did not have any value. He also disagreed with the claimant's assessment that her actions should be categorised as "one off unimportant, pseudo theft" which was not capable of amounting to serious misconduct. He believed that the claimant was in breach of the partnership policies, as referred to above, of which she was aware, and the value of the cake and the one off nature of the misconduct did not mitigate against the seriousness of the breach. In his view, all partners are aware of the need to abide by the partnership's handbook and policies. In any event, he considered that it was reasonable to assume that the claimant understood that taking an item in the manner that she did, without permission and without paying for it, was wrong, regardless of its value.

64 Having reviewed her written submissions and the other relevant documents, Mr McCormack adjourned the meeting to consider the appropriate outcome. He considered his findings and wanted to check the reasonableness of his decision and so he contacted the respondent's HR team during the adjournment. They reminded him that, before imposing any sanction, he needed to have a genuine and reasonable belief that the claimant was guilty of serious misconduct based on the evidence gathered. He explained the background and his findings to the respondent's HR team and they agreed with his decision.

65 Mr McCormack concluded that the claimant was guilty of misconduct, namely theft, and that, due to the seriousness of the misconduct, it was appropriate to dismiss with immediate effect. As he would in all cases, he did consider whether a lesser sanction may have been appropriate. However, given the nature of the allegations against the claimant and the fact that he did not find her explanation to be credible, not only did he believe that the claimant had stolen the cake but he also believed that she had lied about her actions and therefore he considered dismissal was the appropriate sanction in the circumstances.

66 He reconvened the meeting and confirmed that he was proposing to terminate the claimant's contract on the grounds of serious misconduct. The claimant had taken a cake without permission and without paying for it; the partnership takes any form of theft seriously, regardless of the value of the

item taken, and the claimant's actions were, in Mr McCormack's opinion, a clear breach of the partnership's policies and procedures, which the claimant had acknowledged that she was aware of. He also believed that the claimant had stolen a cake and then lied about her true intentions. This was particularly serious in his view as it would mean that the partnership could not trust the claimant. Such behaviour in his view broke down a relationship between an employer and an employee. That was why he did not believe that actions short of dismissal would be appropriate.

67 Following the meeting, Mr McCormack wrote to the claimant on 3 June 2016 to advise her of his decision to dismiss her on the grounds of serious misconduct, namely theft, and he enclosed a copy of his detailed notes of the Disciplinary Hearing. The letter confirmed the claimant's right of appeal against the decision and stated that she could seek more information and support from the respondents "partner support" if required.

Written Reasons

68 On 10 June 2016, Mr McCormack received an email and letter from the claimant requesting further reasons for her dismissal. He responded to the claimant's email on 14 June 2016 to confirm that, as per the dismissal letter, the reason for her dismissal was serious conduct, namely theft. He also confirmed that she should have received the notes of the disciplinary hearing which included the summary of the outcome and the reasons why Mr McCormack came to the conclusion which he did. The claimant responded the same day requesting a "written statement of reasons for dismissal", on the basis that Mr McCormack had only explained the nature of her dismissal (i.e. summary dismissal on the grounds of serious misconduct, namely theft).

69 Mr McCormack responded to the claimant's email restating the reason for dismissal as serious misconduct, namely theft, and copied an extract from the disciplinary meeting notes which summarised the fact that the claimant had taken a cake, concealed it in her bag and sought to leave the branch without paying for the cake, which he considered to be serious misconduct which warranted summary dismissal.

70 On 16 June 2016 the claimant emailed Mr McCormack again to ask him to provide the reason as to why he considered summary dismissal to be the appropriate sanction. By that point he felt that he had already answered the claimant's question and, as he did not think that there was anything else that he could add, did not reply to the claimant's email.

Appeal/Grievance

71 On 9 June 2016, the claimant wrote to the respondent appealing against the decision to dismiss her. The claimant's grounds of appeal included: that the process was not followed properly; the sanction was too harsh; and that information the claimant had provided had not been taken into account.

72 On 16 June 2016, the respondent wrote to the claimant to acknowledge receipt of her appeal and to confirm that an appointment was being arranged with the Partners' Counsellor's Office for her appeal to be heard. She was informed of her right to be accompanied.

73 The claimant had submitted a grievance on 4 June 2016. After reviewing the content of the grievance, the respondent concluded that it should not be progressed through the grievance procedure and instead passed it on to the appeal manager to include in their considerations as it related to the claimant's dismissal. The respondent wrote to the claimant on 23 June 2016 to advise her of this.

74 On 19 July 2016, the claimant wrote to the respondent to confirm her attendance at the appeal hearing on 21 July 2016. The claimant also submitted various documents, including an "addition to the grounds for the appeal", various emails, letters and print outs from Partner Link (the respondent's HR system).

75 On 21 July 2016, the claimant attended an appeal meeting chaired by Ms Dee Monaghan, an Appeals Manager. Ms Monaghan is a manager from the appeals office within "Registry", a department entirely separate from the respondent's management. Her function is specifically to hear appeals against dismissals and grievances.

76 The claimant declined to be accompanied by a colleague/trade union representative. At the meeting she explained her grounds of appeal to Ms Monaghan and the claimant and Ms Monaghan agreed that Ms Monaghan would investigate the following points:-

1. That, having found the cake in the claimant's bag, Mr Stower had instantly suspended the claimant and refused to listen to her explanation;

2. That Mr Roome had told the claimant that he wanted to meet the claimant for a "little chat" but when she had arrived she had been told that it was an investigation meeting;

3. That the claimant had not received a copy of the notes following the investigatory meeting on 29 April 2016 and had to ask for them;

4. That the notes taken at the meetings with Mr Roome did not reflect "exactly" what the claimant said and she felt they presented her as being "submissive"; and

5. That the claimant was not provided with reasons for why summary dismissal was chosen as an appropriate sanction.

77 Following a full and thorough review of the claimant's appeal, which included interviewing Mr Stower, Mr Roome and Mr McCormack, Ms Monaghan concluded that the evidence showed that the claimant had committed serious misconduct in that she had stolen the cake. Ms Monaghan found no evidence to substantiate the claimant's appeal and it was not upheld.

78 On 15 August 2016, Ms Monaghan wrote to the claimant confirming that her appeal was not upheld and setting out her findings. The outcome letter was extremely detailed. A summary of her findings, with reference to the claimant's grounds of appeal, is as follows:-

1. Ms Monaghan was satisfied with the reasons why Mr Stower had suspended the claimant pending an investigation. It is normal procedure for individuals to be asked for their account of the incident by the investigating manager and not the person who suspends them;

2. Ms Monaghan was satisfied that Mr Roome had made it clear to the claimant that he wanted to meet her to investigate the reasons why she had attempted to leave the branch with a cake concealed in her bag which had not been paid for;

3. Ms Monaghan noted that, as soon as Mr Roome became aware that the claimant had not received the notes of the first investigation meeting, he provided her with a copy and rescheduled the second investigation meeting in order to give the claimant time to read them;

4. Ms Monaghan noted that, when the claimant had been asked whether the meeting notes were a true reflection of the conversation between the claimant and Mr Roome, the claimant had, without hesitation, confirmed that they were. In addition, Ms Monaghan was satisfied, having reviewed the meeting notes and the claimant's written submissions and spoken to the claimant, that the key facts (being that the claimant had wasted one cake, concealed it in her bag and attempted to take it from the branch without payment or permission) were not in dispute; and

5. Ms Monaghan was satisfied that the claimant was aware of the type of conduct that amounted to misconduct and the rules around partner shopping procedures. Ms Monaghan was also satisfied that Mr McCormack had provided the claimant with written reasons for her dismissal.

79 During the appeal the claimant on two occasions also stated that she may have tasted the cake. This was a further reason why Ms Monaghan doubted the credibility of the claimant's original explanation about trying to protect partners from food that was unhealthy; if she had been worried about health and safety implications if the cake was sold to partners and therefore sought to dispose of it in a bin, why would she taste it herself?

80 Although Ms Monaghan dealt with the points the claimant had raised in her original grievance which related to her dismissal, she considered that as the claimant had also raised several additional points which had no bearing on her dismissal, those points should be investigated as a separate grievance. She therefore adjourned the appeal hearing and contacted Mr Kelly of HR to recommend that the claimant's grievance be picked up by an appropriate manager. Mr Kelly explained to Ms Monaghan whom the claimant should contact to progress her grievance and the details she needed to provide and Ms Monaghan passed this information on to the claimant when she reconvened the appeal hearing.

81 Consequently Mr Kevin Sharkey, another store manager, was appointed to hear the claimant's grievance and the claimant subsequently attended a grievance hearing on 9 August 2016. Mr Sharkey duly investigated and turned down the claimant's grievance.

82 Having read through Mr Sharkey's statement, I find that the points in that grievance were not relevant to the claimant's dismissal and primarily concerned allegations which had nothing to do with the dismissal. The only allegation in the grievance which in any way could be linked to the claimant's dismissal was a complaint about Mr Stower's decision to suspend the claimant. However, in the light of the facts that were admitted at the point when Mr Stower found the claimant with the cake in her bag, which required an explanation of circumstances which, in the absence of an explanation, looked like theft, suspension was a normal and reasonable course of action. Mr Sharkey also considered that the decision to suspend was a reasonable one. In relation to the other allegations in the grievance, he properly investigated and duly turned them down.

Conclusions on the Issues

83 I make the following conclusions, applying the law to the facts found in relation to the agreed issues.

84 First of all, I find that the reason for dismissal was conduct. That is clear from the dismissal letter, the notes of Mr McCormack's deliberations at the disciplinary hearing and the further reasons he sent to the claimant when she requested them. No other reason was suggested at any point during the internal proceedings or in the claim form or in the questions put to the witnesses at this hearing. The claimant suggested at the end of her cross examination at this hearing and in her written submissions and oral submissions a rather strange conspiracy theory that somehow the respondent was out to get her and that some of the complaints in her grievance were evidence of this. However, I accept Mr Lockley's submission that it is impermissible for me to consider this anyway as it was not part of the claimant's claim nor was it put to the respondent's witnesses. In any event, even if I were permitted to consider it, the allegation is incoherent and hard to understand even as put by the claimant. Furthermore, there was no evidence beyond speculation and assertion on her part that there was a

conspiracy to dismiss her. Furthermore, Mr McCormack and Ms Monaghan, who made the decisions in relation to her dismissal, were entirely independent of the claimant's Branch and could not therefore be affected by anything which the claimant alleged in her grievance happened to the claimant in the Branch. By contrast, it is not disputed that the claimant took the cake and did not pay for it, so that is clearly likely to be the more probable reason for dismissal. I therefore find that the reason for dismissal was conduct, namely the alleged theft of a cake.

85 Furthermore, it is clear that Mr McCormack genuinely believed that the claimant had stolen the cake. That is clear from the dismissal letter, his notes of the disciplinary hearing and the reasons for dismissal which he subsequently sent to the claimant, as it was from his evidence both in his written statement and his oral evidence before this Tribunal. Ms Monaghan also clearly genuinely believed that the claimant was guilty of theft, as is evident from her outcome letter and her written and oral evidence before this hearing.

86 I therefore turn to the issue of whether or not the belief that the claimant had committed theft was reasonably held.

87 First, as noted, the core facts are not disputed. The claimant took the cake out of the store without paying for it. Furthermore, she admitted in evidence that she had never done this before and that she had never seen anyone else do it. In his interview with Ms Monaghan, Mr Roome told Ms Monaghan that there was no culture of partners taking stock out of the Branch.

88 Therefore, I accept Mr Lockley's submission that it was therefore incumbent on the claimant to give an explanation as to her reason for doing this, the core facts of which are not in dispute. For a number of reasons, the explanation she gave in the investigation and beyond was not credible.

89 Firstly, she said in the investigations that the cake had no value so it could not be theft. Even if she did genuinely believe this, it would still be misconduct to take a cake with no value as it is clear from the respondent's policy that taking stock even without value is theft.

90 However, as she admitted in cross examination, the claimant did know that it could be sold as she said she saw that happening in the branch. Her own definition of value was that, if something could be sold, it had value and she said this in the investigation meeting. Therefore, contrary to her assertion, she did know that the cake had value.

91 Secondly, the respondent's policies, training and posters around the Branch, were clear on the distinction of "Use By" and "Best Before". As I have found, the claimant was aware of the policies and had had the training, and it is inconceivable that she did not see the posters in the store. Therefore I find that she did know of this distinction, and that "Best Before" goods could, after

the "Best Before" date had expired, be sold by the respondent to partners in partners shopping.

92 The claimant admitted in the investigation that she was aware of the rules and understood them. The only change in the rules had been one relating to stock on the shop floor. The incident related to stock (the cake) that had been removed from the shop floor and therefore the change to the rules did not impact on the claimant's understanding of the relevant rules for the purposes of this incident.

93 However, crucially, the story the claimant told in the investigation, namely that she took the cake because she wanted to save other partners from the risk of exposure to out of date food, was incredible for a number of reasons as follows:-

1. Firstly, if this was the case, why did the claimant take only one cake and not the other two (which were also past their "Best Before" date). At this Tribunal, the claimant said the distinction was that the one she took had a small hole in the packaging and was therefore damaged. However, the respondent's policy is clear that, in such cases, the item should be taped up and could still be sold to partners. This excuse is not therefore credible. The claimant also said that she could not carry all three cakes. That is incredible in its own right. However, at this Tribunal the claimant admitted that she could have carried all three cakes to the indoor bins. She also said at this Tribunal that she did not want to interfere with the plans for the other two cakes. However, that makes no sense; why would she want to interfere with one cake and not the other two if she thought that all these products, because they were passed their "Best Before" date, were a danger to partners' health.

2. The second reason to doubt the credibility of the explanation regarding protecting partners is that it does not explain why the claimant did not simply dispose of the cake or cakes in the respondent's internal bins, which would be much easier for her to do and which she admitted she had to walk past on the way to her locker in the branch. She could not explain this adequately in the investigation. When it was put to her in cross examination at this Tribunal, she seemed to be suggesting that doing so would not be enough to protect the partners, as if partners would somehow be looking for items to eat in the internal bins, when they could easily buy them at a discount under the respondent's partner shopping policy. The explanation therefore became even more absurd.

3. Thirdly and finally, the claimant could not explain why the cake was concealed beneath clothing in her bag. If she wanted to bin the cake, there is no reason why she would cover it up.

94 All these three reasons were key in Mr McCormack's concluding that her explanation was false and that in fact she intended to take the cake to consume it.

95 In the light of this, his conclusion in this respect that she did take the cake for personal consumption and it was therefore theft was entirely reasonable.

96 However, Ms Monaghan then had a further reason to doubt the credibility of the claimant's explanation. The claimant told her twice that she may have tasted the cake. This is of course hardly something that you would do if you considered that consumption of the cake was a danger to health and safety.

97 Therefore, these inconsistent and incredible explanations were more than enough to found a reasonable belief that the claimant's motivation in taking the cake was not to protect partners and was therefore for her own consumption. As such it was theft of property belonging to the respondent and serious misconduct.

98 The claimant has criticised the investigation carried out. However, the key point is again that the core facts were never in dispute. All that was at issue was the claimant's motivation in taking the cake.

99 The investigation was thorough, consisting of two investigatory meetings. The second may not even have been necessary but came about through an abundance of caution on Mr McCormack's part, to the claimant's benefit, to ensure that she was aware of the respondent's procedures.

100 The claimant suggested that Gina and Abu should have been interviewed. However, there was absolutely no need to do so; interviewing them would have added nothing to the core facts already established, so it was not unreasonable for the respondent not to do so.

101 The disciplinary hearing was thorough. It was the claimant's own decision not to attend it. Furthermore, from the letter she wrote to Mr McCormack it was her expectation that the hearing should go ahead and should be on the basis of her written submissions. Nevertheless, as is evident from the notes, Mr McCormack did a thorough examination of the evidence before him, including the written evidence that the claimant submitted for the hearing, before reaching his decision.

102 The appeal was particularly thorough and I note that it was carried out by an independent appeals manager, someone who was independent of the respondent's management. Ms Monaghan carried out with the claimant a thorough lengthy hearing lasting over two hours and investigated all the outstanding points, including doing further relevant interviews, before responding to the claimant in a detailed outcome letter in relation to all of these points. For the thoroughness of this investigation, she, and the respondent as a whole, is to be complemented.

103 The investigation was therefore entirely reasonable.

104 As to procedure, there was a suggestion from the claimant that there was undue delay. I do not, however, accept this. Six weeks from the date of the incident to the claimant's dismissal is not an undue delay in these circumstances in any event. Furthermore, any delay by the respondent was to carry out a further investigatory interview and to allow the claimant to have more time to read the notes of the first interview, both of which were to the claimant's benefit.

105 The claimant suggested that Mr Roome's notes were inaccurate. However, she never pointed out in what respect they were, even when Ms Monaghan gave her a break during the appeal hearing in order to consider this. I do not therefore find that they were inaccurate.

106 As to the point about the different versions of the partner handbook, I have already found that there was no material difference between version 6 (which the claimant was aware of) and version 7. There is therefore no unreasonableness in this respect.

107 The claimant alleged that she did not receive written reasons for her dismissal. However, as I found at the start of the hearing, and is clear from the findings of fact above, she did receive written reasons, both in the dismissal letter and the notes which were sent with the dismissal letter and in further emails from Mr McCormack.

108 There were therefore no procedural defects in relation to the dismissal nor was there any breach of the ACAS Code.

109 As to sanction and whether the decision to dismiss was within the range of reasonable responses open to a reasonable employer, Mr McCormack found that the claimant had committed theft; that she had taken an item dishonestly; and that all this was compounded by her untrue explanations in the investigation. She could have admitted the truth that she took the cake for her own consumption and declared that she would never do something like that again, but that was not what she did.

110 Employers generally place trust and honesty in their employees at a premium; I accept that, as Mr Lockley submitted, the respondent placed trust and honesty at an ever greater premium, as set out in the partners handbook. This is, furthermore, entirely reasonable given that the respondent has thousands of employees handling small items of food on a daily basis.

111 The respondent's procedures are clear that theft is serious misconduct and can lead to dismissal. This is the case for any item, however small, and even if it has no value (which was not the case in relation to this cake, which did have value).

112 Mr McCormack did not immediately decide to dismiss and considered whether there was any mitigating evidence. He even referred his decision past the respondent's HR Department who confirmed to him that they did not consider it to be unreasonable.

113 The decision was therefore well within the range of reasonable responses and was not therefore unfair.

114 To pick up some of the points in the claimant's written submissions that have not already been covered above:-

1. I do not consider that the suspension was unfair in itself or unduly long. It is perfectly reasonable to suspend in the case of suspected theft, as there is a risk in the case of potential dishonesty of a further offence and the respondent losing further stock. The period, as already referred to, was not unreasonable in duration and its length was partly due to decisions taken, for example to hold a further investigatory meeting, which were for the claimant's benefit. Furthermore, the claimant was on full pay throughout her suspension, which mitigated any prejudice to her.

2. The claimant says that the investigation was about "trapping" her. However, there is no evidence of this beyond assertion. Questions asked by Mr Roome were in any case entirely appropriate to the circumstances of the case.

3. Finally, the claimant maintains that to dismiss her for "serious misconduct – theft" automatically implies to a future employer that she must have stolen money. However, it does not and the other documents are clear that she was dismissed for the theft of a cake. Whatever her future employer may think of the claimant's dismissal or the reasons for it does not impact upon the fairness or otherwise of the dismissal.

115 In the light of my decision that the dismissal was not unfair, the issues relating to contributory conduct and Polkey fall away.

116 However, in the alternative, I consider that, for the same reasons as Mr McCormack and Ms Monaghan gave, the claimant did commit the conduct for which she was dismissed, namely theft of a cake, and that the claimant's conduct contributed wholly to her dismissal and would therefore have made a 100% reduction in both basic and compensatory awards for unfair dismissal in the event that the dismissal had been unfair.

117 Similarly, had there been any procedural defect, I consider that it would not have made any difference to a fair dismissal taking place by 3 June 2016 in any event and would therefore have made a 100% reduction in any compensatory award under the principles in Polkey.

Respondent's Costs Application

118 Mr Lockley then made an application for costs.

119 The Tribunal's powers to make awards of costs are set out in the Employment Tribunal Rules of Procedure 2013 at Rule 74-84. The test as to whether to award costs comes in two stages:-

1. Firstly, has a party (or that party's representative) acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted or did the claim or response have no reasonable prospect of success? If that is the case, the Tribunal must consider making a costs order against that party.

2. Secondly, if that is the case, should the Tribunal exercise its discretion to award costs against that party? In this respect the Tribunal may, but is not obliged to, have regard to that party's ability to pay.

120 I explained in summary the law in relation to costs as set out above, for the claimant's benefit, before Mr Lockley commenced with the detail of his application.

121 Before making his application, Mr Lockley handed up two documents, firstly a costs schedule and secondly a letter of 26 January 2017 from the respondent's solicitors to the claimant marked "without prejudice save as to costs".

122 Mr Lockley's application was on the basis that the claim had no reasonable prospect of success and that the claimant had acted unreasonably in continuing with the claim after the "without prejudice save as to costs" letter.

123 Although the respondent had incurred a total of £14,870, including Mr Lockley's brief fee, in defending the claim, it was only seeking a costs award in respect of £4,530, which represented the sums incurred following the "without prejudice save as to costs" letter (all sums exclude VAT and Mr Lockley confirmed that the application was not for VAT as well, which could be recovered by the respondent).

124 Mr Lockley and the claimant, who opposed the application, then made submissions. I adjourned briefly to consider and, when the parties returned, gave them my decision.

Stage One

125 I decided that the claim had no reasonable prospects from the start for the reasons which I had already set out in my decision on liability. In the light of

the undisputed facts of what happened and in the light of the evidence of what she did, which the claimant had full knowledge of from the start, it was clear that the respondent had behaved entirely reasonably in concluding that she had stolen the cake and in deciding to dismiss her. The respondent was fully entitled to find that she had committed theft and to dismiss her for it. Whether the claimant's view at the time or at this hearing was that the taking of the cake was only of an item which had no or trivial value was irrelevant; it was nonetheless theft and the respondent was clearly not unreasonable in dismissing for that. Therefore, I concluded that the claim had no reasonable prospect from the point it was brought and the first stage of the test was met in this respect.

126 Secondly, I also found that it was unreasonable conduct on the part of the claimant to continue to pursue the claim after the "without prejudice save as to costs" letter had been sent to her. That letter was not, as she submitted, mean. By contrast, it was a measured and reasoned letter, put in simple language, which politely pointed out why the claimant's claim would fail. It even went so far as to give the claimant the name of a local Citizens Advice Bureau and encouraged her to take some legal advice on the merits of her claim. However, the claimant did not take this up. It was not unreasonable of the respondent to send this letter; if the claimant had followed its advice she may not have been in the position that she is in now. By contrast, the fact that the claimant chose to pursue the litigation after receiving that letter was unreasonable in the light of the obvious weaknesses in her case, which had been pointed out in the letter. The first stage of the test is therefore met in this respect as well.

Stage Two

127 As noted, the respondent incurred £14,870 of costs but was only claiming £4,530 of those costs, namely those incurred after the date of the "without prejudice save as to costs" letter. I note that, as I considered that the case had no reasonable prospect of success from the start, the larger amount of costs flow from that, albeit the respondent is not seeking to claim them. The costs were incurred by reference to fixed fees for different aspects of the litigation (not by reference to an hourly rate for the number of hours a particular solicitor did). However, having looked through the schedule and seen what the items were which incurred the costs, the costs incurred by the respondent after the date of the letter (as indeed is the case with the costs incurred prior to the letter) were unsurprising in their amount and were not unreasonable given the amount of work likely to be required to prepare for a hearing of this nature. The claimant complained that the respondent used a Bristol set of solicitors for a case in London; however, I consider that, from my experience, a reasonable quality firm of London solicitors would be unlikely to be cheaper. Furthermore, Mr Lockley is a barrister of 3 years' call and I did not consider that his brief fee of £1,480 (which was part of the costs sought) was unreasonable for someone of that level of call in relation to preparation for and representation at a two day hearing.

128 Therefore, I would have been minded to award the full amount of costs sought but for the claimant's means.

129 The claimant has no income (despite making efforts to find work); she has no assets or savings; she has just lost her housing benefit and jobseekers' allowance and has been threatened with being deported; she has outgoings of £625 per month for rent and bills and she has outgoings for underground tickets (which she said amounted to around £1,000 per month). Although the figure for underground tickets seems to me to be surprisingly high it is nonetheless clear that the claimant has very limited means to pay costs and, for that reason alone, I do not make an award of costs in the full amount asked but make an award in a nominal amount of costs only, being £500. This is an amount which the claimant will be able to find the means to pay in some way, whether it be by borrowing, some form of assistance, future income etc. The respondent has not indicated that it will seek to enforce the whole debt straight away if the claimant is unable to pay it all straight away.

130 I would add that I do not consider, as the claimant has submitted, that it was "mean" of the respondent to apply for its costs at the end of the hearing; by contrast, I consider that it was entirely reasonable for the respondent to do so, given that it has unnecessarily had to incur almost £15,000 of costs in relation to a meritless claim. As the claimant knows full well, as the respondent is collectively owned, that money effectively comes out of the pockets of, at least in part, the claimant's former co-workers.

131 Since the above reasons were given orally at the hearing, the claimant wrote to the Tribunal on 27 February 2017 requesting that the costs order be suspended on the basis of her means. However, account of her means was taken in the decision to make the costs order at the hearing (the reasons for which are set out in the paragraphs above). There are therefore no grounds for reconsidering that decision and that decision remains effective.

Employment Judge Baty
23 March 2017