EMPLOYMENT TRIBUNALS

Claimant: Mrs C Reynolds

Respondent: Royal Mail Group Limited

Heard at: Ashford

On: 11th and 12th December 2017

Before: Employment Judge Pritchard

Representation
Claimant: Mr D Percival, CWU representative
Respondent: Mr C Bailey-Gibbs, solicitor

JUDGMENT

1 The Claimant's claim that she was unfairly dismissed is well-founded and accordingly succeeds.

2 Any compensatory award will be reduced by 50% under the Polkey principle.

3 Any compensatory award shall be increased by 10% by reason of the Respondent's unreasonable failure to comply with the ACAS Code of Practice.

4 Any basic and compensatory awards will be reduced by 75% to reflect the Claimant's conduct and contribution to her dismissal.

REASONS

1. The Claimant claimed unfair dismissal. The Respondent resisted the claim.

2. The Tribunal heard evidence from the Respondent's witnesses: Andrew Williams (Dock CSS Indoor Manager); Stephen Nelson (Delivery Sector Manager); and Sue Knight-Smith (Independent Casework Manager). The Tribunal heard evidence from the Claimant and from Stephen Wisely (CWU Divisional Representative) who gave evidence on her behalf. The Tribunal was provided with a bundle of documents to which the parties variously referred. At

the conclusion of the hearing the parties made oral submissions supported by written submissions. The Tribunal reserved its decision.

The issues

3. The issues were discussed with the parties at the commencement of the hearing and were agreed as follows:

    3.1. Whether the Respondent can show the reason (or, if more than one, the principal reason) for the Claimant's dismissal and that it was for a reason relating to the Claimant's conduct. This will require the Respondent to show that they believed the employee was guilty of misconduct. The Claimant contended that she had been dismissed because of a perceived lack of flexibility on her part. Nevertheless, the burden of showing the reason for the dismissal remains with the Respondent;

    3.2. Whether the Respondent had reasonable grounds upon which to sustain that belief; and

    3.3. Whether at the stage at which that belief was formed on those grounds, the Respondent had carried out as much investigation into the matter as was reasonable in the circumstances;

    3.4. Whether the decision to dismiss fell within the band of reasonable responses which a reasonable employer might have adopted (the Claimant contended that she had been treated inconsistently in that other employees guilty of similar misconduct had not been dismissed);

    3.5. The Tribunal will have regard to any provision of the ACAS Code of Practice 1 of 2015 which appears to be relevant to any question arising in the proceedings and take it into account in determining that question;

    3.6. Whether any defects in the original disciplinary hearing or pre-dismissal procedures were remedied on appeal thus curing any such defects, having regard to the procedural fairness, thoroughness and open-mindedness of the decision maker at the appeal;

    3.7. If the Tribunal finds the dismissal was unfair by reason of any procedural defect, whether the Respondent might or would have dismissed the Claimant in any event and whether any compensation should be reduced accordingly (Polkey).

    3.8. Whether the Claimant caused or contributed to his dismissal such that any compensation should be reduced.

4. Other than issues relating to Polkey and contribution, the Tribunal did not otherwise consider the question of remedy. It was agreed that if the Claimant was successful in her claim, a further hearing would take place to consider remedy. Mr Percival indicated that the Claimant was no longer seeking re-instatement or re-engagement; she sought compensation only.

Relevant findings of fact

5. The Claimant commenced employment with the Respondent on 4 September 1989 based at the Respondent's Tunbridge Wells Mail Processing Unit (MPU). Throughout the course of her employment, the Claimant undertook delivery duties at Operational Postal Grade. At relevant times, the Claimant worked five days each week including Saturdays (although the roster arrangements meant that she did not work every sixth Saturday). She lived close enough to the MPU to be able to walk to and from work.

6. The Respondent's conduct policy provides, among other things:

> *When it is considered that an employee's conduct or behaviour has not met the required standard, the employee's manager will make a prompt and detailed investigation of the facts and may seek a more detailed explanation from the employee*

7. The Respondent's Code of Business Standards states, among other things, that it expects employees to act with honesty at all times. It reminds employees that they must not:

- *Claim money for a journey they did not make*
- *Claim an expense they did not legitimately incur*

and that this would be unacceptable and may be treated as gross misconduct.

8. Not least because of their responsibility for the care and safe delivery of postal items, the Respondent reasonably requires employees to act with honesty and integrity. Employees are reminded of this in the Respondent's Code of Business Standards.

9. In 2013, the Claimant's work base changed when she was transferred to the Respondent's Tonbridge delivery office. Given the distance from her home, the Claimant was now required to drive to work.

10. The Respondent agreed with the CWU to put in place, for a limited period of three years, an Excess Travel Expenses policy in order to compensate employees who now incurred greater travel expense travelling to and from work. This policy was part of the nationally agreed Managing the Surplus Framework (MTSF).

11. The Excess Travel Expenses Policy provides, among other things:

> *The amount claimed will not change during the three year period, unless the employee moves home or transfers again during that time, or if they cease to incur the extra cost (e.g. they are able to get to work with a lift from a colleague).*

12. The MTSF provides, among other things:

> *Employees will need all the relevant information on travel costs for their old journey from home to work and their new journey from home to work location and they must complete a claim form. Employees will have to*

sign to certify that all the information is correct i.e. payment is conditional on them actually incurring the extra cost as claimed…

13. The Claimant completed a claim form for travel expenses under the policy on 9 July 2013. The form showed she attended work five days each week. The figures on the form clearly show that excess vehicle mileage was calculated on the basis of travel five days each week. The Claimant signed the document to confirm that the information shown was correct and the expenses claimed would be incurred as a direct result of her transfer. This led to the Claimant being paid travel expenses in excess of £800 per annum. She was also issued with a car parking permit at a cost to the Respondent of approximately £1,000 per annum for use of the council run Sainsbury's car park which is situated about one mile from the Tonbridge delivery office. The Claimant's husband also works for the Respondent at the Tonbridge delivery office. He completed a separate claim form and was paid Excess Travel Expenses. Because of his seniority he was permitted to park in the yard at the Tonbridge delivery office. When completing her claim form, the Claimant remarked, as is documented, that she would not be car-sharing with her husband.

14. In 2014, the Claimant broke her ankle and did not want to undertake overtime duties. She later complained that she was being bullied by managers and she raised complaints about Andrew Williams and others.

15. In March 2016, Stephen Nelson issued the Claimant with a two year suspended dismissal under the Respondent's conduct policy for having negligently delayed delivery of a special delivery item for two days. The Claimant, although believing the penalty harsh, did not appeal against it. Until the imposition of this penalty, the Claimant had a clean disciplinary record.

16. In early 2016 it came to light that one of the Respondent's employees had moved home, (presumably closer to the Tonbridge Delivery Office), but was still claiming Excess Travel Expenses and the Respondent demanded repayment of the expenses. This employee, and his union representative, complained to the Respondent that others whose circumstances had changed were still claiming Excess Travel Expenses and he was therefore being treated unfairly.

17. In consultation with the union, the Respondent agreed to give briefings to employees and grant amnesty to anyone who disclosed changed circumstances. The effect of the amnesty was such that employees who came forward and disclosed changed circumstances and agreed to repay any overpayment of Excess Travel Expenses would otherwise avoid disciplinary action. The Tribunal accepts the Respondent's submission that this was "drawing a line in the sand". Among other things, employees were informed:

> *Can we please remind you that as part of the terms of the agreement you signed it is your responsibility to inform the business of any changes that may have occurred during the period of MTSF and may have changed your claim, this includes change of address and changing the mode of travel you charged for.*
>
> *…*

If anyone has had any changes to their circumstances which may have or affect their original claim you need to notify your line manager as soon as possible

18. A further briefing stated:

> *.. we have recently had people who have been identified as changing mode of travel to work and these people have had to repay this money to the business but we are also aware that this may be a bigger issue than expected. If you have for any reason changed your mode of travel then please speak to your line manager so that it can be picked up as I do not want anyone getting caught out knowingly claiming money and not informing the business as this is fraud and is an instant dismissal offence.*

19. The Claimant and her husband attended at least one of the briefing sessions which took place on 31 May 2016.

20. Between March 2016 and November 2016 Andrew Williams carried out a review of those in receipt of Excess Travel Expenses. He made visits to some employees' home addresses, to local railway stations and to bus stops to check employees were travelling in the way they had claimed and for which they were being paid. In evidence, Andrew Williams told the Tribunal that he had visited the Claimant's home address on days when she was at work and observed her vehicle there. However, he did not make notes and did not record the dates or times of his visits. Nor did he obtain any documentary evidence that the employees concerned were indeed at work on the day in question.

21. Andrew Williams held informal meetings with employees to discuss their claims for Excess Travel Expenses. A number of employees disclosed their change of circumstances and, in accordance with the amnesty, appropriate repayments were made.

22. Andrew Williams met with the Claimant on 1 June 2016. The Claimant told Andrew Williams that she was using her car to travel to work but was parking in nearby streets. However, she did not want to lose her car park permit and told Andrew Williams that she would start using the Sainsbury's car park again. The Claimant also told Andrew Williams that she had begun parking in the yard of at the Tonbridge Delivery Office despite not having the authorisation to do so. Andrew Williams told the Claimant that he had seen her and her husband coming and going together.

23. Andrew Williams invited the Claimant to attend a fact find meeting under the Respondent's conduct policy on 16 August 2016 to discuss her use of the Sainsbury's car park permit and her mode of travel to work. At the fact find meeting the Claimant said that:

    23.1. her travel arrangements had not changed since she had made her initial claim for Excess Travel Expenses;

    23.2. she travelled with her husband on Saturdays, approval having been granted by Martina Colleton, but otherwise they travelled separately;

23.3. she parked in nearby streets but then changed her answer saying she had not parked in nearby streets but had in fact been parking in the yard.

24. Although the brief description above attributes the comment to the Claimant, in fact she did not herself answer Andrew Williams' questions; rather, the Claimant's union representative, Andrew Combden, answered on her behalf.

25. Andrew Williams showed the Claimant an undated photograph of the Claimant's car on her driveway. He also showed her a copy of a log which showed that the Claimant had parked at the Sainsbury's car park on just two occasions (22 July 2015 and 18 August 2015). The parties before the Tribunal were in agreement that the log was unlikely to present a complete picture: the car park might not be patrolled at all times; the ticket machine was subject to frequent breakdowns; and weather conditions could affect the handheld scanners.

26. By way of amendment to the notes of the fact find meeting, the Claimant subsequently informed Andrew Williams that it was Claire Buddle who had given approval for the Claimant to car share with her husband on Saturdays, not Martina Colleton.

27. Andrew Williams decided that disciplinary action should be taken and he forwarded the papers to Stephen Nelson for him to consider.

28. In her defence, the Claimant obtained two letters: the first from a neighbour who stated that there were numerous times when neither the Claimant's nor her husband's car was on the Claimant's driveway; the second from a friend of the Claimant who stated, among other things, that during 2016 she had regularly seen the Claimant driving alone at around 3 pm wearing her work jacket.

29. The Claimant also obtained signatures on a document of 17 colleagues who attested:

> *We the undersigned are prepared to testify that we have seen Caroline Reynolds park her own car on either the Sainsbury's car park or the Royal Mail car park during the last 3 years*

30. Stephen Nelson held meetings with six of the individuals who had signed the Claimant's document. Stephen Nelson explained to the Tribunal that he met with those who happened to be available on the day he wished to hold the meetings. These individuals were each asked the same question:

> *I am currently dealing with a conduct case and your name has been brought up as stating that you could testify that Caroline Reynolds has parked her car in Sainsbury car park during the last 3 years*
>
> *Is that correct?*
>
> *If yes, can you also testify that you have seen her park there every single day in the last 3 years?*

31. The individuals' replies are recorded as follows:

Is that correct?

(a) No. Only Royal Mail car park
(b) Only seen a couple of times
(c) Yes
(d) Yes
(e) No. Seen in car not in car park
(f) Yes

If yes, can you also testify that you have seen her park there every single day in the last 3 years?

(a) Me and John leave together/leave in own cars generally seen this
(b) No
(c) Most day varies
(d) No
(e) (deleted)
(f) No

32. Stephen Nelson also obtained copies of photographs which were said to have been taken by a Robert Horseman. One of the photographs was accompanied by a document dated 4 December 2016; that future date could not have referred to the date on which the photograph was taken.

33. On 5 September 2016, Stephen Nelson invited the Claimant to attend a formal conduct meeting on 14 September 2016 to consider:

    - *Fraudulent claim of excess fairs* [sic]
    - *Not using your vehicle to travel to unit*

    The Claimant was informed that her conduct record would be taken into consideration and that the current disciplinary allegations were being considered as gross misconduct for which one outcome could be dismissal without notice.

34. As at the fact find meeting, Andrew Combden answered questions at the conduct hearing on the Claimant's behalf with the Claimant nodding her approval. Through Andrew Combden the Claimant stated, insofar as relevant:

    - She had been using her own car to travel to work except Saturdays when she travelled with her husband, authorisation having been granted verbally three times by Claire Buddle

    - She had been led to believe that as long as she drove her vehicle the majority of the time that would be ok

    - She had been parking mostly in the yard, especially since January 2016

    - She did not believe that her car had been seen on numerous occasions at her home address when she was at work

- She would have been seen leaving the yard together with her husband because he drove her to her vehicle in the Sainsbury's car park

The Claimant produced a log she had obtained showing her use of the Sainsbury's car park from July 2014 to May 2016. The log records 20 entries in 2015 and two entries in 2016.

35. After the conduct meeting, Stephen Nelson made enquiries of Scott Horseman who was unable to say how many times he had seen the Claimant's car on her driveway but that it was on those days the Claimant was at work. Scott Horseman said that he had taken photographs on his IPhone with dates and times. Scott Horseman said he was accompanied on those days by a Paul Collyer. Upon enquiry of Paul Collyer, he replied:

> *When did this occur as I've not done any patrols / deliveries with Scott since possibly January / February time this year*
>
> *Can't answer the questions as do not recall doing Barnets around that time…*

36. The Tribunal was told that the Claimant lived in Barnets.

37. By letter dated 29 September 2016, Stephen Nelson informed the Claimant of his decision that she should be summarily dismissed for having fraudulently claimed Excess Travel Expenses. Stephen Nelson's conclusions can be described as follows:

- When making her claim for Excess Travel Expenses, the Claimant stated that she would not be car sharing with her husband;

- Not having been able to speak to Claire Buddle who was no longer employed by the Respondent, but having discussed the matter with the project lead for the Kent team, he doubted that Claire Buddle would have given the authorisation asserted by the Claimant and that, if asked, Claire Buddle would have said the Claimant was only entitled to claim for four days Excess Travel Expenses;

- The Claimant had been informed that she was required to come forward with any change of circumstances;

- He had a reasonable belief that the Claimant knew she should not have been claiming as she did;

- The letters from the Claimant's neighbour and friend should be discounted because they would naturally wish to support her and that they could not confirm that the Claimant used her car every day for the last three years;

- The Claimant had admitted car sharing with her husband on Saturdays;

- The employees whom he had interviewed were unable to confirm that they had seen the Claimant's car every day;

- The Sainsbury's car park log only showed two entries for 2016;

- If the Claimant had been parking in the yard as she said, it was difficult to understand why she drove out of the yard each day in her husband's car;

- A statement from a manager confirmed that he had seen the Claimant's car parked on her driveway on numerous occasions when she was at work.

38. The Claimant subsequently appealed. Sue Knight-Smith held an appeal hearing with the Claimant on 14 October 2016. The appeal was said to be a re-hearing of the case. Stephen Wisely represented the Claimant at the appeal hearing and put forward a number of submissions on her behalf. Following the appeal hearing Sue Knight-Smith interviewed Andrew Williams and made enquires of Stephen Nelson by email. Among other things, Andrew Williams told Sue Knight-Smith that he often saw the Claimant leave the yard with her husband. The Claimant was invited to comment on what Andrew Williams and Stephen Nelson had said, copies of the notes having been sent to her. A key aspect of the Claimant's response was that her circumstances had not changed – she continued to use her car to travel to work except on Saturdays.

39. Sue Knight-Smith's decision was that notwithstanding the Claimant's long service, the original decision was appropriate and the Claimant's appeal accordingly failed. The thrust of Sue Knight-Smith's evidence before the Tribunal was that her decision was based on Andrew William's assertion that he had seen the Claimant car sharing and the Claimant's own admission that she was car sharing on Saturdays and therefore not entitled to four days Excess Travel Allowance.

Applicable law

40. Under section 98(1) of the Employment Rights Act 1996, it is for the employer to show the reason for the dismissal (or if more than one the principal reason) and that it is either a reason falling within section 98(2) or for some other substantial reason of a kind such as to justify the dismissal of the employee holding the position he held. A reason relating to conduct is a potentially fair reason falling within section 98(2). Conduct does not have to be blameworthy to fall within section 98(2).

41. The reason for the dismissal is the set of facts or the beliefs held by the employee which caused the employer to dismiss the employee. In determining the reason for the dismissal, the Tribunal may only take account of those facts or beliefs that were known to the employer at the time of the dismissal; see W Devis and Sons Ltd v Atkins 1977 ICR 662.

42. Under section 98(4) of the Employment Rights Act 1996, where the employer has shown the reason for the dismissal and that it is a potentially fair reason, the determination of the question whether the dismissal was fair or unfair

depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and must be determined in accordance with equity and substantial merits of the case.

43. When determining the fairness of conduct dismissals, according to the Employment Appeal Tribunal in British Home Stores v Burchell 1980 ICR 303, as explained in Sheffield Health & Social Care NHS Foundation Trust v Crabtree [2009] UKEAT 0331, the Tribunal must consider a threefold test:

    a. The employer must show that he believed the employee was guilty of misconduct;
    b. The Tribunal must be satisfied that he had in his mind reasonable grounds upon which to sustain that belief; and
    c. The Tribunal must be satisfied that at the stage at which the employer formed that belief on those grounds, he had carried out as much investigation into the matter as was reasonable in the circumstances.

44. Mr Bailey-Gibbs referred the Tribunal to paragraphs 35 and 36 of the judgment in Santamera v Express Cargo Forwarding t/a IEC IRLR 273 in his written submissions.

45. Mr Bailey-Gibbs also referred to Royal Society for the Protection of Birds v Croucher 1984 ICR 604 EAT and submitted that in light of the Claimant's admission that she car shared on Saturdays, the Respondent was under no duty to investigate further.

46. Mr Percival referred the Tribunal to the case of O'Hanlon v Post Office Ltd UKEAT/0202/12/LA. In that case the Employment Appeal Tribunal held that the claimant had been unfairly dismissed in circumstances in which he had been dismissed for two reasons, one of which was unfair. Mr Percival also referred the Tribunal to Smith v Glasgow City District Council [1987] IRLR 326.

47. In A v B [2003] IRLR 405, the Employment Appeal Tribunal said that the gravity of the charges and the potential effect on the employee will be relevant when considering what is expected of a reasonable investigation. As Mr Percival reminded the Tribunal, it was said in that case:

> *Serious allegations of criminal misbehaviour, at least where disputed, must always be the subject of the most careful investigation, always bearing in mind that the investigation is usually being conducted by laymen, not lawyers. Of course, even in the most serious of cases, it is unrealistic and quite inappropriate to require the safeguards of a criminal trial, but a careful and conscientious investigation of the facts is necessary and the investigator charged with carrying out the inquiries should focus no less on any potential evidence that may exculpate or at least point towards the innocence of the employee as he should on the evidence directed towards proving the charges against him.*

48. See also: Crawford v Suffolk Mental Health Partnership NHS Trust [2012] IRLR 402 and Salford Royal NHS Foundation Trust v Roldan 2010 ICR 1457 CA.

49. However, it is not for the Tribunal to substitute its own decision as to the reasonableness of the investigation. In Sainsburys Supermarkets v Hitt [2003] IRLR 23 the Court of Appeal ruled that the relevant question is whether the investigation fell within the range of reasonable responses that a reasonable employer might have adopted.

50. Nor is it for the Tribunal to substitute its own decision as to the reasonableness of the action taken by the employer. The Tribunal's function is to determine whether, in the particular circumstances of the case, the decision to dismiss fell within the band of reasonable responses which a reasonable employer might have adopted. See: Iceland Frozen Foods v Jones [1982] IRLR 430; Post Office v Foley [2000] IRLR 827.

51. Mr Bailey-Gibbs referred the Tribunal to Wilson Devonald Ltd v Suckling [2010] UKEAT/0131/10 as authority for the proposition that once gross misconduct if found, prima facie it is a dismissable offence and difficult to characterise a decision to dismiss for such misconduct as falling outside the band of reasonable responses.

52. During the course of the hearing, it became clear that the Claimant accepted that, objectively judged, it might be thought dishonest to claim for excess travel expenses for five days each week when usually only incurring extra expense four days each week. However, the Claimant maintained that she was not knowingly doing anything dishonest because she had been told by Claire Buddle that car sharing with her husband was acceptable. This caused the Tribunal to raise with the parties the correct test to be applied and whether the test set out in the criminal case of R v Ghosh 1982 QB 1953 and considered in later case law might provide assistance. The Tribunal provided the parties with copies of extracts at paragraphs 6.183 to 6.189 from the IDS Employment Law Handbook, September 2015 together with a copy of the judgment in JP Morgan Securites v Ktorza UKEAT/0311/16/JOJ which the parties might wish to consider and refer to in their submissions.

53. Inconsistency of treatment between employees accused of the same offence is a factor Tribunals will take into account, although the respective roles each employee played in the incident, their past records, and their level of contrition may justify different treatment. The guiding principle is whether the distinction made by the employer was within the band of reasonable responses open to it; see Walpole v Vauxhall Motors Ltd 1998 EWCA Civ 706 CA. Consistency must mean consistency as between all employees of the employer; see Cain v Western Health Authority [1990] IRLR 168. However, the emphasis in section 98(4) is on the particular circumstances of the individual employee's case and the crucial question is whether the decision to dismiss fell within the range of reasonable responses. An argument by a dismissed employee that the treatment he received was not on par with that meted out in other cases is relevant in determining the fairness of the dismissal in only three sets of circumstances:

    53.1. if there is evidence that employees have been led to believe by their employer that certain categories of conduct will be overlooked or not dealt with by the sanction of dismissal;

53.2. where evidence in relation to other cases supports an inference that the purported reason stated by the employer is not the real or genuine reason for the dismissal; or

53.3. evidence as to decisions made by an employer in truly parallel circumstances may be sufficient to support an argument, in a particular case, that it was not reasonable on the part of the employer to visit the particular employee's conduct with the penalty of dismissal and that some other lesser penalty would have been appropriate in the circumstances.

See: Hadjioannou v Coral Casinos Ltd [1981] IRLR 352. It was stated in that case that it is of the highest importance that flexibility should be retained and employers and Tribunals should not be encouraged to think that a tariff approach to industrial misconduct is appropriate.

54. In Taylor v OCS Group Ltd [2006] IRLR 613, the Court of Appeal stressed that the Tribunal's task under section 98(4) of the Employment Rights Act 1996 is not only to assess the fairness of the disciplinary process as a whole but also to consider the employer's reason for the dismissal as the two impact on each other. It stated that where an employee is dismissed for serious misconduct, a Tribunal might well decide that, notwithstanding some procedural imperfections, the employer acted reasonably in treating the reason as sufficient to dismiss the employee. Conversely, the Court considered that where the misconduct is of a less serious nature, so the decision to dismiss is near the borderline, the Tribunal might well conclude that a procedural deficiency had such impact that the employer did not act reasonably in dismissing the employee.

55. Defects in the original disciplinary hearing and pre-dismissal procedures can be remedied on appeal. It is not necessary for the appeal to be by way of a re-hearing rather than a review but the Tribunal must assess the disciplinary process as a whole and where procedural deficiencies occur at an early stage, the Tribunal should examine the subsequent appeal hearing, particularly its procedural fairness and thoroughness, and the open-mindedness of the decision maker; see Taylor v OCS Group Ltd [2006] IRLR 613 CA.

56. The requirement for procedural fairness is an integral part of the fairness test under section 98(4) of the Employment Rights Act 1996. When determining the question of reasonableness, the Tribunal will have regard to the ACAS Code of Practice of 2015 on Disciplinary and Grievance Procedures. That Code sets out the basic requirements of fairness that will be applicable in most cases. Under section 207 of the Trade Union & Labour Relations (Consolidation) Act 1992, in any proceedings before an Employment Tribunal any Code of Practice issued by ACAS shall be admissible in evidence and any provision of the Code which appears to the Tribunal to be relevant to any question arising in the proceedings shall be taken into account in determining that question. Section 124A of the Employment Rights Act 1996 together with 207A of the Trade Union & Labour Relations (Consolidation) Act 1992 provides that where an employer has unreasonably failed to comply with the Code of Practice, a Tribunal may, if it considers it just and equitable in all the circumstances to do so, increase the compensatory award by up to 25%. Similarly, where an employee has unreasonably failed to comply with the Code, a Tribunal may, if

it considers it just and equitable in all the circumstances to do so, reduce the compensatory award by up to 25%.

57. In Polkey v Dayton Services Ltd [1988] ICR 142 the House of Lords held that if a dismissal is found unfair by reason of procedural defects then the fact that the employer would or might have dismissed the employee anyway goes to the question of remedy and compensation reduced to reflect that fact. Assessing future loss of earnings will almost inevitably involve consideration of uncertainties: Thornett v Scope 2007 ICR 236 CA. In Software 2000 v Andrews 2007 ICR 825 the following principles were enunciated:

    57.1. In assessing compensation for unfair dismissal, the Tribunal must assess the loss flowing from the dismissal, which will normally involve an assessment of how long the employee would have been employed but for the dismissal;

    57.2. If the employer contends that the employee would or might have ceased to have been employed in any event had a fair procedure been adopted, the Tribunal must have regard to all the relevant evidence, including any evidence from the employee (for example, that he intended to retire in the near future);

    57.3. There will be circumstances where the nature of the evidence for this purpose is so unreliable that the Tribunal may reasonably take the view that the exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on the evidence can properly be made. Whether that is the position is a matter of impression and judgment for the Tribunal;

    57.4. However, the Tribunal must recognise that it should have regard to any material and reliable evidence that might assist it in fixing just and equitable compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence;

    57.5. A finding that an employee would have continued in employment indefinitely on the same terms should only be made where the evidence to the contrary (i.e. that employment might have been terminated earlier) is so scant that it can effectively be ignored

58. Section 122(2) of the Employment Rights Act 1996 provides that where the Tribunal finds that any conduct of a Claimant before the dismissal was such that it would be just and equitable to reduce the amount of the Basic Award, the Tribunal must reduce that amount accordingly. Section 123(6) of the Employment Rights Act 1996 provides that where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the Claimant, it must reduce the amount of the compensatory award by such proportion as it considers just and equitable.

59. Before making such a deduction, the Tribunal must make three findings:

59.1. That there was conduct on the part of the Claimant in connection with his unfair dismissal which was culpable or blameworthy to the extent that it was perverse, foolish, bloody-minded or unreasonable in the circumstances;

59.2. That the matters to which the unfair dismissal complaint relates were caused or contributed to some extent by the Claimant's action (or inaction) that was culpable or blameworthy;

59.3. That it is just and equitable to reduce the assessment of the Claimant's loss to a specified extent.

See: Nelson v BBC (No.2) [1979] IRLR 346, CA

Conclusion and further findings of fact

60. The Tribunal has considered the Claimant's contention that the reason for her dismissal might have been a perceived lack of flexibility on her part. However, she gave little credible evidence about this. The Tribunal reminds itself that the burden of showing the reason for the Claimant's dismissal, and that it was for a potentially fair reason, rests on the Respondent. The Tribunal is satisfied that, having regard to the context in which the Claimant's alleged misconduct arose, the reason for the Claimant's dismissal, as determined by Stephen Nelson and upheld by Sue Knight-Smith on appeal, was their belief that the Claimant had wrongfully been making claims for excess travel expenses. However, there were two aspects to that belief: the first, based principally upon Andrew Williams' evidence, that the Claimant had been car sharing with her husband on weekdays; and the second based upon the Claimant's own evidence that she had been car sharing with her husband on Saturdays. Thus it can be said that there were two reasons for the Claimant's dismissal: the Claimant wrongfully claiming travel expenses for weekdays; and wrongfully claiming travel expenses on Saturdays. The Tribunal accepts that the Respondent's belief in the Claimant's misconduct was genuine.

61. The Tribunal next addresses the questions of whether the Respondent had reasonable grounds upon which to sustain that belief and whether at the stage at which that belief was formed on those grounds, the Respondent had carried out as much investigation into the matter as was reasonable in the circumstances. The burden does not fall on either party in these respects: the burden is neutral.

62. The Tribunal finds that this is a case to which the principles in A v B apply. The Claimant was accused of fraud. That is a very serious accusation. Such an allegation is likely to leave a stain on an individual's character and likely to affect their future employment prospects.

63. The Claimant's own evidence given in the course of the disciplinary proceedings was that she had been car sharing on Saturdays. The Respondent attempted to contact Claire Buddle and seek information and, when that proved fruitless, the Respondent did the next best thing by obtaining information from the project lead for the Kent team as to what advice Claire Buddle was likely to have given to the Claimant. The Tribunal finds that the Respondent was under no duty to investigate that aspect further; see Royal Society for the Protection of Birds. With regard to Saturday car sharing, the Tribunal is unable to conclude

that the investigation fell outside the range of reasonable responses that a reasonable employer might have adopted in the circumstances. The Tribunal concludes that both Stephen Nelson and Sue Knight-Smith held a reasonable belief in the Claimant's misconduct by claiming for five days' excess travel expenses when, even on the Claimant's case, she usually only used her car four days each week. The Respondent acted reasonably in concluding that the Claimant acted dishonestly when objectively judged and that the Claimant should have known that it was dishonest.

64. With regard to the investigation undertaken into to alleged weekday car sharing:

64.1. Andrew Williams was the primary witness to the Claimant leaving the yard with her husband yet he provided no detail as to when this was said to have taken place. Indeed, it could have been when the Claimant was leaving with her husband on Saturdays; or when, as the Claimant asserted, she was being taken to the Sainsbury's car park;

64.2. The Respondent simply accepted Andrew Williams' bare assertions that he had seen the Claimant car share on numerous occasions and seen her car on her drive on numerous occasions. There appears to have been no attempt to conduct a careful investigation into Andrew Williams' assertions of wrongdoing or ascertain details of alleged numerous observations, not least because Andrew Williams was the investigating officer as well as the primary witness;

64.3. The lack of detail or precision in what Andrew Williams was saying meant that there was no documentary evidence which could be provided to the Claimant in advance so she could consider the evidence against her;

64.4. The Respondent did not appear to consider with any care any evidence which might point towards the Claimant's innocence. The evidence provided by Claimant's neighbour and friend, while not conclusive of innocence, was simply discounted as likely to be unreliable and did not appear to merit further investigation;

64.5. The questions asked of six of the Claimant's colleagues could not possibly lead to a finding of guilt or innocence on the Claimant's part and were almost meaningless. There was no evidence as to when these individuals did or did not see the Claimant in either the Sainsbury's or yard car parks; it was absurd to ask these individuals if they could confirm that they had seen the Claimant park there every single day in the last three years, not only because the Claimant only worked five days each week, would ordinarily take holidays, and had periods of sickness, but it also assumes that these individuals would necessarily have had the opportunity to see the Claimant park her car every day in the last three years. Again, it appears that Stephen Nelson was simply seeking to find some evidence pointing towards the Claimant's guilt rather than innocence;

64.6. There was no explanation as to why others who had signed the Claimant's document were not also questioned save that they were not about on the day Stephen Nelson wished to hold the meetings;

64.7. The photographs were untimed/undated or incorrectly dated and were of no relevance without such information coupled with records or evidence as to when the Claimant was at work. There was no attempt to pursue any line of enquiry about the source of the photographs as might reasonably be the case, especially in light of Paul Collyer's response. As Andrew Williams conceded during cross examination, the photographs proved nothing. Sue Knight-Smith sensibly discounted the photographs but, as above, given her acceptance of Andrew Williams' sketchy evidence of the Claimant car sharing with her husband, it cannot be said that defects were remedied at the appeal stage;

64.8. The Sainsbury's car park log informed the Respondent's views yet it was clearly an unreliable document, as conceded in terms before the Tribunal. Mr Williams told the Tribunal that logs of use by other employees were more extensive (some were two or three pages) but they do not appear to have been considered for comparison by Stephen Nelson or Sue Knight-Smith with a view to gaining a more informed view of the Claimant's use of the Sainsbury's car park;

64.9. The Tribunal is astonished that the Claimant's husband, with whom it was alleged the Claimant was car sharing, was not interviewed as part of the investigation and for which the Respondent failed to provide any explanation whatsoever;

64.10. The period of alleged misconduct was never really made clear; at first it appeared to be the whole three year period during with Excess Travel Allowance was paid but by the appeal stage it appeared to be related to the last six months ending in about July 2016; as above, no dates or times were ever specified and the Claimant faced allegations with no specificity.

65. It would not be appropriate to impose unrealistic standards upon the Respondent but allegations of fraud must always be the subject of the most careful investigation. There was no careful investigation in this case insofar as it related to alleged weekday car sharing; it was woefully inadequate. The Tribunal concludes that the investigation as to whether the Claimant was car sharing on weekdays, and which in part was the reason for her dismissal, fell outside the range of reasonable responses that a reasonable employer might have adopted in the circumstances.

66. The Tribunal concludes that the decision makers, Stephen Nelson and Sue Knight-Smith, were not therefore in a position to have a reasonable belief in the Claimant's wrongdoing, in particular in relation to car sharing other than on Saturdays to which the Claimant admitted. It could not be reasonably concluded that because the Claimant car shared on Saturdays she was likely to be car sharing during the week.

67. The Respondent is a large employer with substantial administrative resources.

68. The Tribunal concludes that the Claimant was unfairly dismissed.

69. The Tribunal has found that the Claimant was unfairly dismissed but for completeness considers the inconsistency argument put forward by the

Claimant. The Tribunal concludes that the argument has little merit. The evidence before the Tribunal, which the Claimant was unable to challenge, was that the other employees who had wrongfully been claiming excess travel allowance had all come forward and agreed to make repayments. The circumstances relating to the Claimant were different.

70. The Tribunal next considers, in accordance with Polkey, what potentially fair reason for dismissal, if any, might emerge had there been a proper investigation and disciplinary process. There was insufficient evidence before the Tribunal for any firm conclusions to be drawn as to whether weekday car sharing would have been established such that the Respondent could have had reasonable grounds for their belief in such misconduct.

71. Mr Bailey-Gibbs sought to persuade the Tribunal that since the Claimant was on a two year suspended dismissal, any further misconduct would mean that the Claimant would have been dismissed in any event, albeit with notice. The Claimant herself, when pressed during cross examination, suggested that a warning might have been appropriate had she been blameworthy. However, there was no evidence as to the effect that the Claimant's pre-existing disciplinary penalty might have had. Indeed, Sue Knight-Smith told the Tribunal that if the Respondent had simply established Saturday car sharing, the Respondent "might" have dismissed the Claimant. Based on this evidence, it is the Tribunal's view there was a 50% likelihood that the Respondent would have dismissed the Claimant for a reason relating to conduct and any compensatory award will be reduced accordingly.

72. The Tribunal finds that there was conduct on the part of the Claimant in connection with her unfair dismissal which was culpable or blameworthy to the extent that it was perverse, foolish, bloody-minded or unreasonable in the circumstances. Although the Claimant maintained that she need disclose nothing to the Respondent about a change of circumstances because, having been advised by Claire Buddle at the outset, her circumstances in relation to Excess Travel Allowance had not changed, she did not concede to the Respondent, as she and Mr Wisely did before the Tribunal, that claiming five days Excess Travel Allowance for four days travel was in principle wrong. The Claimant was largely to blame for her own dismissal. In the Tribunal's view it is just and equitable to reduce any basic and compensatory awards by 75%.

73. The Respondent unreasonably failed to comply with aspects of the ACAS Code of Practice at paragraphs 5, 6 and 9: it cannot be said that the facts of the case were established; different people did not carry out the investigation and the disciplinary hearing (Stephen Nelson investigated certain matters as well as holding the disciplinary hearing); and the Claimant was not given sufficient information about the alleged misconduct (which would have included details of the alleged observation dates). It would be just and equitable for any compensatory award to be increased by 10%.

74. The parties are encouraged to enter into negotiations with a view to reaching settlement. In the meantime, this case will be listed for a remedy hearing with a one day time estimate. If the parties to reach agreement, they are required to notify the Tribunal immediately.

Case No: 2302733/2016

Employment Judge Pritchard

Date 19 December 2017