EMPLOYMENT TRIBUNALS

Claimant Miss K B Montique

Respondent Boots Management Services Ltd

HEARD AT: Bury St Edmunds ET **ON**: 14th & 15th March 2017

BEFORE: Employment Judge G P Sigsworth

REPRESENTATION

For the Claimant: Mr M Judkins (Solicitor)

For the Respondent: Miss K Duff (Counsel)

RESERVED JUDGMENT

1. The Judgment of the Tribunal is that the Claimant was not unfairly dismissed.

RESERVED REASONS

1. The Claimant brings a claim of unfair dismissal. The dismissal is admitted by the Respondent, and the reason given for it relates to conduct, a potentially fair reason. Unfair dismissal is denied. The Tribunal heard oral evidence from the Claimant, and called on her behalf were former colleagues, Ms Jessica Munro and Ms Jessica Mack. For the Respondent, there were two witnesses; Mr Paul Seaton, store manager; and Ms Caroline Fisk, general manager. There was a bundle of documents of some 400 pages, to which the Tribunal was referred as was relevant and appropriate. At the end of the evidence, there was insufficient time for the parties to make oral submissions. Accordingly, the decision was reserved, pending receipt of written submissions from the parties' representatives. These were provided to the Tribunal on 30th March 2017.

FINDINGS OF FACT

2. The Tribunal made the following relevant findings of fact:

(1) The Claimant was employed by the Respondent from the beginning of her employment on 12th June 2005 on a concessionary counter for a cosmetic company (Benefit) in the Respondent's retail store at Petty Cury, Cambridge. The Claimant began her employment as a sales assistant, progressing to account manager and then, from 2012, as business manager. Although she was recruited by Benefit, she was employed directly by the Respondent (as were all Benefit counter staff). In the terms and conditions section of the Respondent's employee handbook are the Respondent's security rules and code of conduct. Such security rules state that all incidents of theft or fraud will be treated as gross misconduct, which is a dismissible offence, and may be passed onto the police with the possibility of criminal prosecution. The code of conduct for employees states that all employees must behave honestly, ethically and lawfully in the course of their business dealings. Fraudulent and dishonest acts will not be tolerated. The Respondent's disciplinary policy contemplates an informal approach in the first instance, although if the matter is considered too serious to be dealt with informally action may be taken under the formal disciplinary process. The right to suspend employees on full pay is expressly reserved so that investigations and meetings can take place. An employee has the right to be accompanied in any formal meeting by a companion, usually a work colleague or trade union representative. The disciplinary process has three stages; an investigation meeting, a formal meeting and an appeal meeting. The disciplinary policy also gives examples of gross misconduct. These include falsifying records, attempting to defraud or defrauding the Respondent, and any deliberate act or omission that undermines the mutual trust on which the contract of employment relies.

(2) Benefit counter staff are entitled to a commission of 2% on any sales achieved, excluding walk ups and other types of sales such as star gifts or on special promotion. Account and business managers, such as was the Claimant, are entitled to a quarterly bonus of £300 if their retail targets are achieved (and earning £100 if their service – brow bar – target is achieved). The only written instructions for staff about commission are in the Benebabe's guide, which the Claimant denies seeing (and there is no evidence that she had seen that guide). However, the Claimant was a long standing and senior employee, and I find that she knew what the rules were for claiming bonus and commission. She was able to articulate them to the investigation and the disciplinary hearing managers. Monthly sales were written down on productivity sheets and they would all get 2% commission, said the Claimant in her investigation meeting. Also at that meeting, she said that only if they did magic formula could they claim commission, sometimes interpreted as sitting down with the customer and spending time with them. In the disciplinary meeting, the Claimant said that there was no commission for star gifts and you would not add them to your commission claim. She estimated 25-30% walk ups which were non

commissionable. In her evidence at this Tribunal, the Claimant also said that if she did not have customer interaction she did not claim commission. Thus, the Claimant knew that some 30% of sales were not commissionable.

(3) In February 2016, the acting deputy store manager, Ms Phillipa Lakey, noticed that the Claimant's claim for commission in the last quarter of 2015 was vastly in excess of the documented sales put through her till on her pin number. For example, in December 2015 her till sales were recorded as being £2,833.37, but her individual sales claim for commission purposes was £29,813.50. It is the case that some of the discrepancy can be explained by two factors. First, that employees ring through colleagues' sales on occasions. Second, that items although sold on the counter by magic formula or similar technique can be paid for by the customer elsewhere in the store. However, it was a huge discrepancy and it could not be explained by these factors alone. Ms Lakey's discovery was passed to Ms Julia Hobson-Cooper, a loss and audit investigator, for investigation. The Claimant was called into a meeting with little or no warning, and no companion, with Ms Hobson-Cooper on 29th February 2016. When confronted with the two figures referred to above, the Claimant said; "that can't be" – "that can't be right – that's definitely wrong – twenty six thousand pound difference". "It's a big difference – I don't understand." The Claimant also told Ms Hobson-Cooper that she would add items to the daily/weekly sales sheets after checking the item movements list for items she had sold but not put through the till. She said that she added up her colleagues' sales daily – checking against the item movement list – and whatever the list showed as sold if not by a colleague the Claimant would claim it as hers. She later qualified this comment at the meeting, saying that she would claim if she knew they were hers. Ms Hobson-Cooper told the Claimant that she believed the Claimant was claiming the difference in sales from the item movements list. When she said to the Claimant that she was claiming items not personally sold by her the Claimant said, "some I would have sold" (as if she accepted that some she had not sold). Later she said; "I've sold some of them" (in other words meaning not all). Later still in answer to Ms Hobson-Cooper's allegation/comment that the Claimant had taken everything on the item movement list and put through the figures left as her commission she responded; "I've sold some of them" (thereby not denying it). Ms Hobson-Cooper asked her – how much have you put through that you have not sold? The Claimant replied, "maybe £2,000". When it was put to her that she had inflated some sales to increase commission and asked whether she had, she replied "I would have thought I would have sold them. If I can't remember I would estimate what I think I sold." She was asked whether it was right to estimate and she said "we always have". When asked whether she agreed that her figures were inflated, she said; "no, I would estimate the ones where I think customers have paid at other tills." She denied knowingly inflating her sales figures. She said that she thought she had estimated roughly but was not doing anything fraudulently. She said that she had used the item movement sheet to estimate because she may not have written down every sale. The meeting ended with Ms Hobson-Cooper saying

she would have to suspend the Claimant on full pay pending a disciplinary meeting, originally arranged for the following Thursday. However, because the Claimant's trade union representative was not available, the meeting was later moved to 9th March.

(4) The letter inviting the Claimant to the disciplinary meeting to discuss her potential gross misconduct (as it is put) states that it was the Respondent's belief that based on the data and evidence available she had inflated her sales figures to personally gain commission to which she was not entitled. With that letter were relevant documents, such as investigation notes from the 29th February meeting, Benefit sales sheets, and her operator sales report. The meeting on 9th March was chaired by Mr Paul Seaton, store manager at Boots, Grafton Centre, Cambridge. The Claimant's TU rep attended with her. The Claimant now said that the £2,000 worth of items she told Ms Hobson-Cooper she put through not sold by her was in fact an estimate of the value of goods abandoned by customers in the store after the Claimant had "sold" them. In other words, the Claimant was in effect claiming commission on goods that had not been sold at all. The Claimant also said that she did not put much through the tills, more customer selling. She said that 25-30% of sales were non commissionable. She agreed that she could not claim commission unless she applied the magic formula or there had been customer interaction. In her cross examination at this Tribunal, she confirmed that her own commission claim for quarter 4 did not include walk up sales. Mr Seaton could not understand why the Claimant would not put a transaction through the till where she had applied the magic formula, and pointed out that apparently 9 out of 10 of the Claimant's customers were paying somewhere else or with someone else. The Claimant was not finalising and securing the deal, despite her claims to "legendary customer care". The Claimant agreed that this "was weird". £47,000 worth of sales in the last quarter were claimed by the Claimant, yet only £4,000 went through the till on her pin number. The Claimant's TU representative wondered how it was that the way the Claimant operated had gone unnoticed and unchallenged for 10 years, and queried the general level and extent of her training. He also challenged the method of interrogation by the investigation officer, which was the Wicklander technique adopted in allegations of fraud. In the interview meeting, Ms Hobson-Cooper had said that she was not going to share all the evidence she had now with the Claimant but needed to know whether the Claimant was telling the truth. She then asked the Claimant this; "When was the first time you falsified your sales to gain commission?" The Claimant replied – "I never have, I'm shocked". She was then asked to explain her monthly sales.

(5) At the end of the first disciplinary hearing, Mr Seaton decided that he did not have adequate information and wanted to investigate further. He adjourned the hearing, to be re-convened on 22nd March. In the meantime, interviews were conducted by a deputy manager (Mr Stuart Pestell) with three people. The first was with Ms Natalie Shipp, Benefit area manager, and the Claimant's line manager. She explained the magic formula, and she noted that pillar sales by the Claimant were

below expectations, and as these formed the bedrock of any magic formula approach that indicated that the Claimant's claim for commission was inflated. She stressed the high proportion of walk up sales in Quarter 4 (October to December 2015). She said that the Claimant should spend the majority of her time on the counter selling, and that paperwork should only take 10-15 minutes per day. She had on numerous occasions tried calling the counter and Benefit team members had been unaware of the Claimant's location. Ms Shipp compared the Claimant's sales with those of comparators in John Lewis Cambridge and House of Fraser Norwich where there were business managers on the Benefit counter. In John Lewis Cambridge, in the same period, the manager had sales of £14,639 with an average sale of £41. Customers per day were 16 and sales £650 per day. In House of Fraser Norwich, the manager sold £17,294 worth of goods in the same period, an average sale of £52 per customer, with 13 customers per day and taking £691 per day. Ms Shipp regarded the manager there as her strongest performing manager, yet the Claimant's sales figures made it appear that she was selling over double of her closest comparators. This was despite the fact that House of Fraser total retail sales were £97,600, and Boots in Cambridge were £53,090. This indicated that the Claimant's personal sales were apparently 56% of total retail sales for the store, whereas the House of Fraser manager's were just 18%. With a low pillar performance, Ms Shipp did not believe that the Claimant was applying magic formula, and there were few re-bookings. It did not appear to Ms Shipp that the Claimant had a large and loyal customer following, although she said she did. Further, the Claimant had not received much positive feedback, and indeed had had a minimum of five negative feedbacks relating to conduct around customers. The target rate of 20% for customer re-booking (a good indicator of customer loyalty) was pitifully low for the Claimant at just 0.69%, said Ms Shipp. Ms Amy Johnson, Benefit advisor, was also interviewed and said that there was never a queue of customers waiting for the Claimant to serve them. The Claimant spent 2 or 3 hours a day off the counter most days, and would spend a very long time with just one customer. Ms Johnson said all the Claimant did was talk about skin care and give out lots of skin care samples. There were no customers that wanted the Claimant's service over Ms Johnson. Ms Chloe Drage, Benefit advisor, was also interviewed. She confirmed that there was never a queue waiting to see the Claimant. Ms Drage said that the Claimant did great customer service, and had lots of friends and got lots of Christmas cards, but did not have that many sales. Although when she did the job she did it properly.

(6) At the second disciplinary hearing on 22nd March, again conducted by Mr Seaton, when again the Claimant was represented, key documentary evidence discussed with the Claimant included the monthly sales sheet. At the end of Quarter 4 2015, the Claimant claimed to have exceeded the quarterly target – thereby earning her £300 bonus – and her figure for her quarterly sales was £109,045. However, the Claimant was not able to explain to the Respondent how she arrived at that figure. The three monthly sales sheets add up to quarterly sales of just £106,954, when the target was £108,730. CBO

sales show a lower figure – £104,210 – or adjusted for refunds £105,110. In other words, none of the sales records produce a figure of £109,045. All this was put to the Claimant at the disciplinary hearing of 22nd March and the Claimant was not able to explain the discrepancy. She made denials in respect of the allegation that she would often be away from the counter doing paperwork. Other matters were put to the Claimant – concerning pillars, customer loyalty etc - and the Claimant agreed that there were no re-bookings. Mr Seaton concluded at the end of the hearing that, based on the evidence and data, the Claimant had inflated her figures to gain commission (and bonus), and that a further disciplinary hearing would be convened. In the meantime, the Claimant would remain suspended. As before, challenges were made by the Claimant's TU representative. He said that there was no evidence of the Claimant ever being trained on relevant matters and she was doing what she had been shown to do. She had followed the same practice for a number of years and despite past performance reviews there was no record of concerns being raised by anyone. He asked Mr Seaton to consider those matters/points when he was making his decision.

(7) The third and final disciplinary hearing was on the 5th April 2016, again chaired by Mr Seaton and with the Claimant accompanied by her TU representative. Mr Seaton conceded that the commission/bonus policy needed tightening up and should be put into writing, but also noted that the Claimant was able to articulate the sales and commission policy. He based his decision on the Claimant's knowledge of the processes as articulated by her, on her replies to questions in the investigation meeting, on the difference between the Claimant and other account managers, and on the discrepancies in the figures, including the CBO figures. He decided that the Claimant should be summarily dismissed for gross misconduct.

(8) The dismissal was confirmed in writing on 6th April. The reason given for the dismissal was that the Claimant had inflated her sales figures to personally gain commission that she was not entitled to. The Claimant was notified of her right to appeal. In his evidence to this Tribunal, Mr Seaton said that during the investigation and disciplinary process the Claimant's account of her methods and calculations changed. In the investigation, she admitted that on occasion she would estimate her sales and sometimes inflate them. She also admitted there that she would use the item movement report to estimate the sales figures, removing any sales that had already been claimed by her colleagues and then claiming the remaining sales as hers, regardless of whether she completed the sale personally or not. To Mr Seaton, this meant that the Claimant was claiming commission on all Benefit sales even those purchased without her intervention and use of the magic sales technique. In December 2015, the Claimant had claimed 56% of sales. When compared to a manager with similar sales amounts, the account manager there only claimed 17% of the sales. This lead Mr Seaton to believe the Claimant was inflating her figures. He was concerned that she did not seem to understand that this was wrong. The December sales figure adjusted by the Claimant was £54,380, which was more

than the CBO which was £53,090. That was simply not possible, and anyway did not take into account all the walk up and impulse sales, accounting for 30% of CBO. In cross examination, Mr Seaton said that the solid part of his analysis was that these figures simply did not add up, and the Claimant could not possibly justify the £300 bonus claim. He acknowledged that there were grey areas. However, the Claimant's percentage of bookings was low and she had low sales of pillar items, which was key to claiming commission on sales. If you were using a sales technique that affects commission you would expect a lot of pillar sales, Mr Seaton said. Further, Mr Seaton could not understand why the Claimant did not want to finish a transaction, which is the essence of excellent customer care. Further, her colleagues did transactions for others but not at the percentage put forward by the Claimant. The Claimant had failed to use the item movement report to remove items that had been returned, although she used it to add items that she thought she had sold. She could not have it one way without the other way. The Claimant had not been disadvantaged in the process, said Mr Seaton, and had plenty of opportunity to put forward her case and information in support of it. There was a combination of the bonus and the excessive commission payments that tipped the balance against the Claimant into the decision to dismiss her. She had breached trust and had been dishonest.

(9) The Claimant appealed the decision to dismiss her. The appeal hearing was held on 17th May 2016, and chaired by Ms Caroline Fisk, when again the Claimant was accompanied by her TU representative. Prior to the appeal hearing, Ms Fisk took the opportunity to review all the notes of the investigation, disciplinary hearing and disciplinary outcome letter so that she had a full understanding of the facts. She also reminded herself of the Respondent's disciplinary policy. The basis of the Claimant's appeal was that she had new evidence that she wanted Ms Fisk to consider, and further commented that she did not believe her actions warranted dismissal as she claimed to have been doing the same thing with regards to claiming sales commission over a lengthy period of time and was not clear on the commission rules, due to the different interpretation of the rules by a number of different Benefit area managers. Ms Fisk noted that the Claimant's claimed sales were significantly higher than the rest of her team. Further, the Claimant wanted the summary dismissal for gross misconduct taken off her record. She produced statements from two former employees, the same employees who gave evidence for the Claimant at this Tribunal hearing.

(10) In the dismissal appeal decision, dismissing the Claimant's appeal, dated 15th June 2016, Ms Fisk noted that the Claimant could articulate the Benefit commission claiming policy, that the Claimant did not produce any new evidence that was relevant to the case, that the Claimant had made admissions during her first investigation interview that she had put through items that had not been sold to the value of £2,000 and had claimed sales she could not personally account for and had attributed sales not claimed by other colleagues to herself even though she had no record that those items had been sold by her.

Comparison sales performance data between the Claimant's account and larger accounts in the area showed that the Claimant's personal sales claims were significantly higher in both monetary terms and also as a percentage of total retail sales than others in larger accounts. The area manager's statement that the accounts pillars were below the Company expectation would also indicate that commission had been inflated. Ms Fisk said that the Claimant had put in her appeal hearing outcome letter that the Claimant had signed the Company security rules in May 2014 which clearly set out the Respondent's position with regard to instances of theft and fraud by employees, that there was evidence that the Claimant's personal sale figures submitted for her commission claim were inflated against actual takings, till and colleague data, and that the Claimant had provided no new evidence that was relevant to the case. Ms Fisk therefore agreed with the original decision of Mr Seaton. Ms Fisk told this Tribunal that she had given due consideration to the Claimant's length of service and other mitigation, but ultimately believed that summary dismissal was both reasonable and fair. Ms Fisk was satisfied that the Claimant had deliberately and willfully made a number of claims for commission that she was not entitled to for personal gain.

(11) I found that the Claimant's evidence to the Tribunal was inconsistent and difficult to follow. For example, in paragraph 14 of her witness statement she said that if a customer decided not to buy or to discard an item bought somewhere else in the store having apparently purchased it on the Benefit counter, the item movement report would not show it and therefore the item would need to be taken off the sales sheets. However, in her oral evidence, the Claimant said that she did not take sales of the sales sheets that had not been recorded on the item movement report. The Claimant also said that she would claim commission even if the sale may not have been made at all. This was in conflict with her witness Ms Munro's evidence, where she said that items on the daily sheet would be specifically checked against the items movement report at the end of the day or early the following day, and if necessary not included in the sales sheet if there was no evidence of purchase. Thus, it would seem that the Claimant was not in fact checking the items movement report to take off sales not in fact made, but only to add sales that she had not recorded. Thus, it cannot be the case that the Claimant only claimed commission on sales achieved as she says in her witness statement. She appears to have claimed commission on sales that may not in fact have been made at all. The Claimant first of all said that there were no walk up sales in November and December 2015, then that there were but they were not recorded (as had been done in October 2015 by Ms Shipp). Although the Claimant said that her colleagues did not work as many days as she did, as an explanation as to why her figures were consistently so much higher than theirs, the documentary evidence does not bear that out. In December 2015 the Claimant worked 19.5 days, compared with Christina's 24 days, Amy's 18 days and the two temporary staff's 15 days and 13 days. There is thus no significant difference in the number of days worked that would explain the huge discrepancy in their commissionable sales figures – Christina £5,921, Amy £8,582, and

temporary staff £10,063 between the two of them. However, as pointed out by the Respondent, on the other hand it could be easily explained by the Claimant appropriating unclaimed items sold elsewhere in the store that did not appear on her colleague's commissionable sales list. The Claimant's explanation that the figure of £109,045 must have come from the weekly sales sheets printed off by her and kept in a blank folder at her counter does not stack up, because the monthly totals were also drawn from the weekly sales records and add up to just £106,954. The Claimant knew that she was claiming bonus on retail sales only, not for service or brow bar sales, because she wrote on the quarterly sales sheet that the bonus claimed was retail only.

THE LAW

3. By section 94(1) of Employment Rights Act 1996, an employee has the right not to be unfairly dismissed by his employer.

By section 95(1)(a), for the purposes of the unfair dismissal provisions, an employee is dismissed by his employer if the contract under which he is employed is terminated by the employer (whether with or without notice).

By section 98(1) & (2), it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal, and in the context of this case that it related to the conduct of the employee. Conduct is the reason relied upon by the Respondent. In *Abernethy v Mott, Hay and Anderson* [1974] IRLR 213, CA, it was held that a reason for a dismissal is a set of facts known to the employer or beliefs held by him which cause him to dismiss the employee.

By section 98(4), where the employer has shown the reason for dismissal, the determination of the question whether the dismissal is fair or unfair having regard to that reason;

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and

(b) shall be determined in accordance with equity and the substantial merits of the case.

4. The law to be applied to the reasonable band of responses test is well known. The Tribunal's task is to assess whether the dismissal falls within the band of reasonable responses of an employer. If the dismissal falls within the band, the dismissal is fair. If the dismissal falls outside the band, it is unfair. I refer generally to the well know case law in this area; namely, *Iceland Frozen Foods Ltd v Jones* [1982] IRLR 439, EAT, and *Foley v Post Office; HSBC Bank v Madden* [2000] IRLR 827, CA. The band of reasonable responses test applies equally to the procedural aspects of the dismissal, such as the investigation, as it does to the substantive decision to dismiss – see *Sainsbury's Supermarkets Ltd v Hitt* [2003] IRLR 23, CA. As far as the investigation is concerned, and the formation of the reasonable belief of the

employer about the behaviour, conduct or actions of the employee concerned, then I have in mind, of course, the well known case of *British Home Stores Ltd v Burchell* [1978] ICR 303, EAT. Did the Respondent have a reasonable belief in the Claimant's conduct formed on reasonable grounds after such investigation as was reasonable and appropriate in the circumstances?

In *Taylor v OCS Group Ltd* [2006] ICR 1602, CA, it was held that if an early stage of a disciplinary process is defective and unfair in some way, then it does not matter whether or not an internal appeal is technically a re-hearing or a review, only whether the disciplinary process as a whole is fair. After identifying a defect a Tribunal will want to examine any subsequent proceeding with particular care. Their purpose in so doing will be to determine whether, due to the fairness or unfairness of the procedures adopted, the thoroughness or lack of it of the process, and the open mindedness (or not) of the decision maker, the overall process was fair, notwithstanding any deficiencies at an early stage.

CONCLUSIONS

5. Having regard to the findings of relevant fact, applying the appropriate law, and taking into account the submissions of the parties, I have reached the following conclusions:

(1) The Respondent has shown the reason for dismissal. It was for misconduct, a potentially fair reason. That misconduct in the mind of the Respondent (Mr Seaton and Ms Fisk) was that they regarded as deliberate and unjustified the inflation of the Claimant's sales figures so as to gain commission and bonus to which she was not entitled.

(2) The Claimant criticises the investigation interview conducted by Ms Hobson-Cooper, who was using a recognised interview technique for fraud suspects. The ACAS Code (paragraphs 5-8) provides that an investigation into misconduct should be carried out without unreasonable delay to establish the facts, the investigating officer and the disciplinary hearing manager should be different people, and there is no statutory right to be accompanied at any investigation meeting. There was no breach of the ACAS Code by Ms Hobson-Cooper – even if the questioning was robust. It may be that there was a technical breach of the Respondent's own rules of procedure, which if this was a formal meeting meant that the Claimant should have had representation. However, I conclude that the Claimant gave what are likely to be truthful answers, as she had not had the opportunity to think up reasons (real or spurious) for the discrepancies that the Respondent had found. A companion would not have been able to answer for her. Ms Hobson-Cooper made no decision in the disciplinary process, save to refer the Claimant's case on for disciplinary hearing. I conclude that Ms Hobson-Cooper had ample evidence on the basis of the sales data and the Claimant's admissions on which to do so. The failure to allow the Claimant a companion at the investigation meeting did not make the disciplinary process as a whole unfair (see below).

(3) The Claimant also criticises Mr Seaton's conduct of the disciplinary hearing process. However, if he had not adjourned the first hearing in order to obtain further information/evidence he could have been criticised for not taking into account matters raised by the Claimant at the first disciplinary hearing. In accordance with the ACAS Code, someone else conducted those further enquiries, not Mr Seaton. The fact that Mr Seaton gave the Claimant three opportunities at three disciplinary hearings to explain her case indicates that he had not pre-judged the matter. So far as the appeal was concerned, then the Claimant's "new" evidence consisted of witness statements from Ms Munro and Ms Mack – which were not really relevant to the events of October 2015, as they had left the Respondent's employment one year and three years before. Whether different Benefit area managers in the previous years have followed different processes or whether the same process had been followed throughout was irrelevant. The Claimant was able to articulate the current process. Ms Fisk focused on the Claimant's admissions in the investigation interview, and the comparative sales performance data from other larger accounts in the area, and Ms Shipp's evidence that the account pillars were below company expectation indicating that the Claimant's commission claim had been inflated. Ms Fisk was entitled to take these matters into account. I conclude that there was no procedural irregularity in the disciplinary and appeal hearings which would take them outside the band of reasonable responses. When looking at the disciplinary process as a whole, I conclude that it was fair and within the band of reasonable responses (*Taylor v OCS*). The Claimant was notified in advance of the charges against her, she was accompanied at the disciplinary and appeal hearings, she had the opportunity to read all the documentation and provide further documentation if she had it, and to answer all the questions asked of her and to put her case.

(4) There was ample evidence on the basis of which the Respondent could form a reasonable view that the Claimant had deliberately inflated her sales figures, with the result that she was paid commission on sales that she had not personally made, and had received bonus when she was not entitled to it. As has been said before, she correctly articulated the commission policy, whether or not she had received Benebabe's documentation; and even if she had been doing it the same way for years, that does not mean that she is absolved from wrongdoing in the fourth quarter of 2015. Both sides agree that approximately 30% of sales are non commissionable. Taking December 2015 as the most serious instance, the commissionable sales claimed exceeded the CBO and therefore did not allow for any impulse buys, star gifts sales or walk up sales. This was simply not possible and the Respondent reasonably concluded that it could only be explained by the Claimant having inflated the figures. As pointed out by the Respondent, the Claimant's explanations for the discrepancy do not stand scrutiny. Her colleagues said that she was not a fantastically popular sales person whom repeat customers sought out; she spent a lot of time off counter doing paperwork; she spent a long time with each customer (meaning that it was unlikely she could have served 20 customers a day in December); her rebooking rates were low or non-existent; she worked a similar

number of days to her colleagues; her pillar sales were below target, indicating low customer interaction; and her sales figures compared with her peers in comparable stores were unbelievable. The fact that colleagues sometimes put through the Claimant's sales on the till could not account for the 1/10 ratio revealed by the Claimant's claimed sales against her actual sales on her till number. The Claimant admitted that she put through items that she did not know had gone on to be sold and that she would roughly estimate her sales, and had put through £2,000 worth of items without knowing whether she had sold them. As pointed out by the Respondent, her evidence regarding the use of the item movement report was contradictory and irreconcilable. The Claimant could not support her very specific monthly commissionable sales totals with any hard evidence. She could not explain where the quarterly figure of £109,045 had come from. Whichever way the figures were presented, they did not add up to that very precise number. The Claimant did not add in the service figures to get her bonus, as she knew that the two had to be accounted for separately. The *Burchell* test is well and truly satisfied by the Respondent. It was the accumulation of all these factors outlined above that indicated to the Respondent that the Claimant must have been inflating her sales figures and must have known that she was doing this.

(5) The decision to dismiss. In his summary to the Claimant of his reasons for dismissing her, Mr Seaton placed substantial reliance on the Claimant's answers to Ms Hobson-Cooper in the investigation meeting, and also on the sales data. I refer back to the findings of fact. Mr Seaton concluded that the Claimant's actions had resulted in a serious and deliberate breach of the Respondent's security rules, which was an act of gross misconduct. Mr Seaton was concerned that the Claimant did not seem to understand that what she had done was wrong. He said that the Claimant had acted dishonestly and he had lost trust in her. If it had just been the £300 bonus, he might have given the Claimant a final written warning, but there were substantial claims for commission as well, and summary dismissal was justified, said Mr Seaton. Ms Fisk could not see any reason to interfere with that decision. She took the view that the Claimant's length of service and previous clean disciplinary record was not sufficient to save her. I conclude that the decision to dismiss the Claimant for misconduct was well founded on the evidence that the Respondent had before them and within the band of reasonable responses. There is no claim brought for wrongful dismissal or dismissal without notice.

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Employment Judge G P Sigsworth, Bury St Edmunds

Date: 28th April 2017

JUDGMENT SENT TO THE PARTIES ON

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FOR THE SECRETARY TO THE TRIBUNALS