EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102456/2020

Final Hearing held at Dundee on 14, 15 and 16 October 2020

Employment Judge A Kemp

Mr A Singh	**Claimant** **In person**
MSG Scotland Ltd	**Respondent** **Represented by:** **Mrs H Winstone,** **Counsel**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The claimant was not unfairly dismissed by the respondent and the claim is dismissed.

REASONS

Introduction

1. This was a Final Hearing into a claim for unfair dismissal. The claimant represented himself, and Mrs Winstone represented the respondent.

2. The hearing took place in person. It followed a Preliminary Hearing on 4 August 2020 when a three day Final Hearing was fixed.

3. At the commencement of the hearing I explained to the claimant how it would be conducted, that the respondent would give its evidence first as it has the onus of proving the reason for dismissal, and that he in cross examining the respondent's witnesses should challenge any matter of fact that is said by them he does not agree with, and put to them anything not covered which they are able to comment on which he is to cover in his own evidence. I suggested that he may wish to use an aide memoire when giving his own evidence, and if so he should show that in advance to Mrs Winstone. I explained about closing of evidence, and making submissions, including that there was no onus to prove a fair or unfair dismissal. I then suggested issues which both parties were content with, being the issues noted below.

4. Before the claimant gave his evidence I explained that the respondent alleged that he had been guilty of falsification of records such that there may be an allegation of a criminal offence, including that of embezzlement, and that he had the right not to answer any question that might incriminate him.

The issues

5. The following issues were before the Tribunal:

(i) What was the reason, or if more than one the principal reason, for the claimant's dismissal?

(ii) If potentially a fair reason, was it fair or unfair having regard to the terms of section 98(4) of the Employment Rights Act 1996, and in that regard:

(a) Did the respondent have a belief that the claimant had been guilty of misconduct?

(b) Was that belief a reasonable one?

(c) Was it based on a reasonable investigation?

(d) Was the procedure followed reasonable, having regard to the terms of the ACAS Code of Practice on Discipline and Grievance Matters, and

(e) Was the penalty of dismissal reasonable?

In the above respects where the word “reasonable” is used that is in the sense of within the band of responses of a reasonable employer.

(iii) In the event that the dismissal is held to be unfair, to what remedy is the claimant entitled having regard to:

(a) His losses

(b) The extent of any contribution

(c) Whether a different procedure might have led to a fair dismissal

(d) Mitigation of loss

The evidence

6. The respondent led in evidence Mr S Kaki, Mr G Penman, Mr G Buntin, and Mr J Cunningham. The claimant gave evidence himself. The witnesses spoke to a Bundle of Documents that had been prepared by the parties. The respondent tendered a separate Bundle in respect of mitigation, and the claimant provided further documents in respect of loss. The claimant had not provided a Schedule of Loss as required by a case management order, but spoke to the losses and what he claimed in his evidence without objection from the respondent. Not all of the documents in the Bundle of Documents or additional documents were spoken to in evidence. The respondent sought to add additional documents on the final day, after the claimant had commenced cross examination, which after hearing both parties I allowed. They further sought and were granted permission, this being unopposed to adduce additional evidence from Mr Atif Ali, and Ms Clare Slater, which was said to come out of the evidence given initially by the claimant. I considered that doing so was in accordance with the overriding objective.

7. Evidence finished at about 4.25pm on the third day of the hearing. The parties were given the choice of having a further hearing fixed for submissions, doing so in writing, or doing so briefly that day, and both parties wished to give brief oral submissions, which they then did.

The facts

8. The claimant is Mr Amarjit Singh. His date of birth is 27 April 1989. His first language is Punjabi. He has a good command of English.

9. The respondent is MSG Scotland Limited. It is a franchisee of the Domino's Pizza chain, known as the master franchisor. It is one of a number of such franchisees.

10. The claimant was employed by the respondent as a Store Manager. He worked at the store of the respondent in Perth. His employment commenced on 21 February 2018.

11. Prior to that employment the claimant was employed by the SK Group as a Team Member. His employment with them commenced in February 2014. The claimant underwent training on basic management and advanced management in July 2015. The training conformed to requirements imposed by the master franchisor.

12. The claimant applied to the respondent for a position as Store Manager, and provided an application and CV which stated that he had been a Store Manager from February 2014.

13. The claimant had not been a Store Manager from February 2014. He had from 2016 acted up as Store Manager for periods, the details of which were not given in evidence.

14. The claimant was paid on average the sum of £459.47 per week with the respondent, and had pension deductions of £19.51 per week together with employer pension contributions of £18.61.

15. The claimant was the only Store Manager at the Perth Store. He had a varying number of staff in managerial roles working under him as Assistant Managers or Managers in Training. Latterly there were up to eight staff working in such roles, together with about 20 – 30 team members, at the Perth store. The staff including the claimant worked a rota system, with the store open for trade about 12 hours per day. There was an early shift, a middle shift and a late shift. The claimant reported to an Area Manager Mr Atif Ali, who in turn reported to a Regional Manager.

16. The respondent operates over 200 stores in the UK, and about 45 in Scotland, under the Domino's Pizza brand. The nearest store to the respondent's store in Perth within its group of stores is at Glenrothes which is about 23 miles from Perth. The respondent has about 5,500 staff. It

makes and sells pizzas and related products, including soft drinks. The pizza is made from pre-prepared dough, and toppings are added to it. Staff are trained to do so according to specific instructions for each type of pizza. Some toppings such as cheese are taken and added to the pizza by hand. Other toppings such as pizza sauce are taken by an item called a spoodle, which has a depression in it to allow taking of a measured amount of the sauce, and added to the pizza. The usage of toppings is monitored closely by the respondent to ensure that sufficient, but not excessive, amounts are used to retain quality and efficiency.

17. The respondent, and other franchisees of the Domino's Pizza's franchisor such as the SK Group, use a computer system called Pulse to record management information, including as to levels of stock and cash, together with transactions including those for food. The operational processes of such franchisees are very similar.

18. To access the Pulse system requires an identity number provided to each employee, unique to them, and a password that each person sets themselves, and changes every six weeks. The instruction is that the password should not be provided to any other member of staff. Different levels of management have different levels of access to information within Pulse, with greater access the higher the level of management. Managers and others at Head Office of the respondent can access information for stores, and amend them, but if so a record of that is maintained in Pulse.

19. The claimant's duties included entering food transactions with other stores, either within the respondent group or with other franchisees, in Pulse. They also included carrying out daily checks of the Pulse transactions, and of the levels of food stock and cash held as petty cash, to ensure that they reconciled with Pulse records.

20. On 20 November 2019 the respondent received a letter of grievance from one of the employees at the Perth store Mr Mitchell Boag. He made 19 allegations in total, and they were investigated by Mr Satish Kaki, the Regional Manager of the respondent. He concluded in early February 2020, after a period of annual leave, that the first and second allegations made by Mr Boag were appropriate to take forward to disciplinary action.

Those allegations were that (i) use by dates for food items had been re-dated on direction of the claimant, and (ii) there had been major manipulations of statistics and cash, with under-topping of pizzas leading to underuse of food, which was then sold outwith the respondent's franchise, and was not properly accounted for.

21. Under-topping is where the items placed on the pizza base, such as sauce, cheese, chicken, beef or other such items, is less than the required amount. The respondent has a standard by which it measures the use of such items in a store, and records usage levels daily to do so. It allows stores a variance of 0.25% against the anticipated levels of usage. If that is met, it is one of the key performance indicators (KPI) used to give managers a bonus. If the KPI is not met, it requires to be investigated.

22. In the Perth store the float was £700. It was used to pay for incidental purchases, and to provide drivers with cash to give change to customers buying pizzas by cash. Cash movements in the float were recorded in Pulse and checked daily by the Store Manager.

23. There was also a daily reconciliation of items of food held in the store, in a refrigerated area. If there was a variance against the recorded level, that required to be checked by the Store Manager.

24. It was possible for a store within the respondent's group to carry out transactions with other stores in that group to sell, purchase or swap items of food if one had run out, or was liable to, or had food nearing its use by date, or a surplus. It was rare, but not prohibited, to undertake such transactions with stores of other franchisees, such as the SK group. The respondent's expectation was that transactions would take place with stores within the respondent's group, and not with other franchisees save exceptionally.

25. If such a food transaction was undertaken, whether with a store in the respondent group or another franchisee, the details of that required to be entered into Pulse by the store concerned. Each store within the Domino's Pizza brand in the UK was allocated by the franchisor a store number. The numbers were entered sequentially dependent on when the store was opened. The Pulse system was used to record which store was being

traded with, on what date, which person was making the entry using his or her identity number and password, what the transaction value was, and with the ability to enter comments to describe it. The person making the delivery was entitled to be paid for doing so on the basis of mileage. Drivers employed by the company used their own cars.

26. Food was delivered by the respondent to its stores from what it termed the Commissary, situated in Livingston, about 48 miles from Perth. There were two cycles of deliveries on Monday, Wednesday and Friday or Tuesday, Thursday and Saturday. An emergency delivery could also be arranged, or food collected from the Commissary.

27. The Pulse system could be used to monitor levels of food stocks, together with the usage of such stocks, and ascertain what to order for appropriate levels of new stock to replace it. Items of food had varying degrees of shelf life, or time within which they required to be used. Some items such as pizza sauce or cheese had relatively longer such shelf lives. Others, such as dough, had shorter such shelf lives, of two to five days, with days three and four being optimum for use.

28. Mr Kaki sought the assistance of Mr David Parker when investigating the grievance, Mr Parker being an analyst of the respondent, who in turn conducted a review of Pulse records. Mr Parker identified that there were a number of transactions from the Perth store which involved another franchisee of the master franchisor, the SK Group, but not part of the respondent. He passed the issue to a director, who sought the assistance of the SK Group. That was granted, and information from Pulse of the transactions with the Perth store of the respondent, and stores in Scotland of the SK group, was provided by them to the respondent.

29. Mr Parker prepared a report in the form of a spreadsheet which contained 36 food transactions between the respondent's store in Perth and those of the SK group where he had information, in the period May to November 2019 inclusive. It provided the date, the other store, the transaction amount recorded in Perth, the transaction amount recorded in the other store, and the level of variance where there was that. There was a column for comments where they had been entered on Pulse. He sent that to

Mr Jack Cunningham an Employee Relations Adviser of the respondent. That report included comments added by Mr Parker.

30. Those comments made by Mr Parker were removed from the report by Mr Cunningham and the report then passed to Mr Kaki. He completed his investigations when he returned from annual leave after the Christmas holiday period.

31. Mr Kaki considered that the report was such that led to allegations against the claimant which were sufficiently serious to warrant being taken to disciplinary action. He set out his conclusions in an email, which was not before the Tribunal.

32. The claimant was then informed of the allegations against him by letter from Mr Cunningham dated 13 February 2020. It had attached to it the food transactions' report that had been sent to Mr Kaki, and extracts from the respondent's disciplinary policy. It required the claimant to attend a disciplinary hearing on 18 February 2020 on two allegations:

(i) "Deliberate falsification of company records…. specifically ….you have been engaged in a practice of entering false food transfers entered into the Pulse system, ……[involving] another franchise to prevent the company from being able to "balance" the financial aspects of these transfers."

(ii) "Abuse of Position of Authority….to instruct employees within your team to breach company procedures in relation to food dating and shelf life in an effort to resent a false food cost to the business."

The letter further warned the claimant that if it was found that the alleged conduct had taken place a possible consequence was termination without notice. His right to be accompanied by a fellow employee or trade union representative was confirmed. The letter did not suspend the claimant, who remained able to access the respondent's systems including Pulse to prepare for the hearing.

33. The disciplinary hearing took place before Mr Gordon Penman on 18 February 2020. He is the Sales Forecasting Controller for the respondent in Scotland, and had prior experience of being a Store

Manager and then Area Manager. The claimant was accompanied by Ms Ida Ramic. Ms Claire Smith of the respondent took notes of it. Following the hearing the claimant was allowed time to review those notes, and to suggest amendments. He made suggestions for amendment which Ms Smith accepted, and made. The claimant and his companion then signed the minutes later that day. They are a reasonably accurate record of the meeting.

34. At the meeting the claimant was asked if he believed that he was an experienced Store Manager and said, “I believe so”. He was asked if he would say that he had good stock management skills and said, “I believe so but at the same time I am struggling with my management team to follow the instructions given by myself the Area Manager and the company.”

35. He provided a large volume of documentation, but only referred to some of it during the meeting, which included documents in relation to purchase of string cheese on 3 December 2019 not entered into Pulse, and transactions with errors on them. He provided three statements from other employees in relation to the second allegation set out above, and other documentation in relation to it. Not all the documentation he provided at the meeting was before the Tribunal.

36. The claimant was asked by Mr Penman if he understood the table of food transfers included with the invitation letter and said, “Yes, I think, most of it.”

37. During the meeting the claimant was asked to comment on each of the transactions in the food transactions’ report. He was asked to explain them. On many occasions he did not give an explanation. He made suggestions that others in the Perth store had used his identity number and password, or that there had been access and changes made remotely by higher managers or those from Head Office. He argued that there may have been incorrect or missing entries made by the SK group stores as they may have engaged in improper or dishonest conduct. He explained that he had not been in the store on some of the dates involved. He stated that no mileage had been claimed for some of them as sometimes staff

agreed to collect or deliver items without doing so, if they were on their way to or from home. He further suggested that there may have been an incorrect store number entered on the system such that the transaction was not with the store whose details were stated on the report, which was why it did not have a record of that transaction, but with another store within the Domino's Pizza's brand. He also explained that he would agree to take stock from other franchise stores to help them out, and they would help him out on other occasions. He did not answer the question asked on a number of occasions. In a number of instances he could not provide any explanation, or said that he would need to look into it and go back to Mr Penman. He denied the allegations.

38. The details of the transactions included the following:

(i) Cowdenbeath

On 20 November 2019 the transactions entered at the Perth store included purchase of 2 bags of cheese, but there was no record of the cheese having been received at Perth. That would have involved taking £120.38 from petty cash for the purchase, which included 2 bags of pizza sauce that was received.

(ii) Dalgety Bay

On 22 November 2019 a purchase transaction for £39.55 was not recorded in Perth and had no corresponding entry for the SK store.

(iii) Dunfermline

There were a total of twelve transactions that Mr Penman regarded as suspicious, from 2 May to 18 October 2019. They included transactions where the price recorded as paid for dough was substantially higher than the true price, purchases recorded in Perth with no corresponding entry in the Dunfermline store, purchase and sale transactions with different figures recorded Dunfermline to those in Perth, the purchase of soft drinks when there was no requirement to do so as there was adequate stock in Perth, and transactions where the Perth transaction entry was not consistent as between stock and cash entries, such as on 1 August 2019 when the records was of a purchase of "5 large" but there was no

corresponding record in Perth showing that purchase in stock, which was of bags of chicken.

(iv) Falkirk – Grangemouth

There were three transactions all of which Mr Penman regarded as suspicious, which included one involving a shortage of cash in Perth of £173.04 on 19 August 2019, which the claimant said he would have recorded and made up from his own funds, and two sales transactions of £274.24 and £123.49 which would have involved cash coming to the Perth store which was not recorded.

(v) Falkirk

The transactions included one with a discrepancy between the Perth and Falkirk records for a sale and purchase transaction on 13 September 2019 of £95.68, for which the claimant said that he did not know what had happened.

(vi) Winchburgh

There were three transactions Mr Penman regarded as suspicious, which the claimant could not give an explanation for save for one where he was not in store on the day of the transactions on 27 July 2019.

39. The meeting also addressed transactions in Edinburgh-Colinton which latterly Mr Penman discounted. The claimant also provided during the meeting documents which indicated, amongst other matters, that transactions had not been properly recorded on all occasions, together with documentation including statements in relation to the second allegation.

40. The approximate distances in miles between Perth and each of those locations (within judicial knowledge) is as follows:

(i) Cowdenbeath – 24
(ii) Dalgety Bay – 31
(iii) Dunfermline – 28
(iv) Grangemouth – 45
(v) Falkirk – 46

(vi) Winchburgh - 36

41. Mr Penman asked the claimant for explanations as to how the deliveries for the transactions were made, including for Grangemouth particularly, and he said that it could be someone doing so for near where they live. He was asked if the transactions had occurred, and said, "Yes – I believe so." He was asked how many transactions he checked and said it was 80%. He said that he checked the transaction reports, and the food worksheets, weekly. The claimant also said that there were 171 food transactions within the period of the report, and 18% of them were being questioned. He suggested that the transaction amounts were small.

42. Mr Penman asked him about the second allegation, which the claimant denied and provided information about. Mr Penman asked him if he wished to add anything else at the conclusion of the meeting. He said that mistakes occur, and that they were made by the SK stores.

43. Following the meeting Mr Penman wished to carry out further investigations. He did so, checking the respondent's records in Pulse and elsewhere, to do so, and summarised them in an email to Mr Cunningham on 5 March 2020. He attached the food transactions' report which had added to it information on whether the claimant was at work that day, and if so the date he clocked on and off, and with colour coding to show suspicious transfers in green, those where mileage was paid in yellow, and those where mileage was possibly paid in orange.

44. There were 23 transactions Mr Penman thought to be suspicious from the original 36 following those further investigations. For five of them the claimant was not at work, and for 18 of them the claimant was at work, on the day of the transaction. For three of the suspicious transactions mileage had been paid. For one of the suspicious transactions mileage might have been paid.

45. Mr Penman noted occasions where a food item was purchased from an SK Group store when there was more than sufficient stock in the Perth store, such as for cheese or bottles of soft drink, or where there was to be a delivery for the same item from the Commissary due to take place the following day, such that there appeared to him to be no commercially

sensible explanation for the transaction. He noted that there were transactions where the location of the SK Group store was relatively far removed from the Perth store, when there were respondent group stores that were closer geographically. There were transactions where the figure recorded for it did not equate to the recorded amount for such an item of stock, such that the records for stock or cash were not consistent with the transaction. He noted that there were a number of SK group stores involved, and considered that the chance of all of them not noticing on their checks disparity between transactions records and records of stock and cash to be very low indeed, if there had been an error or deliberate falsification of records at those stores as suggested by the claimant. He did not agree with the claimant that the quantity of suspicious transactions was low or that the cash sums were small. He did not consider that the claimant's explanations given to him at the meeting were credible. Whilst the claimant had said on occasion he would look into matters, as he could not explain the transaction at the meeting, he did not contact Mr Penman with any further submission or comment. Mr Penman considered that the lack of proper accounting, that that had not been identified by the claimant as the Store Manager in daily checks, and the circumstances overall led him to believe that there was likely to have been dishonest fabrication of entries and that that was likely to have been carried out by the claimant.

46. He stated in his email, "my feelings are that something dishonest is going on, but its extremely difficult to tell exactly what. The motivation is there to either generate a cash surplus in the store which could then be taken or to cover a cash shortage to stop the management team repaying them. They could also be used to cover up large levels of under-topping which is a big problem in Perth (sauce and cheese). With regard to [the claimant]'s part in this, I believe he has to be the orchestrator of any issues."

47. He decided that that was a sufficiently serious matter to warrant summary dismissal. The allegation as to abuse of position was dismissed on the basis of insufficient evidence.

48. Mr Cunningham prepared a draft letter of decision following discussions which they had, which Mr Penman reviewed, amended and agreed. The

letter was then sent to the claimant on 11 March 2020 confirming the reasons for the summary termination of his employment on the basis of gross misconduct for falsifying records.

49. The claimant appealed that decision by letter dated 17 March 2020. It included that which included that the company had a target of plus or minus 0.25% on food use, and that "we are hardly hitting this target", and that he was hardly receiving bonus. He suggested that the Area Manager sometimes picked up food if visiting one of the SK stores. He alleged that there was a personal reason for the decision, and that there was a heated moment in the meeting, that there were mistakes in the notes, and that Mr Penman did not answer questions.

50. The appeal was heard by Mr Gordon Buntin on 15 April 2020, by Skype as there was at that stage a "lockdown" in light of the Covid-19 pandemic. Mr Buntin is the Head of Operations for Scotland for the respondent, and has three Regional Managers for Scotland reporting to him. The claimant attended the appeal hearing alone. Mr Kevin Cook attended as a note taker. His note is a reasonably accurate record of the meeting. During the meeting the claimant made further comments, including that he would drive to the other store and buy food off them (the SK store) to help them out. He suggested that some entries could have been put in by a person at Head office doing so remotely, He suggested that there could have been a transaction involving three stores with transfers between them before coming to Perth. He claimed that he had sent emails to Stephen Preston to report concerns on cash.

51. Following the appeal hearing Mr Buntin conducted further enquiries. He spoke with Mr David Parker, a person named Anita in payroll, Gordon Penman, and Claire Smith. He reviewed company documentation including weekly consolidated inventory reports. Mr Parker and Anita confirmed that although the claimant said that he had not met the KPI and not received bonus, the claimant had received bonus in seven of the last 12 months. Mr Penman gave further explanations for the decision he had reached, and the conduct of the disciplinary hearing. Ms Smith denied that there had been any undue pressure by Mr Penman during the meeting, and that the claimant's suggestions that it had been conducted not

properly and openly were incorrect. Mr Buntin also spoke with Mr Stephen Preston who the claimant had said he had sent emails to regarding cash shortages. Mr Preston confirmed that he had not received such emails from the claimant.

52. Mr Buntin concluded that he did not believe the claimant, and that the appeal should be refused, and wrote to the claimant to intimate that on 19 May 2020 providing his reasons in a detailed letter.

53. Following the termination of employment by the claimant he applied for and received Universal Credit. He made enquiries about jobs through friends. He had been working as a pizza chef whilst employed by the respondent, and increased his hours after the dismissal such that he had a further income of about £125 per week following the dismissal from that employer.

54. The claimant commenced a new role on 19 June 2020 with Mani Singh Ltd. The claimant's employment with Mani Singh Ltd pays him £253.13 net per week, and he has no pension contributions. The company is operated by his brother Mr Mani Singh.

Respondent's submission

55. The following is a brief summary of the submission made. There had been a reasonable belief in guilt following a reasonable investigation. Should that not be accepted, there would have been no different outcome from any different process. The claimant's position was not credible. He did not give satisfactory answers in the hearing or appeal, or this Tribunal. Mr Penman could understand why there may be one or two mistakes or differences in transactions, but not the number and breadth of those that were found. It did not matter that the precise motive was not known, it could have been to take cash or cover up shortages or earn a bonus. It does not require to be a criminal act to justify dismissal. The claimant argued that he was not trained or an experienced manager, but that is not what he presented, and not what Mr Ali thought. What is now argued for was not said during the disciplinary process.

56. All matters had been raised during the disciplinary hearing and there was no requirement to put the points in the email sent to Mr Cunningham after the hearing to the claimant. The claimant had the option to go back to Mr Penman after that hearing and did not. The claimant was wholly disingenuous in his appeal in alleging that he was not meeting targets, when he was paid bonus on seven out of twelve occasions.

57. If there was held to be an unfair dismissal the contribution was 100%. The claimant should not be believed. He gave vague answers and sought to create a smokescreen. She invited the Tribunal to dismiss the Claim.

Claimant's submission

58. The following is also a brief summary of the submission by the claimant. He was here to seek justice, as the respondent failed him. He knew that he did not do what was alleged, and it was not known who had. He did not wish the events to happen to anyone else. The respondent should track matters properly and not blame other people.

The law

(i) The reason

59. It is for the respondent to prove the reason for a dismissal under section 98(1) and (2) of the Employment Rights Act 1996 ("the Act"). If the reason proved by the employer is not one that is potentially fair under section 98(2) of the Act, the dismissal is unfair in law. Conduct is a potentially fair reason for dismissal.

(ii) Fairness

60. If the reason for dismissal is one that is potentially fair, the issue of whether it is fair or not is determined under section 98(4) of the Act which states that it

> "depends on whether in the circumstances…..the employer acted reasonably or unreasonably in treating [that reason] as a sufficient reason for dismissing the employee, and shall be determined in accordance with equity and the substantial merits of the case."

61. That section was examined by the Supreme Court in ***Reilly v Sandwell Metropolitan Borough Council [2018] UKSC 16***. In particular the Supreme Court considered whether the test laid down in ***BHS v Burchell [1978] IRLR 379*** remained applicable. Lord Wilson considered that no harm had been done to the application of the test in section 98(4) by the principles in that case, although it had not concerned that provision. He concluded that the test was consistent with the statutory provision. Lady Hale concluded that that case was not the one to review that line of authority, and that Tribunals remained bound by it.

62. The ***Burchell*** test remains authoritative guidance for cases of dismissal on the ground of conduct in circumstances such as the present. It has three elements

(i) Did the respondent have in fact a belief as to conduct?
(ii) Was that belief reasonable?
(iii) Was it based on a reasonable investigation?

63. It is supplemented by ***Iceland Frozen Foods Ltd v Jones [1982] ICR 432*** which included the following summary:

> "in judging the reasonableness of the employer's conduct an Industrial Tribunal must not substitute its decision as to what the right course to adopt for that of the employer…….the function of the Industrial Tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair."

64. The manner in which the Employment Tribunal should approach the determination of the fairness or otherwise of a dismissal under s 98(4) was considered and the law summarised by the Court of Appeal in ***Tayeh v Barchester Healthcare Ltd [2013] IRLR 387***.

65. Lord Bridge in ***Polkey v AE Dayton Services [1988] ICR 142***, a House of Lords decision, said this after referring to the employer establishing potentially fair reasons for dismissal, including that of misconduct:

> "in the case of misconduct, the employer will normally not act reasonably unless he investigates the complaint of misconduct fully and fairly and hears whatever the employee wishes to say in his defence or in explanation or mitigation."

66. The requirement of a fair investigation may include a requirement to be even-handed, taking fully into account evidence that could be in the employee's favour: ***A v B [2003] IRLR 405, EAT, Leach v OFCOM [2012] IRLR 839).***

67. Guidance on the extent of an investigation was given by the EAT in ***ILEA v Gravett 1988 IRLR 497***, that "at one extreme there will be cases where the employee is virtually caught in the act and at the other there will be situations where the issue is one of pure inference. As the scale moves towards the latter end, so the amount of inquiry and investigation which may be required, including the questioning of the employee, is likely to increase."

68. The focus is on the evidence before the employer at the time of the decision to dismiss, rather than on the evidence before the Tribunal. In ***London Ambulance Service v Small [2009] IRLR 563*** Lord Justice Mummery in the Court of Appeal said this;

> "It is all too easy, even for an experienced ET, to slip into the substitution mindset. In conduct cases the claimant often comes to the ET with more evidence and with an understandable determination to clear his name and to prove to the ET that he is innocent of the charges made against him by his employer. He has lost his job in circumstances that may make it difficult for him to get another job. He may well gain the sympathy of the ET so that it is carried along the acquittal route and away from the real question – whether the employer acted fairly and reasonably in all the circumstances at the time of the dismissal."

69. The band of reasonable responses has also been held in ***Sainsburys plc v Hitt [2003] IRLR 223*** to apply to all aspects of the disciplinary procedure.

70. Although there is an onus on the employer to prove the reason for dismissal, there is no onus on either party to prove fairness or unfairness.

71. The Tribunal is required to take into account the terms of the ACAS Code of Practice on Disciplinary and Grievance Procedures. It is not bound by it. The following provisions may be relevant:

> "5. It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case. In some cases this will require the holding of an investigatory meeting with the employee before proceeding to any disciplinary hearing…..
>
> 9. If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification…
>
> 23. Some acts, termed gross misconduct, are so serious in themselves or have such serious consequences that they may call for dismissal without notice for a first offence…."

72. The Code of Practice is supplemented by a Guide on Discipline and Grievances at Work, which is not a document that the Tribunal is required to take into account but which gives some further assistance in considering the terms of the Code of Practice. Under the heading "Investigating Cases" the following is stated "When investigating a disciplinary matter take care to deal with the employee in a fair and reasonable manner. The nature and extent of the investigations will depend on the seriousness of the matter and the more serious it is then the more thorough the investigation should be. It is important to keep an open mind and look for evidence which supports the employee's case as

well as evidence against. It is not always necessary to hold an investigatory meeting…..” Under the heading of “Preparing for the meeting”, which is a reference to a disciplinary meeting, is included “Copies of any relevant papers and witness statements should be made available to the employee in advance.”

73. The extent of documentation that should be placed before an employee depends on all the circumstances. It has been addressed in ***Spink v Express 1990 IRLR 320*** and ***Louies v Coventry 1990 IRLR 324***, in which what was provided by the employer was held to be inadequate, and ***Fullers v Lloyds Bank 1991 IRLR 326*** where a summary of the evidence was held to be adequate. The extent of the investigation required similarly depends on all the circumstances, as addressed in ***Shrestha v Genesis Housing Association Ltd [2015] IRLR 399.***

74. A finding that there was gross misconduct does not lead inevitably to a fair dismissal. In ***Brito-Babapulle v Ealing Hospital NHS Trust [2013] IRLR 854*** the Tribunal suggested that where gross misconduct was found that is determinative, but the EAT held that that was in error, as it gave no scope for consideration of whether mitigating factors rendered the dismissal unfair, such as long service, the consequences of dismissal, and a previous unblemished record.

75. An appeal is a part of the process for considering the fairness of dismissal – ***West Midlands Co-operative Society Ltd v Tipton [1986] ICR 192*** in which it was held that employers must act fairly in relation to the whole of the dismissal procedures. The importance of an appeal in the context of fairness was referred to in ***Taylor v OCS Group [2006] ICR 1602*** in which it was held that a fairly conducted appeal can cure defects at the stage of dismissal such as to render the dismissal fair overall. That case also emphasised that procedure is not looked at in a vacuum, but that the fairness of a dismissal is looked at in the round having regard to all the circumstances, as was reiterated in ***Sharkey v Lloyds Bank plc UKEAT/005/15.***

(iii) Remedy

76. In the event of a finding of unfair dismissal, the tribunal requires to consider whether to make an order for re-instatement under section 113 of the Employment Rights Act 1996. The matter is further considered under section 116.

77. The tribunal requires also to consider a basic and compensatory award which may be made under sections 119 and 122 of the Employment Rights Act 1996, the latter reflecting the losses sustained by the claimant as a result of the dismissal. In respect of the latter it may be appropriate to make a deduction under the principle derived from the case of ***Polkey,*** if it is held that the dismissal was procedurally unfair but a fair dismissal would have taken place had the procedure followed been fair. That was considered in ***Silifant v Powell 1983 IRLR 91***, and in ***Software 2000 Ltd v Andrews 2007 IRLR 568,*** although the latter case was decided on the statutory dismissal procedures that were later repealed.

78. The amount of the compensatory award is determined under section 123 and is "such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer". The Tribunal may separately reduce the basic and compensatory awards under sections 122(2) and 123(6) of the Act respectively in the event of contributory conduct by the claimant. Guidance on the amount of compensation was given in ***Norton Tool Co Ltd v Tewson [1972] IRLR 86.*** In ***Nelson v BBC (No. 2) [1979] IRLR 346*** it was held that in order for there to be contribution the conduct required to be culpable or blameworthy and included "perverse, foolish or if I may use a colloquialism, bloody minded as well as some, but not all, sorts of unreasonable conduct." Guidance on the assessment of contribution was also given by the Court of Appeal in ***Hollier v Plysu Ltd [1983] IRLR 260***, which referred to taking a broad, common sense view of the situation, in deciding what part the claimant's conduct played in the dismissal. At the EAT level the Tribunal proposed contribution levels of 100%, 75%, 50% and 25%. That was not however specifically endorsed by the Court of Appeal. Guidance on the process to follow was given in ***Steen v ASP***

Packaging Ltd UKEAT/023/13.) A Tribunal should consider whether there is an overlap between the ***Polkey*** principle and the issue of contribution (***Lenlyn UK Ltd v Kular UKEAT/0108/16).***

Observations on the evidence

79. I considered that all of the witnesses for the respondent were generally seeking to give honest evidence. They spoke clearly and candidly in answer to the questions asked of them. I was struck by the fact that both Mr Penman and Mr Buntin carried out their own investigations after the hearings each held, and it was a not inconsiderable period in each case before they made their decision. That was indicative of someone taking care with the decision. Mr Penman discounted 13 of the 36 allegations in the spreadsheet, and all of the second allegation. That too indicates someone taking care to make a decision on a proper foundation of evidence. Whilst I have some concerns over the way that the matter was conducted as I shall come to, I considered that these witnesses for the respondent who took the decision to dismiss, and heard the appeal, were credible and reliable. Mr Kaki and Mr Cunnningham gave evidence which was more in the nature of background, and I accepted what they said.

80. Mr Atif Ali was called latterly by the respondent. He is a friend of the claimant, who had assisted him during his employment and with the disciplinary process. He had been his Area Manager. He did not however support the claimant's evidence on some matters of significance which arose out of the initial part of the claimant's evidence. The claimant had said in his evidence that the reason he had stated on his CV and application to the respondent that he was a Store Manager from February 2014 was on Mr Ali's advice. Mr Ali denied that, and said that he had no reason to think that the claimant was other than a Store Manager. The claimant alleged that he had not been properly trained, did not know procedures properly and spoke every day to Mr Ali on the phone so that Mr Ali could tell him what to do. Mr Ali denied that, and said that it had taken about two weeks for him to inform the claimant of the respondent's procedures. He thought that the claimant was a very good manager. He had not spoken to him on a daily basis for an hour or so as alleged. The claimant alleged that Mr Ali had taken food to or from the SK stores, which

he denied, saying that he is instructed not to attend such stores unless exceptionally required. Mr Ali also said that the claimant had informed him when preparing for the appeal that his brother had an interest in a Subway franchise at a petrol station in Edinburgh. The claimant did not cross examine him on these details, but raised other matters involving other instances of mistakes in transactions and related points. I had no hesitation in accepting Mr Ali's evidence as he gave it, and that he was a credible and reliable witness.

81. Ms Slater gave evidence that the respondent's training and that of the SK group was in effect the same, and that the basic and advanced manager's course that the claimant had been on when at SK was the equivalent of their own training. She also spoke to having telephoned a Shell petrol station in Edinburgh after an internet search on the third day of the hearing, 16 October 2020, that she had spoken to the claimant's brother Mr Mani Singh, and asked about meeting the claimant there, and being told that he "was not in that day". I accepted her evidence as credible and reliable.

82. The claimant's evidence was not always easy to follow. He did not always answer the question asked in cross examination. Some of the matters raised with him he did not have what I considered to be a reliable answer for. There were some points of detail where what he had stated to the respondent were demonstrated not to be correct, such as in relation to emails to Mr Preston or not meeting target and not having a bonus. I was concerned that he denied any involvement in his brother's busines at a petrol station where he had told Mr Ali about it, and Ms Slater had been told that he was not in that day. The questions asked of him were in relation to a petrol station, rather than a Subway at it, and it is possible that technically his answers were not untrue, albeit I consider them to lack candour. I did not make a finding that he had been working at the Subway as the question asked was about a petrol station, but his answer that he knew nothing of a petrol station was not I consider likely to be entirely truthful in light of the later evidence. What I found particularly concerning was the evidence of Mr Ali which so clearly contradicted his own, and I believed Mr Ali. There were other points of concern as I shall come to.

83. I did have however some sympathy for the claimant in his comment that he did not have all the documentation he might have had. There was no investigation report, nor any evidence beyond the food transactions' report which of itself is not easy to follow. The grievance by Mr Boag was not sent to him, nor was anything to provide context for the issues that arose from the food transaction report, such as the weekly inventory reports or cash reports. But the claimant was a Store Manager, had a knowledge of Pulse and how it operated, had access to it during the period up to the disciplinary hearing, and until his dismissal over three weeks later, and did not ask for documentation during the hearings. He said to Mr Penman that he understood the report in the main, and did not indicate during the hearing any lack of understanding. He indicated that he would need to follow up on points, and had the opportunity to do so, but did not revert thereafter to Mr Penman.

84. I took into account that the claimant's first language was Punjabi and that English was therefore his second language, but his English was good, and it was not an issue that I considered explained the lack of answers or the answers that were given.

85. After the hearing Mr Penman conducted further investigations and sent an email to Mr Cunningham with a summary of his findings, which was not sent to the claimant. Good practice suggested that that should be done, but that is not the test in law which I require to apply, as I address further below.

86. Whilst matters might have been handled better, I considered it at the least highly surprising that a Store Manager who had been in post for as long as the claimant had with the respondent, and had access to the accounting and other records both in Pulse and elsewhere as he was not suspended, had not been able to provide answers for the questions asked of him, given the need for daily checks, the stock and cash control procedures in place, and the number and variety of the issues of concern that arose from the report. That lack of explanation is considered in the context of evidence on matters which I did not regard as credible or reliable.

87. The claimant raised in evidence matters that he had not set out in the Claim Form or during the hearings, which was a further basis for concern. An example of that was an allegation that he had been threatened by Mr Connor Smith. When asked by me when that had taken place, he said in February 2020. When asked why it had not been raised in the disciplinary hearing he said that it was after that hearing. When asked further to explain the process he referred to a text message he had sent his Area Manager, Mr Atif Ali, but that text was dated 28 January 2020, and therefore before the disciplinary hearing.

88. The claimant gave in evidence two further explanations for the entries in the food transactions' report, firstly that someone had used his login details when he had gone out of the office briefly, and secondly that someone had seen his login details and used them themselves. Each one was new, not raised during the disciplinary or appeal hearings. The claimant also said in evidence that he had tried to tell Mr Penman that other employees were trying to get him out, but that he had not been allowed to do so. He accepted that it was not in the notes of meeting that he had signed, nor in the revisals' document also produced, nor had it been put to Mr Penman in cross-examination. He said that the point had only been recalled by him when giving his evidence on the third day of the hearing.

89. These factors all are indicative of a witness who is not reliable as a witness, and cast material doubt over credibility.

90. There were further matters that caused concern as to credibility, which included his CV stating that he was a Store Manager at his former employer, when he at best had been acting in that role for various periods from 2016 onwards, such that the statement that he was a Store Manager from February 2014 was not true, and although he stated that Mr Ali had said he should put that that was not I considered credible, as explained above, as was his alleging that he had not received bonus for meeting targets for food use when he had on seven out of the last 12 months, and his alleging that he had emailed Stephen Preston about issues, when he had not. I was also concerned at his suggestion that staff would agree to pick up or deliver items in their personal cars on the way to, or going back

from, work. The routes suggested were not likely to be such that staff would do them free of cost to the respondent, with that cost being met by the staff member, given the location of the stores in question which were far afield and in different geographical locations. The detour that would be required for such locations is considerable, and the suggestion that someone would do so on all the occasions involved without claiming the mileage that they were entitled to stretched credibility very far indeed. The SK stores in Falkirk and Grangemouth are very close in distance to the Commissary in Livingstone, such that carrying out food transactions with such stores rather than with the Commissary makes no commercial or other sense. The explanation that the claimant gave was in effect of doing a competitor franchisee a favour, on the basis that they would do the same in reverse, but Mr Penman did not accept that, and as an explanation for what could be fraudulent activity it is not a strong one.

91. Taking all of the evidence in the round, I preferred the evidence of the respondent on any issue of disputed fact against that of the claimant.

Discussion

92. I shall address the issues in turn.

(i) Reason

93. I was readily satisfied that the reason for dismissal had been established by the respondent, and that it was conduct. The claimant did not accept that. An issue he raised on appeal was his race or religious beliefs as a Sikh, but there was no basis to do so. Conduct is a potentially fair reason for dismissal.

(ii) *Fact of belief*

94. I was satisfied that the respondent did have a belief that there had been gross misconduct by the claimant, and that that was genuinely held.

(iii) Reasonableness of belief

95. The question of reasonable belief is to be judged against the standard of the reasonable employer. I am not entitled to substitute my views for those

of the respondent. It is worth re-stating that the test is not that of a criminal trial, nor that of a civil proof. It is not enough however that there is suspicion. There requires to be a basis sufficient to entitle a reasonable employer to believe that the claimant was guilty of the allegation.

96. In my judgment, there was here. There are a number of reasons for that, which include:

(i) The details were entered on the claimant's identity number and password. Whist some were when he was not at work, which was a concern, others were when he was. Most importantly however he accepted that he had been involved in at least some of the transactions, and sought to justify that for reasons I shall come to.

(ii) The other stores were not those of the respondent, but another franchisee, which was in effect a competitor. The expectation if a store was short of an item of food would be to order that from the Commissary, if necessary on an emergency basis, or to arrange a purchase or swap from another of the respondent's stores. Whilst transactions with the SK group were not prohibited, the expectation was that they would be very rare, and not with the frequency that was seen in the report.

(iii) The location of the SK stores was disparate, and many were located a material distance away from the Perth store.

(iv) There were a number of such stores, and the possibility of fraud or improper or inaccurate accounting in all of them, over a period of six months, that was in each case not caught by daily checks or auditing there, was remote at best.

(v) There were entries in the Perth store that did not make the slightest commercial sense, such as ordering food which was due for delivery the next day, ordering food or drink not required at all, or ordering items that were at the end of their shelf life, and not then used. That supported the belief that the transactions had not taken place.

(vi) Many of the transactions had no mileage claims attached to them, when that would be expected. The explanation given for that was not credible to Mr Penman, in effect that the staff agreed to do so

at their own cost when using their personal cars. That tended to support the suggestion that the transactions had not taken place..

(vii) There were 23 transactions latterly considered by Mr Penman to be of concern. That is a reasonably high number. Mistake is very unlikely to account for such a high number.

(viii) The transaction records were not consistent, such as when a purchase of food did not lead to an increase in the stock of food, or the sale of food did not lead to an increase in the cash held, which supported the suggestion that the transactions had not taken place.

(ix) Whilst transactions for sums about £20 might take place from time to time, those involving sums about £100 or more were rare, such that they, or at the least some of them, would be expected to be remembered.

(x) Some were not that far back in time from the disciplinary meeting such that again recollection of them would be anticipated, yet the claimant on many occasions was not able to give any explanation, said that he would need to look into it, but did not follow that up with further detail provided to Mr Penman.

(xi) If the claimant had not himself carried out the transactions, as Store Manager he was responsible for carrying out daily checks of stock, cash, and of the transactions recorded. He did not work every day, and was not always on duty, but he was likely to be on duty for the large majority of the transactions and yet did not appear to notice anything amiss. He could not adequately explain that.

(xii) The explanations he gave for what occurred were many, varied, and inconsistent. They were on many occasions given as possibilities, assumptions or in effect guesses, rather than as explanations of what had in fact happened.

(xiii) His explanation for the transactions he admitted, at the Disciplinary Hearing, to being involved in were to help out the SK stores, on the basis that if he did so they may help him out later. That was not the practice of the respondent as Mr Penman understood it, and it was not consistent with commercial common sense in his view, particularly to the extent shown in the report.

(xiv) The circumstances were such that there was the possibility of dishonesty, either using fabricated transactions to cover the taking

of cash, or to increase artificially the store's financial figure to assist in gaining bonus, or otherwise. Mr Penman was not able to decern what precisely had happened, but he was satisfied that there had been fabricated transactions. The claimant alleged that they were small in amount and number, but Mr Penman did not agree.

97. Taking the evidence overall, I concluded that Mr Penman was entitled to hold the belief that the claimant had been guilty of the first allegation against him. He had not upheld the second.

(iv) Reasonable investigation

98. There were a number of matters in relation to the investigation that caused me some concerns initially. As stated above, the respondent did not follow best practice. It is a large organisation, with a level of resource to match. The matters that I considered were as follows:

99. Mr Kaki investigated the grievance, and provided a report by email, but that was not before the Tribunal nor sent to the claimant.

100. There was no investigation report into the allegations of gross misconduct. There was a spreadsheet produced by Mr Parker in relation to food transactions as set out above, but that was all that was sent to the claimant. That is at the very lowest level of what is a reasonable investigation. In a case such as the present, it is not easy to understand why there was not a written investigation report explaining what had been found, and providing further details as to issues around the individual transactions such as for ordering food items, delivery of food items, daily reconciliations for stock and cash, and instructions given for entries on the Pulse system. Whilst the claimant, Mr Penman and Mr Buntin were all very familiar with the systems and procedures involved, it was not a simple matter to follow the terms of the spreadsheet as presented in evidence, nor to relate that to the minutes of meetings or the evidence given.

101. The grievance by Mr Boag was provided to Mr Penman, but not the claimant, even in the form of an extract for items 1 and 2. Yet it led to the matter being raised. The outcome of Mr Penman's further investigation was not provided to the claimant for further comment.

102. These are material concerns, but I have decided that having regard to all of the evidence that they do not take the case outwith the band of reasonable responses. I require to consider all of the evidence, and that includes the following –

(i) The claimant did not ask for more information or for additional documentation at the disciplinary or appeal hearing.

(ii) He accepted that he generally understood the report at that hearing.

(iii) He had had access to the Pulse and other systems and records as he was not suspended, and continued to do so up to the dismissal.

(iv) He had the opportunity to revert to Mr Penman after the hearing, indeed said that he would look into a number of matters, but did not contact him in the period of over three weeks after the hearing and before the decision.

(v) Whilst it would have been best practice for the outcome of the investigations to be given to the claimant for further comment, Mr Penman said that the issues had been discussed at the hearing such that reconvening it was not he considered required. I consider that there was just sufficient for that decision to be within the band of reasonableness.

(vi) The claimant did not give, in many instances, explanations when they would ordinarily have been expected. That reduced the extent to which investigation was possible, or required.

(vii) Those explanations that were given were, for the reasons set out above, ones that Mr Penman was entitled to regard as not credible or reliable, having regard to the evidence before him as a whole.

(viii) In the event that there was any concern over the disciplinary hearing, and I considered on balance that there were not sufficient to render it unfair, then such concerns were addressed effectively at the appeal stage so that the dismissal as a whole was not unfair. Mr Buntin also made his own, not inconsiderable, enquiries. He spoke to a number of colleagues. The answers given were all contrary to the position of the claimant. Some of what the claimant had alleged was found to have been untrue. There was a material delay between the appeal hearing and decision whilst these

enquiries were made by Mr Buntin. Against that background it was at the least within the band of reasonable responses for Mr Buntin to disbelieve his explanations and have the belief that the claimant had acted as alleged

(ix) I concluded in light of that that the investigation was within the band of reasonable responses.

(v) Procedures

103. I considered the procedures followed, some of which are addressed in the context of investigation. I do not consider that there was any breach of the Code of Practice.

104. Had Mr Penman made a decision on the basis only of the food transactions' report and the disciplinary hearing that may well I consider, subject to an appeal, have been unfair, but he did not. He undertook his own investigations afterwards. He discovered that a number of the transactions were undertaken in circumstances where there was no obvious reason to do so, contrary to normal practice and commercial common sense. That included the purchase of a large quantity of cheese when there was sufficient in store, the purchase of items near the end of their shelf life for no apparent reason, and the purchase of bottles of soft drinks which were not required as there was more than sufficient in stock. He checked mileage, and found that for all but a few of the suspicious transactions there were none that could be related to the transactions, and as set out above the distances (which I have taken from judicial knowledge) of the stores involved are not ordinarily explained by someone making a delivery or taking a delivery on the way to or from work from home. He found that only on a few occasions was the claimant not present. Even after discounting 13 of the transactions, 23 remained involving SK stores in disparate locations where there was either no explanation or one he did not consider credible. The number and variety of the suspicious transactions, involving cash movements, were an important factor for him. He would have expected the claimant to have discovered a transaction carried out when he was not in the store if it was not properly entered on Pulse, or otherwise recorded properly, for so many such transactions. He would have expected the SK stores to find the

discrepancy for so many transactions in so many different stores if the mistake, if that it be, was made at the SK stores. The SK stores were outwith the respondent group, and interrogating further their records was not something he could do. It was not in any event a requirement of a reasonable employer. In summary, given all that was before him he had done all that a reasonable employer is required to do to investigate the matter. The extent of the required procedure is partly dependent on what the employee says, or does not say, and here it is significant that the claimant did not seek more documentation, or make further submissions after the hearing, when he could have done. He also had access to the systems of the respondent as he was not suspended.

105. If procedurally he was in error in not providing the claimant with the outcome of his investigations, that was I consider remedied by the appeal. Although the email from Mr Penman explaining his thinking, and with the spreadsheet amended with further details and colour coding was not itself provided to the claimant, Mr Penman did set out what had been the findings he made and the reasons for that in the letter of dismissal. Mr Buntin undertook his own enquiries, and he ascertained that what the claimant was stating was not credible or reliable in a number of material respects. He was entitled to hold that, when that is considered with the absence of explanation when one would be expected and the reasons as Mr Penman had set them out, that the claimant's version of events was not credible, such that a belief that he had acted as alleged in the first allegation was upheld.

106. I concluded that even if there had been held to be a procedural defect earlier, and I did not consider that there had been, then the appeal cured that, such that overall there was a fair procedure, being one that a reasonable employer could have undertaken.

(vi) Penalty

107. Whilst it does not follow that a finding of gross misconduct inevitably leads to a fair dismissal, given the circumstances of this case I consider that it was at the very least within the band of reasonable responses to dismiss the claimant.

(vii) Conclusion on section 98(4)

108. I considered all the evidence as a whole, and concluded that the dismissal was not unfair under the terms of section 98(4) of the Employment Rights Act 1996.

109. For completeness I would add firstly that the claimant raised in evidence many individual issues that did not, I consider, adequately explain the matters alleged such that they were not relevant, and are not addressed in detail in the Judgment, and secondly that had there been a finding of unfair dismissal on the basis of the procedures followed I would have held that had the procedures been different the same result is practically certain to have been the outcome, and reduced any award to nil on the basis of the ***Polkey*** principle. I would also have separately held that in all the circumstances the claimant contributed to the dismissal to the extent of 100% such that no basic or compensatory award fell to be made.

110. Whilst I have found that the dismissal was not unfair, I do not wish to give the impression that I endorse all that the respondent did. I consider that the respondent did not follow best practice in the manner in which it addressed the issues in this case. The law does not require it to do so, but I did give serious consideration to whether the aspects I have identified led to there being procedurally an unfair dismissal. The respondent did what was just above the bare minimum for the dismissal to be not unfair. It would have been preferable to have provided the claimant with all relevant material, including the extract from the grievance, and documentation for the dates of the alleged transactions showing stock and cash records at the Perth Store. It would have been preferable to have had an investigation report, and for that to have included an investigation interview with the claimant. It would have been preferable for Mr Penman to have sent the outcome of his investigations following the investigation to the claimant, and reconvened the hearing to allow him to comment on them or on further issues which he had not answered during the hearing. There were also some details not before the Tribunal, such as Mr Kaki's email to report the outcome of the investigation into the grievance, which would ordinarily have been expected to be produced. The food

transactions' report was not simple to follow, and even in a copy with colour codings and increased size was not easy to read.

Conclusion

111. I have found that the claimant was not unfairly dismissed, and I require to dismiss the Claim.

Employment Judge:	**Alexander Kemp**
Date of Judgment:	**22 October 2020**
Date sent to parties	**22 October 2020**