EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mr. S. Baig	v	**Sky U.K. Limited Retail Services**

Heard at: Birmingham via CVP **On: 10 & 11 June & 23 July 2021**

In chambers 29 September 2021

Before: **Employment Judge Wedderspoon**

Representation:

Claimant: **Mr. T. Wilding, Counsel**

Respondents: **Miss. Ferguson, Counsel**

JUDGMENT

1. The claim of unfair dismissal is well founded and succeeds.

2. The claimant contributed to his dismissal by 25%.

3. A remedy hearing will take place by CVP for one day. The parties will be informed of the date by the Tribunal.

REASONS

1. By claim form dated 27 November 2020 the claimant brought a claim for unfair dismissal.

2. The Tribunal was provided with an agreed bundle of 366 pages. This bundle was added to by agreement; pages 367 to 370. The respondent relied upon the evidence of Micah Shepherd, investigating officer, Scott Brown, dismissing officer and Mr. A. Brookes, appeal officer. The claimant relied upon his own evidence. The hearing was time-tabled and the Employment Judge read the documents contained in the witness statements and the list of documents suggested by counsel.

3. The liability hearing took place on 10 June 2021 and due to time constraints it was not possible for submissions to be dealt with. A submissions hearing was listed on 23 July 2021 but due to congestion in the list, further cases were listed following the submissions hearing so that the Tribunal was unable to deliberate

on that date. The Tribunal has considered this case on the first date available in chambers.

4. At the commencement of the hearing it was agreed that the following issues should be determined :-

   (1) What was the reason or principal reason for dismissal? The respondent says the reason was conduct. The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.

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

   1.1.1 there were reasonable grounds for that belief;
   1.1.2 at the time the belief was formed the respondent had carried out a reasonable investigation;
   1.1.3 the respondent otherwise acted in a procedurally fair manner;
   1.1.4 dismissal was within the range of reasonable responses.
   1.1.5 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
   1.1.6 If so, should the claimant's compensation be reduced? By how much?
   1.1.7 Did the claimant cause or contribute to his dismissal?
   1.1.8 If so should the claimant's compensation be reduced? By how much?

Law

5. In an unfair dismissal complaint, the respondent bears the burden of proving on the balance of probabilities that the dismissal was for an admissable reason; this includes misconduct. If the respondent fails to persuade the tribunal that it had a genuine belief in the claimant's misconduct and that it dismissed him for that reason, the dismissal will be unfair.

6. If the respondent does persuade the tribunal that it held the genuine belief in misconduct and that it did dismiss the claimant for that reason the dismissal is only potentially fair. The tribunal must then go on and consider the general reasonableness of the dismissal under section 98 (4) of the Employment Rights Act 1996. That section provides that the determination of the question of whether a dismissal is fair or unfair depends upon whether in the circumstances (including the respondent's size and administrative resources) the respondent acted reasonably or unreasonably in treating the misconduct as a sufficient reason for dismissing the claimant. This is to be determined in accordance with equity and the substantial merits of the case. The burden of proof in this regard is neutral.

7. In conduct cases, when considering the question of reasonableness the Tribunal is required to have regard to the test outlined in **British Homes Stores v Burchell (1980) ICR 303.** The three elements of the test are :

(1)Did the employer have a genuine belief that the employee was guilty of misconduct ?

(2)Did the employer have reasonable grounds for that belief?
(3)Did the employer carry out a reasonable investigation in all the circumstances?

8. The additional question is to determine whether the decision to dismiss was one which was within the range of reasonable responses that a reasonable employer could reach.

9. It is important that the Tribunal does not substitute its own view for that of the respondent **London Ambulance Service NHS Trust v Small (2009) EWCA Civ 220** at paragraph 43 says :

"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 take 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."

10. The appropriate standard of proof for those at the employer who reached the decision was whether on the balance of probabilities they believed that the misconduct was committed by the claimant. They did not need to determine or establish that the misconduct was committed beyond all reasonable doubt.

11. In considering the investigation undertaken the relevant question for the Tribunal is whether it was an investigation that fell within the range of reasonable responses that a reasonable employer might have adopted. Where the Tribunal is considering fairness, it is important that it looks at the process followed as a whole including the appeal (see **Taylor v OCS Group Limited (2006) EWCA Civ 702**. The Tribunal is also required to have regard to the ACAS code of practice on disciplinary and grievance procedures.

12. In the case of **Hadioannous v Coral Casinos Limited (1981) IRLR 352** the EAT considered that evidence as to decisions made by an employer in truly parallel circumstances may be sufficient to support an argument in a particular case that it was not reasonable on the part of the employer to visit the particular employee's conduct with the penalty of dismissal and that some lesser penalty would have been appropriate. However the EAT sounded a note of caution "Tribunals would be wise to scrutinise arguments based upon disparity with particular care..there will not be many cases in which the evidence supports the proposition that there are other cases which are truly similar or sufficiently similar to afford an adequate basis for the argument. The danger of the argument is that a Tribunal may be led away from a proper consideration of the issues raised by section 57 (3) of the Act of 1978. The emphasis is that section is upon the particular circumstances of the individual employee's case..".

13. Where a Tribunal considers that if a different procedure had been adopted in the disciplinary process but it would not have made any difference to the outcome, the Tribunal is entitled to reduce compensation accordingly.

14. Furthermore, if the Tribunal is satisfied that the claimant was guilty of blameworthy conduct which caused or contributed to the dismissal, the tribunal is entitled to reduce compensation.

Facts

15. The claimant was employed by the respondent from approximately September 2005 until his dismissal on 15 July 2020 as a sales representative based in the Perry Barr store. His employment was subject to a policy called "How we Work Policy". The claimant was familiar with the policy. The policy required advisors to profile a customer beforehand to ensure they do not already have or have had an active service in the last 12 months (page 62). It also stated that a duplicate account is a second active account at the same address or a customer cancel or system cancel account that was cancelled less than 12 months ago at the same address and explicitly states that "we never create a separate or duplicate account". Failure to follow these policies may lead to consequences for the customer such as loss of telephone number, loss of tenure and financial implications which may cause the customer to have a poor customer journey and lose confidence in the respondent and damage the respondent's reputation.

16. The policy further stated that "we keep all passwords to our devices secure and never share them with anyone." This was to ensure the system and customer's data is kept secure.

17. The conduct policy stated that gross misconduct is a very serious type of offence leading to dismissal. The policy contained a non-exhaustive list of offences that could constitute gross misconduct including a serious breach of the terms and conditions of employment and/or sky rules and policies.

18. The claimant worked as part of the team at the Perry Barr store. The custom and practice at the store (known and condoned by the team leader, Mark Hutchinson Bell) was to take a collegiate and shared approach to sales so that agents gave each other opportunities to complete sales. This meant that a customer could be passed from one agent to another to complete a sale; the practice being that the first agent would complete the fact finding and provide explanations about available packages before passing onto another agent colleague to complete the sale.

19. On 11 March 2020 there is no dispute that Muhammad Mudassar ("MM") passed to the claimant a customer D who he stated wanted a sky entertainment package and the claimant placed the order on the Ipad. On 18 March 2020 all of the Sky retail stores were closed due to the impact of the COVID 19 national lockdown

20. On 27 March 2020 (p.100) Micah Shepherd (Retail Operations Support Leader) became aware by email about the creation of a duplicate account, on 11 March

2020, following a customer complaint about poor service and mis-selling. The email alleged the claimant was responsible. The duplicate account was cancelled on 18 March 2020. It alleged the claimant had verified the customer's existing account; called the booking line to change the customer's contract to BB Unlimited to BB essentials and Talk anytime to pay as you Talk. It alleged the customer had fallen into £180 worth of debt due to phone calls. A concern was raised as to why the claimant had created a new account for this customer; failed to verify the existing account to make changes to the Talk and Broadband. Mr. Shepherd commenced an investigation.

21. On 1 April 2020 Mr. Shepherd interviewed the claimant's colleague MM (page 104 to 109). Much of this interview (and others in the bundle) which appears in the trial bundle has been redacted by the respondent. From the information, which is available to the Tribunal, it was clear from the interview that the team at Perry Barr store work as a team and share sales so to ensure that nobody goes without a sale on the day; this corroborated the claimant's account. He also stated that there appeared to be an issue with ipads/log ins so that where the team share ipads (sometimes through necessity because the batteries had ran out) although an advisor (A) can log out of ipad, if another colleague (B) uses the ipad, his colleagues log in would still show the first advisor (A)(page108). This appeared to be a glitch in the system.

22. On 6 April 2020 (page 112 to 117), the claimant was contacted by telephone by Micah Shepherd who informed him that he wanted to ask him some questions. The telephone conversation lasted about 2 hours. He told the claimant that the customer he booked on 11 March 2020 already had an active account for her Sky TV, phone and broadband so that the claimant had caused the customer to get another booking and changes to her existing call package so that it resulted in the customer getting a higher bill for her phone calls so she complained and about her bad experience. The suggestion that the claimant had in fact caused the customer a higher bill was actually inaccurate; which is accepted by the respondent. The claimant was also informed by Mr. Shepherd that the customer already had an active TV subscription.

23. The claimant had some difficulty initially recalling the events of 11 March 2020. The claimant explained that he had no idea that customer D had an existing sky account; he explained he had been passed the customer by MM who did not mention that the customer had an existing account but told the claimant that the customer wanted a TV package. He was passed the customer by MM because that was the first sale for the claimant that day. Also, the sky booking system failed to display the usual pop up message to inform him the customer had an active account. The customer did not inform him she had an existing account. He said if he knew she had an active account he could not have processed the sale. He was asked whether he had called the booking line to make changes. The claimant respondend that he did not make any calls to the booking line; he had not made any changes to the customer's existing account with Sky. Had he known that the customer had an existing account he could have added the new sky package which would have been easier and quicker for him to do. There is not dispute between the parties that there was no incentive or financial benefit

for the claimant for deliberately creating a new customer account. The claimant was suspended pending an investigation that a customer has incurred extra charges on an active sky account by virtue of the claimant creating a duplicate account. Mr. Shepherd informed the claimant that he believed he had called the booking line and he would listen to the call.

24. By letter dated 10 April 2020 (page 119) Mr. Shepherd confirmed that the claimant was suspended until further notice to allow the respondent to investigate. His suspension was extended until August 2020. The extension of the suspension resulted in the claimant becoming very worried and stressed and he made contact with Mr. Shepherd who failed to give the claimant an update about the investigation. The Tribunal finds that this was unjustified and the respondent failed to provide any reason why Mr. Baig had not been updated.

25. On 16 April 2020 (page 126) Mr. Shepherd spoke to customer D who recalled only speaking to one advisor who placed the sale and spoke to her when she returned to complain and stated it was not made clear to her that her Talk package would be changing or that a new account had been set up for her. This in fact was not correct. The evidence of both the claimant and his colleague MM corroborated that both of them spoke to the customer. She alleged she did not receive paperwork and did not fully understand the changes. Part of the interview with D by Mr. Shepherd has been redacted for no explicable reason.

26. On 20 April 2020 (page 129- 136) the claimant was interviewed again by Mr. Shepherd for about two hours. Mr. Shepherd did not inform that this was a formal stage of the disciplinary process and pursuant to the policy at page 128 the claimant should have been so informed. However the Tribunal finds that even had the claimant known this he would not have provided a different account.

27. Mr. Shepherd told the claimant he had listened to the booking line and it was MM (not the claimant) who had made the call and changed the customer's call package; this corroborated the claimant's earlier evidence to Mr. Shepherd. The claimant told Mr. Shepherd it was the store rules to share sales as informed by Mark Hutchinson Bell and that there was a practice of sharing the use of ipads with colleagues. The team as a whole did not consider that this was a serious issue. The claimant confirmed again that MM passed the customer to him. The claimant usually gave customers paper terms and conditions but due to the pandemic he says he may not have done so. The customer and MM did not inform the claimant that she had an existing account.

28. The claimant's case is that he accepted the importance of profiling a customer to ensure that the customer did not have an existing account but he said he created a duplicate account accidentally. He did not ask the customer and she did not say. He was unaware whether the customer told MM she was an existing customer. The claimant said context should be taken into account; it was amid the covid pandemic; the customer was in a rush she wanted to go to

Asda. It was not normal situation. His case was that there were issues on the respondent's IT system so that there were errors. He said that banner did not come up and this had not happened to him in 14 years. This was a new IT system installed about 2 years ago.He disputed the test that Mr. Shepherd had carried out; it could, not replicate what he experienced on 11 March. On 11 March he said no details of the customer's account came up. By 18 March the account had been cancelled. Mr. Shepherd performed his test on 12 June some three months later.

29. On 21 April 2020 (p.138 -149) Mr. Shepherd interviewed MM. A large section of his interview has been redacted by the respondent. The respondent's explanation about this was that some material was confidential to MM. The Tribunal rejected this explanation. MM was asked about a data breach at page 140 "how often does it happen"; this was redacted from the material. For example, MM is asked about the practice of knowing each others iPad number (p.142) and MM's answer is blocked out; this would have been significant to support the claimant's evidence about the custom and practice as to how the team worked at the particular store. MM was also asked whether sales sharing was allowed. His response is redacted; this is of some significance to the claimant's credibility who said it was the custom and practice. He was asked whether he had processed a sale for another advisor through their ipad; his answer is redacted. His responses were relevant to the claimant's credibility generally and as to the custom and practice adopted at the store. The Tribunal was not persuaded by Mr. Shepherd that these matters were simply confidential to MM. Further MM's responses to the questions about passing on the sale to the claimant as a new TV sale is redacted. He was directly asked whether the claimant knew whether the customer had an existing account; this too has been redacted. The Tribunal finds that this could have been significant as to whether the claimant deliberately or negligently created a duplicate account. MM was also asked why the email address for the customer existing account was accessed then; MM's answer is redacted. At page 145, MM was asked to explain by Mr. Shepherd why MM passed this over to the claimant as a new TV sale knew about account; Mr. Shepherd agreed in evidence that this was directly relevant to the claimant's case and half the answer was redacted. He stated this was private to MM. The Tribunal reject this; this was highly relevant material to the claimant's case and the failure to disclose it to the claimant left the Tribunal with the clear impression that the respondent was not being forthcoming or candid with the material evidence it had the opportunity to consider. Further it was directly put to MM at page 146 as to whether the claimant knew about an existing account, MM's answer is redacted; Mr. Shepherd said the answer was private. The Tribunal rejects this. The claimant was impeded by this lack of disclosure in challenging the adequacy of the investigation conducted by the respondent into this matter. Mr. Shepherd said it was a careful redaction proves using HR and himself. Mr. Shepherd was unwilling to disclose whether MM was in breach of the HWW policy. MM was not dismissed. MM was given a warning but the claimant was dismissed Mr. Shepherd was unable to disclose whether MM had admitted that he failed to inform the claimant that the customer was already a sky customer. In the

witness statement MM admitted he did not tell the customer he was a sky customer and its was MM's actions which led to the financial detriment suffered by the customer; it is accepted that this had nothing to do with the claimant.

30. Mr. Shepherd interviewed MM again on 8 May 2020 (p.151-158). Substantially this interview has been redacted. However, MM is recorded as stating that there was an issue with the ipads in that the same person who logs into the ipad but passes it to a colleague (even if they log) the initial advisor's ID still comes up (p.157).

31. Mr. Mark-Hutchinson Bell the manager of the store was interviewed by Mr. Shepherd on 15 May 2020. He described the store working as a team; sharing walk ups but there is a need to book their own customers on to avoid the was a danger in sharing sales because whoever is passed the customer has to ask additional questions so that the customer has a full understanding. He had not informed his team that the team can not book customers on for each other. He did not believe the team knew each other passwords to the ipads. He first said he did not inform the team not to share ipads (p.163); he later said he noted some at the store were using bouncepads and told them to stop. He said he did not allow the perry barr team to share or use another agent's identification. He said customer leaflets did not run out and there was no guidance given to staff about giving out leaflets.

32. On 3 June 2020 the claimant was further interviewed by Mr. Shepherd (page 170-173) He stated that his manager knew he was using the bouncepad ipad; he told the claimant not to use it but the wifi was sometimes down so had to be used. He said everybody used the bouncepad ipads for sales. The claimant stated he did not appreciate sharing the ipads was that bad.

33. Mr. Shepherd further interviewed MM on 3 June 2020 (p.175-8). Again, significant parts of his interview have been redacted. In particular in response to questions about sharing of ipads, his evidence is not clear. This could have been relevant to the customs and practice adopted by the team at the store and the context in which the claimant conducted himself on 11 March.

34. Mr. Shepherd produced an investigation summary concerning the claimant at pages 181-4. On 3 July 2020, Mr. Shepherd advised that a formal disciplinary hearing be held to determine allegations of potential gross misconduct namely a breach of the retail How we work guidelines namely (a)creating a duplicate account on 11 March 2020 and (b)breach of retail shop user policy by allowing a colleague access to your agent ID to access a customer's account on 11 March 2020. He also considered there were potential allegations of misconduct namely (a)failure to provide an acceptable level of customer service and breach of sky retail's how we work guidelines specifically failing to provide the customer with a copy of key facts on 11 March 2020 and breach of the how we work guidelines regarding incorrectly capturing a customer's email address.

35. Mr. Shepherd determined that the claimant had committed a serious breach because he was aware that there was an existing account at the address. He considered that the claimant had failed to check the profile of the customer prior to the sale; had the claimant inputted the postcode and door number, the customer would have been flagged up on the system.

36. Mr. Shepherd accepted in evidence that the claimant's account was consistent throughout the process; that he put in the details, he was told it was a new package and the system did not flag up an existing account. Mr. Shepherd's evidence was that the original account as long as it exists its flagged. Mr. Shepherd went to the compliance team and was confident that the banner came up. In 8 years he has not known the banner not to come up. Mr. Shepherd tested it on three separate occasions. He accepted he was unable to replicate the conditions that occurred on 11 March. The date of birth of the customer did not match. If the postcode and door number comes up providing the customer initials and an active address should come up and an adviser can call the booking line. Mr. Shepherd said he formed a reasonable belief that that the claimant knew there was an account.

37. On 9 June 2020 the claimant was invited to attend a disciplinary meeting on 15 July 2020 (page 185-6). The allegations included (a)creating a duplicate account (b)sharing his log in details with a colleague (c)did not provide the checklist to the customer and (d) incorrect email. He was provided with documentation including notes of his investigation meetings; the redacted notes of the meetings with MM and his manager. He complains he was not provided at any time despite requests with the unredacted notes of MM.

38. On 15 July 2020 (page 187-214) the claimant attended the disciplinary hearing before Scott Brown with his trade union representative John Ballard. The meeting started at 12pm and finished at 18.20. The claimant repeated that the team share walk ups in the store; he was passed the sale by MM; he said MM said the customer wanted an entertainment pack. Customer D had been passed to him by MM, the claimant believed MM had completed the fact find in the usual practice. MM's personal statement corroborated this and stated he had only informed the claimant to book a Sky Q with entertainment package and nothing else. The claimant accepted that it was his responsibility to ensure the sale completed by him is compliant within the company policy. He said he simply processed the deal when MM said that she wanted the entertainment package. He also described unusual times in the context of the COVID pandemic and pressure to socially distance. He said he did not get the pop message alerting him that customer D was a current customer. He repeated had he done so he could have simply added the tv to her existent account but he didn't know she had an account. The claimant stated he did not have any financial benefit in creating a duplicate account. He was unaware of the customer complaint and MM called customer services and changed the customer call package which resulted in the customer getting a higher bill to create a complaint. The system did not prevent the claimant from creating a

duplicate account and no messages appeared. An email from Zoe dated 22 April 2020 states this type of customer does not constitute an active TV subscription. He had not shared his details; he said there was a system fault where agent 1 logged onto the system and logged out after agent 2 went on it showed agent 1's id again. He stated that he generally gave a checklist to the customer. A list was not given if out of stock or the customer may have lost it. Customers are sent an email confirmation from Sky. Previously the respondent had a system of verifying the customer's email address. This was not possible; he entered the email address provided by the customer. The claimant accepted that the customer complained she did not receive the correct paperwork. He accepted this. He could not recall on 11 March whether he had done so. MM did not give the checklist which was not his fault. He believes in his usual practice he gave the customer the paperwork.

39. Mr. Brown the dismissing officer stated that the £180 debt did not play anything into his decision dismiss the claimant. Mr. Brown took the view that the claimant was responsible for that sale. Mr. Brown accepted that MM had not been dismissed but it was a very complex confidentiality issue. He was unable to go into detail because he did not have the case in front of him. The Tribunal found this evidence unsatisfactory and again gave the appearance that the respondent was not being candid with the claimant or the Tribunal about the available evidence it considered in this case.

40. Mr. Brown's evidence was that a duplicate account is serious for the customer and for the business. He felt dismissal was the correct sanction. Based on the merits of the case. He upheld allegations 1, 3 and 4 namely breaching the how we work guidelines in three respects in creating a duplicate account; failing to provide an acceptable level of customer service and breach with a copy of key facts; breach failure in capturing a customer's email address. He considered allegations 3 and 4 were misconduct allegations. He decided to summarily dismiss the claimant by creating a duplicate account for the customer. He dismissed allegation 2 (regarding a colleague accessing the claimant's agent ID to access the customer's account) as the respondent acknowledged there was a fault of the system. By letter dated 16 July 2021 (page 215-6) the dismissal was confirmed. He was advised about his right to appeal. Mr. Brown confirmed allegation 1 of creating a duplicate account amounted to gross misconduct. The respondent rejected the trade union's submission that the investigation into MM should be completed prior to a decision being made by the claimant. They dismissed him on the same day as the disciplinary hearing.

41. Mr. Brown accepted the respondent had closed many stores with consequent redundancies. The claimant had worked for longer than MM. He was unaware of redundancies at the time he made the decision to dismiss the claimant.

42. The claimant submitted appeal grounds on 19 July 2020 (page 217). He stated he did not get an opportunity to put his case at the disciplinary hearing. He stated that the dismissal was both unjust and unfair and arrived at without going into the merits of the case. He submitted the evidence of MM. The statement of

MM stated that he had passed a customer D to the claimant to book a tv sale around 3 pm following the store practice and culture. He confirmed that he remembered checking the customer's account who was only a standalone broadband customer at the time. He discussed the potential sale of sky tv with the customer who agreed to purchase the entertainment bundle. Under the stores common practice, he passed on the customer to the claimant and told him to book the new TV sale for the entertainment package. He confirmed he did not mention to the claimant that this customer already had an existing sky account. He gave permission to the company to share his full meeting notes with the claimant. The respondent did not share the notes with the claimant.

43. On 28 July 2020 the claimant was informed that an appeal hearing would take place over teams on 13 August 2020. This was re-arranged to 14 August 2020.

44. The appeal hearing took place on 14 August 2020 (p.225 to 244) via microsoft teams and lasted 2 hours (p.225-244). The appeal hearing was chaired by Mr. Brookes, Regional Manager. The claimant was accompanied by his trade union representative. He confirmed the sharing of sales in his branch. In the course of the appeal the claimant confirmed that the team leader Mark Hutchinson Bell set out the sharing rule for sales calls. He raised his concerns that he did not have the access to all investigation notes; the system had failed on this occasion; no messages displayed that this was an existing customer. This was the first mistake made by the claimant in a 15 year career. MM's written statement was not discussed by Mr. Brook.

45. Under cross examination Mr. Brooks felt duplicating an account was a serious breach of the policy.

46. On 4 September 2020 Mr. Brookes spoke to Mr. Brown, the dismissing officer (pages 248-249) who confirmed the claimant was dismissed the claimant for creating a duplicate account. He said he had a reasonable belief that the claimant knew there was an existing account and created the new account When tested on the customers the name and address banner came up.

47. The claimant expected a response to his appeal within 14 days but he had not received a response and chased Adrian Brookes on 2 September 2020. On 3 September Mr. Brookes informed the claimant he would be in touch next week; he was on leave. On 16 September having not heard about his appeal he contacted Mr. Brookes again who told the claimant that he was in hospital but would send the outcome letter tomorrow. By letter dated 17 September 2020 the claimant was informed that his appeal had been unsuccessful. The reason for the delay in providing the claimant with an outcome was that he was taken into hospital and then had a holiday.

48. By letter dated 17 September 2020, Mr. Brookes dismissed the claimant's appeal. He took into account that Mr. Shepherd's testing showed the banner that the customer already existed came up three ties when the customer's details were entered. Mr. Brookes said he took account of the evidence of MM but he had the redacted version only. He was told it was unnecessary for him to have the full version. He accepted that on closer inspection that parts of the interview of MM could have been relevant to the claimant;s case in respect of data protection.

Submissions

49. Both parties relied upon written submissions and supplemented these with oral submissions. The claimant submitted that the real reason for dismissing this claimant was redundancy and the claimant was dismissed for "misconduct" so to avoid having to pay him a large statutory redundancy payment. The claimant did not commit gross misconduct. The How we work document does not indicate what amounts to a serious breach so to result in dismissal. It was disingenuous for the respondent to allege that there was an impact on the customer because although a duplicate account was created on 11 March 2020; it was cancelled by 18 March. The customer's account was in debt; the debt had nothing whatsoever to do with the claimant. There was no poor customer experience because there was no impact upon her. It was submitted there could be no genuine belief in misconduct because there was no reasonable investigation in the circumstances. There was no reasonable investigation by the technical department that a banner did not display when entering the customers details to alert the claimant; the investigator did a test himself; he accepted he could not replicate the circumstances on the day the claimant experienced with the system. The claimant's evidence is that glitches occurred all the time. There was no evidence that the claimant purposely ignored a warning sign. A procedural failing was the delay in which the claimant was required to recall events and the time it took Mr. Shepherd to investigate the issue. Ultimately the decision to dismiss fell outside the band of reasonable responses. If there was an inadvertent breach it was perverse to consider that this amounted to gross misconduct. The significant amount of redactions in the evidence of MM means that this claimant could not have had a fair hearing before the respondent. There was no reasonable justification for the respondent to have removed so much material from MM's interviews and particularly when MM expressly said he gave consent to the claimant to see the interviews. This was an unfair dismissal.

50. The respondent submitted that pursuant to page 63 a breach of the policies includes duplication of accounts; this has serious consequences. The claimant accepted he was aware of the policies. The claimant disputes that he clicked past the pop up alerting him to the existence of customer D on the system; he says there was computer glitch. Mr. Shepherd reasonably investigated this by inputting the name three times and the banner came up; he reasonably disbelieved the claimant. The claimant admitted he did not profile the customer; he was obliged to do so. The Tribunal should disregard any suggestion there

has been inconsistent treatment between the claimant and his colleague MM; they were accused of different things and MM had mitigation; that mitigation was redacted from the notes. It therefore cannot be said the cases are "truly similar. If the Tribunal finds that the sanction was too heavy handed the claimant should face a heavy procedural reduction.

Conclusions

The reason/principal reason for dismissal

51. The Tribunal was satisfied that the principal reason for the claimant's dismissal was misconduct for creating a duplicate account. Although it was part of the claimant's case that the respondent closed stores and made redundancies, so that it was cheaper for the respondent to dismiss him as opposed to his colleague, the Tribunal was not satisfied that this was the case. At the time that the claimant was dismissed the respondent's evidence is that it did not know about redundancies in the business and there was no evidence to gain say this.

52. Further, there was a customer complaint about the customer experience on 11 March 2020 and a real issue about the creation of a duplicate account which the claimant was involved in; this could be a breach of the How we work policy which Mr. Shepherd investigated. On the balance of probabilities, the Tribunal was satisfied the reason for dismissal was misconduct.

The Burchell Test

53. The Tribunal concluded having heard all the evidence that the investigation conducted by the respondent in this case was inadequate and not reasonable in all of the circumstances so that the respondent could not have formed a genuine belief in the claimant's misconduct.

54. A fundamental part of the investigatory process, is for an employee to be aware of all relevant evidence to be considered by the employer; it may not necessarily assist the employee but it is of fundamental importance that the employee has access to all potentially relevant material in order to have a fair hearing and for the respondent to consider the employee's response to the material.

55. The claimant was not provided with unredacted interviews of his colleague MM despite the fact that MM provided a statement to the appeal hearing agreeing to consent to the claimant seeing his interviews. The Tribunal was not provided with a satisfactory explanation as to why the evidence of MM was redacted so extensively.

56. Mr. Shepherd told the Tribunal that he with the advice of H.R. redacted the interviews so to exclude confidential matters about MM and where he provided personal mitigation. The Tribunal finds that this was untrue. In particular, responses from MM as to custom and practice in the store; what he had/had not

said to the claimant all provided a context which a reasonable employer would have considered and provided to the employee to comment upon. The claimant was denied this opportunity. Indeed, some matters redacted were highly relevant to the part played by the claimant in this context namely what the claimant was told by MM; this could have impacted upon how this claimant behaved on 11 March 2020. A reasonable employer would have appreciated that this material could have provided context to the claimant's conduct on this occasion. In the absence of the information the clamant did not have an opportunity to consider this or respond to it nor did the dismissing officer of appellant officer.

57. The Tribunal rejects that this is a "red herring" argument by the claimant; this respondent did not stipulate in the conduct policy what aspects of the HWW policy could amount to very serious misconduct justifying dismissal. In order to formulate a reasonable belief that an employee is guilty of very serious misconduct, the context of creating a duplicate account is relevant.

58. Furthermore, the Tribunal found that from the outset Mr. Shepherd proceeded with his investigation with a closed mindset against the claimant. He considered that the claimant had initially caused financial loss to the customer; this was not true; the customer had run up a debt of £180 herself and/or this was aggravated by MM's conduct; this had nothing whatsoever to do with the claimant. Mr. Shepherd unreasonably failed to consider that the customer may not have had the clearest recollection of events/been unreliable when she stated she just spoke to one adviser; this was clearly incorrect from the corroborative evidence of MM who accepted he had passed customer D over to the claimant. However, the respondent accepted the customer's word that she did not get the documentation from the claimant. The respondent closed its mind as to whether the claimant may have been telling the truth and accepted the customer's account in the absence of recognising she may have been unreliable.

59. There is no dispute that a duplicate account was created. The claimant states that the banner to alert him to the fact that customer D had an account was not displayed. He stated that there were glitches in the system. This was supported by MM who indicated that there were errors in the system by virtue of different team members logging off and passing the ipad to a colleague but it continued to show the same colleague logged in. Mr. Shepherd discounted the claimant's account on the basis on three occasions he tested the system and the banner came up but this was some considerable time after event and he accepted he cannot replicate what occurred on 11 March 2020. When making a judgment call Mr. Shepherd was entitled as a reasonable employer to form the view that it was likely that the banner did show up. However, by failing to consider the context of the claimant's conduct on this occasion and what he was/was not told by MM or allowing the claimant to see this material to comment or respond, which a reasonable employer would do, the respondent failed to consider whether the employee made a mistake or intentionally overrode it. This distinction was not considered by Mr. Shepherd or the dismissing officer or the

appellant officer; the Tribunal finds that a reasonable employer would have considered this distinction because it would reasonably lead an employer to a conclusion whether this was serious misconduct or misconduct. This was not explored by the respondent at all.

60. The dismissing officer did not seek to obtain the unredacted versions of the interviews of MM. He concluded the creation of the duplicate account was gross misconduct. The decision maker decided because there was a breach it must be gross misconduct. He did not make any distinction between a deliberate or a mistake or weigh in the balance the undisputed evidence that the claimant had nothing to gain from creating the duplicate account and in fact to do so created extra work for him. This flaw meant that the dismissing officer could not have held a genuine belief on reasonable grounds in the claimant's serious misconduct. A breach of the policy can amount to gross misconduct. However, in order to formulate a genuine belief the respondent has to have the full facts. By failing to consider the context of the claimant's conduct or draw a distinction between negligent or intentional conduct the respondent failed to form such a genuine belief on reasonable grounds following a reasonable investigation.

Similar cases

61. The Tribunal is not persuaded that the case of **Hadioannous v Coral casinos Limited** assists the claimant. Comparing cases is restricted to cases where there are parallel circumstances. Due to the lack of disclosure by the respondent it is difficult for the Tribunal to reach a conclusion on this. The main point for the Tribunal to determine is whether on the particular facts of this case, the employer formed a genuine belief in misconduct based on reasonable grounds following a reasonable investigation. The Tribunal finds the respondent did not

Sanction

62. Even if the Tribunal is incorrect and the respondent formed a genuine belief in misconduct on reasonable grounds following a reasonable investigation, the Tribunal finds that the decision to dismiss fell outside the band of reasonable responses.

63. The respondent's officers took the view creating a duplicate account was serious and justifying summary dismissal for gross misconduct. The Tribunal is not satisfied that the respondent considered the claimant's long unblemished career with the respondent; he had not made a mistake before; that he had made no financial gain in the creation of a duplicate account. The customer was not disadvantaged save that she made a complaint of unsatisfactory service. The claimant was not responsible for any financial loss of the customer.

64. The Tribunal was not satisfied that the dismissing officer took reasonable account of these factors. The Tribunal is minded that it cannot substitute its

view for the respondent and does not do so. Taking into account that the matter was remedied within a week and the customer did not suffer financially by any actions of the claimant; the claimant did not financially benefit, the decision to dismiss was not simply harsh, it fell outside the band of reasonable responses.

65. The Tribunal finds that the claimant was unfairly dismissed.

66. The Tribunal is invited to consider Polkey by the respondent. However, based on the evidence produced by the respondent the Tribunal determines that it can not make such a deduction. The dismissal was substantively unfair because the respondent did not form a genuine belief in misconduct on reasonable grounds following a reasonable investigation.

67. In respect of contributory fault, the claimant did create a duplicate account. This was a breach of the HWW Policy which the claimant was familiar with. The claimant was guilty of blameworthy conduct but the Tribunal concludes the level of his misconduct contributed 25% to his dismissal.

Employment Judge Wedderspoon

04/10/2021

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.