EMPLOYMENT TRIBUNALS

Claimant: Ms. S Mcmillan

Respondent: Wilko Limited

Heard at: **Reading by CVP** **On:** **4 July 2022**

Before: **Employment Judge S. Matthews**

Representation
Claimant: Mr. Bronze (Counsel)
Respondent: Mr. Sanders (Counsel)

RESERVED JUDGMENT

The complaint of Unfair Dismissal is not well founded and is dismissed.

REASONS

Claims and Issues

1. By a claim dated 25 August 2021 the claimant has brought a claim for unfair dismissal relating to the termination of her employment at the respondent company on 4 May 2021.
2. The issues were discussed at the start of the hearing. It was agreed that the reason for dismissal was a reason relating to the claimant's conduct, a potentially fair reason under sections 98(1) and (2) of the Employment Rights Act 1996 (ERA 1996). The issues to be decided were therefore:
   2.1 What was the conduct?
   2.2 Did the respondent have a genuine belief in the claimant's guilt?
   2.3 Was that belief held on reasonable grounds?
   2.4 Did the respondent carry out a reasonable investigation?
   2.5 Did the respondent follow a fair procedure?
   2.6 Did the respondent in all respects act within the band of reasonable responses including in deciding what penalty to impose?
3. Although the **Polkey** and contributory conduct issues concerned remedy and would only arise if the claimant's complaint of unfair dismissal

succeeded, I agreed to consider them at this stage and invited the representatives to deal with them in evidence and submissions.

Procedure, Documents and Evidence Heard

4. There was an agreed bundle of 203 pages. The Tribunal heard sworn evidence from the claimant and her witness, Rachelle Wilkins, trade union officer and from the following witnesses for the respondent: Emma Gonzalez, team supervisor, Kirsten Mclean, store manager of Wellingborough, Katrina Dorrian, store manager of Corby, and Adrian Gray, store manager of Ely.
5. References to the agreed hearing bundle are in the form (page number) and references to the witness statements are in the form (Initial/paragraph).
6. The hearing was listed for one day. It was agreed at the outset of the hearing that the listed time would be insufficient to hear evidence from all the witnesses and submissions. It was agreed that the Tribunal would attempt to hear all witness evidence today and adjourn the hearing part heard. Counsel for each party could then forward submissions in writing.
7. After the filing of written submissions Solicitors for the claimant filed a further statement from the claimant entitled 'Mitigation statement'. The respondent's Solicitors objected on the grounds that evidence and submissions had concluded and the respondent was not given an opportunity to cross examine the claimant on the new evidence. The claimant's solicitors clarified that the statement related to remedy and not to liability. I indicated that I would not consider this statement until I had given this reserved Judgment. If I decided in favour of the claimant on liability I would list a further hearing on remedy. As the claimant has not succeeded in her claim a further hearing has not been listed.

Findings of fact

8. The relevant facts are as follows. Where I have had to resolve any conflict of evidence, I indicate how I have done so at the material point.

Background

9. On 4 September 2006 the claimant started employment as a customer service assistant (sales assistant) at their Wellingborough store. The respondent business comprises numerous stores and retails home and garden 'DIY' goods, including age restricted products such as kitchen knives.
10. The claimant was required to undertake training on retail law on an annual basis. The most recent was on 25 January 2021 in which she achieved a score of 100%. The training included instruction on the law and company procedures relating to the sale of age restricted products such as knives. She also underwent specific training on Age Restricted Sales on 1 August 2017 (103 and KM/14).
11. The respondent operated a Challenge 25 policy. This is set out in the Challenge 25 Manual (146) and provides that a customer seeking to purchase an age restricted product must be asked to prove their age unless they are clearly over 25. If a sales assistant has any doubt that a customer is over 25 they must ask for specific age related identification (ID).
12. In addition, the till prompts sales assistants to check a customer's age each time an age restricted product is scanned. The screen locks and a message is displayed informing the sales assistant that this is an age restricted product and if they have any doubt that the customer is over 25 they must

ask for ID. If the sales assistant approves the sale they are required to click on the option; 'Customer clearly over 25' (144).

13. The respondent's Disciplinary policy provided that gross misconduct includes 'Sale of age restricted products outside of company policy' (125) and that gross misconduct will usually result in summary dismissal (122).
14. The respondent has issued Management guidelines relating to the action to be taken in the event of the sale of an age restricted product. The bundle contained guidelines dated July 2018 (117-119) and March 2020 (127-129). They do not differ in any material respect. They are prefaced with the statement that 'they are not intended to be prescriptive directions' (117).
15. The guidelines set out various scenarios. For example, 'Scenario 1', where the sales assistant looks up at the customer but assesses that the customer looks over 25 years of age. If the manager agrees that the customer looks over 25 then no formal action need be taken. If management do not agree that the customer looks over 25 retraining is the appropriate action. However, the guidelines also state that any sale to an underage customer must be treated as gross misconduct. Counsel for the claimant submitted that 'Scenario 1' applied in the claimant's case. Counsel for the respondent relied on the guideline that any sale to an underage customer is gross misconduct and submitted that 'Scenario 1' did not apply as the customer was underage. The wording is unclear. However, I find that the guidelines were not intended to be prescriptive but were intended to guide managers and allow flexibility.
16. The respondent does not have an automatic policy of dismissal in every case of failure to follow the Challenge 25 policy. Another member of staff at the same store was given a final written warning for breaching the Challenge 25 policy in November 2018 (149). In that case the sale was to an 18-year-old, not to an underage customer. A member of staff at the Porthmadog store who sold an age restricted product to an underage customer was dismissed (150).

Incident

17. On Friday 30 April 2021 at 17.49 the claimant was working on the till at the Wellingborough store. She was due to finish her shift at 18.00 hours. The store was not busy. A customer approached the till and purchased a knife. The receipt shows that the customer was served by 'Susan' (the claimant). It records 'Age restricted sale 18: APPROVED' and 'Reason: Customer clearly over 25' (42). The sale was part of a police operation, and the customer was 16 years old. The claimant does not dispute that she made the sale and cleared the prompts on the till.
18. The claimant says in her statement that she 'made the required visual check' and judged the customer to be 25 years old or older (SM\2). In the investigation (referred to below) the claimant said she thought the customer was 26 years old. In evidence to the Tribunal the claimant said the customer looked 'way over 25'.

Investigation

19. On 1 May 2021 the claimant attended an investigation meeting with Kirsten Mclean, store manager of Wellingborough. The minutes of the meeting state that she was told the reason for the meeting was alleged gross misconduct and that she was entitled to a witness, which she declined (43).
20. The claimant admitted that she cleared till prompt (43). She said that she had a 'lot going on at home', 'lapse of concentration' ,'I even looked at her face' and 'I believed her to look 26' ((43-44). In evidence before the Tribunal she said that the lapse of concentration occurred before the customer came

to the till and that she looked at the customer and judged her to be 'way over 25'.

21. Ms Mclean did not believe the claimant had looked at the customer to check her age (KM/31). She decided that there were sufficient grounds for disciplinary action for gross misconduct. She suspended the claimant on full pay (44).
22. After the meeting Ms Mclean reflected on the fact that the claimant said she thought that the customer looked 26. She spoke to Julie Sinclair, another sales assistant who was on shift at the time. Ms. Sinclair confirmed that she had noticed the girl and thought she was clearly underage, but she did not wish to give a statement (KM/33-34). There was no attempt to look at the CCTV to see if this showed how old the customer looked or whether the claimant looked up at her. Ms Mclean appears to have proceeded on the basis that the customer was clearly underage, because of the belief that the police were unlikely to use a test purchaser that looked over 25, and the information she had been given by Emma Gonzalez when she reported the incident (KM/23).

Disciplinary hearing

23. On Tuesday 4 May 2021 a disciplinary hearing took place, chaired by Katrina Dorrian, store manager of the Corby store. The claimant was unaccompanied. She denies that she was informed that she could have a representative ((SM/8) or that dismissal was a possible outcome (SM/12). She did not receive the letter inviting her to the meeting and setting out this information. The letter was sent by email and she had changed her email address and not informed the respondent. In evidence the claimant accepted that she understood at the investigation stage that there was a risk of losing her job and that this was an allegation of gross misconduct. She understood she could be sacked for that. I accept Ms Mclean's evidence that she notified the claimant by telephone that there would be a meeting on 4 May and that she had a right to be accompanied (KM/37.2). At the meeting on 4 May I find that she was reminded of her right to have a witness or a representative. Ms. Dorrian read out this information from laminated sheets. In evidence the claimant said that she did not remember if Ms.Dorrian had read from 'a sheet' or not. The laminates were annotated by Ms. Dorrian at the time of the meeting (55-56) and I find it more likely than not that she read from them.
24. At the disciplinary hearing the claimant said 'she looked much older than she was', 'it was late at night', she had 'a lot going on at home'. Ms.Dorrian did not ask about the problems at home. She said in evidence that she did not consider that was her role. She had a short adjournment. She did not believe the explanation that the customer looked over 25 (KD16). She consulted with the HR department as she was concerned that a letter from the police confirming the underage sale had not been received at that stage and queried whether she should adjourn (KD/16). She was advised that she did not need to wait. She considered a final written warning in the light of the claimant's length of service and clean disciplinary record but considered 'she should have known better' as a long standing and fully trained team member (KD/18). She returned to the meeting and informed the claimant that her decision was to dismiss for gross misconduct. The claimant's employment was terminated by a letter of same date.
25. The letter confirming termination stated that the claimant 'knew you should of challenged the customer to provide ID' (57-60). It notified her of the right of appeal.

The Appeal

26. The claimant appealed by letter dated 8 May 2021 on the grounds that proper procedures were not followed, there was no prior warning of the sanction and dismissal was too severe as it was her first offence (61).
27. An appeal hearing was arranged for 20 May 2021 but this did not take place because the notification was sent again to the defunct email address and the claimant did not receive it.
28. On 2 June 2021 the appeal meeting took place (86-91), chaired by Adam Gray, store manager of Ely. Mr. Gray reviewed the evidence in advance and queried the fact that there was no CCTV evidence. On being told that there would not be a clear picture of individuals at that till he accepted that it was reasonable to proceed, taking into account that there was no dispute that the claimant had carried out the transaction (AG/9).
29. The claimant was accompanied by Rachelle Williams, GMB trade union officer. Emma Gonzalez, the claimant's supervisor was the note taker. Mr Gray checked that the claimant had the notes from the investigatory meeting and from the disciplinary (AG/14). The Challenge 25 management guidelines (117-119) were brought to hearing by Ms. Williams (RW/19) and the claimant raised the argument that a similar situation 2 years did not result in the employee losing their job (AG/15). Mr. Gray decided to adjourn the hearing to investigate the guidelines further and the alleged similar situation 2 years previously (AG/16).
30. On 8 June 2021 Mr. Gray sent a letter to the claimant to confirm he was seeking further information (92). Mr. Gray decided to ask Ms. Mclean, the investigating officer, if there had been any witnesses to the sale (AG/20). He was sent a statement by Ms. Gonzalez (93). He realised that she had been taking the notes at the meeting and arranged for a different notetaker to take minutes at the next meeting. Ms. Gonzalez statement said that she would personally judge that the customer looked about 14 years old.
31. The second appeal meeting took place on 2 July 2021. The claimant said that she looked at the customer for 3 or 4 seconds and selected 'customer clearly over 25' (96). Mr. Gray did not believe she had looked up or if she did look up 'her mind was elsewhere'(AG/25). He believed that the claimant was not concentrating fully on the job (AG30). He thought that a test purchaser used by the police for this purpose was unlikely to look over 25 (AG/25). Mr. Gray did not make a decision that day but gave the matter consideration for a further few days. He re-read the notes and evidence (AG/29).
32. On 5 July 2021 Mr. Gray notified the claimant by letter that her appeal was not upheld (99-100). The letter confirmed the sanction of summary dismissal for gross misconduct, specifically failure to comply with the Challenge 25 policy.
33. The letter also acknowledged three points; the investigation and disciplinary 'could have been carried out more thoroughly', the communication 'could have been better' from the time when the claimant was suspended, and Ms. Gonzalez should not have been used as a notetaker. The letter stated that these did not affect the outcome.

Law

34. Section 94 of the Employment Rights Act 1996 confers on employees the right not to be unfairly dismissed. Section 98 of the 1996 Act deals with the fairness of dismissals.

35. There are two stages within section 98. First, the employer must show that it had a potentially fair reason for the dismissal within section 98(2). This is conceded. The potentially fair reason is misconduct.
36. Second, if the respondent shows that it had a potentially fair reason for the dismissal, the Tribunal must consider, without there being any burden of proof on either party, whether the respondent acted fairly or unfairly in dismissing for that reason.
37. Section 98(4) deals with fairness generally and provides that the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and shall be determined in accordance with equity and the substantial merits of the case.
38. In misconduct dismissals, there is well-established guidance for Tribunals on fairness within section 98(4) in the decisions in **British Home Stores v Burchell 1980 ICR 303.** The Tribunal must decide whether the employer had a genuine belief in the employee's guilt. Then the Tribunal must decide whether the employer held such genuine belief on reasonable grounds and after carrying out a reasonable investigation. In all aspects of the case, including the investigation, the grounds for belief, the penalty imposed, and the procedure followed, in deciding whether the employer acted reasonably or unreasonably within section 98(4), the Tribunal must decide whether the employer acted within the band or range of reasonable responses open to an employer in the circumstances. It is immaterial how the Tribunal would have handled the events or what decision it would have made, and the Tribunal must not substitute its view for that of the reasonable employer (**Iceland Frozen Foods Limited v Jones 1982 IRLR 439**, **Sainsbury's Supermarkets Limited v Hitt 2003 IRLR 23**, and **London Ambulance Service NHS Trust v Small 2009 IRLR 563**).
39. The Tribunal should have reference to the ACAS code of practice on Discipline and Grievance Procedures 2015 and take account of the whole process including any appeal (**Taylor v OCS Group Ltd 2006 ICR 1602, CA).**

Submissions

40. Counsel for the claimant and counsel for the respondent filed written submissions on fairness within section 98(4) which I have considered and refer to where necessary in reaching my conclusions.

Claimant

41. Counsel for the Claimant submitted that this was a one-off error of judgment. The appropriate response was re-training in line with the management guidelines, unless the respondent believed that the claimant did not look up or deliberately sold a knife to someone she knew (or reasonably believed) to be under 25. The investigation and disciplinary procedure was flawed. She did not receive the invitation to the first disciplinary hearing in writing and did not understand that dismissal was a possible sanction or that she had the right to be accompanied. She was not shown the receipt of the transaction. There was no attempt to look at the CCTV evidence, a witness (Emma Gonzalez) was a note taker at the disciplinary appeal hearing, the claimant was not accompanied at the investigation meeting or the first disciplinary hearing and she was not asked 'probing' questions that could

have helped the decision makers understand problems at home that she had raised. The respondent did not apply the management guidelines consistently; other employees who had failed to follow the Challenge 25 had not been dismissed.

Respondent

42. Counsel for the respondent reminded the Tribunal that analysis of the fairness of the procedure is subject to the range of responses test. The fairness of the process can be judged by the process as a whole and defects can be cured on appeal. The claimant admitted in oral evidence that she knew the possible outcome from the investigation meeting onwards. Regarding the disparity of treatment Counsel referred to **Hadjioannou v Coral Casinos Ltd [1981] IRLR 352**. Arguments on disparity of treatment should be scrutinised with particular care. The claimant's case was materially different from the other store member as in that case the customer was 18 years old and an offence had not been committed.

Conclusions

43. I need to decide the nature of the conduct. Did the respondent have a genuine belief in it? Was that belief held on reasonable grounds? Did the respondent follow a fair procedure? Did the respondent act within the band of reasonable responses in deciding what penalty to impose? In reaching my conclusions on the facts I have I have taken into account that the range of reasonable responses is engaged at all stages of the disciplinary process.

What was the conduct?

44. The fact that the claimant sold a knife to a 16-year-old is not in dispute. The claimant admits the offence. The sale of an age restricted product to a 16-year-old was in breach of the law and the respondent's disciplinary policy. However, in ascertaining the level of responsibility or 'guilt' the respondent rightly went on to consider whether the claimant was in breach of the Challenge 25 policy.

Did the respondent have a genuine belief in the claimant's guilt?

45. Did the claimant fail to follow the Challenge 25 policy? The claimant's case was that she did follow it; she looked up and judged the customer to be 25 or older. I find that the respondent's management had a genuine belief that she did not follow the Challenge 25 policy. None of the individual managers involved in the investigation and disciplinary believed her explanation that she had applied the Challenge 25 policy. Ms. Mclean did not believe she had looked at the customer, Ms. Dorrian did not believe her explanation that the customer had looked over 25 and Mr. Gray did not believe that she was concentrating on the job as her mind was elsewhere.

Was that belief held on reasonable grounds?

46. I find that it was. The respondent's management were influenced by the viewpoint that the police were unlikely to use a test purchaser that looked over 25. This was a reasonable viewpoint to take. The claimant was given ample opportunity to put forward her case as to why she believed the customer to be over 25 but she was unconvincing in her evidence at the various stages of the investigation and disciplinary. At the investigation she said that the customer looked 26. This is a very specific age and it is not 'clearly' over 25. She reiterated that the customer looked over 25 at the disciplinary hearings. She did not offer any details about why she thought that was the case. A reasonable employer was entitled to disbelieve her.

Did the respondent follow a fair procedure?

47. Did the procedure adopted and applied by the respondent fall within the range of reasonable responses (procedures) which a reasonable employer would have adopted and applied?
48. I start with considering whether the respondent carried out a reasonable investigation. I find that they did, notwithstanding some minor flaws. As there was never any doubt that the claimant made the sale and cleared the prompts on the till the investigation did not need to focus on that issue. The investigation established that the claimant's defence was that she looked up and considered the customer to be over 25. At that stage the respondent could have looked at the CCTV and taken statements from Emma Gonzalez and Julie Sinclair. Mr. Gray considered this at the appeal stage and sought to rectify it; a statement was taken from Emma Gonzalez. He considered the lack of CCTV evidence and reasonably decided that it would not be determinative as it would not show individuals clearly. Overall the failure to deal with these matters at the investigation stage was an omission but it was reasonable because there was already evidence for the respondent to form a view that the claimant did not apply Challenge 25. This included the viewpoint that the police would be unlikely to use a test purchaser who looked over 25. The respondent is not required to conduct an investigation that seeks to establish the facts beyond reasonable doubt but to act as a reasonable employer. In any event Mr. Gray's actions cured the flaws at the appeal stage.
49. I next consider the disciplinary process. A formal disciplinary process was followed, as would be expected from an employer of this size and resources. The matter was dealt with promptly and the claimant knew the case against her. She was given ample opportunity to put forward her case at the disciplinary hearing and the two meetings which were held for the appeal hearing. She was offered a representative at the disciplinary and she was accompanied by a trade union representative at the two appeal hearings. The hearings were conducted by managers independent of the store and investigation and they took care in reaching their conclusions, including in the case of the appeal adjourning to seek further information.
50. There were some imperfections in the disciplinary process which Mr. Gray acknowledged and dealt with at the appeal stage. The claimant did not receive the letter inviting her to the disciplinary hearing. This was not the fault of the respondent as the clamant had changed her email address and had not notified the respondent. However, she had been informed about the hearing and the right to be accompanied over the telephone by Ms.Mclean. Ms. Dorrian checked that the claimant knew what the meeting was about and informed her of her right to have a witness or representative. Mr. Gray was careful to check that she had received relevant documentation by the time of the appeal. I find that the procedure was conducted fairly and within the range of reasonable responses.
51. Mr. Gray changed the note taker when he realised that she was a potential witness. As she was not involved in the decision her attendance at the first appeal meeting did not invalidate the process.
52. I therefore find that taking into account the whole process the procedure followed was within the band of reasonable responses. The claimant was aware of the case against her, that the allegation was gross misconduct and that dismissal was a possible outcome. As a large employer the respondent is held to a high standard in terms of the investigation and disciplinary and there were some minor flaws but these were not sufficiently serious to make the procedure unfair.

Did the respondent in all respects act within the band of reasonable responses in deciding what penalty to impose?

53. Could a reasonable employer have decided to dismiss for selling a knife to a 16-year-old? I find that they could. Although the claimant had a long record without any previous warnings this was a very serious offence. It was listed in the disciplinary procedure as gross misconduct. It could have resulted in criminal prosecution of both the respondent and the claimant. The respondent reasonably did not believe the claimant's explanation that she had judged the customer to be clearly over 25 and was entitled to decide that her actions amounted to gross misconduct.
54. The management guidelines allow for flexibility in the case of a failure to follow the Challenge 25 policy. The respondent did consider and assess the claimant's explanation in deciding what view to take of her culpability and what sanction to impose. I find that it was reasonable for the respondent to conclude that the claimant's explanation and mitigation for her behaviour did not outweigh the seriousness of her actions.
55. Some employers might have decided in similar circumstances to allow the claimant to undergo retraining and give a warning but the question is not what another employer may do but whether what this employer did fell within the band of reasonable responses. The respondent considered retraining but decided reasonably that this would not make any difference as she was already well trained and very familiar with Challenge 25.
56. The respondent decided the sanction on the basis of the claimant's individual circumstances, rather than having a fixed approach to a failure to follow Challenge 25. It did not have an automatic dismissal policy and it did not have an automatic warning policy for a first offence. The disparity in treatment with another employee can be reasonably explained on these grounds. The respondent is a large employer and treating each case individually is a more time consuming but fairer approach.
57. I find that the respondent's management properly considered the claimant's length of service and explanation for her actions. They did not conclude that dismissal for the offence was inevitable, and they gave her an opportunity to put forward mitigation and explain. She did not offer mitigation (at any stage, including at the Tribunal), other than referring to problems at home. The respondent did not interrogate her about this but did give her ample opportunity to be more specific if she had wished to rely on mitigation. Instead, she made her case predominantly on the shortfalls in procedure and what had happened to a previous employee who did not apply Challenge 25.
58. I find for these reasons that the respondent's decision to dismiss the claimant was within the range of reasonable responses to her conduct and the claimant was not unfairly dismissed.

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Employment Judge **S.Matthews**

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Date 18 November 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

23 November 2022

FOR EMPLOYMENT TRIBUNALS