THE EMPLOYMENT TRIBUNALS

Claimant: Mr J Sheekey

Respondent: Jayar Components Limited

Heard at: Bury St Edmunds

On: 13 March 2018

Before: Employment Judge M Warren (sitting alone)

Representation

Claimant: Mr Raffell, legal representative

Respondent: Mr Oulton, counsel

JUDGMENT

The Claimant's claim that he was unfairly dismissed fails and is dimissed.

REASONS

Background

1. By a claim form received by the tribunal on 17 November 2017, Mr Sheekey brings a claim of unfair dismissal arising out of his dismissal from the Respondent's employment after 6 years' service as a Branch Manager, on 19 October 2017.

Evidence

2. I had before me 2 witness statements from Mr Sheekey, one as to lability and one very short one as to remedy. For the Respondent, I had witness statements from:

    2.1. Mr Kevin Mallet, Regional Manager;

2.2. Mr Nick Allen, Operations Manager, and

2.3. Mr Ashley Jones, Parts Advisor.

3. I heard evidence from Mr Sheekey, Mr Mallet and Mr Allen. I did not hear evidence from Mr Jones; his witness statement did not appear to refer to anything relevant to the issues in this case.

4. I had before me an indexed and oddly paginated bundle of documents, running to page number C 82. We added C 83 to the bundle during the hearing, a document produced by the Respondent's accounts department in relation to a customer called Suffolk Automotive Limited. I also had a schedule of loss from Mr Sheekey and 2 copy wage slips.

5. During a break at the outset of the case, I read the witness statements and read the relevant invoice in question and the dismissal letter.

6. Whilst it is common practice for tribunals to hear and decide liability first and only go on to consider remedy if it has found in the claimant's favour, in this case I explained to the parties that remedy should also be dealt with during the hearing because it was clear that issues as to contributory conduct and a possible Polkey deduction where likely to be at large and it seemed to me appropriate and in accordance with the overriding objective to have all such matters before me in deciding the outcome of the case.

The Issues

7. I identified the issues with the representatives at the start of the case as set out in the paragraphs below.

8. Although there are references in the claim form to possible claims for unauthorised deduction from wages and failure to provide written reasons, Mr Raffell confirmed at the outset that no such claims are pursued.

9. The Respondent says that it dismissed Mr Sheekey for the potentially fair reason of his misconduct, namely theft and breach of trust and confidence, when he sought to charge an item to a customer, (a strimmer) which he had taken home for himself.

10. Mr Sheekey says that he merely made a mistake.

11. The first test for the Respondent in assessing the fairness of the dismissal is whether it genuinely believed that Mr Sheekey was guilty of the alleged misconduct and if so, whether that belief was based upon reasonable grounds after conducting a reasonable investigation. He says that the Respondent did not conduct a reasonable investigation, did not have reasonable grounds to conclude his guilt and did not genuinely so conclude. The Respondent says that Mr Sheekey admitted that of which he was accused.

12. If the Respondent passes the first test, the second question will be whether the decision to dismiss lay within the range of reasonable responses of the reasonable employer. Mr Sheekey says that it was not, having regard to his unblemished disciplinary record and the inconsistency of his treatment to that which was afforded to others.

13. Mr Sheekey will say that in any event, the dismissal was procedurally unfair in that the Respondent:

    13.1. Conducted no investigation;

    13.2. Did not inform him in writing of the allegations against him;

    13.3. Did not hold a disciplinary hearing;

    13.4. Did not give him an opportunity to explain, and

    13.5. Afforded him no right of appeal.

14. The Respondent says that Mr Sheekey admitted his offence on being confronted and in the circumstances, there was no point in any further investigation, he was in a position of trust and the decision to dismiss therefore lay within the range of reasonable responses.

15. The Respondent also argues that if I find the dismissal procedurally unfair, I should in any event find that Mr Sheekey contributed as to 100% to his dismissal, by his culpable conduct and that he should therefore receive no compensation. Further and alternatively, that even had a fair procedure been followed, he would have been dismissed anyway and any compensation should be reduced accordingly.

The Law

16. Section 94 of the Employment Rights Act 1996 contains the right not to be unfairly dismissed. Section 98 at subsections (1) and (2) set out five potentially fair reasons for dismissal, one of which at subsection (2)(b) is the conduct of the employee. Section 98(4) then sets out the test of fairness to be applied if the employer is able to show that the reason for dismissal was one of those potentially fair reasons. The test of fairness reads:

> "*Where the employer has fulfilled the requirement of subsection (1) the determination of the question whether the dismissal was fair or unfair (having regard to the reason shown by the employer)*
>
> *(a) depends on whether in the circumstances including the size and administrative resources of the employer's undertaking the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and*

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

17. We have guidance from the appeal courts on how to apply that test where the grounds for dismissal relied upon by the employer is misconduct. The first is the test set out in the case of British Home Stores v Burchell [1980] ICR 303. The Tribunal must be satisfied that the employer holds a genuine belief, based upon reasonable grounds and reached after a reasonable investigation. It is for the employer to show the genuine belief, the burden of proof in respect of the reasonable grounds and the investigation is neutral.

18. If the employer is able to satisfy that test, the Employment Tribunal must go on to apply the test set out in Iceland Frozen Foods Ltd v Jones [1982] IRLR 439. The function of the Tribunal is to determine whether in the particular circumstances a decision to dismiss fell within the band of reasonable responses which a reasonable employer might have adopted. If a dismissal falls within the band the dismissal is fair, if the dismissal falls outside the band it is unfair. In judging the reasonableness of the employer's conduct, the Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer.

19. The band of reasonable responses test also applies to the question of whether or not the employer's investigation into the alleged misconduct was reasonable in all the circumstances. See Sainsbury v Hitt [2003] IRLR 23.

20. The investigation should be into what the employee wishes to say in mitigation as well as in defence or explanation of the alleged misconduct.

21. In this case, the Claimant argues that he was treated inconsistently with others. Insofar as that argument relates to a claim of unfair dismissal in the context of Section 98(4), the ACAS Code of Practice on Discipline and Grievance Procedures 2009 provides at paragraph 4 that dealing with issues fairly includes acting consistently. By the same token, the ACAS guide explains that does not necessarily mean that similar offences will always call for the same disciplinary action, one has to look at the context of the particular circumstances. This is reflected in the relevant case law and in particular, the cases of Hadjioannou v Coral Casinos Limited [1981] IRLR 352 and Paul v East Surrey District Health Authority [1995] IRLR 305 in the Court of Appeal. These cases enjoin Tribunals to scrutinise arguments of disparity with particular care, because ultimately it is a question of whether, in the particular case, the decision to dismiss was a reasonable response. An employer in fairness ought to consider whether it has dealt with similar cases differently in the past and equally take into account the particular circumstances of the instant incident and any particular mitigation. Action or inaction in the past may lead employees to believe that certain categories of conduct would be overlooked or at least not dealt with by the sanction of dismissal. Sometimes inconsistency may point to a suggestion that the reason for dismissal contended for by the employer is not the genuine reason and sometimes, if the circumstances

of the two cases compared could truly be said to be parallel, it may not be a reasonable decision to dismiss one employee, when one has not dismissed the other.

22. In this case, the Respondent says that Mr Sheekey was guilty of gross misconduct justifying dismissal without warning. The test for gross misconduct, or repudiation, is that the conduct must so undermine the trust and confidence which is inherent in the particular contract of employment that the employer should no longer be required to retain the employee in its employment, see Neary v Dean of Westminster Special Commissions [1999] IRLR 288.

23. More serious allegations, which might have more serious consequences if upheld, call for a more thorough an investigation. The ACAS 2014 Guide to Discipline and Grievances at Work, (not the code of practice) advises as such and the EAT confirmed as such in A v B [2003] IRLR 405.

24. Section 207(2) of the Trade Union & Labour Relations Act 1992 provides that any Code of Practice produced by ACAS under that Act which appears to an Employment Tribunal to be relevant shall be admissible in evidence and shall be taken into account.

25. One such code of practice is the ACAS 2009 Disciplinary and Grievance Procedures code referred to above, which includes the following in respect of disciplinary proceedings relating to misconduct:

> *"3.*
>
> *Where some form of formal action is needed, what action is reasonable or justified will depend on all the circumstances of the particular case. Employment tribunals will take the size and resources of an employer into account when deciding on relevant cases and it may sometimes not be practicable for all employers to take all of the steps set out in this Code.*
>
> *4.*
>
> *That said, whenever a disciplinary or grievance process is being followed it is important to deal with issues fairly. There are a number of elements to this:*
>
> • *Employers and employees should raise and deal with issues **promptly** and should not unreasonably delay meetings, decisions or confirmation of those decisions.*
>
> • *Employers and employees should act **consistently**.*
>
> • *Employers should carry out any necessary **investigations**, to establish the facts of the case.*
>
> • *Employers should **inform** employees of the basis of the problem and give them an opportunity to **put their case** in response before any decisions are made.*

- *Employers should allow employees to be **accompanied** at any formal disciplinary or grievance meeting.*

- *Employers should allow an employee to **appeal** against any formal decision made.*

On how a disciplinary process should be conducted, the code includes the following:

Establish the facts of each case

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. In others, the investigatory stage will be the collation of evidence by the employer for use at any disciplinary hearing.

6.

In misconduct cases, where practicable, different people should carry out the investigation and disciplinary hearing.

7.

If there is an investigatory meeting this should not by itself result in any disciplinary action. Although there is no statutory right for an employee to be accompanied at a formal investigatory meeting, such a right may be allowed under an employer's own procedure.

…

Inform the employee of the problem

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.

10.

The notification should also give details of the time and venue for the disciplinary meeting and advise the employee of their right to be accompanied at the meeting.

Hold a meeting with the employee to discuss the problem

11.

The meeting should be held without unreasonable delay whilst allowing the employee reasonable time to prepare their case.

12.

Employers and employees (and their companions) should make every effort to attend the meeting. At the meeting the employer should explain the complaint against the employee and go through the evidence that has been gathered. The employee should be allowed to set out their case and answer any allegations that have been made. The employee should also be given a reasonable opportunity to ask questions, present evidence and call relevant witnesses. They should also be given an opportunity to raise points about any information provided by witnesses. Where an employer or employee intends to call relevant witnesses they should give advance notice that they intend to do this.

Allow the employee to be accompanied at the meeting

13.

Workers have a statutory right to be accompanied by a companion where the disciplinary meeting could result in:

- *a formal warning being issued; or*
- *the taking of some other disciplinary action; or*
- *the confirmation of a warning or some other disciplinary action (appeal hearings).*

…

17.

The companion should be allowed to address the hearing to put and sum up the worker's case, respond on behalf of the worker to any views expressed at the meeting and confer with the worker during the hearing. The companion does not, however, have the right to answer questions on the worker's behalf, address the hearing if the worker does not wish it or prevent the employer from explaining their case.

Decide on appropriate action

18.

After the meeting decide whether or not disciplinary or any other action is justified and inform the employee accordingly in writing.

> …
>
> *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. But a fair disciplinary process should always be followed, before dismissing for gross misconduct.*
>
> *24.*
>
> *Disciplinary rules should give examples of acts which the employer regards as acts of gross misconduct. These may vary according to the nature of the organisation and what it does, but might include things such as theft or fraud, physical violence, gross negligence or serious insubordination.*
>
> …

And as to the right of appeal:

> *26.*
>
> *Where an employee feels that disciplinary action taken against them is wrong or unjust they should appeal against the decision. Appeals should be heard without unreasonable delay and ideally at an agreed time and place. Employees should let employers know the grounds for their appeal in writing.*

26. In the case of Polkey v A E Dayton Services Limited [1988] ICR 142 it was made clear that employers can not argue that a procedurally improper dismissal was none the less fair because it would have made no difference had a fair procedure been followed, save in wholly exceptional cases where it could be shown that following a proper procedure would have been, "utterly useless" or "futile". At paragraph 12 of that Judgment, Lord Mackay of Clashfern adopted the reasoning of Browne-Wilkinson J in Sillifant v Powell Duffryn Timber Limited [1983] IRLR 91 later helpfully summarised by Lord Bridge of Harwich at paragraph 28 as follows:

> *"If an employer has failed to take the appropriate procedural steps in any particular case, the one question the Industrial Tribunal is not permitted to ask in applying the test of reasonableness posed by s.57(3) is the hypothetical question whether it would have made any difference to the outcome if the appropriate procedural steps had been taken. On the true construction of s.57(3) this question is simply irrelevant. It is quite a different matter if the Tribunal is able to conclude that the employer himself, at the time of the dismissal, acted reasonably in taking the view that, in the exceptional circumstances of the particular case, the procedural steps normally appropriate would have been futile, could not have altered the decision to dismiss and therefore could be dispensed with. In such a case the test of reasonableness under s.57(3) may be satisfied."*

27. When a Claimant has succeeded in a claim for unfair dismissal, the award of compensation falls into two categories. The first is in respect of a Basic Award pursuant to sections 119 to 122 of the Employment Rights Act 1996 (ERA) which provide that such an award shall be a multiple of the number of years' complete service and the individual's gross pay, (subject to a statutory maximum).

28. The second element of the award is to compensate the Claimant for losses sustained as a result of the dismissal, known as the Compensatory Award. The amount of such an award is governed by sections 123 to 126 of the ERA. Section 123 (1) states:

> "*The amount of the compensatory award shall be 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 insofar as that loss is attributable to any action taken by the employer.*"

29. In Polkey referred to above, Lord Bridge also quoted Browne-Wilkinson LJ from Sillifant, as follows:

> "*If the Tribunal thinks that there is a doubt whether or not the employee would have been dismissed, this element can be reflected by reducing the normal amount of compensation by a percentage representing the chance that the employee would still have lost his employment*."

30. Whilst that case involved redundancy and an unfair procedure, the principles set out in this quotation apply equally to any case of unfair dismissal, for applying section 123(1) requires the Tribunal to award such sum as it considers just and equitable and what is just and equitable must depend, to some degree, on what prospects there were that the Claimant might have been or might in due course have been, fairly dismissed any way, see Gove and Others v Property Care Limited [2006] ICR 1073. The burden of proof is on the employer, (see Software 2000 Ltd v Andrews [2007] ICR). The assessment I must make is what this employer would have done, (in other words, not apply a test of what some other, reasonable employer, would have done – see Hill v Governing Body of Tey Primary School [2013] ICR 691). A reduction in accordance with these principles might be a percentage reduction or it might involve limiting the compensation to a particular period.

31. Section 123(6) of the ERA provides that where a Tribunal finds that the dismissal was to any extent caused or contributed to by the Claimant, it must reduce the award of compensation by such proportion as it considers just and equitable.

32. In Nelson v BBC (No2) 1979 IRLR 346 the Court of Appeal laid down that there are 3 findings that an Employment Tribunal must make before reducing an award for contributory fault. They are:-

1. There must have been culpable and blameworthy conduct by the employee, (that can include not just misconduct or breach of contract but also conduct which could be described as perverse, foolish, bloody-minded or merely unreasonable in all the circumstances – but not all unreasonableness – it depends on the circumstances);

2. The conduct must have caused or contributed to the dismissal.

3. It must be just and equitable to reduce the award by the proportion specified.

33. The amount of any reduction is a matter of fact and degree for the tribunals discretion but the Court of Appeal gave some general guidance in Holliers v Plysu Ltd 1983 IRLR 260:-

- employee wholly to blame : 100%
- employee largely to blame : 75%
- employee and employer equally to blame : 50%
- employee slightly to blame : 25%

34. A Claimant's conduct might also result in the Basic Award also being reduced: section 122(2) provides that the Basic Award may be reduced where the Tribunal considers the conduct of the Claimant before dismissal such that it is just and equitable to do so.

Credibility

35. This is a case which turns on the credibility of evidence, primarily on the conflict of evidence between Mr Sheekey and Mr Allen as to what was said between them in their meeting on 19 October 2017, but also in respect of Mr Sheekey's denial of wrong doing. In a misconduct, unfair dismissal case, the tribunal is primarily concerned not with whether the claimant is guilty of the misconduct alleged, but with the reasonableness of the employer's conclusion that he was, based upon the evidence available to the employer at the time. However, where possible contributory conduct may be relevant in the assessment of compensation, it is necessary for the tribunal to make a finding in respect of that alleged conduct.

36. In the course of hearing their oral evidence, I found no particular reason to doubt the credibility of Mr Mallett and Mr Allen.

37. As for Mr Sheekey, there were some problems with his evidence:

37.1. During cross examination he began speculating that the reason he had charged the strimmer to a customer's account and not the cash account, was because he had taken a phone call from or about the customer in question. This was an entirely new explanation not previously mentioned to the Respondent, not in the ET1 and not in his witness statement.

37.2. His attempts to explain under cross examination why he had changed the description of the strimmer on the customer's account from that which was automatically entered by the system, was unconvincing.

37.3. He was unwilling, until pressed by me, to accept that there was a difference between taking something from one's employer and not telling them on the one hand, and taking something but telling them, by leaving an IOU.

37.4. In his remedy witness statement he made a statement about being on reduced earnings for the first 2 months of his new employment and he reiterated that in cross examination. However, he did not produce any documentary evidence, either in the form of a contract or correspondence with his new employers as one would expect, nor a pay slip for either of those 2 months. The gross earnings to date figure on the one pay slip he did produce, for February 2018, suggested that what he had told me, was not true.

38. I would not hold against Mr Reevey, as Mr Oulton invites me to do, the incomprehensible nature of the allegation at paragraph 3 of his particulars of claim, where he criticises the Respondent for not speaking to the individual, "who was to collect the item". That was probably a drafting error by his lawyer.

39. Above all though, is the difficulty that the documents significantly undermine the credibility of Mr Sheekey's evidence to the effect that he had booked the strimmer to the customer by mistake and he had not acted dishonestly:

39.1. The supplier's invoice shows that he had arranged for the Respondent to purchase the strimmer with the description, "4 IN 1 PETROL MULTI – TOOL" for £144.99 excluding VAT.

39.2. He had physically changed the description of the strimmer on the customer's account, from that referred to above, which would have been automatically entered by the system, to, "TOOL".

39.3. The price charged to the customer had been increased to £225 excluding VAT.

39.4. If he were genuinely intending to purchase the strimmer himself and merely accidently added it to the wrong account, he would have added 10% to the cost price, in accordance with company policy.

39.5. He had not asked for permission to purchase the strimmer in accordance with company policy.

40. For these reasons, I am afraid I did not find Mr Sheekey a credible witness.

Facts

41. The Respondent is in the business of supplying car parts. At the time of the dismissal, it had about 400 employees, 17 at the Ipswich branch at which Mr Sheekey worked. It had, (but has no longer) a dedicated Human Resources advisor. Its head office is in Maidstone, Kent and it has 38 branches in the south and east of the country.

42. Mr Sheekey began his employment with the Respondent on 18 October 2011. He was employed as a Branch Manager, originally in Colchester. He moved to manage the Ipswich branch in March 2017.

43. The Job Description for the post of Branch Manager includes reference to responsibility for maintaining discipline, ensuring records are kept of goods in and out and that all money and goods are properly accounted for, leading by example and setting high standards.

44. Mr Sheekey's contract of employment provides that his employment can be terminated without notice in the event that he is guilty of gross misconduct.

45. Included within the Company Handbook, (which is incorporated into the contract of employment) as examples of gross misconduct are theft or fraud, deliberate falsification of records, failing to follow company procedures in financial transactions and with regard to stock.

46. Staff are permitted to purchase stock through the Respondent's business at cost plus 10%. Such purchases are accounted for by entry either on a staff account known as IV8000 which requires payment straightaway, or on the managers, "branch account" known as IZ6000 if payment is to be made later, usually by the end of the month.

47. If a Branch Manager wished to purchase something unusual other than normal stock, permission should be obtained from a more senior manager.

48. On 13 July 2013, Mr Sheekey received a verbal warning which expired 6 months thereafter. It did not relate to honesty and has no bearing on the issues, I mention it merely because in his ET1, he said that he had never received any warnings.

49. On 29 August 2017, Mr Sheekey placed an order on behalf of the Respondent, with a supplier, Draper Tools, for a strimmer, described on the invoice as, "4 IN 1 PETROL MULTI – TOOL". He negotiated a discounted price, £144.99 ex vat, which represented a discount of £40. He intended to take the strimmer for his own personal use. (Document C68)

50. The strimmer was delivered to the Respondent on 3 October 2017, (document C69).

51. On 3 October 2017, Mr Sheekey entered the strimmer onto the account of

a customer, Ipswich Clutch Centre Limited. He chose this particular customer because he knew it was not diligent in checking its invoices. He manually changed the description of the goods from that in the previous paragraph, which would have been automatically entered by the Respondent's IT system, to, "TOOLS" so that it would be less likely to be noticed if the customer did check the invoice. He also added the Respondent's standard profit mark up of 35% to the cost price, so that the customer was charged £225 ex vat.

52. Mr Sheekey kept the strimmer on the premises and in his van for a few days and then took it home, intending to keep it.

53. Mr Peter Ottaway is the Respondent's Warehouse Manager at Ipswich. He has been with the Respondent since 1992 and is well known to take great pride in stock being accurately recorded.

54. On 11 October 2017, Regional Manager Mr Mallet, visited the Ipswich branch. Mr Ottaway drew to his attention the entry of the strimmer to the Ipswich Clutch account and that the strimmer was in Mr Sheekey's van. Mr Mallet looked in Mr Sheekey's van and saw the strimmer. He took no immediate action.

55. On 12 October, Mr Mallet returned to the Ipswich branch and saw that the strimmer was still in Mr Sheekey's van. He looked at the Respondent's IT system and saw the document at C69 which showed that the strimmer had not been marked for, "branch use" and had been invoiced to Ipswich Clutch. He also saw that the description of the item had been changed. He knew that the customer was not good at checking its paperwork.

56. On 13 October, Mr Mallet visited the customer and in converstation, asked whether he knew of anyone he could borrow a strimmer from and the customer replied not. From this, he deduced that the customer had not purchased the strimmer. He returned to the Ipswich branch and saw that the strimmer had gone from the van. He looked around the branch and could not see it anywhere.

57. On 19 October, Mr Mallet met with Operations Manager Mr Allen. He explained to him the information he had received, the investigation he had carried out as explained above and gave him a copy of the invoice which had been raised to the customer, (document C70).

58. Mr Allen acknowledges that ordinarily, he would have suspended Mr Sheekey, provided him with the information obtained and called him to a disciplinary hearing. However, because he knew Mr Sheeney and did not want to believe what he was seeing and felt that there must be an explanation, he drove to the Ipswich branch to speak to him and ask for an explanation. He did not tell Mr Sheekey in advance what the meeting was about.

59. In the meeting between Mr Allen and Mr Sheekey on 19 October 2017, Mr Allen gave Mr Sheekey a copy of the invoice and asked him to explain. Mr

Sheeky put his head in his hands and said nothing. Mr Allen then said he would explain to Mr Sheekey what he thought had happened and that Mr Sheekey should interrupt him if he was wrong. He proceeded to explain that it looked as if Mr Sheekey had booked the strimmer to the customer knowing that it was a customer that was not good at checking paperwork and he had changed the description so that it would not be noticeable.

60. Mr Sheekey admitted that he had booked the strimmer to the customers account, but said that he had intended to credit it off before the end of the month before it was noticed. He said he could not afford to pay for it at the time and had needed to clear the paperwork so that head office would pay the supplier. Mr Mallet asked why he had not booked it to the manager's branch account, (IZ6000) and Mr Sheekey replied that he wished he had done.

61. What Mr Sheekey did not do, was suggested that he had made the entry in error to the wrong account.

62. Mr Allen decided to dismiss Mr Sheekey there and then. He took the view that on the basis of the information before him, what Mr Sheekey was saying did not make sense, was not credible and that dismissal was inevitable. He told Mr Sheekey that in his view, he had deliberately booked the strimmer to the account, defrauding his employer and the customer.

63. Mr Allen met Mr Sheekey again by arrangement, at the Ipswich branch at the end of the following working day. Mr Sheekey collected his belongings and Mr Allen handed him a letter confirming his dismissal as of 19 October 2017 for, *"booking a purchase for personal use to a customer account, without the customers knowledge or consent"* which is described as theft and attempted theft. The letter does not inform Mr Sheekey that he has a right of appeal.

64. During the meeting on 20 October 2017, Mr Sheekey raised a number of matters concerning Mr Mallet with Mr Allen, suggesting that he had been targeted because he knew of a particular scam that Mr Mallet was running with catalytic converters. Mr Mallet subsequently investigated these matters. These matters were:

    64.1. It was suggested that Mr Mallet had instructed Mr Sheekey to clear some cash tickets due from one customer, to the account of another. Mr Allen found there to be no evidence of this. Mr Mallet denied the allegation when it was put to him by Mr Allen and denied it in tribunal.

    64.2. Mr Sheekey claimed that he had been instructed by Mr Mallet that there were certain customers who did not keep a careful eye on their accounts and in respect of those customers, if there were perhaps 20 returns in a month to be credited, only say 15 should be credited. Mr Allen found there to be no evidence of this. Mr Mallet denied the allegation when it was put to him by Mr Allen and denied it in tribunal.

64.3. Used catalytic converters have a resale value. The Respondent would receive customers' used catalytic converters in return for a £20 credit and had an arrangement with a business that bought them from the Respondent. Mr Sheekey suggested that Mr Mallet was involved in a scam whereby the more valuable of these used converters were being swapped with less valuable parts and sold to a third party for private profit. Mr Sheekey suggested that Mr Mallet had targeted him in relation to the strimmer, because he knew about the scam. Mr Allen found there to be no evidence of this. Mr Mallet denied the allegation when it was put to him by Mr Allen and denied it in tribunal.

65. Mr Sheekey argues that he has been treated inconsistently compared with others. The comparators he refers to and my finding of facts on the same are:

65.1. A Mr Richard Gissing-Thorpe had been discovered to have stolen Tesco vouchers intended for customers. He was dismissed.

65.2. Mr Samuel Kane had taken money from the Respondent's safe but had left an IOU to say that he had done so. He was given a warning.

65.3. Mr Mick Kane's practice of supplying a particular customer with multiple parts on a daily invoice was acceptable to the business. He did not take cash payments for his personal benefit.

65.4. The reference to a Mr Pestell swearing is irrelevant; this case is about dishonesty.

Conclusions

66. I am satisfied that Mr Allen genuinely believed that Mr Sheekey was guilty of the misconduct for which he dismissed him.

67. I am also satisfied that conclusion was reached on reasonable grounds after the conduct of a reasonable investigation, (in the sense that it was within the range of what a reasonable employer might have done by way of investigation). Mr Mallet's investigation had established and Mr Allen had before him that:

67.1. Mr Sheekey had invoiced a customer for an item he had taken for himself;

67.2. The customer was one who was known not to check paperwork carefully;

67.3. Mr Sheekey had altered the description of the item so that it was less likely to be spotted and queried;

67.4. Mr Sheekey had charged the usual profit margin to the customer, and

67.5. Mr Sheekey's assertion at the time that he had intended to clear it and pay it at the end of the month did not make sense and was not credible.

68. These provide reasonable grounds on which Mr Allen could reasonably conclude on the balance of probability, that Mr Sheekey had intended to steal the strimmer.

69. Was the decision to dismiss within the range of reasonable responses? Mr Sheekey complains that he was dealt with inconsistently compared to others. On the facts, none of the comparators he seeks to rely on bear comparison to his own circumstances. There is no inconsistency of treatment.

70. It is hard to conceive of a circumstance in which the decision to dismiss an employee one has reasonably concluded is guilty of theft, would not be within the range of reasonable responses of the reasonable employer. In this case, Mr Sheekey was in a position of trust, responsible for accurate stock recording, for maintaining discipline and setting high standards of behaviour to the staff he managed. In those circumstances, there can be no doubt that the decision to dismiss lay within the range of reasonable responses.

71. However, that is not an end to it. In complying with the test set out at s.98(4) employers are expected to follow fair procedures. Tribunals are required to have regard to the ACAS code referred to above in assessing the employers compliance or otherwise, with s98(4).

72. I consider in turn, each of the Claimant's complaints about the procedure followed, as identified at the outset of the case:

72.1. He said there was no investigation. In fact, there was. Mr Mallet conducted an investigation and I have set out his findings in the facts. The investigation does not necessarily have to entail an investigatory meeting with the employee, here evidence was collated for use at the disciplinary hearing. Different people conducted the investigation and the disciplinary hearing, Mr Mallet followed by Mr Allen.

72.2. Mr Sheekey was not informed in advance in writing of the allegations against him.

72.3. There was however, a disciplinary hearing, that is what the meeting on 19 October amounted to. It was of course, unsatisfactory and held at variance with the ACAS code; he did not know it was a disciplinary hearing, he did not know the allegations in advance, he was not afforded the opportunity of being accompanied.

72.4. The details of the allegations against him were explained to Mr Sheekey and he did have the opportunity to and did respond; he admitted what he had done and said that he intended to put it right at the end of the month.

72.5. Mr Sheekey was not informed in writing, as required by the ACAS code, of his right to appeal. That though is no impediment to his appealing. He told me that he went to see his lawyer for advice the day after he was dismissed. One would have thought that having done so, he would have appealed. His failure to do so is itself, a breach of the ACAS code which could result in a reduction in compensation.

73. The ACAS code is not a prescriptive statute. It sets out a standard of behaviour that employers ought to have regard to and informs a tribunal's assessment as to the fairness of the employer's decision to dismiss. The code itself at paragraph 3 acknowledges that it sometimes may not be practical to follow all steps. It does also say that whilst in cases of gross misconduct it may be appropriate to dismiss without prior warning or notice, a fair disciplinary process should always be followed.

74. Employers should follow the code and if they depart from its standards of fairness, ought not to get away with it. Employers are not permitted to argue that a fair procedure would have made no difference. No fair procedure means no fair dismissal. The fact that a fair procedure would still have led to a dismissal is to be reflected in the compensation awarded to the employee claimant.

75. However, there is the possible wholly exceptional situation referred to in the passages from Polkey that I have referred to and quoted from above at paragraph 26, where a proper procedure would be utterly useless or futile. This is not a case of it being an exception to the requirement to act fairly as I understand it, but an acknowledgment that an employer can be regarded as having acted fairly, in accordance with s98(4), in certain exceptional circumstances where the process contemplated by the ACAS code or something similar, (such as the employer's own procedure) would have been futile.

76. In this case, Mr Allen, having heard Mr Sheekey acknowledge that he had indeed charged to a customer the strimmer that he had taken home and his implausible explanation that he intended to put it right before the end of the month, took the decision that he knew all he needed to know and that dismissal was inevitable. This is one of those exceptional cases where the decision to dismiss was a reasonable decision in the circumstances, taking all into account, having regard to the test in s98(4), notwithstanding the procedural failings I have identified above.

77. Had I decided otherwise, I would have concluded that Mr Sheekey contributed 100% to his dismissal and that his compensatory and basic awards should therefore have been reduced to zero, for the reasons set out below.

78. Thus far I have been concerned with the fairness of the decision making of Mr Allen on the basis of the information he had before him at the time. When it comes to assessing contribution, my judgment is based on the evidence which I have heard, to reach a conclusion on what I find, on the balance of probabilities, Mr Sheekey did. In addition to the information before Mr Allen discussed above, I have had the benefit of hearing evidence from Mr Sheekey under cross examination. I have already set out why it is that I found his evidence lacking in credibility. I find that probably, Mr Sheekey knowingly charged the strimmer to a customer, intending to take the strimmer for himself. He marked up the price and he changed the description, so that what he had done would be less likely to be detected. He did not say to me that he intended to sort it out and pay at the end of the month, his evidence was that it was mistake. That evidence was not credible and I did not believe him. His behaviour was culpable and blameworthy conduct that contributed entirely, 100%, to his dismissal. It would be just and equitable to reduce the compensatory and basic award by that percentage.

79. Had I found that the dismissal was procedurally unfair and the percentage reduction for contribution had been anything less than 100%, I would have found that inevitably, had a fair procedure been followed, Mr Sheekey would most certainly have been fairly dismissed by this employer. With the investigation having already been carried out, that would be likely to have happened within a week. Accordingly, any compensation, (which would then have to be subjected to the percentage reduction for contribution) would have been limited to one week's loss of earnings.

Dated: 15 March 2018

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Employment Judge M Warren

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE