EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4110236/2021

Final Hearing Held by Cloud Video Platform (CVP) on 22 to 24 November and 20 to 21 December 2021

Employment Judge Russell Bradley

Matthew Danes — **Claimant**
Represented by:
J Grant
Solicitor

Wm Morrison Supermarkets plc — **Respondent**
Represented by:
S Liberadzki
Of Counsel
Instructed by:
Messrs Eversheds Sutherland (International) LLP

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the claimant was unfairly dismissed. The respondent is ordered to pay to the claimant: -

1. A basic award of ONE THOUSAND AND SEVENTY SIX POUNDS (£1076.00)
2. A compensatory award of THIRTY FIVE THOUSAND FIVE HUNDRED AND SEVENTEN POUNDS AND EIGHTY ONE PENCE (£35,517.81)

The Employment Protection (Recoupment of Job Seeker's Allowance and Income Support) Regulations 1996 apply. The monetary award is £36,593.81.

The prescribed element is £17,195.00. The dates to which that prescribed element apply are 25 February 2021 and 21 December 2021. The monetary award exceeds the prescribed element by £19,398.81.

REASONS

Introduction

1. In an ET1 presented on 29 June 2021 the claimant maintained the single claim of unfair dismissal. It was resisted. In accepting that it dismissed the claimant the respondent relied on "*conduct*" as its reason. The case was listed for a three day final hearing on 22 to 24 November to consider the merits and if appropriate remedy. The claimant sought compensation. It was not possible to conclude the case in those three days. The hearing resumed on 20 and concluded on 21 December.

2. An indexed bundle was emailed to the tribunal late on 19 November. In the course of the hearing parties agreed that a document later added as **pages 71a to 71g** was the claimant's contract of employment. **Pages 513r to 513x** were also added to the bundle. The respondent produced a counter schedule of loss outwith it.

3. In the course of the hearing and at my request the respondent produced (and the claimant agreed) a cast list, a chronology and a typewritten version of the notes from a disciplinary hearing on 25 February 2021. The handwritten version of the notes was indexed as **pages 456 to 482**. Also produced by the respondent was a document to aid cross referral of documentation between the bundle (and also not produced in it) and the documentation provided to the claimant when invited to a disciplinary hearing. I am grateful for those additional papers which assisted me.

The issues

4. The issues for determination were:-

    1. Did the respondent have a genuine belief in the guilt of the claimant in respect of the allegations which resulted in his dismissal?

2. Did the respondent have reasonable grounds upon which to sustain that belief?

3. At the stage at which it formed that belief on those grounds, or at least by the final stage at which it formed that belief on those grounds, had it carried out as much investigation into the matter as was reasonable in all the circumstances of the case? In particular, had it carried out as much investigation into of the allegations as was reasonable so as to sustain its belief?

4. In all the circumstances of the case was the decision to dismiss the claimant fair in the context of section 98(4) of the Employment Rights Act 1996?

5. In the event that the claimant was unfairly dismissed to what compensation is he entitled? And in particular; to what extent should it be reduced to reflect issues of mitigation, ***Polkey*** and/or any contributory conduct?

Evidence

5. Evidence was heard for the respondent from John Thorburn regional manager and Ben Goodhand store manager. The claimant also gave evidence.

Findings in Fact

6. From the evidence and the tribunal forms, I found the following facts admitted or proved.

7. The claimant is Matthew Danes.

8. The respondent is Wm Morrison Supermarkets plc. It has a number of business premises in Great Britain. They include a supermarket store at Eskbank Road, Dalkeith, Midlothian.

9. The claimant began his employment with the respondent on 8 August 2016. His agreed effective date of termination was 25 February 2021. By that date, the claimant was 39 years of age. He was employed as store manager. As at that date his agreed gross weekly pay was £1390.92.

10. With a letter dated 6 June 2016 the respondent issued to the claimant a written contract of employment (**pages 71a to 71g**). Annual salary was to be paid 4 weekly. The contract sets out its "*key benefits*". Amongst other things it referred to a disciplinary procedure within a "*Colleague Handbook*." The respondent also has a disciplinary guide (**pages 73 to 74**). It sets out examples of misconduct and gross misconduct. The latter includes *"Serious disregard of Health and Safety precautions, rules, procedures or standards including, but not limited to, hygiene, fire, food safety and trading standards, including eating on the shop floor*" and "*Serious breach of any statutory duty or regulatory requirement*". The respondent has a Health and Safety Handbook. It is issued to all staff, or colleagues. Amongst other things it contains information on fire safety and prevention and accidents at work.

11. In January 2020 the respondent announced a restructuring exercise. It was called "*Castle*". At that time the claimant was the store manager of the respondent's store at Moredun, Edinburgh. In January 2020 and relative to that exercise the respondent issued a Store Briefing Pack (**pages 78 to 132**). Its introduction included reference to a proposal of a new management structure. Its timetable (**pages 84 to 87**) proposed Monday 30 March as "*Live in new structure*". The timetable proposed the first briefing of all managers on or about 23 January. The claimant received the Pack at about that time. Under the heading of "***Manager in Charge Guidance***" (**page 116**) the Pack said, "*In all formats, the most senior manager will take on the role as Manager in Charge. For example if the Store Manager is in, they would then be Manager in Charge. In cases where the Store Manager is day off/holiday etc, the most senior manager would become the Manager in Charge, for example Operations Manager or People Manager. We would utilise our wider Management Team when they are the most senior colleague in the store.*" It also set out (**page 116**) that "*The proposed expectation is that all Managers will be Manager in Charge trained*".

12. The claimant has a condition called pulmonary sarcoidosis. It was diagnosed prior to January 2020. He was also diagnosed with severe anxiety. Neither condition required him to be absent from work prior to March 2020.

13. In late March 2020 the claimant began shielding because of the COVID-19 pandemic. As a result, he was absent from work.

14. Also in March 2020 the respondent issued a "*Manager in Charge – Relief*" training document (**pages 133 to 143**). It provided under the heading of "***Manager in Charge Relief - Emergency Training Approach – Headlines***" that the "*Overall approach is for the Store Manager (or Safe Hands Store Manager) to upskill all Managers currently not MIC trained on the critical areas required to open and close the store and maintain legal requirements in the event that they need to provide temporary relief until a qualified Manager in Charge becomes available*." It set out that "*overall MIC Relief Training takes 2 x shifts shadowing an Opening & Closing plus 6 hours of elearning on the key critical areas*." It set out four "*Safe & Legal*" areas and 14 workbook modules to complete. Those 14 modules included ones on Security, Fire and Refrigeration, Store Security, Control of Keys and Emergency Procedure. Appendix four (**page 140**) contains a declaration to be completed and signed by a Manager in Charge – Relief.

15. In about the end of August 2020 the claimant returned to work. He became store manager at the Dalkeith superstore on his return. The People Manager at Dalkeith at that time was Grace Tierney. The Operations Manager there was Lee-Ann Wilkinson. Other managers there at that time included Scott Green, Colin Halliday and Douglas Stewart.

16. In October 2020 the respondent issued a document called "*Manager in Charge Training Approach*" (**pages 144 to 148**). Under the heading "*Manager in Charge key points*" it sets out two aims. They were (i) to enable managers to have the competence and confidence to run a shop and (ii) to provide the technical knowledge to manage safe & legal operations, with the ability to deal with both internal and external escalations in the moment. Under the heading "*Manager in Charge New Training Approach*" it provided links to three other documents. One of them was a "*Manager in Charge Workbook*". It was to be completed by "*manager in charge*" (MIC) in training.

17. In November 2020 the respondent issued a document called "*Manager in Charge - Workbook (Covid Relief Pack)*" (**pages 149 to 204**). Its stated

purpose for a Manager in Charge was to "*enable you to have the competence and confidence to run a shop. Providing you with the technical knowledge necessary to manage safe & legal operations, with the ability to deal with both internal and external escalations in the moment*." It contained 17 modules. They included; Alarms – Security, Fire and Refrigeration, Store Security, Control of Keys, Health and Safety and Emergency Procedures.

18. On 20 November the claimant attended a meeting with Carolyn Gibson Regional Manager (Safe Hands), Eastern Scotland and Nathan Battle, Regional People Manager, Eastern Scotland. By that time Ms Gibson was the claimant's line manager. The meeting reviewed a document called *"Christmas Sign Off – Eastern Scotland – 2020*" (**pages 384 to 386**). It contained information under a column for each of the four weeks commencing 7, 14, 21 and 28 December 2020. Proforma script appears in green in an outer left column. Inserted information appears in black script. An outer right column contained "*Next Steps and agreed follow up date*" information (also in black). For week commencing 7 December, and opposite the green proforma text of "*Manager in Charge rotas reviewed with appropriate cover at all times*" there is inserted the word "*Completed*." For the other weeks/columns the space for inserted information is "*greened out*."

19. Between 6am and 6pm on Friday 25 December 2020 four "*level 1*" colleagues worked in the Dalkeith store. They did so with the prior knowledge and consent of the claimant.

20. Between 29 and 31 December 2020 a whistleblowing case was raised (see the chronology). The case detail (what was raised and treated as a whistleblowing issue) was recorded as part of an internal investigation report (**pages 400 to 403**). The case detail itself is recorded on pages **400 and 401**. A number of issues were raised. They included; (i) no MIC (Manager in Charge) shifts awarded to or being completed by SM (Store Manager) or PM (People Manager) or Cafe Manager on paper or "*My Schedule*"; (ii) a number of complaints about the Operations Manager; and (iii) "*Xmas Day - No-one could believe that a cafe assistant, just 18 yr old, was left in charge of the store with shop keys and one other deli colleague. No training and no experience of being a keyholder*."

21. On Thursday 13 January 2021 Clare Doolan Regional People Manager, Northern Scotland was assigned the role of investigator (see **page 401**). That day and as part of her investigation Ms Doolan carried out "*listening sessions*" with four members of staff. They were; Douglas Stewart (Fresh manager) (**page 404**), Grace Tierney (People manager) (**pages 405 to 407**), Colin Halliday (Replen manager) (**pages 408 to 409**) and the claimant (**pages 409a and 409b**). Mr Stewart was not asked about the issue of colleagues working on Christmas day.

22. On the issue of Christmas day working Ms Tierney said; colleagues were in that day; a manager worked from 6pm on Christmas Eve until 6am on Christmas day; colleagues worked from 0600 until midday and midday until 6pm then a manager and some night colleagues worked 6pm Christmas day until 6am on Boxing Day; none of the four (whom she named) were key holder trained but she had been led to believe they were trained on alarms; Carolyn and Nathan Battle were informed at Christmas sign off that the store had colleagues in it on Christmas day; they were not specifically advised that they would be there without a manager present; and she thought them working was ok because the store wasn't trading and was "*like when Night Managers go on holiday and a colleague steps up.*"

23. On the issue of Christmas day working Mr Halliday said; in answer to a question, it had not happened before and he had been there for a few years; two of the colleagues working had just turned 18; one had only been in the company for a few weeks and the other a few months; there was no manager with them; he had said to the claimant and to Ms Wilkinson that he did not agree with it; Ms Wilkinson had told him (Mr Halliday) that's what she did in Tesco; and that the claimant had also allowed colleagues in the store without a manager in Moredun.

24. On the issue of Christmas day working the claimant said; there had been two colleagues in until midday and two from midday until 6pm when the nightshift came in; those colleagues were level 1 customer assistants and the store was not open; they were trained on the fire system and security system and they had his Operations Manager's phone number because she was on call; there had been four colleagues in store without a trained 'manager in charge' manager. The claimant then asked, "*is that a problem*

from a process point of view?" On hearing the explanation that it was, and why (no-one should be in store without a manager in charge trading or not and the respondent's insurance would be void if there had been a flood, fire or break in) he said, "*I thought it was ok as long as it was dual manned. It has been done historically in this shop, the last 2-3 years so that is why I thought it was ok. Plus, we presented the rota at the Christmas schedule sign off with Nathan and all and they didn't say anything*."

25. Also on 13 January Ms Doolan recorded four summary findings. The first was "*Both the Store Manager and People Manager admitted they allowed level 1 customer assistants to work in the store on Christmas Day, without a 'Manager in Charge' trained colleague. Two colleagues were scheduled 0600-1200 and two others were scheduled 1200-1800. When we have no keyholder (MIC) trained manager in store it should be fully locked down (all internal and external alarms set). The colleagues in the store that day were not MIC trained, therefore the store was exposed from both a security and health & safety perspective. In addition, night assistants are covering night managers holidays, rather than a day manager going on to night shift*." She also made three recommendations. The first was "*Gross misconduct investigation with Mat Danes for breach of LP policy*." (**pages 401 to 402**) It appears that "*LP*" is a reference to the respondent's Loss Prevention Policy (**pages 76 to 77**).

26. Also on 13 January another investigator, David Rogers recorded his investigation update (**page 402**) by noting "*Review completed of Christmas day keyholding & confirmed via CCTV that a manager leaves store on 25/12/20 at 06:00 leaving 2 colleagues in charge of the store, another 2 colleagues arrive later in the day & a manager arrives back at store at 18:00. 12hr period on 25/12/20 where store was manned by level 1 colleagues*."

27. As investigation manager Colin Pearce (Regional Manager, Eastern Scotland) met with Lee-Ann Wilkinson (Operations Manager) on Friday 22 January 2021. Notes were taken which were produced within the bundle (**pages 412 to 419**). The meeting started at 13.21pm. The notes record Mr Pearce as saying that he was conducting an investigation "*into … an incident on Christmas Day and some ways of working routines in store*." The notes record that; Ms Wilkinson started work for the respondent on

19 November 2019; in relation to Christmas day; she knew that Scott Green was night shift on Christmas Eve and returned at 6pm on Christmas day; in between there were colleagues in the store, about 6am to 6pm; at the time she questioned; is that alright? and the claimant told her "*as long as there is at least 2 colleagues it's fine*"; there was no manager (which she questioned) "*as in Tesco there was always a manager in to supervise*". This had prompted her to ask, either the claimant or Ms Tierney, albeit she was not 100% sure who she asked; she just thought it "*must be a Morrisons thing*"; she asked and got an answer, maybe she "*should have probed it further*"; she thought there probably was a risk involved with untrained colleagues being left in the building alone, unsupervised, but they had been "*shown how to use the HHT to open the door and given various phone numbers if they needed any help or support*". In answer to the question "*Were you aware of any other element of training that they should have had*?" she said, "*The MIC stuff? They were in to replenish, they had plans of what they were doing. One of the colleagues is Rachel, a competent general assistant. Everything was locked up, cash office, the building. Alarms where on, cash office, perimeter alarm. Could have used a fire exit if needed. We had a fire evacuation just before Christmas and they were in the store so knew what to do.*" In relation to her clarity on their level of training, she said that her only conversation was with the claimant to the effect that they "*needed to speak to*" the colleagues working that day in case anything happened and she knew that Mr Green was speaking to them. The meeting ended at 14.29.

28. Colin Pearce then met with Grace Tierney (People Manager, Dalkeith) on Friday 22 January 2021. Notes were taken and produced (**pages 420 to 425**). The meeting started at 14.55pm. The notes record Mr Pearce as saying that he was conducting an investigation "*into … an incident on Christmas Day and some ways of working routines in store*." The notes record that; Ms Tierney started work for the respondent in April 2020; in relation to Christmas day she said that; up until her meeting with Ms Doolan the previous week she did not realise that colleagues being in on their own 6am to 6pm without a manager was an issue; in relation to manager in charge training she did not think that they were appropriately equipped to be by themselves, as she believed they had not done that training; she did

not know what training had been given to them in relation to emergency procedures; in answer to a question on her awareness of the toolkit being explicit on what is expected of "*MIC coverage and Night managers etc*" she said that she was not, but had had it fully clarified the previous week, she had raised it in a People Manager call the previous Tuesday; she recognised risks in having untrained colleagues in store; and she did not raise it as an issue at sign off, Ms Wilkinson had mentioned that Tesco always had a manager in the building and she (Ms Wilkinson) had raised it with her (Ms Tierney) and with the claimant at the time of Christmas sign off, she had asked the claimant who had said that as long as there were two colleagues in the building it wasn't an issue. The meeting ended at 15.48.

29. Mr Pearce then met with the claimant on Wednesday 27 January. Notes were taken and produced (**pages 426 to 442**). The meeting started at 13.41pm. Again, the notes record Mr Pearce as saying that he was conducting an investigation "*into … an incident on Christmas Day and some ways of working routines in store*." The notes record that; the claimant acknowledged that he was in the middle of enacting "*Castle*" when he went out of the business (shielding) and finished on his return; his explanation for allowing the four colleagues to work on Christmas day unsupervised and what he put in place; and his acceptance that what occurred was not company policy but it had not occurred knowingly aimed to create risk. The meeting ended at 16.00.

30. On Thursday 11 February Carolyn Gibson met with Rachel Heatherill. Ms Heatherill was one of the four colleagues who worked on Christmas day. Notes were taken and produced (**pages 443 to 445**). The meeting started at 11.33am. The notes record Ms Gibson as saying that she was conducting "*an investigation into some incidents which have been brought to my attention. These are in relation to Christmas Day 2020*." The notes record that Ms Heatherill said; she worked 6am until 12.30pm on Christmas Day; Scott Green was the manager who let her in; he left 10 to 15 minutes after arrival; no other manager was in; it had not happened before; so far as training was concerned she said she had been shown how to use the phone and the HHT log to let people in a few days prior; she had been shown "*the*

fire safety thing", "*the security panel thing*" and received Mr Green's passcode and the "*wee manager's phone*" on arrival in the morning of Christmas day but didn't really get it; she felt like a manager for a bit; if there had been an issue she was not really sure what to do, but had phone numbers for Mr Green, the claimant and Ms Wilkinson to phone them if needed. The meeting ended at 11.52am.

31. Also on Thursday 11 February Carolyn Gibson met with Derren Watson. Mr Watson was another one of the four colleagues who worked on Christmas day. Notes were taken and produced (**pages 446 to 449**). The meeting started at 11.56am. The notes record Ms Gibson as saying that she was conducting "*an investigation into some incidents which have been brought to my attention. These are in relation to Christmas Day 2020*." The notes record that Mr Watson said; he worked 6am until 12.30pm on Christmas day; there had been no manager on the shift, Scott Green had been on nightshift before and "*gave the phone*" to Ms Heatherill; as far as he was aware Ms Heatherill was in charge as she had the phone; so far as training was concerned, he said Mr Green had shown him the panel; which button to press for the full store; the security panel, and explained that the fridge one always made a beep so he advised how to turn it off and if it was "*red or something, you check the fridge*"; Mr Green had gone through the "*really important*" fire alarm panel really briefly but he wouldn't have known what to do; in answer to questions Mr Watson explained; that in relation to any burglary he had asked the question prior to Christmas day but didn't get an answer; what he would do in the event of a fire, a power failure or an accident; that if a bomb threat he did not know what to do. The meeting ended at 12.17pm.

32. 20 minutes later (12.37 on 11 February) Ms Heatherill and Mr Watson asked to see Ms Gibson again which she did. Notes were again taken and produced (**pages 450 to 452**). The notes record that between Ms Heatherill and Mr Watson they said; they wanted to provide the correct version of the story but had been concerned they would get people into trouble, they had been advised by Mr Green that morning of their interviews with Ms Gibson; they had been given fire training that morning (11 February) "*to cover their backs*"; they had been shown the security panel on Christmas day for the

first time; they had not been talked through any emergency scenarios; Mr Green had done this training retrospectively to save the claimant's job; and they were worried about the repercussions because Mr Green would be "*mad at us*." The meeting ended at 12.57pm.

33. By letter dated 15 February, John Thorburn (at that time Regional Manager, Western Scotland) required the claimant to attend a disciplinary hearing on Thursday 25 February 2021 at 16.30pm (**pages 453 to 455**).

34. The letter of 15 February lists two (bulleted) allegations. They replicate *verbatim* wording from the respondent's disciplinary guide (see **page 74**) as examples of gross misconduct:-

    1. Serious disregard of Health and Safety precautions, rules, procedures or standards

    2. Serious breach of any statutory duty or regulatory requirement.

35. The letter continues that "*the above allegations are made against you following an incident on 25th December 2020 where you knowingly planned and allowed four colleagues to work unsupervised and untrained (as per company specification) in store with no manager present, or competent, trained/signed off individual, between the hours of 06.00 and 18.00*."

36. The letter alleged that; the conduct was "*negligence*"; put colleagues at a potential risk; and compromised the business in that it would have been liable should anything have happened to them. It alleged that he had knowingly failed in his duty of care which he owed as store manager towards his colleagues.

37. The allegation continued that the claimant had:-

    1. Failed to follow the respondent's policies and procedures on Manager in Charge training and emergency procedures and

    2. Admitted that the (named) colleagues who worked on Christmas day had received no formal training which would equip them to work alone or unsupervised.

38. The allegation further said that the claimant had:-

1. Failed to inform his line manager during the Christmas sign off process that there would be colleagues working unsupervised and untrained and

2. Chose to ignore concerns raised by his People Manager and Operations Manager and decided to allow the situation to occur.

39. The letter included:-

1. All of the investigation meeting notes

2. All of the listening session notes

3. Copies of training notes for those who worked on 25 December

4. Copies of timesheets for 25 December

5. Copies of 7 2020 Change and MIC principles and training

6. Christmas signoffs

7. November 2020 "*Working with Purpose*" reset slides

8. An email from Colin Halliday to Clare Doolan dated 15 January

9. Copies of H&S Handbook, HS03 unsafe activities and LP toolkit alarm system.

40. Mr Thorburn had some assistance from Kate McCabe (Head of People, North) with his understanding of the disciplinary process. He was unsure as to why the letter included reference to conduct having been done "*knowingly*."

41. On 25 February the hearing duly took place. Mr Thorburn spent two hours before it going over the material that had been provided to him. Hand notes were again taken at it. They were produced (**pages 456 to 482**), albeit it was easier to refer to the numbers marked by hand on them. They were signed by the claimant and Mr Thorburn that day to confirm that; they were taken at it; were a summary of the discussion; and reflected a true account of the points discussed. Present in addition were Tracey Phillips Regional People Manager (notetaker) and Eva Wallace a store manager as the

claimant's representative. The notes record that the meeting; started at 4.30pm; ended at 8pm; had breaks at 6.09 pm (17 minutes), at 6.52pm (53 minutes) and for a further 5 minutes between 7.48 and 7.53pm. The notes suggest that no reference was made in the meeting to any of the material enclosed with the letter of 15 February. Page 2 of the hand notes is missing. The bundle index says "*there is no page 3, the pages have been misnumbered*." This suggests that they are complete, there never was a page 3. However, in the typed version which I sought the claimant has added "*There is a whole page missed here- hand written page 3 has not been typed*". The text contained at the start of page 4 suggests that it does not naturally lead on from the text at the end of page 2. On that basis, there probably was a page 3 which is missing.

42. In relation to the allegations, the notes record that the claimant said; he was not sure of the detail of each section of the allegation; the policy of Manager in Charge training changed during "*Castle*" as a result of which there "*became a need for manager to be present*"; he was not aware that it had become necessary for a manager to be present until reading the notes from his meeting with Ms Doolan; on the allegation of his admission that the (named) colleagues who worked on Christmas day had received no formal training he left the actions to his operations manager and the "*other WL3*"; on the allegation of choosing to ignore concerns, he said that his People Manager was "*external*" and had not questioned the plan that had been put to him, her experience being like his that on a non-trading day two people in the building was as per that experience; he was disappointed that no-one had raised the issue earlier; he made a mistake; did not dispute not following company policy but did not knowingly or purposefully put the respondent at risk; he and his operations manager were "*on call*" on Christmas day; accepted that none of the four colleagues had had MIC training; only on reading papers for the disciplinary hearing did he realise that the colleagues hadn't had training; having people in the store on Christmas day did not matter from an operational point of view; his clarity of thinking was not what it needed to be; on the allegation of failing to inform his line manager said that he did not hide anything and referred to another document which could not be accessed; his decision-making on the question of colleagues working on Christmas day was impaired by how he

was feeling; explained that getting into the store was on some days "*an achievement*" and he was fighting to put on a front, and fulfilling his role was a challenge. On several occasions he accepted that he had made a mistake. On one occasion, he described it as "*a huge mistake*". In answer to a question about confidence of managing situations such as a fire, electrical fault or a break in, the claimant said that on reflection he believed they were taken care of based on what he understood had been basic training and the capability of the colleagues but at the time of the disciplinary hearing he accepted that that was also a mistake. In answer to a question the claimant said he had indicated to Carolyn (Gibson Regional Manager (Safe Hands)) that he had colleagues in on Christmas day, it being on the schedule which had been presented. He was not able to explain to Mr Thorburn if he told her who they were. He accepted that he made no reference to his line manager (Ms Gibson) that there was no "*Manager in Charg*e" in on Christmas day.

43. The notes record a considerable amount of information from the claimant about his period of absence from the business; his health reasons for it; and his interactions with colleagues about returning to work and review meetings. When invited to add anything further at the end of questions, the claimant said that; from the start he accepted that he did not follow policy and had never tried to deny it; he did not purposefully or knowingly put the respondent at risk; he had too much to lose by make a decision or doing something which was underhand or knowingly not right and referenced his family responsibilities.

44. The notes then record Mr Thorburn saying that he would stop the hearing and go over the notes. There is then a suggestion that he may or may not make a decision that day, and it was agreed (at 6.52pm) to reconvene at 7.45pm which they did. In that time he spoke with Tracey Philips. On reconvening, Mr Thorburn is noted as saying "*Findings gross misc has been committed leaving stores 4 untrained colleagues. Evidence substantiated and mitigating circumstances not founded*." Mr Thorburn is further noted as saying, "*Listened to all evidence and considered your input today. Reached conclusion that gross misconduct has been committed so will be terminating*

you from the business today, based on all evidence considered and tonight's discussion. Full rights to appeal. Letter will be sent."

45. By letter dated 4 March 2021 (**pages 483 and 484**) Mr Thorburn confirmed his decision to summarily dismiss the claimant. After repeating in full the allegations Mr Thorburn said, "*We discussed the matter fully at the hearing and my decision has been based on the following:*

- *Your actions as a Store Manager to knowingly plan and allow four colleagues who were not trained or signed off as a Manager In Charge, to work in the store with no management supervision, demonstrates a serious disregard of Health and Safety precautions, rules, procedures and standards.*
- *As a Store Manager you are the custodian of policy and procedure and I believe that you failed in your responsibility on this day in question.*
- *After thoroughly considering the points you described I believe there are no substantiated mitigating circumstances to take into account*."

46. Mr Thorburn would not ever expect to have staff in store without a manager in charge. He believed, based on what was said at the disciplinary hearing, that the claimant had a sense that he knew they should have been supervised by a manager in charge, or a manager in charge – relief. In his view, the claimant had allowed colleagues to work in store unsupervised on Christmas day with no manager in charge, which was a breach of the respondent's policy. Mr Thorburn did not believe the claimant when he said that he did not know it was against company policy because in his view any "*competent and confident*" manager who was responsible for about 150 colleagues and who had been employed as a manager since August 2016 if he asked four colleagues to be in the building, would have known they should have had both competence and training to do so. In his view having a manager in charge on site was a regulatory requirement based on the disciplinary guidelines. He accepted that at no stage in the disciplinary process did the claimant say that he was knowingly in breach of policy.

47. Mr Thorburn considered alternatives to summary dismissal. They included no sanction and a warning. When he considered the disciplinary guidelines, his decision was that this was gross misconduct.

48. By email dated 13 March (**pages 486 to 488**) the claimant set out his grounds of appeal. They were:-

"*Severity*

- *Dismissal on the grounds of gross misconduct was an excessive outcome and was not within the band of reasonable given my unblemished disciplinary record and my length of service.*
- *I consider that compared to other 'Gross Misconduct' cases very harsh outcome. 2 examples- Store Managers knowingly repackaging competitor products and labelling as Morrisons (Allergen risks, brand damage) and defrauding company sales through tills.. I do not consider that my situation is of a similar magnitude.*
- *My Mental Health Nov/ Dec*
- *Gap from the business March- August. No phased return or time to 'catch up'- straight in and to a different store. Comparably- the RM was off for 10 weeks and had a phased return with nearly 50% duties for a period of time so he could get back up to speed.*
- *A company policy (that was unknown) was not followed- the law according to HSE was not broken.*
- *There was not a deliberate breach of the policy*

Process

- *Timescale- Whistleblower on 29th Dec- Company aware from 30th Dec. Yet only spoke to me informally to ask on 12th Jan, then only investigated formally (what I had already said I did not know) and then not dismissed until 25th Feb. If the company considered that I could cause damage to the business or commit any further misconduct then I would have expected to be suspended on pay. Also- the company let me stay in the business knowing that I was Clinically Extremely Vulnerable.*

- *When I went to the store there was a colleague running nightshift in the nightshift manager's absence (holidays etc). So not only was the practice already being carried out in that store as a precedent but this shows I did not know the change in process. Again, I consider that I was treated inconsistently and unfairly.*
- *Company did not brief the Store Manager population on the change that was 'proposed' in January. Store Managers were not aware of this and I was not briefed on this.*
- *A second (Safe Hands) RM was involved in the investigation stage- interviewing colleagues. This should be the same investigating Manager- and indeed in this case this compromised the situation because Safe Hands RM had been bullying myself through store visits and an incorrect company performance process. I believe that this may have influenced the decision to dismiss me and that I would not have been dismissed otherwise*."

49. On 8 April 2021 the claimant's appeal was heard by Ben Goodhand, then a regional manager. Hand notes were taken by Kay Ashley, Regional People Manager. Copies were produced (**pages 496 to 513**) and a "*clear version*" of them, (**513a to 513q**) (albeit also handwritten). They are not signed. They are marked "*N/A virtual*". They record that the meeting began at 10.00am and ended at 12.30pm. The claimant again was accompanied by Eva Wallace. They record breaks at 10.30 until 11.45 and 12.13 until 12.22pm.

50. On 12 April Mr Goodhand had an investigation hearing with Colin Pearce. Hand notes were taken. They were produced (**pages 513r to 513x**) They disclose that Mr Pearce was the notetaker which I assume is an error. The notes record that the four main points for discussion with Mr Pearce were; (i) consistency of action taken; (ii) MIC across the group; (iii) timescales of process and (iv) Carolyn issues.

51. By letter dated 28 April (**pages 515 to 519**) Mr Goodhand wrote to advise the claimant of the outcome of his appeal. The letter set out the allegations as per the disciplinary invitation letter (**page 453**). It summarised the grounds of appeal. It recorded that the claimant's desired outcome was to complete the process under advice from his solicitor and was not to seek reinstatement as he had lost faith in the respondent. It set out that he had

investigated each point of appeal and his findings on each. In it he said amongst other things; Mr Thorburn had "*considered alternative sanctions to dismissal, however, was clear that the act of deciding to allow colleagues to work without sufficient training and without a manager, or person trained to a sufficient level of competency, was an act so serious that he no longer had trust and confidence in your decision making ability in the role of Store Manager, and given the severity and potential impact this of this decision, no alternative course of action was appropriate*"; his *"record and length of service as a store manager was considered, and given your level of experience it was felt that you have sufficient experience and knowledge to understand this was not acceptable and put your colleagues, your store, and the business at risk*"; it was his "*reasonable belief based on your investigation notes and your return to the business that you had sufficient time to upskill yourself on the manager in charge expectations*"; and he believed his actions demonstrated "*a complete disregard for your role and obligations as a Store Manager and …. serious negligence to Health and Safety precautions, rules, procedures or standards*."

52. Since his dismissal, the claimant has not found alternative employment. He produced (**pages 610 and 611**) his job application diary. It notes "*Platforms in constant use*", which I took to mean sources of possible vacancies. It notes other actions. In table format it lists 21 positions for which applications were made over the period March to November 2021. The latest four (three in November) are shown as "*pending outcome*." Two of them (Proposition Consultant- Phoenix Group and Student Support Manager- University of Edinburgh) remained pending by the time of the December hearing. The claimant was unsuccessful in his application for the position at Zachary Daniels. It was one of three positions which were "*retail*." Prior to his dismissal the claimant's wife worked part time. She has since sought and obtained full time work. As a result, if the claimant is to return to employment it will be necessary to pay for childcare. By the claimant's calculations, he requires to earn at least £1400 per month to be able to meet that cost. His schedule of loss says that he has received Jobseekers Allowance of £75 per week for 28 weeks (£2,100). The bundle contained (**pages 581 to 597**) "*open vacancies*" posted on Indeed Edinburgh and for roles as manager or assistant manager at five retailers. **Page 581** suggested that it was the first

page of 269 jobs. The Indeed vacancies included a number of retail roles. The claimant was aware of some of them. He did not apply for any. His explanation was his need for a salary at a certain level. He gave as examples the vacancies at Game and Nike.

Submissions

53. Both parties produced written submissions to which they spoke. I do not repeat them. Both referred to familiar case-law. Some of those references were common to both. I did not understand there to be a significant difference on the principles derived from them. To the extent relevant I consider them below.

Law

54. Section 98(1) of the Employment Rights Act 1996 provides that *"In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—(a) the reason (or, if more than one, the principal reason) for the dismissal, and (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*" One reason with subsection (2) if it relates to the conduct of the employee.

55. Section 98(4) of the Act provides "*Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is 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*."

56. The three-part test which Tribunals and courts apply in cases of alleged misconduct is well known, derived as it is from ***British Home Stores v Burchell*** [1980] ICR 303. "*First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain*

that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case." Equally well known and often cited is what was said in ***Iceland Frozen Foods Ltd v Jones*** [1983] ICR 17. The Tribunal "*must not substitute its decision as to what was the right course to adopt for that of the employer*." And "*The function of the Employment Tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted*." The band of reasonable responses applies to the consideration of the investigation by the Tribunal as well as the decision to dismiss (***Sainsbury's Supermarkets plc v Hitt*** [2003] IRLR 23. As noted by the President Mr Justice Choudhury in the EAT's decision in ***Hope v British Medical Association*** EA-2021-000187-JOJ a four-stage analysis is pithily summarised by Langstaff J in ***JJ Food Service v Kefil*** [2013] IRLR 850 at paragraph 8. "*In approaching what was a dismissal purportedly for misconduct, the Tribunal took the familiar four stage analysis. Thus it asked whether the employer had a genuine belief in the misconduct, secondly whether it had reached that belief on reasonable grounds, thirdly whether that was following a reasonable investigation and, fourthly whether the dismissal of the Claimant fell within the range of reasonable responses in the light of that misconduct*."

57. "*A '**Polkey** deduction' has these particular features. First, the assessment of it is predictive: could the employer fairly have dismissed and, if so, what were the chances that the employer would have done so? The chances may be at the extreme (certainty that it would have dismissed, or certainty it would not) though more usually will fall somewhere on a spectrum between these two extremes. This is to recognise the uncertainties. A Tribunal is not called upon to decide the question on balance. It is not answering the question what it would have done if it were the employer: it is assessing the chances of what another person (the actual employer) would have done*." And "*the Tribunal has to consider not a hypothetical fair employer but has to assess the actions of the employer who is before the*

Tribunal, on the assumption that the employer would this time have acted fairly, though it did not do so beforehand." ***Hill v Governing Body of Great Tey Primary School*** [2013] ICR 691.

58. Section 123(6) of the 1996 Act provides that where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding. A Tribunal must identify the conduct which is said to give rise to possible contributory fault. Having identified that conduct, it must ask whether that conduct is blameworthy. The Tribunal must ask if that conduct which it has identified and which it considers blameworthy caused or contributed to the dismissal to any extent. If it did then the Tribunal moves to the next question; by what proportion is it just and equitable, having regard to that finding, to reduce the amount of the compensatory award?

59. Section 122(2) provides that where the Tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce that amount accordingly.

60. I also took account of principles contained in ***Cooper Contracting Limited v Lindsey*** UKEAT/0184/15/JOJ now reported at [2016] ICR D3 on the issue of mitigation of loss.

Discussion and decision

61. In his written submission the claimant notes that it was for the respondent as employer to show that "*conduct*" was the reason for dismissal. Both submissions proceed on that basis. The claimant does not argue that there was another reason or that it masked the "*real*" reason. I am satisfied from the evidence of both Mr Thorburn and Mr Goodhand including their "*outcome*" letters that the respondent has shown that the reason for his dismissal related to the claimant's conduct. The letter of 15 February 2021 (pages **453 to 455**) prefaces and categorises the bulleted allegations as being of gross misconduct. Both Mr Thorburn and M Goodhand proceeded on that basis.

62. The central factual element of the allegation is that on 25th December 2020 the claimant "*knowingly planned and allowed four colleagues to work unsupervised and untrained (as per company specifications) in store with no manager in charge present, or competent, trained/signed off individual between the hours of 06.00 and 18.00*." In its written submission (at paragraph 5) the respondent suggests that an abbreviated version is "*the key finding*". In the whole disciplinary process, the respondent's approach to that central element was to categorise it in two ways. The first is a rationale for the second. In other words, the second, the "*policies and procedures*", are intended to avoid the first, the "*mischief*", being the possibility of the negligence occurring. The two ways are:-

    1. "*Negligence; which put both the colleagues at a potential risk as well as compromising the business in the event that that risk were realised. It is also called a knowing failure in a duty of care to them based on his direct accountability for them as store manager.*
    2. *A failure to follow the company's own policies and procedures in relation to*

        i. *Manager in Charge training and*
        ii. *Emergency procedures*."

63. There are three related elements to the allegation:-

    1. An admission by the claimant that none of the four colleagues had received any formal training which could equip them to work alone or unsupervised. For it to form part of the allegation against him, the "*admission*" must have occurred prior to the disciplinary hearing.
    2. A failure to inform his line manager (Carolyn Gibson) during the sign off process that they would be working unsupervised and untrained; and
    3. His choice to ignore concerns raised by his People Manager (Grace Tierney) and Operations Manager (Lee-Ann Wilkinson).

64. The claimant admitted throughout the disciplinary process (and before it) that he sanctioned the four colleagues to work in the store with no manager

in charge present on the day in question. It hardly needs saying that both Mr Thorburn and Mr Goodhand believed that he had done so.

65. The first of the three related elements (if accurate) would be evidence on which the respondent could rely that the claimant knew that the four were neither trained nor "*competent, trained/signed off*" themselves. In contrast, in the claimant's investigatory meeting on 27 January, Colin Pearse summarised the point as being that the claimant had "*mitigated the risk by asking someone to cover the emergency training with them*" (**page 434**). The claimant's position in that meeting was (**page 428**) Lee-Ann Wilkinson made sure that Scott Green (Manager at Dalkeith) took them through training. Neither the disciplinary nor the appeal minutes deal specifically with this alleged admission. There was therefore no basis for the respondent to allege or conclude that the claimant had made it. It was not accurate. Separately, on the point of none of the four being a "*competent, trained/signed off individual*" it was the respondent's pled position (grounds of resistance paragraph 2**, page 29**) that *"It is accepted practice within the Respondent's stores that there must always be a Manager in Charge (MiC) present at a store when anyone is working at the store whether or not the store is trading. A person who is not MiC trained must not be left in charge of a store*." On that case, the question of whether or not the four colleagues received any training short of MIC training was irrelevant. On that analysis, whether or not the claimant checked that his request for them to be trained had been carried out was equally irrelevant. Self-evidently, that training was less thorough than MIC training. Accordingly, on the respondent's case, even if it had been done, the claimant's actions were nonetheless in breach of its "*practice*".

66. The second and third (if accurate) could be construed as evidence on which the respondent might rely as indicating that the claimant knew or at least had an awareness that what was planned was unacceptable.

67. On the second, the claimant said (in the investigation meeting, **page 431**) "*Christmas sign off for example, can't remember how much detail we looked at, obviously they were aware that the store was manned. I certainly can't remember anything being discussed about `not having` a manager there. I didn't say anything, but I wasn't asked by them if a manager was present.*

Nathan might remember that Carolyn wasn't convinced we would achieve what we needed to on Twilight, so I talked through what the team would do over Christmas Eve and Christmas day." From this passage, the respondent was aware that the claimant had not informed Ms Gibson that the colleagues would be working unsupervised. But that is consistent with his position; that he did not see anything wrong with such a situation. In my view, the fact of the failure to inform Ms Gibson is not evidence that the claimant knew that what was planned was either negligent or a breach of policy.

68. On the third, in her interview on 22 January, and prior to the interviews with Grace Tierney (which was later that day) and the claimant (27 January) Lee-Ann Wilkinson said (**page 418**), ""*At the time I did question is that alright, and Mat said as long as there is at least 2 colleagues it's fine. There is no manager, I questioned this as in Tesco there was always a manager in to supervise. But that is what prompted me to ask, either Mat or Grace, I'm not 100%, I just remember asking is it okay. I just thought it must be a Morrisons thing. I asked and got an answer, maybe I should have probed it further. Maybe that's my fault for not challenging it more*." On neither occasion when she provided information did Grace Tierney say she had raised concerns with the claimant. In contrast, on **page 406**, (her listening session) she said that she thought it was ok because the store wasn't trading. In the investigation meeting (**page 422**) she said "*Until Clare* [Doolan] *brought it up last week when she was in, I didn't realise that colleagues being in on their own was on issue. Colleagues in the building 6am to 6pm working alone, without a manager in charge in*." And also on **page 422** in answer to the question: "*Did you raise concerns regarding these risks to anyone at the time, and if so what happened / was discussed?* She said, "*Lee-Ann had mentioned in Tesco that they always had a manager in the building. She raised it to myself and Mat on the day of Christmas sign off. I asked Mat and he said, as long as there was 2 colleagues in the building it wasn't an issues. I never thought to question that as Mat said it, and in previous business it's been allowed*." As an aside I note that in its submission (at paragraphs 10 and 13) the respondent said that there was evidence from three colleagues including Ms Tierney that they had queried whether the claimant's plan was appropriate. I do not accept that Ms Tierney was one

of them. It appears therefore that this concern was not accurate. There was no basis for the respondent to say that the claimant's People Manager had raised concerns which he ignored. Certainly, Ms Wilkinson did, but her point of reference for raising it was not that it was negligent or a breach of the respondent's policy; rather it was not how things had been done by a previous employer, Tesco. That is not a reasonable basis from which to conclude that the claimant had ignored concerns that the planned working was negligent or a breach of the respondent's policies.

69. The question then becomes; was it reasonable for Mr Thorburn or at least by the time of the appeal for Mr Goodhand to disbelieve the claimant's explanation for his conduct? That explanation was that at the relevant time (before Christmas day) he did not know that it was a breach of the respondent's policy, albeit he later accepted that it was, it having been explained to him in January 2021. Or another way of asking the same question is; did the respondent have a reasonable basis on which to believe that his admitted conduct was a breach of the policies relied on and that at the time of that conduct he knew it to be a breach?

70. Neither in the notes of his meeting with the claimant nor in his dismissal letter of 4 March does Mr Thorburn set out a basis for his belief on the point. What is noticeable from both is the absence of a reasoned explanation for his decision that the claimant was guilty of the alleged misconduct. On the question of sanction, he said (**page 484**) that there were no substantiated mitigating circumstances to take into account. In his evidence to the tribunal, Mr Thorburn said he believed that with the claimant's experience at his level within the respondent's organisation (6 years at level 5) he should have known that it was a "*must*" to have an MIC looking after the building, and that to have done so was not the right thing to do. In Mr Thorburn's opinion; there had always been a need for a manager to be present. Previously, (i.e. prior to Castle) it had been a senior manager. Since Castle, it had been a "*Manager in Charge*"; company policy/guidelines should always be followed, meaning either a relief manager or an MIC; the claimant's actions were in breach of policy, adding "*We allowed colleagues to work on Christmas day unsupervised with no MIC*."

71. Mr Goodhand's decision at the time was; (**page 517**) "*It is my reasonable belief based on your investigation notes and your return to the business that you had sufficient time to upskill yourself on the manager in charge expectations*." In other words, Mr Goodhand appears to be accepting the claimant's explanation that the MIC expectations had indeed changed, but in the time after his return to the business (in August 2020) and before November he should have been able to "*upskill*" himself by familiarising himself with them. On that view, the conduct of which the claimant was culpable was not upskilling himself within a reasonable time. That is different from concluding that he is guilty of the misconduct alleged. On that analysis, the respondent did not have a reasonable basis on which to conclude that the claimant was guilty of the misconduct alleged against him. That being so, the second part of the ***Burchell*** test has not been met.

72. Separately I had regard to the ACAS Code of Practice on Disciplinary and Grievance Procedures (2015). In particular, I had regard to paragraph 23. It states, "*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*." The importance of the Code was emphasised in the case of ***Lock v Cardiff Railway Company Ltd*** [1998] IRLR 358 to which the claimant referred. In particular, reference was made to what was said at paragraph 22 of that report. "*It seems to us essential that employees should be given due warning of which types of misconduct will, on a first breach, lead to dismissal. They are entitled to know before they are dismissed what they may be in for if they break that particular rule*." In this case there is a disconnect between the "*central factual element of the allegation*" or as the respondent called it "*the key finding*" and the idea that there was a particular rule which outlawed it. In classing the central factual element of the allegation as gross misconduct, the respondent referred to two examples within its disciplinary policy. As noted above, it categorised the allegation as being "*a failure to follow the company's own policies and procedures in relation to Manager in Charge training and Emergency procedures*." But neither the Manager in Charge training materials or the emergency procedures (**pages 133 to 305**) specifies that there must always be a

Manager in Charge (MiC) present at a store when anyone is working at it whether or not the store is trading. And that is borne out by the respondent's pled case which asserts that it is merely accepted practice. In its submission the respondent maintained that the "*crux of the Claimant's case was that a 'new policy' had been introduced in June 2020, while he was shielding, requiring stores to have a trained Manager in Charge while they were staffed during non-trading as well as trading hours, and that he was still unaware of this 'new policy' in November/December 2020*." It argued that it had reasonable grounds to find that the requirement pre-existed any restructuring, did not change, and must have already been known to the claimant. In support of that argument it referred to four sources. But none of them was reference to a policy-sourced rule that there must always be a Manager in Charge (MiC) present at a store when anyone is working at it whether or not the store is trading. The respondent did not have a reasonable basis for its conclusion that the requirement pre-existed the changes. Mr Goodhand's contemporaneous view appeared to be the contrary. That being so, the second part of the ***Burchell*** test was again not met. The claimant was therefore unfairly dismissed.

Remedy

73. The claimant was 39 years of age at his effective date of termination. He had been employed for four years. His agreed gross weekly pay was £1390.92. The basic award due to him would therefore (prior to any deduction) be £2152.00. The claimant calculates (using that gross figure) that the statutory cap (and thus his gross annual salary) is £72,327.84.

74. Parties were unable to agree the claimant's net pay. This was despite two schedules of loss, a counter-schedule and comment from the respondent's solicitor on the first schedule (**page 609**). They agreed that it would be for me to determine it by reference to his net earnings prior to his dismissal using the information from his payslips (**pages 598 to 603**). They are four weekly and cover the payment due dates in October 2020 to March 2021. I take the last of them (**page 603**, dated 12 March) to be to his effective date of termination. The "*payments*" on all payslips include a number of other entries as well as basic pay. Not all of them appear in all of the six payslips. They include car allowance. Immediately after the hearing there was an

exchange of emails between solicitors forwarded to the tribunal to say "*car allowance should not be awarded separately (as claimed in the Claimant's Schedule of Loss)*". I have therefore taken it into account in calculating net pay. The claimant asserted it was £951. The respondent asserted it was £905. Averaging by various means produces various results all of which were less than the respondent's confirmed amount. I have therefore used £905 as the claimant's net pay. That includes car allowance. I have used the respondent's amount (£69.75) for weekly loss of pension benefits. The claimant has received £2100.00 jobseekers allowance over 28 weeks.

75. The respondent argued that there was a "*clear failure to take all reasonable steps to mitigate his loss*." Reference was made to the 269 "*store manager*" adverts and several Aldi store manager roles which were produced. The respondent argued that he should have found a retail management job within 12 weeks of his dismissal. I took account of the nine principles set out at paragraph 16 in the decision of the EAT in ***Cooper Contracting***. I also noted what was said at paragraph 17. "*A phrase such as 'a duty to take all reasonable steps' is likely if too generally applied to divert focus away from those which are the legal principles and may seem to lead to a conclusion that may be erroneous ….*" In particular I took account of:-

1. The burden of proof is on the wrongdoer; a claimant does not have to prove that he has mitigated loss

2. What has to be proved is that the claimant acted unreasonably; he does not have to show that what he did was reasonable

3. There is a difference between acting reasonably and not acting unreasonably

4. What is reasonable or unreasonable is a matter of fact

5. It is to be determined, taking into account the views and wishes of the claimant as one of the circumstances, though it is the Tribunal's assessment of reasonableness and not the claimant's that counts

6. The test may be summarised by saying that it is for the wrongdoer to show that the claimant acted unreasonably in failing to mitigate.

76. Taking account of what is summarised as the test, the respondent's starting point is in error. Applying the test from ***Cooper Contracting***, the respondent in this case has not shown that the claimant acted unreasonably. In my view the impact of the loss of his employment on the claimant's home life was reasonable for him to take into account. His wife took up full time employment. He became more involved in child care. It is reasonable for him to take that, and its cost, into account in the roles for which he has applied. Separately, the respondent's argument contains an evidential gap. It assumes that by virtue of the number of advertised vacancies the claimant should have obtained alternative work within 12 weeks. But there was no evidence to support conclusions that (i) had he applied for any of them he would have been successful or (ii) he would have done so within 12 weeks.

77. The claimant sought loss of net pay and pension for a period of 46 weeks, 38 weeks past and eight future. In my view an assumption that the claimant will obtain employment with similar pay within eight weeks of the date of the hearing is not unreasonable. 46 weeks' net pay is a loss of £41,630.00. Loss of pension benefits over the same period is a loss of £3,348.00. The parties agreed £300 for loss of statutory rights.

78. The claimant sought £32,600 for the loss of contractual bonus to the date of his schedule. Clause 2.6 of his contract says that his summary page details if he is eligible for any "*non-contractual benefits. The company reserves the right to vary any non-contractual benefits (those which do not form part of your contract) at any time. See your Colleague Handbook for further details*." One discretionary incentive contained in the summary page is an annual bonus of 30%. In its counter-schedule, the respondent said that if the 20/21 annual bonus plan had paid out in full it would have paid £21,698.70, that is (as per its written submission) 30% of his gross annual salary. The respondent's position was that the amount of any bonus is dependent on performance, split between 60% for the performance of the respondent's business against its targets and 40% against individual performance to reflect against personal objectives. That position was not challenged. In its submission the respondent asserted that "*Mr Thorburn gave evidence that the company's targets were not met this year, meaning*

that nobody received a full bonus." His evidence was that the respondent had not fully achieved its objectives in the relevant year. He also gave evidence that in his region relative to the personal element the percentage ranged from 0 to 60%, and no-one received 100% of the bonus. I noted the respondent's position in its counter-schedule as being "*For the 20/21 scheme, if this were to pay out in full it would have paid £21,698.70 in April 2021. For colleagues who are in their notice period or who have left the business prior to April 2021, this was a discretionary payment. As the Claimant left the business on 25 February 2021 and received his final wage on 12 March 2021 he did not receive this discretionary payment*." This takes no account of what would have been due to the claimant had the claimant not been dismissed. By the date that its counter was produced the respondent must have known the actual performance of its business for these purposes. Similarly, the respondent would have known by December 2021 how well its eligible staff had performed against personal objectives so as to know what they had achieved for bonus purposes. This evidence was absent. That said, and given its relative importance to the claimant, it is surprising that he did not obtain (on a voluntary basis or with an order from the tribunal) sufficient information to be able to fix with a degree of certainty what bonus he would have received. He appears to have assumed an entitlement to 30% of his gross annual salary. Mr Thorburn's evidence was scant, short and general. Without further information from the respondent I am not prepared to accept that it did not achieve its own performance targets for bonus purposes. On that basis, the claimant would have received 60% of his bonus (£13,019.22). I am prepared to accept Mr Thorburn's evidence that no-one within his region scored better than 60% relative to their personal performance targets. That would include the claimant. 60% of the balancing 40% is £5,207.69. Without any additional or contrary material it appears to me that on this basis the claimant's bonus would have been £18,226.91.

79. The claimant also sought £14,800 for the loss of an annual share award to the date of his schedule. The other discretionary incentive contained in the summary page is "*long term incentive*" of 20%. I note that £14,465.57 is 20% of £72,327.84, the claimant's calculation of his gross annual salary. The claimant provided no other documentation as to how this loss was to

be calculated. I assume that he "*rounded up*" to the sum sought. In its counter-schedule the respondent said this;

> "*By the annual share award, it is assumed that the claimant is referring to the respondent's long term incentive plans, which are again discretionary. This pays out based on performance and in a combination of shares and additions to salary. The maximum pay-out would be 20% of annual salary, c. £14,500 but again it is unlikely the claimant would have received such an amount.*
> *This is calculated initially by getting the 20% of the eligible salary, so for Claimant this case, 20% of £69,000 (for 2020/21) = £13,800. This is then divided by the share price (which was £2.0946) to get his 6,588 shares. Due to the Claimant then leaving, he was eligible for none of these shares. Had he still been in the business, it would have been calculated as follows to get the shares vested: The 6,588 shares would have been subject to a performance outturn which was 53.5%, so 3,524 shares and then multiplied by the share price which was £1.7975, to be £6,335.43*."

80. Applying that method (20% to his gross annual (eligible) salary of £72,327.84) = £14,465.57; divided by the share price of £2.0946 to get 6,906 shares. Those shares (subject to the outturn of 53.3%) = 3,680 shares at a share price of £1.7975 = £6,614.80. Without any other information this seems to me to be the value of the loss had the claimant remained in employment.

81. Subject to any deduction for contributory fault his losses which total £70,119.71 are:-

1. Loss of net pay	£41,630.00
2. Loss for pension	£ 3,348.00
3. Loss of statutory rights	£ 300.00
4. Loss of annual bonus	£18,226.91
5. Loss re: incentive share scheme	£ 6,614.80

82. On the question of the application of ***Polkey***, the respondent's short point was that any unfairness in the procedure or investigation made no difference to the outcome, which would have been the same in any event. I

took this to mean that any compensation should be reduced considerably. The claimant's written submission does not expressly deal with the point. I reminded myself that the exercise is predictive. Further, "*If the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for him to adduce any relevant evidence on which he wishes to rely. However, the tribunal must have regard to all the evidence when making that assessment, including any evidence from the employee himself*" (***Software 2000 Ltd v Andrews*** [2007] ICR 825). The respondent in this case has not given any relevant evidence. I assessed the evidence as a whole. In my view, it was not possible to predict to any extent that the respondent would have fairly dismissed the claimant. I made no reduction to compensation on this basis.

83. In considering the question of contributory fault, a tribunal must identify the conduct which is said to give rise to it. Having identified it, it must ask whether that conduct is blameworthy. The Tribunal must ask whether that conduct caused or contributed to the dismissal to any extent. If it did so, then the Tribunal moves to the next question; to what extent should the award be reduced and to what extent it is just and equitable to reduce it? The respondent's submission was that the claimant had contributed "*overwhelmingly*" to his own dismissal by his admitted actions in planning for the store to be staffed by Level 1 colleagues, with no trained manager present. The claimant's primary position is that he did not contribute to the dismissal; the subsidiary argument being that it should be no more than 20%. In my view the claimant was at fault in failing to become aware of the "*policy change*" before November 2020. In January 2020 and relative to project Castle the respondent issued a Store Briefing Pack which the claimant received. He was not absent from work by reason of illness before March. He returned to work in August. The respondent issued further materials in October and November. He accepted (on several occasions in the disciplinary process that he had made a mistake. The typed disciplinary notes record him as saying, "*From the start I accept that I haven't followed company policy. Never tried to deny this when I became aware of this now understand have made a huge mistake, I didn't purposefully or knowingly put colls or co at risk*." In addition, the claimant was at fault in not taking

cognisance of the concerns of both Ms Wilkinson and Mr Halliday. While neither of them referred specifically to a rule or policy which required colleagues to be accompanied by an MIC on Christmas day, together those concerns could have alerted the claimant to it being an issue, something which he should have checked with his line manager. Christmas day is very unusual in the respondent's trading calendar in being a full day when its stores are closed for business. The claimant assumed, without checking, that colleagues could work without an MIC. In my view both issues are blameworthy. Both contributed to his dismissal. A tribunal's discretion is limited to considering what is just and equitable having regard to the extent to which the employee's contributory conduct contributed to the dismissal (***British Gas Trading Ltd v Price*** EAT 0326/15). I had regard to the decision of the Court of Appeal in ***Hollier v Plysu*** Ltd [1983] IRLR 260. It approved the EAT's division of cases under the statutory provisions into four general categories. While those categories do not limit a tribunal's discretion they are useful guidance. I see no reason to depart from it. I consider that this case falls into the third of those categories. In my view, compensation should be reduced by 50%. Both parties were equally to blame for the claimant's dismissal. Had the claimant acted as he should have done, he may well not have had the colleagues at work on 25 December unsupervised. Had that occurred, in all likelihood he would not have been dismissed. But if the respondent had had regard to the ACAS Code and given consideration to the question of whether the claimant knew, before it decided on guilt, of a rule the breach of which could result in summary dismissal, it in all likelihood it would not have upheld the allegation. I have reduced the compensatory award of £70,119.71 by 50%. The compensatory award is therefore £35,059.85.

84. On the basic award, I had regard to the decision of the EAT in ***RSPCA v Cruden*** [1986] ICR 205. There it was held that only in exceptional cases should a tribunal differentiate in the exercise of its discretion under the statutory provisions governing a basic and a compensatory award. This was not an exceptional case. The basic award is therefore reduced by 50% to £1,076.00.

85. The schedule of loss anticipates a liability to tax on compensation at this level at 20%. The tax free element minus the basic award is £28,924.00(A). The compensatory award of £35,059.85 minus that amount is £6135.85. Dividing that by 0.8 gives £7,669.81(B). (A)+(B)=£36,593.81 which I calculate to be the grossed up version of the award. Of that, £1076.00 is the basic award.

86. The judgement reflects that the claim succeeds and the reduction to both awards. The Employment Protection (Recoupment of Job Seeker's Allowance and Income Support) Regulations 1996 apply given that the claimant was in receipt of jobseekers allowance.

Employment Judge: Russell Bradley
Date of Judgment: 17 February 2022
Entered in register: 18 February 2022
and copied to parties