EMPLOYMENT TRIBUNALS

Claimant: Mr Muhammad Shahid

Respondent: Mr Muhammad Azeeem Khan t/a Yorkshire Retail Services

Heard at: **Leeds** **On:** **19 December 2022**

Before: **Employment Judge Jaleel**

Representation
Claimant: **Mr M Shahid (Claimant)**
Respondent: **Mr Muhammad Azeem Khan (Respondent)**

RESERVED JUDGMENT

1. The claimant's complaint of unfair dismissal is not well-founded and is dismissed.

2. The claim for breach of contract in respect of unpaid notice pay is not well-founded and is dismissed.

3. The claim for holiday pay succeeds. The respondent made an unauthorised deduction from wages by failing to pay the claimant in lieu of accrued but untaken holiday and is ordered to pay to the claimant the sum of £73.95.

4. The claim for an unauthorised deduction from wages succeeds. The respondent made an unauthorised deduction from wages in respect of salary to 27 January 2022 and is ordered to pay the claimant the sum of £534.60.

REASONS

Introduction

1. This was a complaint of unfair dismissal, unauthorised deduction from wages, notice pay and holiday pay brought by the claimant. There is no dispute that the claimant's employment was terminated for a reason related to conduct.

2. I had before me two sets of papers prepared by the claimant and the respondent respectively.

3. Having identified the issues, I took some time to privately read into the witness statements exchanged between the parties and relevant documentation.

4. I heard evidence from the respondent's witnesses, Mr Muhammad Khan (respondent) and Mr Sher Dil Khan.

5. I then heard evidence from the claimant.

6. I found that the parties had not adequately prepared to deal with any remedy applicable so I determined that this would be dealt with, if required, at a separate hearing. I confirmed that, on this basis and changed circumstances, I would consider any arguments either that compensation ought to be reduced to reflect the claimant's pre-dismissal conduct and/or on the basis that, if there had been a defect in procedure, it may not have made a difference to the outcome.

7. The claimant accepted that the reason for his dismissal was the potentially fair reason of conduct. I identified the issues to be determined and both parties confirmed their agreement as follows:

   7.1 Did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant, having regard in particular, whether;

      7.1.1 there were reasonable grounds for that belief;
      7.1.2 at the time the belief was formed the respondent had carried out a reasonable investigation;
      7.1.3 the respondent otherwise acted in a procedurally fair manner;
      7.1.4 dismissal was within the range of reasonable responses.

7.2 If the claimant's dismissal was unfair, what is the chance, if any, that he would have been fairly dismissed in any event?

7.3 If the claimant was unfairly dismissed, did he cause or contribute to his dismissal by his own culpable and blameworthy conduct?

Notice Pay

8.1 Did the claimant fundamentally breach his contract of employment by committing an act of gross misconduct? This requires the respondent to prove that the claimant committed an act of gross misconduct.

Holiday pay

8.2 Did the respondent fail to pay the claimant for annual leave the claimant had accrued but not taken when their employment ended?

Unauthorised deduction from wages

8.3 Did the respondent make unauthorised deductions from the claimant's wages and if so, how much was deducted?

Facts

9 The respondent operates as a petrol station forecourt and service station business. It is part of a franchise agreement. The shop goods belong to the respondent whilst the fuel belongs to Motor Fuel Group. The respondent operated almost 20 sites but has cut this down to 7 or 8 sites due to health issues.

10 The claimant was based at Whinneymoore service station.

11 The claimant commenced work for the respondent on 2 January 2020. He was employed as a sales assistant. His hourly rate at the date of dismissal was £8.91 an hour. He was paid monthly.

12 The claimant stated that he had not been provided with a contract of employment. The respondent included a generic contract of employment that it states is issued to all sales assistants and was provided to the claimant.

13 The claimant stated that he worked 155 hours from 26 December – 27 January 2022. The respondent stated that the claimant worked 15 hours per week.

14 I accepted that a written statement of terms and conditions of employment had been provided to the claimant. The respondent who has been in operation for a number of years across a number of sites is a franchisee and is expected to follow good employment practice of issuing contracts of employment as a franchisee

requirement. The claimant stated that on commencement of his employment he was asked to provide a copy of his driving licence as well as his right to work visa. Mr Sher Dil Khan (who has been employed prior to the claimant) confirmed that he had been provided with a contract of employment on joining the company. On the balance of probabilities, I found that the claimant was provided with a copy of the contract found at page 9 of the respondent's bundle.

15 I found that the claimant worked 15 hours per week, 6 days a week as per the contract of employment. The January 2022 wage slip provided as evidence by the respondent confirms that the claimant worked 60 hours per month and the respondent deducted his entire monthly salary in the sum of £534.60. Further the wage slip and P45 confirm that the total pay to date (10 months in total) equated to £4,864.86 which again supports the view that the claimant worked 15 hours per week.

16 The claimant's contract of employment contains the relevant terms relating to deduction from wages :

> **"Cash/Stock losses**
>
> **If, following investigation, it is found that as a result of your carelessness, negligence, or failure to comply with our procedures, or by wilful act, we suffer loss, or damage of cash and stock…**
>
> **Additionally you may be liable to pay the full or part* cost of making good our losses, or costs which the Company has had to reimburse to a third party. We will advise you in writing of the amount we intend to recover in advance. This is recoverable from any wages owing to you.**
>
> ***For cash shortages or stock deficiencies incurred within the retail sector, an agreed schedule of deductions will be applied in accordance with the Employment Rights Act and any subsequent amendments. No deduction will exceed 10% of gross wages, deducted from your applicable take-home pay on any given payday. We may continue to make similar deductions from your wages on subsequent paydays until the shortage/deficiency is fully discharged. Should you leave our employment during this process; the outstanding amount will be deducted from your final wage"**

17 Relevant terms relating to holiday pay confirm that the holiday year begins on 1 January and ends on 31 December each year. Holiday entitlement is 28 working days and rate of pay is the normal basic rate i.e. £8.91.

> **<u>Annual Holidays</u>**
> **Our holiday year begins on the 1st January and ends on the 31st December each year.**

> **Your annual holiday entitlement is 28 working days, during a complete holiday year. This is the entitlement for full time employees, part time employees will receive a pro-rata entitlement to full-time staff.**
>
> **Where your "working week" is not based on fixed or regular hours and/or days of work, your holiday entitlement will be calculated as an average of the twelve weeks actually worked in the period immediately leading up to the commencement date of your holiday.**
>
> **You will accrue your holidays during the year and your entitlement for part years of service will be calculated as 1/ 12th of the annual entitlement for each completed month of service during the current holiday year.**
>
> **You are not allowed to carry holiday over from one year to the next. Any holiday not taken by the end of the holiday year will be forfeited.**
>
> **In the event of your leaving and having taken paid holiday in excess of your entitlement, the company is entitled to deduct a sum equivalent to pay for those excess days from your final salary payment and any additional Company loan taken out will be deducted from your final salary.**

18 The contract stipulates that an employee is not allowed to carry holiday over from one year to the next. Any holiday not taken by the end of the holiday year is forfeited.

19 The respondent accepted that the claimant did not take any annual leave prior to his termination of employment.

20 In his witness statement the claimant described Mr Sher Dil Khan as ‘not being trustworthy’. I found Mr Sher Dil Khan to be a credible witness who was impartial. He stated that he had no animosity or confrontation with the claimant and had only transferred to the site around December/January 2021. The claimant in his evidence was unable to provide any reasoning as to why he felt Mr Sher Dil Khan was untrustworthy. He stated that Mr Sher Dil Khan would side with the respondent and ‘doesn’t like me as well’. I found that the claimant held this view simply because he had investigated his conduct and had elected to provide evidence on behalf of the respondent.

21 The respondent operates a company policy relating to the purchase of shop items by employees. Employees are permitted to purchase food and drink items if they are served by another member of staff; if they are working alone a receipt is required to be placed in the till as evidence of the purchase. Employees are not

permitted to purchase alcohol and tobacco during their shift. The respondent and Mr Sher Dil Khan stated that employees are also not permitted to purchase lottery items and/or gamble during their work shift. It was also stated that all employees are informed of the policies by way of training and policy handbook which is kept in the staff room area.

22 The claimant confirmed that he had undertaken 3 days' training on joining the company and was made aware of policies relating to the function of cashier such as 'drive-off' and the 'challenge 25 policy'. He was also made aware of the policies relating to purchase of shop items but states that he was never informed about any restriction pertaining to the purchase of lottery related items and/or gambling.

23 I heard from the respondent's witness Mr Sher Dil Khan, a manager who was transferred back to the site in December 2021. He has worked with the respondent for some 4 years initially as a cashier before progressing to a managerial role.

24 The respondent had asked Mr Sher Dil Khan to carry out a stock take of the store. This was a routine request and there was no suspicion at this stage of any wrongdoing taking place in the premises. On carrying out the stock take, Mr Sher Dil Khan found discrepancies in the sale of lottery scratch cards which arose during the claimant's shift and he duly informed the respondent.

25 He was asked by the respondent to investigate the matter further; for a period of 2 weeks in January 2022 Mr Sher Dil Khan utilised CCTV footage and found that the claimant continued taking scratch cards and lottery tickets without paying for these and playing during his work shift. However, if the claimant made any winnings, he would process these through the till immediately. Mr Sher Dil Khan described the volume of scratch cards being used by the claimant as "I can't give a figure of how many he was playing, that many". He also stated that the claimant was playing scratch cards every day and at one point was seen pulling out scratch cards over a 30-minute period continuously. Mr Sher Dil Khan's investigation was from the period December 2021 to January 2022.

26 Mr Sher Dil Khan stated that the claimant did not make any payment into the till, a colleague was not present whilst he was playing scratch cards and he could be seen discarding 'lost' scratch cards into the bin.

27 Mr Sher Dil Khan advised the respondent of his findings and a meeting was held with the claimant on 27 January 2022. I found that this meeting was utilised as an investigatory and disciplinary meeting. It was accepted by the respondent and Mr Sher Dil Khan that the claimant was not informed of the subject matter or the fact that he was at risk of dismissal in advance of the meeting.

28 It is Mr Sher Dil Khan and the respondent's evidence that the claimant was initially asked at the meeting if company policy allowed him to play scratch cards at work, to which he replied 'no'. He was then informed 'you are playing like crazy' but this

was denied by the claimant. The claimant is said to have admitted to wrongdoing only after he was shown CCTV evidence of his actions. Both the respondent and Mr Sher Dil Khan state that the claimant on seeing the evidence and being informed it would be escalated to the police became very emotional and pleaded for leniency. Both Mr Sher Dil Khan and the respondent also stated that the claimant advised that he would cover losses to the company.

29 In his witness statement the claimant denies accepting wrongdoing and states that he was unaware of the policy relating to the purchase of lottery items and/or gambling at the workplace. In his witness statement the claimant denied being shown any CCTV footage of playing scratch cards. However, whilst giving evidence he confirmed that he had in fact been shown the footage during the meeting that took place on 27 January 2022.

30 I accepted the version of events as presented by the respondent. I found that during the meeting the claimant was shown CCTV evidence (as per the claimant's own oral evidence) of taking scratch cards without paying for them and gambling on site during his shift.

31 I also found that the claimant accepted wrongdoing during the meeting bearing in mind the contents of the text message he sent to the respondent regarding the meeting of 27 January 2022:

> ***"…I admit at that day at front of you but I pay money all the time when I play. I know I break the law we are not allowed to play but on the other side I play with my own money but I am really sorry to do all this sorry sorry I break your trust (crying emoji) sorry"***

32 The text message clearly illustrates that the claimant had admitted to wrongdoing and was aware that as an employee he was not allowed to gamble during his shift albeit that he was suggesting that he had paid for the items.

33 I also accepted that the claimant had been emotional at the meeting and had pleaded with the respondent not to escalate the matter. This is also supported by the witness evidence and by the text message from the claimant whereby he states 'sorry' repeatedly and also uses the crying emoji.

34 During the Tribunal hearing, when the content of the text message was put to the claimant he suggested that he had admitted to wrongdoing only after being advised of the company policy (of not being able to gamble on site) during the meeting of 27 January 2022.

35 I did not accept this and found that the claimant was aware that he should not gamble on site and had admitted to the wrongdoing in the presence of Mr Sher Dil Khan and the respondent.

36 The claimant was dismissed by the respondent on the same day following a short interval after the initial meeting. He was asked to remove his unform and leave the premises. A WhatsApp message informed staff members that the claimant was no longer part of the company on 27 January 2022.

37 On being dismissed, the claimant was advised that the respondent would be carrying out an audit within 5 days and seeking recovery of the loss of monies regarding the scratch cards. This is supported by the evidence of the respondent, Mr Sher Dil Khan as well as the letter titled 'termination letter' dated 2 February 2022.

38 Further, having been dismissed the claimant sent several messages to the respondent regarding his wage. There would have been no need for the claimant to query this if this had not been discussed in the meeting and he was to receive his wage as normal.

39 Prior to receipt of the termination letter the claimant was sending evidence to the respondent by way of evidence that he had paid for scratch cards. Again, this supports the view that the claimant had been aware that the company was seeking to recover losses from him directly and he was sending documentary evidence to try and limit any personal loss.

40 A termination letter dated 2 February 2022 was sent to the claimant. The letter reiterated that the claimant's employment had been terminated due to gambling as well as theft. The letter confirmed that the matter was not being escalated to the Police as discussed during the meeting. The respondent also advised that it had considered the bank statements forwarded by the claimant but was not satisfied with these as some of the larger amounts stated were in fact fuel and bill payments. It also confirmed that the respondent would be seeking recovery of losses in the sum of £1,645.00. The letter is consistent with the evidence that I heard on behalf of the respondent.

41 I found that the respondent made a deduction of £534.60 on 31 January 2022. This was prior to advising the claimant of the amount that was to be deducted.

42 Following receipt of the letter dated 2 February 2022 the claimant's position is summarised by way of text message dated 7 February 2022:

> ***"You need to provide a breakdown of how you came to the sum of £1645. As far as im aware I paid for the items by the end of my shift if I couldn't pay it straightaway. You need to look at the CCTV footage thoroughly for the whole shifts I did. You cant go around blaming people of theft without providing any evidence. Im taking legal advice regarding this unfair dismissal and will take further action if necessary"***

43 It is evident from the text message exchange that the claimant sought to challenge the termination of his employment after realising that he would not be receiving his monthly wage. In his initial text messages, he enquired if he would be paid his wage and sought to provide evidence in order to limit any deduction (having been notified that the respondent was seeking to recover losses as a result of his wrongdoing). It was only on 7 February that the claimant sought to challenge the dismissal itself.

44 In his own witness statement the claimant accepts

> ***"..that as far as I can remember, I paid for the items and was not made aware that it was against company policy to play scratch cards while working as I didn't have a contract or anything written or verbally said to me.."***

45 The claimant sent in extracts of his bank statements as evidence that he had made payment of the items in question. He also set out a table which contained details of payments to the respondent from 5 December 2021 to 25 January 2022.

46 The claimant sent a further letter dated 10 February 2022 in which he stated that he had received advice from the Citizens' Advice Bureau. He stated that he was dismissed without an investigation and had been dismissed without notice. The claimant set out monies he was owed in respect of notice pay, wages and holiday entitlement.

47 In the letter of 28 February 2022 the respondent again confirmed the reason why the claimant was dismissed:

50.1 It again details the events that transpired on 27 January 2022;

50.2 In respect of the evidence that the claimant had sent in, the respondent stated that this was not a true reflection of what occurred and one of the transactions listed related to a fuel payment for his vehicle.

50.3 The respondent reiterated that the claimant had contacted him directly on WhatsApp seeking forgiveness and accepted that he had committed gross misconduct by playing the lottery/gambling on almost each shift without paying for them and taking the winning money out of the till without any authorisation.

50.4 In respect of any holiday pay it is the respondent's position that the claimant was aware of the holiday period from January to December and it was each employee's responsibility to take

their holiday hence he was not entitled to any outstanding holiday.

48 The respondent and claimant agreed that employees were part of a WhatsApp group which would discuss work related matters including the news, the petrol station and work shifts. The group remains active. As stated above the respondent used the group to inform staff members that the claimant was no longer part of the company on 27 January 2022.

49 The claimant stated that he was unaware of his holiday entitlement and had not taken any annual leave whilst in employment. He also stated that he was also unaware if any of his colleagues had taken annual leave. I did not accept the claimant's evidence in this regard, again it is highly improbable that the WhatsApp group did not make reference to employees' work patterns and shift change requirements due to annual leave.

50 It is accepted that the respondent did not make payment of the claimant's wage for January 2022. In his evidence the respondent accepted that the claimant had not taken any annual leave but was insistent that this was due to his own failure not to take annual leave rather than being prevented to do so. I found that the claimant was not discouraged from taking his holiday entitlement. He elected not to take it.

The Law

51 In a claim of unfair dismissal, it is for the employer to show the reason for dismissal and that it was a potentially fair reason. One such potentially fair reason for dismissal is a reason related to conduct under Section 98(2)(b) of the Employment Rights Act 1996 ("ERA"). This is the reason relied upon by the respondent.

52 If the respondent shows a potentially fair reason for dismissal, the tribunal shall determine whether dismissal was fair or unfair in accordance with Section 98(4) of the ERA, which 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) –*
> *depends upon whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and shall be determined in accordance with equity and the substantial merits of the case".*

53 In a case of misconduct, a tribunal must determine whether the employer genuinely believed in the employee's guilt of misconduct and whether it had reasonable grounds after reasonable investigation for such belief. The burden of proof is neutral in this regard see **British Home Stores Ltd v Burchell [1980]**

ICR 303 and **Boys and Girls Welfare Society v MacDonald [1997] ICR 693 EAT**.

54 The tribunal must not substitute its own view. The tribunal has to determine whether the employer's decision to dismiss the employee fell within a band of reasonable responses that a reasonable employer in these circumstances might have adopted. It is recognised that this test applies both to the decision to dismiss and to the procedure by which that decision is reached.

55 A dismissal, however, may be unfair if there has been a breach of procedure which the tribunal considers as sufficient to render the decision to dismiss unreasonable. The tribunal must have regard to the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015. In respect of the investigation where an employee admits an act of gross misconduct and the facts are not in dispute, it may not be necessary to carry out a full-blown investigation. In **Boys and Girls Welfare Society v MacDonald** the claimant admitted the misconduct and was dismissed. The EAT said that it was not always necessary to apply the test in **Burchell** where there was no real conflict on the facts.

56 If there is such a defect sufficient to render dismissal unfair, the tribunal must then, pursuant to the case of **Polkey v A E Dayton Services Ltd [1998] ICR 142**, determine whether and, if so, to what degree of likelihood the employee would still have been fairly dismissed in any event had a proper procedure been followed. If there was a 100% chance that the employee would have been dismissed fairly in any event had a fair procedure been followed, then such reduction may be made to any compensatory award. The principle established in the case of **Polkey** applies widely and beyond purely procedural defects. Guidance on how to approach that issue is set out in the case of **Software 2000 Ltd v Andrews [2007] IRLR 568.**

Exception to Polkey

57 However, in **Polkey v A E Dayton Services Ltd [1998] ICR 142** it was also stated that if an employer could reasonably have concluded that a proper procedure would be 'utterly useless' or 'futile', it might well be acting reasonably in not putting one in place. This would be a matter for the tribunal to consider in the light of the circumstances known to the employer at the time of the dismissal.

58 The determination of reasonableness is a question of fact and the focus must be on what the employer has actually done. Thus, the tribunal must ask whether an employer, acting reasonably, could have failed to follow a proper procedure in the given circumstances ***Duffy v Yeomans and Partners Ltd 1995 ICR 1, CA.***

59 Cases where it has been held that the circumstances were exceptional enough to 'excuse' the employer from following the proper disciplinary procedure include **MacLeod v Murray Quality Foods Ltd EAT 290/90, Campion v Emsec Security**

Ltd ET Case No.1800834/17 and **Gallacher v Abellio Scotrail Ltd EATS 0027/19**

60 Under Section 122(2) of the ERA any basic award may be reduced when it is just and equitable to do so on the ground of any kind conduct on the employee's part that occurred prior to the dismissal. In addition, the tribunal shall reduce any compensation to the extent it is just and equitable to do so with reference to any blameworthy conduct of the claimant and its contribution to his dismissal – ERA Section 123(6). There is no requirement for the conduct or action of the claimant in question to amount to gross misconduct for it to be relevant conduct or action for the purposes of s122 or s123 ERA 1996. All that is required is for the conduct to be culpable, blameworthy, foolish or similar and this includes conduct that falls short of gross misconduct, and need not necessarily amount to a breach of contract. In **Hollier v Plysu** [1983] IRLR 260 the EAT suggested broad categories of reductions: 100% where the employee is wholly to blame; 75% where the employee is mainly to blame; 50% where the employee is equally to blame and 25% where the employee is slightly to blame.

Breach of contract

61 An employer will be in breach of contract if they terminate an employee's contract without the contractual notice to which the employee is entitled, unless the employee has committed a fundamental breach of contract which would entitle the employer to dismiss without notice.

62 The aim of damages for breach of contract is to put the claimant in the position they would have been in had the contract been performed in accordance with its terms. Damages for breach of contract are, therefore, calculated on a net basis, but may need to be grossed up to take account of any tax that may be payable on the damages. Damages relating to notice pay are subject to tax.

63 Severance payments are deductible from the losses in respect of which damages for wrongful dismissal are awarded in so far as they are intended to discharge the employer's liability for wrongful dismissal.

64 The right not to suffer an unauthorised deduction is contained in section 13(1) of the Employment Rights Act 1996 (ERA): "An employer shall not make a deduction from wages of a worker employed by him unless— (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or (b) the worker has previously signified in writing his agreement or consent to the making of the deduction."

65 Section 13(1) of the Employment Rights Act 1996 (ERA) provides that an employer shall not make a deduction from wages of a worker employed by him unless the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract or the worker has previously signified in writing his agreement or consent to the making of the

deduction. An employee has a right to complain to an Employment Tribunal of an unauthorised deduction from wages pursuant to Section 23 ERA. The definition of "wages" in section 27 ERA includes holiday pay.

66 Section 20 and 22 ERA are also relevant to matters relating to the recovery of losses from an employee.

Section 20 ERA Limits on method and timing of payments.

(1) Where the employer of a worker in retail employment receives from the worker a payment on account of a cash shortage or stock deficiency, the employer shall not be treated as receiving the payment in accordance with section 15 unless (in addition to the requirements of that section being satisfied with respect to the payment) he has previously—

(a)notified the worker in writing of the worker's total liability to him in respect of that shortage or deficiency, and

(b)required the worker to make the payment by means of a demand for payment made in accordance with the following provisions of this section.

(2) A demand for payment made by the employer of a worker in retail employment in respect of a cash shortage or stock deficiency—

(a) shall be made in writing, and

(b) shall be made on one of the worker's pay days.

(3) A demand for payment in respect of a particular cash shortage or stock deficiency, or (in the case of a series of such demands) the first such demand, shall not be made—

(a) earlier than the first pay day of the worker following the date when he is notified of his total liability in respect of the shortage or deficiency in pursuance of subsection (1)(a) or, where he is so notified on a pay day, earlier than that day, or

(b) later than the end of the period of twelve months beginning with the date when the employer established the existence of the shortage or deficiency or (if earlier) the date when he ought reasonably to have done so.

(4) For the purposes of this Part a demand for payment shall be treated as made by the employer on one of a worker's pay days if it is given to the worker or posted to, or left at, his last known address—

(a) on that pay day, or

(b) in the case of a pay day which is not a working day of the employer's business, on the first such working day following that pay day.

(5) Legal proceedings by the employer of a worker in retail employment for the recovery from the worker of an amount in respect of a cash shortage or stock deficiency shall not be instituted by the employer after the end of the period referred to in subsection (3)(b) unless the employer has within that period made a demand for payment in respect of that amount in accordance with this section.

Section 22 Final instalments of wages.

(1)In this section "final instalment of wages", in relation to a worker, means—

(a)the amount of wages payable to the worker which consists of or includes an amount payable by way of contractual remuneration in respect of the last of the periods for which he is employed under his contract prior to its termination for any reason (but excluding any wages referable to any earlier such period), or

(b)where an amount in lieu of notice is paid to the worker later than the amount referred to in paragraph (a), the amount so paid,
in each case whether the amount in question is paid before or after the termination of the worker's contract.

(2)Section 18(1) does not operate to restrict the amount of any deductions which may (in accordance with section 13(1)) be made by the employer of a worker in retail employment from the worker's final instalment of wages.

(3)Nothing in section 20 or 21 applies to a payment falling within section 20(1) which is made on or after the day on which any such worker's final instalment of wages is paid; but (even if the requirements of section 15 would otherwise be satisfied with respect to it) his employer shall not be treated as receiving any such payment in accordance with that section if the payment was first required to be made after the end of the period referred to in section 20(3)(b).

(4)Section 21(3) does not apply to an amount which is to be paid by a worker on or after the day on which his final instalment of wages is paid.

67 The Working Time Regulations 1998 provide for minimum periods of annual leave and for payment to be made in lieu of any leave accrued but not taken in the leave year in which the employment ends. The Regulations provide for 5.6 weeks leave per annum. The leave year begins on the start date of the claimant's employment in the first year and, in subsequent years, on the anniversary of the start of the claimant's employment, unless a written relevant agreement between the employee and employer provides for a different leave year. There will be an unauthorised deduction from wages if the employer fails to pay the claimant on termination of employment in lieu of any accrued but untaken leave.

68 Section 23 ERA gives a worker the right to complain to an Employment Tribunal of an unauthorised deduction from wages.

Conclusions

Application of the law to the facts

69 Applying these principles to the facts as found, I reach the following conclusions.

Unfair dismissal

70 The respondent alleges conduct as its primary reason. It is for the respondent to establish the reason for dismissal. The claimant accepted that the reason for his dismissal was the potentially fair reason of conduct.

71 I found that the respondent genuinely believed that the claimant had committed an act of gross misconduct and that his employment was terminated for that reason. The respondent dismissed the claimant after he admitted to playing scratch cards without paying for these thus amounting to theft and gambling during his shift.

72 I then turn to the question of whether the respondent acted reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant. I find that it did and dismissal was within the range of reasonable responses. The respondent's investigation appeared to show that the claimant had been stealing and gambling at work. The claimant also accepted his wrongdoing during the meeting dated 27 January 2022.

73 The reasonableness of the investigation, the reasonableness of the grounds for believing in misconduct and the fairness of the procedure all overlap and I consider them together. I make the following observations:

76.1 The claimant was not informed in advance in writing of the allegations against him. 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.

76.2 The respondent conducted an investigation; the investigation does not necessarily have to entail an investigatory meeting with the employee prior to a disciplinary meeting. Here evidence was collated for use at the meeting on 27 January 2022 (which I consider to be an investigation and disciplinary meeting) and the claimant quickly accepted his wrongdoing on being shown CCTV evidence. In the circumstances a further meeting would not have been required. The claimant accepted his wrongdoing, the respondent agreed not to escalate the matter to the police and recovery of losses would be borne by the claimant. This provides reasonable grounds on which the respondent could reasonably conclude on the balance of probability, that the claimant had stolen from the company and was gambling during his shift in contravention of the company policy.

76.3 The details of the allegations against him were explained to the claimant 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.

76.4 The claimant was not informed in writing, as required by the ACAS code, of his right to appeal. Correspondence was exchanged between the parties 7 February onwards pertaining to the dismissal however a formal Appeal was not provided to the claimant.

74 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.

75 Employers are not permitted to argue that a fair procedure would have made no difference. 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.

76 However, in this case, the claimant was invited to a meeting and admitted to serious misconduct (in front of a witness), having been shown CCTV footage of his actions. He pleaded with the respondent not to escalate the matter to the police, was aware of the gravity of the situation and sought to put it right (financial loss to the respondent). This as being one of those exceptional cases where the employer considered it futile to follow a full procedure going forward. The employer

in this case had collated evidence which showed the claimant using scratch cards without making payment. It put the evidence to the claimant who admitted his actions. It was therefore reasonable in light of the respondent's admission of wrongdoing to dispense with a full-blown investigation or otherwise as there was no real conflict on the facts. Any appeal would also have been futile as the claimant had confirmed that he would make things right by reimbursing the respondent for financial loss. He had effectively put an end to the matter.

77 I find that this is such a situation whereby an employer can be regarded as having acted fairly and reasonably 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.

78 I have reminded myself that it is not for me to substitute my view, either as to procedure or as to substance. On balance, given the findings of fact above, I find that in the circumstances 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 identified above.

Notice Pay

79 The claimant brings a claim for wrongful dismissal. He contends that he was entitled to notice pay of 2 weeks unless he was guilty of gross misconduct. The respondent asserted that the claimant had been dismissed because of theft and gambling at work.

80 I must decide if the claimant committed an act of gross misconduct entitling the respondent to dismiss without notice. In distinction to the claimant's claim of unfair dismissal, where the focus was on the reasonableness of management's decisions, and it is immaterial what decision I would myself have made about the claimant's conduct, I must decide for myself whether the claimant was guilty of conduct serious enough to entitle the respondent to terminate the employment without notice.

Findings of fact

81 The claimant has stated that he was unaware of any wrongdoing and had not been informed of the company policy regarding the purchase/sale of scratch cards by employees. By his own admission the claimant stated that on joining the company he was trained by an experienced member of staff over 3 days. He also accepted that he was shown policies relating to the purchase of goods by employees including food, alcohol and tobacco. It is therefore highly implausible that the claimant was informed about these policies but the policy relating to purchase and use of scratch cards had been omitted as part of his training.

82 It was accepted during evidence by the claimant that if a staff member purchases food and drink items he must be served by a colleague. He was also aware that if

he was alone he would be required to ensure a receipt was left at the counter which acts as proof of purchase. The claimant also accepted that he was aware of the company policy relating to the purchase of alcohol and tobacco by employees which was forbidden. The claimant stated in evidence that he was unaware of the respondent's policy relating to the purchase/playing of scratch cards whilst working and in any event he had paid for these.

83 I do not accept this for the reasons already stated above, namely the claimant confirmed that he had undertaken 3 days training with an experienced member of staff and was aware of other policies relating to the function of cashier as well as employee. Further to this I make a point of an element of common sense on part of the claimant that he should have been aware that the respondent would not tolerate employees gambling whilst working. This is particularly relevant when considering the nature of the business whereby sales assistant are required to monitor vehicles who are using the fuel services.

84 The Claimant also stated that he did not admit to any wrongdoing. However, this is undermined by the claimant's own text message sent shortly after the meeting on 27 January 2022 in which it was obvious that he had accepted wrongdoing in the meeting and regretted his actions.

85 The wording of the text message is clear in this regard "I know I break the law". He also stated that he had broken the respondent's 'trust' and appeared very apologetic about this. The claimant was aware of the gravity of the situation, repeatedly apologised to the respondent and accepted that he had broken his trust.

86 The only justification that he gives for his actions is on the basis that he claims that he paid for the items. I would have expected the claimant to reiterate that he was not aware of the company policy regarding gambling in his text message if that had been the case, I found he had not. The claimant did not say that he was not aware of the company policy regarding the purchase of and/or gambling during his shift. I found that the respondent agreed not to escalate the matter to the police taking into account the claimant's personal circumstances. Further it also supports the view that the claimant had agreed to cover the losses to the company.

87 Whilst giving evidence the claimant accepted the following which again was inconsistent with his evidence:

1) That he played scratch cards during his shift; and

2) He did not always pay for them at the time but would make payment by the end of the day.

88 Further, during the hearing the claimant said for the first time that his winnings had been witnessed and approved by a colleague, Mr Sohail. On being advised that

Mr Sohail had left his role in November 2021 and this therefore suggested that the claimant had been playing scratch cards beyond the dates investigated by the respondent he stated that **'my knowledge not clear' and 'my mistake, been a year might have mixed up'**. This was also the first time that the claimant stated that he had **'put all receipts in one place and that goes to the office'**. I found that the claimant's evidence was inconsistent and not credible.

89 Taking all evidence into consideration I found that the Claimant repeatedly played scratch cards during his work shift without paying for them. He was aware that this was not permitted by the respondent.

90 In his evidence the respondent confirmed that an ex-employee who worked alongside the claimant had been dismissed for playing scratch cards in 2019. He also stated that he notified other employees of her dismissal via the company WhatsApp group. This reinforces the fact that the purchase of scratch cards and gambling is not tolerated in the work place.

91 As set out above I did not accept the claimant's version of events namely that whilst he accepted gambling at work, he was not aware of the company policy relating to this and/or that he had made payment for the scratch cards.

92 I found that the evidence from the claimant (bank statements) does not support the contention that he made payment for scratch cards on each occasion that he used them. Those statements show payments being made on 16 occasions between 5 December and 25 January 2021 (2 of which relate to fuel purchases) and 7 payments up to 29 December 2021. There are only 7 payments for the period 10 January 2022 – 25 January 2022 for a period of 5 days. In January 2022 alone the claimant was found to be using scratch cards on a daily basis over a two week period and the payment schedule does not reflect this.

93 It is generally accepted that theft on its own amounts to serious misconduct justifying summary dismissal at common law. Such conduct (as the claimant was advised) may also amount to criminal behaviour and could lead to a separate and parallel investigation by the police and possibly to criminal charges.

94 I find that the claimant's actions to constitute gross misconduct.

95 I must highlight that even if I was to have found that the claimant paid for all the scratch cards he used I would still have found that his conduct in respect of gambling at work on its own would amount to gross misconduct.

Holiday pay

96 The claimant took no annual leave in 2022. His annual entitlement to leave was 28 working days (pro rata as he was not a full-time employee). The leave year

began on 1 January. The claimant was employed until 27 January 2022. He had, therefore, accrued 8.3 hours of his annual entitlement, by the effective date of termination.

97 The claimant is not allowed to carry holiday over from one year to the next. Any holiday not taken by the end of the holiday year is forfeited. i.e I can only take into account the holiday entitlement accrued from 1 January 2022 up until the termination date irrespective of the fact that the claimant did not take annual leave prior to this time period.

98 The claimant was not made any payment for holiday pay. I conclude that the respondent made an unauthorised deduction from wages by not paying him in lieu of annual leave on termination of his employment. The payment is due irrespective of being dismissed for gross misconduct.

99 I calculate the amount of payment on a gross basis, but the respondent is entitled to make any deductions which are due for tax and national insurance contributions before payment is made to the claimant.

100 The amount due was 8.3 hours x £8.91 = £73.95.

Unlawful deduction from wages

101 The respondent failed to make payment of the claimant's wages up to 27 January 2022.

102 The claimant's contract of employment contains the relevant clause relating to deduction of wages as set out in my findings of fact above.

103 Applying the above findings of fact I find that:

101.1 The claimant had been provided with a written statement of terms and conditions of employment;

101.2 The claimant's contractual terms allowed for the deduction of wages;

101.3 The deduction was made on the basis that the claimant admitted to wrongdoing and was responsible for the damage to the respondent;

103.4 The respondent carried out an audit and confirmed in writing on 2 February 2022 the loss to the company in the sum of £1,645.00 which it was seeking to recover.

104 However, the respondent did not inform the claimant of the amount that was to be deducted in writing in advance of the deduction. This was in breach of the claimant's contract of employment which makes it clear that an employee is to be informed in writing of the amount being recovered in advance of the deduction being made. Whilst the respondent made it clear that it would be seeking recovery (and provided an estimate of losses on 27 January 2022), written notification of the amount should have been sent to the claimant prior to 31 January 2022.

105 I therefore found that the respondent made an unlawful deduction from wages in the sum of £534.60 on 31 January 2022.

Employment Judge Jaleel

Date 06 March 2023