Case Number: 2500126/2023

EMPLOYMENT TRIBUNALS

Claimant:	**Miss L Winter**
Respondent:	**EE Limited**
Heard at:	**Newcastle Employment Tribunal (remotely by CVP)**
On:	**23RD and 24th May 2023**
Before:	**Employment Judge Sweeney**

Representation

Claimant:	**In person**
Respondent:	**Priscilla Nketiah, advocate**

RESERVED JUDGMENT ON LIABILITY

The Judgment of the Tribunal is as follows:

1. **The Claimant's claim of unfair dismissal is well founded and succeeds.**

2. **The Claimant's claim of wrongful dismissal is well founded and succeeds.**

3. **The compensatory award shall be reduced by 20% to reflect the chance that the Claimant could and would have been fairly dismissed.**

4. **The Claimant contributed towards her own dismissal and the Compensatory Award shall be further reduced by 50%.**

5. **The Basic Award shall be reduced by 50% to reflect the Claimant's pre-dismissal conduct.**

REASONS

The Claimant's claims

1. By a Claim Form presented on **23 January 2023**, the Claimant brought claims of unfair dismissal and wrongful dismissal arising out of the summary termination of her employment on **14 November 2022**. In respect of the unfair dismissal claim, the Respondent maintained that the Claimant was fairly dismissed for a reason related to conduct and that it acted reasonably in treating the reason as a sufficient reason for dismissal. As regards the claim of wrongful dismissal, the Respondent maintained that it was entitled to summarily terminate the Claimant's contract of employment on the basis that she had repudiated the contract of employment by conduct which amounted to gross misconduct.

The Hearing

2. The Claimant was originally represented by solicitors. However, at the Final Hearing, she represented herself and the Respondent was represented by Ms Nketiah, in-house advocate. The parties had agreed a bundle of documents. However, It became apparent that the Respondent had prepared two bundles: a larger one, consisting of 383 pages, which contained the pleadings and a smaller bundle without pleadings that ran to 345 pages. The pagination was different in each bundle. This led to some initial confusion as the Tribunal had been provided only with the smaller, whereas witness statements referred to page numbers in the larger bundle. Ms Nketiah provided me with a copy of the larger bundle. Any page reference in the body of these reason is to the larger bundle, that is, the one containing the pleadings. One additional document, a letter from the Respondent to the Claimant's GP, was added to that bundle as **page 384**.

3. At the outset of the hearing, we discussed and agreed the issues, namely:

<u>Unfair dismissal</u>

3.1. What was the reason for dismissal?

3.2. Was the reason one that related to conduct of the Claimant and thus a potentially fair reason?

3.3. Was the Claimant's dismissal fair or unfair in accordance with equity and the substantial merits of the case having regard to whether the Respondent acted reasonably in treating the reason as a sufficient reason for dismissing her in the circumstances, which include the size and administrative resources of the Respondent's undertaking?

3.4. If the dismissal was unfair, should any basic or compensatory award be reduced by reason of the Claimant contributing to her dismissal?

3.5. Should the compensatory award be reduced to reflect the chance that the Claimant would or might have been fairly dismissed ('Polkey')?

Wrongful dismissal

3.6. What was the Claimant's contractual notice period? (this was agreed as being 12 weeks)

3.7. Did the Claimant repudiate the contract of employment such that the Respondent was entitled to terminate her employment without notice?

4. The Respondent called the following witnesses:

4.1. Mya Summers, Compliance Manager (investigating manager)

4.2. Gemma Lee, Operations Manager (dismissing manager)

4.3. Jason Bray, currently Head of Property in the EE Retail Division (appeal manager).

5. The Claimant gave evidence and was the only witness on her own behalf.

The facts

6. The Respondent is a wholly owned subsidiary of British Telecommunications plc. It runs the second largest mobile network operator in the United Kingdom. It is a large employer with significant resources and a sizeable Human Resources function. It has ready access to human resource advisers, occupational health physicians and legal advisers and regularly uses their services. The Claimant was employed by the Respondent as a Retail Store Manager from **05 May 2006** to **14 November 2022** upon which date she was dismissed with immediate effect. She was based at The Bridges Shopping Centre in Sunderland.

The Claimant's role

7. The role of Retail Store Manager is a busy one which involves many different duties. Although there was no job description in the bundle, the Claimant understood her role and what was required of her. She was aware of the various policies and procedures which she was expected to adhere to.

The Claimant's health

8. The Claimant had been diagnosed with depression in 2017. Her mental health was particularly bad in July 2022. I accept the Claimant's evidence that her mental health had declined over a period of over a year and that, in July 2022, it was particularly poor, culminating in her contemplating taking her own life. My assessment of the

Claimant was that she was an honest witness and gave a measured account not only of the events that led to her dismissal but also of the external pressures on her life, her mental well-being and her inability to speak up about her mental health at the time. Although no medical evidence was included in the bundle, I accepted her evidence that she was in a bad place mentally during the period of time relevant to these proceedings – in other words, she suffered from poor mental health including heightened anxiety. She shared her experiences and discussed her mental health issues with her line manager, Ben Gascoyne.

The Respondent's policies

9. The Respondent has a number of policies applicable to the responsibility of the store manager and others. Each of the relevant policies is clearly marked: '*failure to adhere to this policy may result in action being taken under the Company's disciplinary policy, which could lead to dismissal and criminal prosecution*.' The Respondent's Petty policy [**page 40**] states that '*all petty cash with a value of £20+ must be approved by your Regional Manager via email without exception. This must be attached to your petty cash paperwork and receipts*.' The policy also states that petty cash receipts must be attached to a petty cash report once reconciled at the end of the month and moved to the 'brown envelope'. The policy states that '*store managers are responsible for ensuring that petty cash spend is controlled and processed in accordance with this policy*' [**page 40**].

10. The banking policy [**pages 52-57**] provides that the till float should be maintained at £100. A till total report must be run every day to check that cash taken has not exceeded £500. Each store was required to bank cash received once a week, every Wednesday unless it had taken £500 in cash, in which case the banking process had to be completed, even if that did not fall on a scheduled Wednesday. The person responsible for banking was invariably either the Store Manager or an Assistant Store Manager. The policy required two employees to cash up: one to count the cash, input data into the cash management system and compete the banking slips and the second to double count the cash being banked and to ensure that all paperwork was completed correctly [**page 52**]. The employees did not physically take money to a bank. Rather, they completed banking slips and placed these with the cash in a banking bag and into the cash safe to be collected by an external company, Loomis, every 4 weeks. The policy sets out the process in some detail in respect of 'employee 1' and 'employee 2' [**page 54**].

11. The policy explains what to do where there are banking discrepancies [**page 56**]. It states: '*discrepancies happen when amount of money in the till is different to the amount the system has calculated. This can be caused by theft, miscounting, cash falling out of the till and sales not processing correctly. It's important to investigate the reason for discrepancy*.' When a discrepancy is £10 or more across all tills, the policy required that an 'incident report form' be completed. The amount must be written down, the reason for the discrepancy given and what actions have been taken to investigate the discrepancy.

12. All employees had access to the Cash Management system and the policy required that they be trained on how to use it [**page 52**]. The policy does not say who is responsible for such training. However, the Claimant did not dispute that it was her responsibility to ensure that staff were trained.

13. Every month the store manager must send all brown envelopes, completed banking books and the contents of the store file for that month for archiving to the department known as 'store support'.

14. As regards banking and filing, the Claimant understood the process and that if there was a banking discrepancy, she – or the person responsible for banking on the occasion in question – was required to complete and retain a banking incident form. She was aware that petty cash receipts were to be retained and that Regional Manager authorisation was required for petty cash spends over £20, and that any petty cash discrepancy or case of missing receipts required the completion of an incident report form.

15. On **04 October 2022** Mya Summers, a compliance manager employed by the Respondent, was contacted by Samantha Angus of the Respondents 'cash planning and reporting' team. Ms Angus explained to Ms Summers that she had identified a large amount of cash discrepancies within the Sunderland store (the identification number of which was 4332) as well as a high number of petty cash transactions. Two days later Ms Angus emailed Ms Summers with some further information highlighting the following:

    15.1. Between **06 June 2021** and **30 September 2022** there had been 65 occasions where the Sunderland store had banking discrepancies resulting in a cash shortage of **£4,975.57**.

    15.2. Between **02 October 2021** and **01 September 2022** petty cash had been used 31 times in the Sunderland store amounting to **£746.69**.

16. The spreadsheet [**pages 113-118**] identified those who had completed the banking as the Claimant, Gurbaghe Singh ('**GS**') and Diana Caras ('**DC**'). **GS** and **DC** were the Claimant's Assistant Store Managers, albeit **DS** left the Respondent in about **July** or **August 2022**. Ms Summers then undertook some further work. She obtained archived boxes, pulling out the 'daily envelope', looking at occasions where a petty cash transaction had been recorded or where a banking discrepancy had been reported. She also looked at how many banking 'incident forms' had been completed since **06 June 2021**. She noted that no petty cash monthly reconciliation had taken place. She also noted that no petty cash receipts were found in the daily envelopes and found only one Regional Manager authorisation email, whereas she would have expected to find 12 (in respect of petty cash transactions over £20). She also found that no incident form had been inserted in the envelopes in respect of the banking discrepancies. She was able to confirm from 'Store Support' that only one such form had been completed in respect of a banking discrepancy on **09 October 2022 [page**

142] by **DC.** This meant, as far as she could discern, that there were 64 discrepancies where no incident form had been completed.

17. Following this, on **13 October 2022,** Ms Summers visited the Sunderland store to undertake an investigation into these matters. The Claimant had not been alerted to her visit in advance – she had not been 'invited' as Ms Summers says in paragraph 11 of her witness statement. It was an unannounced visit. Ms Summers was accompanied by a notetaker, John Clark. She interviewed the Claimant and the notes which were subsequently prepared were found at **pages 143 – 156**.

18. During this interview Ms Summers asked the Claimant about banking discrepancies and petty cash reconciliations and receipts. Among other things in that interview, the Claimant:

    18.1. accepted that she rarely completed an incident report form when she noticed a discrepancy.

    18.2. Said that she did not know she had not done them, that there was no excuse and there had been so many issues with banking.

    18.3. Said that she probably did not reconcile petty cash every month as she feels like she is rushing just to get things done.

    18.4. When asked why she had not been reconciling petty cash, said that she had 'a shit year', worse the last six months', that she has 'relied too heavily on other people and my head hasn't been in it for a while and it's not an excuse'.

    18.5. When asked about reconciliation of petty cash, said 'I have no excuse for it'.

    18.6. When asked about banking and how much should be banked, discounting the float, said that she understood the process, how the drawer totals work and that if till was down should she is required to investigate it and report it.

    18.7. When told that **£4,975.57** was 'missing' from **June 2021**, said that she was shocked to hear this.

    18.8. When Ms Summers asked the Claimant about particular examples of banking discrepancies in September and October 2022 [**pages 151-153**], the Claimant accepted she had not been in control of the situation.

19. The Claimant was cross-examined by Ms Nketiah about what she had said to Ms Summers and in particular where she said she '*had no excuse'*. The Claimant's evidence, which I accept, was that as a person who suffers with mental health issues it is hard for her to speak up and say that she needs help or admit wrong. This was

an unannounced visit by the Compliance Manager, who attended when the Claimant was working in the store to tell her she was starting an investigation. As the Claimant put it in evidence: '*at that moment in time I was thinking I don't have an excuse, why should I use everything that happened to me and use that as an excuse; suffering has not come easy to me'*.

20. Ms Summers asked the Claimant '*with regards to what you're saying about your personal life, have you ever flagged to anyone that you are not capable to conduct your role as store manager to the best of your ability?*' [**page 147**]. The Claimant said: '*No, I have spoke to Ben and Stephen. Ben had helped me get therapy for things that happened in the past. John is aware of things but not to the same level*'. She confirmed that she had not flagged to anyone that she was not capable of conducting her role to the best of her ability adding that '*no one wants to admit to that*.'

21. The reference to Ben was to Ben Gascoyne, the Claimant's Regional Manager up to **August 2022**. The reference to John was to John Martin, who was her manger after **August 2022**. The claimant had a very good relationship with Mr Gascoyne. She shared with him over a period of time a number of personal issues which had affected her mental health and the fact that she had been diagnosed with depression. He gave her advice and she subsequently obtained private mental health counselling.

22. Although Mr Clark was ostensibly present only as a note-taker, he asked why they should believe that money had not been taken by the Claimant. She explained that she did not need the money, that she has had a shocking year and had not been on the ball, that she believed there were human errors, that her focus had not been on work but on her home [**page 154**]. It was, however, clarified in this hearing that there was no suggestion that the Claimant had taken any money.

23. The Claimant accepted that she was not checking the banking and that she was not investigating losses from the store. At the end of the interview, Ms Summers considered the situation and then suspended the Claimant, giving her reasons [**pages 155-156]**. She then prepared a 'gross misconduct investigation report' [**pages 208-218**] dated **18 October 2022**. On the same day, she wrote to the Claimant confirming the reasons for suspension [**pages 219-221**].

24. Gemma Lee was appointed to hear the disciplinary allegations against the Claimant. On **28 October 2022**, she wrote to the Claimant outlining the allegations:

    24.1. That she had admitted knowing the banking and petty cash policies yet chose not to adhere to them

    24.2. That she did not complete incident forms for 64 of the 65 banking discrepancies identified since July 2021

24.3. That she had not reconciled monthly petty cash spend since October 2021

24.4. That she had not raised concerns or asked for support from her Compliance Manager or Regional Manager regarding the 65 banking discrepancies on the system since June 2021

24.5. That the above actions have contributed to banking totalling **£4,975.57** missing since **June 20**21. If concerns had been raised sooner an investigation could have taken place.

25. The letter then identified 8 policies which were said to have been breached. The Claimant was informed that there would be a disciplinary meeting on **07 November 2022** at 1pm. Attached to the letter was the documentation that Mrs Lee had been provided with, which included the banking and patty cash data, the investigation report, interview notes and the various policies.

26. In advance of the disciplinary hearing, the Claimant sent Mrs Lee some screenshots of WhatsApp messages exchanged between her and her assistant managers, DC and GS. She also sent some messages which she and Ben Gascoyne had exchanged regarding her poor mental health.

Disciplinary hearing

27. The claimant, accompanied by a colleague, Kayleigh Spencer, attended a disciplinary meeting with Gemma Lee. At the outset of the meeting Mrs Lee outlined that the claimant had admitted knowing the banking and petty cash policies yet chose not to adhere to them. I pause to note that the claimant had not admitted to choosing not to adhere to policies - that was a view expressed by Ms Summers in her investigation report, as she confirmed in evidence to the tribunal. Ms Summers' phrase was then simply lifted from the report and inserted into the disciplinary invite letter and then repeated by Mrs Lee. Mrs Lee agreed with this phrase and concluded that the Claimant had chosen not to follow the policies. However, it was not an admission by the Claimant that she 'chose' to do so. For her part, in the disciplinary meeting, the claimant accepted that she bore some responsibility for the failures that had been identified by Ms Summers during her investigation. Indeed, in the course of the hearing before me, the Claimant accepted that there had been conduct on her part which warranted disciplinary action. She contended that other factors were at play, such as the systems in place for banking and the failures of others, such as **GS**. However, her primary contention was that this was not a case of gross misconduct and that a sanction of dismissal was too severe in all the circumstances. She had said to Mrs Lee at the disciplinary hearing that she had reflected on the past year and she gave her 'guarantee' that she would not repeat the behaviours demonstrated, recognising the impact of those behaviours on the business [**page 263**].

28. The Claimant highlighted 9 of the discrepancies on the spreadsheet, providing Mrs Lee with an account of what she believed happened on those occasions. She said that she trusted in others, and suggested that **GS**, in particular had been at fault. She did, however, accept that the discrepancies continued after he had left the Respondent's business, saying: '*I hold my hands up, I didn't take action and should have*' [**page 244**]. When asked by Mrs Lee why she had not, the Claimant said: '*I am aware I should have. I don't know if I want to talk about it. I don't want you thinking its an excuse when its not.*' It is clear from this, and indeed from the Claimant's evidence as a whole that she had recognised the impact of her own behaviours and was saying to her employer that there would be no repeat **[page 263]**.

29. What she found difficult to talk about was her mental health. At this point, the Claimant referred Mrs Lee to the screenshot messages between herself and Ben Gascoyne [**pages 352-363**]. The purpose of this was to seek to demonstrate to Mrs Lee that she had experienced poor mental health over the past 2 years and that her line manager was aware of this. She explained to Mrs Lee that she had highlighted issues to Mr Gascoyne in **March 2021**. She explained that Mr Gascoyne had helped her get the right support via a private therapist. She explained to Mrs Lee that she had been hospitalised in **July 2021** as a result of a severe panic attack. The account given by the Claimant of her personal situation outside work is recorded in the notes of the disciplinary hearing. The content from **pages 244 to 248** is largely concerned with the Claimant describing to Mrs Lee how she has suffered from poor mental and physical health for over a year or so which had the result that she has not been herself or given 100% to the company, something which she said she had always done throughout her 16 years of employment. She accepted that the incident forms and reports had to be done, that she understood this but that due to her anxiety '*this is something I have just missed*' [**page 247**] She accepted that she did not reach out for help, adding that it was part of her anxiety to not ask for help. She explained that she loved her job and '*cannot have it come to an end due to my mental health'* [**page 250**]. When asked by Mrs Lee '*why not reach out to Damon and Mya sooner?*' the Claimant told her: '*I think my anxiety just got in the way'*. Mrs Lee then asked: '*how would you prevent this happening again?*' to which the Claimant said '*I would ask Mya to come more regular to support*.' [**page 250**]. My is Ms Summers.

30. Mrs Lee understood the point the Claimant was making about her health and that the Claimant was connecting her health with the charges of misconduct. Towards the end of the hearing, she summarised her understanding of the Claimant's position in 8 bullet points:

    30.1. You trusted your ASMs and feel that they had sufficient training to ensure process was followed in your absence

    30.2. You weren't aware of the extent of the banking discrepancies until Mya brought this to your attention. You believed you were simply fixing issues.

30.3. You recognise that you yourself have not followed the correct process completing incident forms no completing petty cash reconciliation in line with our policies/processes.

30.4. You had authorisations for all petty cash transactions over £20 and believe that the authorisation emails have been removed from the folder, however confident Ben will have a copy. You cannot however explain why no receipts have been archived.

30.5. You have not taken any formal action nor have evidence to highlight coaching/training support instore to address discrepancies/errors from an operational/customer [ers[etove/

30.6. You failed to seek support and whilst you have a good working relationship with Mya and Damon believe your anxiety was a barrier to this.

30.7. You recognise that this past year has not been your best and that your store has been detrimented as a result however given the number of personal issues you have had to contend with and your mental health deteriorating as a result your head hasn't been in the game.

30.8. Overall, you love your role and don't want this past year accounting for sixteen years of service.

31. The Claimant added that, although nothing will be documented, she had trained her assistant managers a number of times on the banking process, so that they should have known better.

32. Mrs Lee was clearly concerned about the Claimant's mental health. Indeed, after the disciplinary hearing, she contacted the Claimant to seek her consent to contact her GP to flag concerns with regards to her mental health. Mrs Lee then wrote to the Claimant's GP on **11 November 2022**. This letter was not disclosed to the Claimant in the proceedings. Following my order that it be disclosed, it was emailed to the Tribunal on **24 May 2023** and given the **page number 384**.

33. Mrs Lee wrote to the Claimant's GP as follows:

"*We feel it is important to convey to you our current concerns regarding Laura's mental health. According to the information available to us, we believe that Laura is a patient at your surgery and may have been receiving support with regards to her mental health.*

*I would like to make you aware that on **7th November 2022**, Laura informed me that she had suicidal thoughts. The most recent occasion being the **13th October 2022**.*
We have offered Laura support via our Employee Assistance Programme and Rehabworks. Both have been declined, as Laura is undertaking private counselling

session twice weekly. However, we remain concerned for Laura’s wellbeing and the risk she may be posing for herself.

BT is in the process of progressing actions regarding disciplinary with the potential for an unfavourable outcome and we wish you to be aware that it may have a further impact on Laura’s mental state and therefore she may benefit from additional support from yourselves”

34. Mrs Lee did not ask for any input from the GP – even though the Claimant had said to her that, whilst she did not want to use it as an excuse, she believed that the state of her mental health had played a part in her conduct, in her failure to follow the Respondent’s policies.

35. Mrs Lee considered but decided not to refer the Claimant to Occupational Health (‘OH’). As she confirmed in her oral evidence, she decided not to refer to OH because the Claimant had been seeing her own private counsellor and had not reached out to the company out of a concern that she would be seen as not able to do her job. Mrs Lee, as she confirmed in oral evidence, considered whether there should be an OH referreal only in the context of whether any ‘support aid’ or adjustments could be provided but decided that to be unnecessary as the Claimant had her own private support. The Claimant had been saying to Mrs Lee that her judgement had been impaired throughout the past year due to issues arising in her personal life (see paragraph 44 of Mrs Lee’s witness statement). As confirmed by her in oral evidence, Mrs Lee did not consider obtaining any medical input (either from Occupational Health or from the Claimant’s GP) as to whether, given the state of her mental health, the Claimant’s judgement might have been impaired or affected so as to explain or even partly explain her failings. Nor did Mrs Lee, when making her decision, consider (with or without medical evidence) her judgement might have been impaired. She considered the Claimant’s mental health only to the extent that she had not previously raised it as an issue affecting her work and in the context of alerting the GP to the potential bad news of a dismissal.

36. Although Mrs Lee spoke to Maya Summers after the hearing, she did not speak to Ben Gascoyne. She did not seek his input into how the Claimant appeared to be coping at work given the catalogue of personal issues described by the Claimant, which she had shared with Mr Gascoyne.

37. Although the Claimant had said that she had trained her assistant managers in banking procedures, Mrs Lee did not interview **DC** to confirm whether what the Claimant said in this respect was accurate. Mrs Lee’s reasoning for this – as set out in paragraph 39 of her witness statement – was that there was no written evidence to show that they were trained and coached so there was no benefit in interviewing **DC**, as she could not challenge this. That may be so, but **DC** could have confirmed either that she had been trained or that she had not been trained. There was an obvious value in this to the decision maker. Mrs Lee concluded that the lack of evidence of training fundamentally demonstrated a lack of leadership on the part of the Claimant. There may have been no documentation evidencing the training but that does not

mean that the Claimant failed in training her team, which was the meaning being ascribed to leadership in this context. The Claimant made the valid point in these proceedings that there was no written evidence that <u>she</u> had been trained on the policies but she had indeed been trained. If that was the case with her, it might equally have been the case for the others.

38. The range of options available to Mrs Lee as decision maker were set out in section 16 of the Respondent's disciplinary policy [**page 66**]. On **14 November 2022**, Mrs Lee wrote to the Claimant confirming that she had decided to terminate her employment with immediate effect for gross misconduct. She attached a rationale document [**pages 256-263**]. It was said that the allegations set out in the disciplinary invite letter breached eight different company policies and procedures those being: standards of behaviour procedures, acting with integrity policy, back-office filing and board's policy, banking policy, incident management policy, key management policy, petty cash policy, store waste and archiving policy.

39. In her oral evidence, Mrs Lee said that the decision to dismiss was on the basis that there were 8 policy breaches and that doing something that caused significant loss constituted gross misconduct in itself. She believed that the failure on the part of the Claimant to upskill her team or to take action where they failed showed a lack of accountability on the Claimant's part. Mrs Lee agreed during her oral evidence to the tribunal that although 8 policy breaches were cited, it was not a case where the Claimant had committed 8 different acts which breached eight different policies. The essential factual allegations against the Claimant were said to fall under any one – and all - of eight different policies. The real issue was the failure to adhere to the banking and petty cash policies.

40. As regards the banking discrepancies, Mrs Lee concluded that the Claimant could not explain the cause of the remaining 55 discrepancies (leaving aside the 9 discussed at the hearing). In her decision and rationale document she noted that the Claimant felt that her '*lack of judgement had been impaired throughout the past year due to issues arising at home'* **[page 261]**. Mrs Lee then set out in 5 bullet points what those issues were. She then set out in a further four paragraphs the fact that the Claimant was receiving counselling.

41. In her rationale document [**page 263**], Mrs Lee went on to say: "*It is very clear to me that on this occasion, Laura has not complied with the fundamental requirements of her role. Laura has had all appropriate training and is well aware of the standards to which she is required to work and processes with which she must, at all times, comply. Her actions could easily cause damage to BT's brand and reputation and, ultimately, could affect customer retention*". There was no explanation as to how BT's brand or reputation might in any way be damaged by the Claimant's failure to follow the banking and petty cash procedures and no explanation as to how the Claimant's failures might affect customer retention. Mrs Lee's and reasoning are scant. There is no clue from the rationale document as to why she concluded summary dismissal as the appropriate sanction. Other than simply reciting what the Claimant said, there is no indication that she gave any or any proper consideration to

the Claimant's contentions regarding her mental health as a factor explaining her conduct or impairing her judgement. She does not say why she rejected this as a factor or explanation.

42. She concluded, as set out in paragraph 41 of her witness statement, that all charges of gross misconduct were proven, that the Claimant admitted that her behaviour was not to the required standard, that she was an experienced store manager who knew the policies.

43. As confirmed in her oral evidence, although there were 55 unaccounted discrepancies (Mrs Lee having accepted 9) she did not at the time believe or conclude that the Claimant was dishonest in the way she carried out her work. She believed her conduct fell under the heading of 'lack of honesty or integrity' only because the Claimant had not followed the company's procedures and had not flagged any need for support. Therefore, she believed the failure to follow the procedures in those circumstances to equate to a 'lack of integrity'. I asked Mrs Lee whether she had concluded or believed that the Claimant knew or believed that less money was being banked than had been expected and that the Claimant knowingly or deliberately did nothing about this. Mrs Lee confirmed that she had concluded only that the Claimant was aware that discrepancies were taking place, that she did not follow the appropriate steps to action things (i.e. completion of incident reports) and thirdly that her failure to follow the appropriate procedures to deal with banking discrepancies so as to prevent further loss amounted to a lack of accountability on the Claimant's part, which in her mind equated to a lack of integrity in her work but not dishonesty. As this conduct breached 8 policies, she believed this to be gross misconduct.

44. As regards the petty cash issue, Mrs Lee gave the Claimant the benefit of the doubt, accepting that she had received Regional Manager authorisation for spends over £20. She concluded only that the Claimant had failed to adhere to the petty cash policy by not evidencing receipts or spending approvals and not reconciling petty cash. As she confirmed in her oral evidence, Mrs Lee did not, therefore, conclude that the Claimant had no approval for spends of over £20, only that she had not evidenced the spend by ensuring the retention of receipts or emails from her manager.

45. When considering sanction, Mrs Lee was of the view that a lesser sanction was inappropriate because the Claimant had demonstrated a lack of integrity and, as she would still be in a position of authority, she could not trust the Claimant in future.

46. Although the Respondent confirmed during the hearing that there was no suggestion that the Claimant had taken any money and that it had carried out no investigation into what it regarded as 'missing' money, in the letter of dismissal, Mrs Lee told the Claimant that '*the company reasonably believes that your actions have caused a loss to the company and therefore we'll follow our civil recovery process for EE Colleagues or our Recovery of Losses process for BT Colleagues'*. Mrs Lee went on to say that your '*conduct will be recorded on fraud prevention databases'* and that

‘*this information may be accessed from the UK and other countries and used by law enforcement agencies and by us and other employers (and potential employers) to prevent fraud*.’

47. The Claimant claims not only that she was unfairly dismissed but that she was wrongfully dismissed. As regards the latter complaint, it is relevant that I set out my findings of fact in relation to her conduct. As I have indicated above, the Claimant gave credible, measured and honest evidence about her conduct and her health. Not only did Mrs Lee confirm there was no suggestion that the Claimant had taken any money or that she acted dishonestly, I am entirely satisfied that the Claimant did not. She gave an honest and candid account of events to Ms Summers, to Mrs Lee, to Mr Bray and to the employment tribunal.

48. What the Claimant did wrong was that she failed to follow the Respondent’s bank discrepancy reporting procedures on a significant number of occasions when she banked up and failed to ensure that those in her team followed the banking discrepancy procedures – whether or not she had trained them on this. She failed to do these things even though she knew and understood that those were her responsibilities. She also failed to follow the Respondent’s petty cash procedures, in particular by failing to evidence spending by attaching receipts and approvals on certain petty cash spends over £20, again knowing that this was required of her under the petty cash policy.

49. As regards the banking discrepancies, she genuinely believed that any discrepancies were the result of human error and not theft, for example, mistakenly banking the float. However, it is a fact that errors were indeed made and in accounting terms, from the Respondent’s perspective, there was a deficiency of **£4, 975.57**. The Claimant accepted that she bore responsibility for the errors that were made and that she and her team had not followed the procedures. As she put it in her evidence ‘*I accepted misconduct but not gross misconduct*.’

50. I find that the Claimant was a hard-working, honest Store Manager who for some time had taken her eye off the ball, so to speak, and neglected her duties in these two respects for some considerable period of time. Reporting of banking discrepancies, ensuring her team adhered fully to the Respondent’s procedures and evidencing petty cash spends were tasks that were relegated by her to the ‘bottom of the pile’, as she herself admitted. I find that she paid little attention to those matters, believing them to be of lesser priority in the scheme of things and that she concentrated on other operational tasks within the store, which kept her very busy. By the time Ms Summers came to interview her, she had lost track of the scale of the problem and was not in control of it. There was no element of dishonesty involved in the Claimant’s failures. Nor did she wilfully or deliberately ignore the Respondent’s procedures. She neglected these particular duties and no more.

51. I am also satisfied that the Claimant was for a period of some time, certainly from the summer of 2021 onwards, under varying but significant degrees of stress and anxiety arising out of her personal circumstances outside work. I accept her

evidence that this adversely affected her sleep pattern and I infer, her focus and attention to detail. She could have asked the company for support but did not. While I accept that she could not be expected to ask for support for matters about which she did not know, she was aware that there were problems with banking and she knew, on occasions when she did the banking, that discrepancies occurred. Whilst I accept her evidence that her mental health played a part in not seeking support (in that she did not want to appear weak), nevertheless the Claimant spoke to her manager Mr Gascoyne about her mental health and could have asked him for further support, for example, for an OH referral. He did not refer her to OH as he understood she was managing her mental health issues privately. He did not know that she was struggling at work.

Appeal against dismissal

52. The Claimant appealed Mrs Lee's decision to dismiss her. In her letter of appeal [**page 267**] the first two points highlighted by her were the severity of the sanction and the Claimant's belief that her mental health was a big factor yet that appeared not to have been acknowledged. Other points of appeal were that she would only be aware of a banking discrepancy if told by ASMs and that no interviews of the store team were undertaken, nor was there any investigation undertaken as to whether money had gone missing.

53. Jason Bray was assigned to hear the appeal, which took place on **12 December 2022**. The Claimant gave Mr Bray a document consisting of a timeline of events relating to her mental health covering the period from **February 2021** up to **September 2022** [**page 329**]. After the meeting, Mr Bray interviewed Mrs Lee asking whether she had considered a lesser sanction and why she had not interviewed other members of the team. He also spoke with Mr Gascoyne.

54. Mr Gascoyne confirmed to Mr Bray that he had conversations with the Claimant about her mental health. He knew that she was undertaking private counselling and as he did not see any impact on her ability to do her work, had no cause for concern. He also confirmed that he would have authorised petty cash for items including staff incentives and awards. He said he held the Claimant in high regard, that she was a capable and competent store manager.

55. The claimant had made it clear to Mr Bray that her mental health was a key issue for her in explaining her actions and as a factor to be taken into account when considering any sanction. She said that '*my ability to do my job was clouded due to my ongoing mental health*' – **page 328**. She had sent Mr Bray a timeline of events that had contributed to her deteriorating mental health since **February 2021**. The most troubling aspect was the reference to an attempt on her life in **July 2022**. As he confirmed in his oral evidence, Mr Bray understood the Claimant to be saying at the appeal that her mental health was a factor or an explanation for her not doing her job properly. However, like Mrs Lee before him, he did not consider seeking a medical view as to whether the external events in her life and the effect on the Claimant's

mental health were or could have been a factor in the events that led to the disciplinary allegations. As he said in oral evidence, he had never had a case where medical advice had been sought in a conduct case or where he had been asked to consider the effects of mental health in a wider context. As Mr Bray put it, he was not qualified to make a direct link between the Claimant's mental health and her actions. He looked only at her acts and omissions. Therefore, as regards the Claimant's second ground of the appeal, 'mental health', Mr Bray said in his rationale: '*I have confirmed that Gemma gave consideration to both your mental health and potential job changes in reaching her decision. I am not upholding this element of your appeal'* [**page 334**]. Mr Bray had considered only whether the Claimant had had support from her managers and whether Mrs Lee had considered that. What he took away from his discussion with Mr Gascoyne was that the Claimant had been given the support needed to help her with her mental health (see paragraph 25 of Mr Bray's witness statement).

56. Mr Bray concluded that the Claimant '*was not persuasive enough'* for him to depart from the Respondent's line of events. He did not uphold any of the appeal points.

Relevant Law

Unfair dismissal

57. It is for the employer to show the principal reason for dismissal and that it is a reason falling within section 98(2) or that it is for some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. The reference to the 'reason' or 'principal reason' in section 98(1)(a) and s98(4) is not a reference to the category of reasons in section 98(2)(a) - (d) or for that matter in section 98(1)(b). It is a reference to the actual reason for dismissal (**Robinson v Combat Stress** UKEAT/0310/14 unreported). The categorisation of that reason (i.e. within which of subsection 98(2)(a) - (d) it falls) is a matter of legal analysis: **Wilson v Post Office** [2000] IRLR 834, CA.

58. The reason for dismissal 'is the set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee: **Abernethy v Mott, Hay and Anderson** [1974] ICR 323, CA. In a more recent analysis in **Croydon Health Services NHS Trust v Beatt** [2017] ICR 1240, CA, Underhill LJ said that the 'reason' for dismissal connotes the factor or factors operating on the mind of the decision maker which causes them to take the decision. It is a case of considering the decision-maker's motivation. In all cases, the 'reason' must be considered in a broad, non-technical way in order to arrive at the 'real' reason: **West Midlands Co-Operative Society v Tipton** [1986] IRLR 112, HL.

59. In a 'misconduct' dismissal, the employer must also show that the principal reason for dismissal relates to the conduct of the employee.

Reasonableness

60. In such a case, if it is established that the reason for dismissal relates to conduct the next question is whether the employer has acted reasonably in treating that reason as a sufficient reason for dismissal – s98(4) ERA 1996. In **West Midlands Co-operative Society v Tipton**, Lord Bridge of Harwich stated, at paragraph 24:

> *"A dismissal is unfair if the employer unreasonably treats his real reason as a sufficient reason to dismiss the employee, either when he makes his original decision to dismiss or when he maintains that decision at the conclusion of an internal appeal."*

61. The burden here is, of course, neutral. It is not for the employer to prove that it acted reasonably in this regard or for the employee to prove unreasonableness. Further, in assessing reasonableness, the Tribunal must not put itself in the position of the employer. It is not for the tribunal simply to substitute its own opinion for that of the employer as to whether certain conduct is reasonable or not but to determine whether the employer acted as a reasonable employer might have acted. It is not for the Tribunal to make its own assessment of the credibility of witnesses on the basis of evidence given before it.

62. The approach to be taken when considering s98(4) is the well-known band of reasonable responses, summarised by the EAT in **Iceland v Frozen Foods Ltd v Jones** [1983] I.C.R. 17. The Tribunal must take as the starting point the words of s98(4). It must determine whether in the particular circumstances the decision to dismiss was within the band of reasonable responses which a reasonable employer might have adopted. In assessing the reasonableness of the response, it must do so by reference to the objective standard of the hypothetical reasonable employer (**Tayeh v Barchester Healthcare Ltd** [2013] IRLR 387, CA @ para 49). The Tribunal must not substitute its own view as to what was the right course of action.

63. In misconduct cases, the approach which a Tribunal takes is guided by the well known decision of **British Home Stores v Burchell** [1978] IRLR 379, EAT. Once the employer has shown a valid reason for dismissal the Tribunal there are three questions:

    (i) Did the employer carry out a reasonable investigation?

    (ii) Did the employer believe that the employee was guilty of the conduct complained of?

    (iii) Did the employer have reasonable grounds for that belief?

64. Tribunals must not, in the words of Mummery LJ, "slip into the substitution mindset": **London Ambulance Service NHS Trust v Small** [2009] IRLR 563, CA. When determining whether dismissal is a fair sanction, again, it is not for the Tribunal to substitute its view for that of the employer. The Tribunal must not ask whether a lesser sanction would have been reasonable but whether dismissal was reasonable.

65. As observed by the Court of Appeal in **Newbound v Thames Water Utilities** [2015] IRLR 734, paragraph 61:

> *"The "band of reasonable responses" has been a stock phrase in employment law for over thirty years, but the band is not infinitely wide. It is important not to overlook s 98(4)(b) of the 1996 Act, which directs employment tribunals to decide the question of whether the employer has acted reasonably or unreasonably in deciding to dismiss "in accordance with equity and the substantial merits of the case". This provision…. indicates that in creating the statutory cause of action of unfair dismissal Parliament did not intend the tribunal's consideration of a case of this kind to be a matter of procedural box-ticking."*

66. The Court of Appeal in **Newbound** referred to an earlier Court of Appeal decision in **Bowater v NW London Hospitals NHS Trust** [2011] IRLR 331, quoting Burnton LJ:

> *"The appellant's conduct was rightly made the subject of disciplinary action. It is right that the ET, the EAT and this court should respect the opinions of the experienced professionals who decided that summary dismissal was appropriate. However, having done so, it was for the ET to decide whether their views represented a reasonable response to the appellant's conduct. It did so. In agreement with the majority of the ET, I consider that summary dismissal was wholly unreasonable in the circumstances of this case."*

67. In **Connolly v Western Health and Social Care Trust** [2018] IRLR 239, the Northern Ireland Court of Appeal (NICA) said:

> *"At paragraph 59 [of the employment tribunal decision] one finds this.*
>
> *'It is not for a tribunal in then determining whether or not dismissal was a fair sanction to ask whether a lesser sanction would have been reasonable, the question being whether or not dismissal was fair.'*
>
> *I express a degree of caution with that statement. The decision is whether or not a reasonable employer in the circumstances could dismiss bearing in mind 'equity and the substantial merits of the case'. I do not see how one can properly consider the equity and fairness of the decision without considering whether a lesser sanction would have been the one that right thinking employers would have applied to a particular act of misconduct. How does one test the reasonableness or otherwise of the employer's decision to dismiss without comparing that decision with the alternative decisions? In the context of dismissal the alternative is non dismissal i.e. some lesser sanction such as a final written warning."*

68. The NICA referred to the Court of Appeal decision in **British Leyland UK Limited v Swift** [1981] IRLR 91 and said this:

> *"The authority for the Tribunal's statement given in Harvey, Industrial Relations at paragraph [975] is the decision of the Court of Appeal in England*

in ***British Leyland UK Limited v Swift*** *[1981] IRLR 91. Lord Denning MR said the following at p. 93:*

"The first question that arises is whether the Industrial Tribunal applied the wrong test. We have had considerable argument about it. They said:

'… A reasonable employer would in our opinion, have considered that a lesser penalty was appropriate'.

I do not think that that is the right test. The correct test is: Was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might reasonably have dismissed him, then the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which one employer might reasonably take one view: another quite reasonably take a different view. One would quite reasonably dismiss the man. The other would quite reasonably keep him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair: even though some other employers may not have dismissed him."

Ackner LJ and Griffiths LJ, as they then were, gave concurring ex tempore judgments. None of those say that a lesser penalty was not a consideration that was relevant for the Tribunal to take into account. They were stating what the overall test was. I think it important to bear this in mind. Harvey also cites in support ***Gair v Bevan Harris Limited*** *[1983] IRLR 368 . The judgment of the Lord Justice Clerk does indeed cite and follow the decision in* ***British Leyland*** *but it does not exclude consideration of a lesser sanction as a relevant consideration."*

69. A NICA judgment is not binding on English employment tribunals and is persuasive only. Article 130 of the Employment Rights (Northern Ireland) Order 1996 is in identical terms to section 98 ERA 1996.

Fair procedures

70. Section 98(4) poses a single question namely whether the employer acted reasonably or unreasonably in treating the reason for dismissal as a sufficient reason for dismissing the Claimant. It requires the Tribunal to apply an objective standard to the reasonableness of the investigation, the procedure adopted and the decision itself. However, they are not separate questions – they all feed into the single question under section 98(4). Whilst in an unfair dismissal case, the parties often invite the tribunal to consider what are referred to as 'substantive' and 'procedural' fairness it is important to recognise that the tribunal is not answering whether there has been 'substantive' or 'procedural' fairness as separate questions. The tribunal's task under s.98(4) is to assess the fairness of the disciplinary process as a whole. Both the original disciplinary hearing and decision and the appeal hearing and decision are elements in the overall process of terminating the contract of employment. At the end of the day, the employment tribunal must consider whether

there has been a fair result, reached by fair process. That assessment will depend on the facts of the case.

Polkey

71. What is known as 'the Polkey principle' (**Polkey v AD Dayton Services** [1988] I.C.R. 142, HL) is an example of the application of section 123(1) ERA 1996. Under this section the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer. A tribunal may reduce the compensatory award where the unfairly dismissed employee could have been dismissed fairly at a later stage or if a proper and fair procedure had been followed. Thus the 'Polkey' exercise is predictive in the sense that the Tribunal should consider whether the particular employer could have dismissed fairly and if so the chances whether it would have done so. The tribunal is not deciding the matter on balance. It is not to ask what it would have done if it were the employer. It is assessing the chances of what the actual employer would have done: **Hill v Governing Body of Great Tey Primary School** [2013] I.C.R. 691, EAT.

72. Whilst the Tribunal will undertake the exercise based on an evaluation of the evidence before it, the exercise almost inevitably involves a consideration of uncertainties and an element of speculation. The principles are most helpfully summarised in the judgment of Elias J (as he was) in **Software 2000 Ltd v Andrews** [2007] I.C.R. 825, EAT (paragraphs 53 and 54).

Contributory conduct

73. If a dismissal is found to be unfair, under section 123(6) ERA where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it must reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding even in cases where the parties do not raise it as an issue (**Swallow Security Services Ltd v Millicent** [2009] ALL ER (D) 299, EAT). The relevant conduct must be culpable or blameworthy and (for the purposes of considering a reduction of the compensatory award) must have actually caused or contributed to the dismissal: **Nelson v BBC (No2)** [1980] I.C.R. 110, CA. The conduct need not be a breach of contract, or illegal conduct. It may be conduct that was 'perverse or foolish' or 'bloody-minded' or merely unreasonable in all the circumstances. Langstaff J offered tribunals some guidance in the case of **Steen v ASP Packaging** [2014] I.C.R. 56, EAT, namely that the following questions should be asked: (1) what was the conduct in question? (2) was it blameworthy? (3) did it cause or contribute to the dismissal? (for the purposes of the compensatory award) (4) to what extent should the award be reduced?

74. There is an equivalent provision for reduction of the basic award, section 122(2) which states that '*where the tribunal considers that any conduct of the complainant before the dismissal…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'. The tribunal has a wider discretion to reduce the basic award on grounds of any conduct of the employee prior to dismissal. It is not limited to conduct which has caused or contributed to the dismissal.

75. Unlike the position under section 98(4) ERA where the Tribunal must confine its consideration of the facts to those found by the employer at the time of the dismissal, the position is different when the Tribunal comes to consider whether, and if so to what extent, the employee might be said to have contributed to the dismissal. In this regard, the Tribunal is bound to come to its own view on the evidence before it. Decisions on contributory fault are for the Tribunal to make, if a decision is held to be unfair. It is the claimant's conduct that is in issue and not that of any others. The conduct must be established by the evidence.

Wrongful dismissal – breach of contract

76. If an employee is dismissed with no notice or in adequate notice in circumstances which do not entitle the employer to dismiss summarily, this will amount to a wrongful dismissal and the employee will be entitled to claim damages in respect of the contractual notice.

77. An employer is entitled to terminate a contract without notice in circumstances where the employee has committed an act of gross misconduct. It is for the employer to prove on the balance of probabilities whether the employee has committed gross misconduct. Whether an employee has committed gross misconduct entitling the employer to terminate summarily is a question of fact in each case. However, the courts have considered when 'misconduct' might properly be described as 'gross': **Neary v Dean of Westminster** IRLR [1999] 288 (para 22). In **Neary**, Lord Jauncey of Tulichettle rejected a submission that gross misconduct was limited to cases of dishonesty or intentional wrongdoing.

78. **Neary** was considered more recently by the Court of Appeal in **Adesokan v Sainsbury's Supermarkets Ltd** [2017 I.C.R. 590. At paragraph 23, Elias LJ said that the focus was on the damage to the relationship between the parties; that dishonesty and other deliberate actions which poison the relationship obviously fall into the category of gross misconduct but so in an appropriate case can an act of gross negligence. The question, in any particular case, will be whether a negligent dereliction of duty is so grave and weighty as to amount to a justification for summary dismissal. This involves an evaluation of the primary facts and an exercise of judgment. Whist the exercise is one of judgment, in paragraph 24 Elias LJ cautioned that the parameters of the exercise are not boundless and that "*it ought not readily to be found that a failure to act where there was no intentional decision to act contrary to or to undermine the employer's policies constitutes such a grave act of misconduct as to justify summary dismissal.*"

Discussion and conclusions

79. I turn now to my conclusions, applying the law to the facts as I have found them.

The reason for dismissal – a genuinely held belief

80. To the extent that Mrs Lee said that she concluded the Claimant's conduct *could easily cause damage to BT's brand and reputation and, ultimately, could affect customer retention* I conclude that this was not a genuinely held belief. There was no explicable connection between the Claimant's actions and these things and I conclude that this was mere recitation of words without any context or meaning for the matters in hand. It was an abstract statement made by Mrs Lee having given the words no genuine consideration as to how they applied in the Claimant's case. In any event – even if Mrs Lee did genuinely believe this - it was not a conclusion or belief for which she had reasonable grounds. It is not at all clear to me how the failure to reconcile petty cash or to ensure the presence of petty cash receipts or to complete incident reports in respect of banking discrepancies has any bearing on BT's 'brand' or 'reputation' or on 'customer retention'.

81. However, the Respondent has shown that the reason for dismissing the Claimant was that Mrs Lee genuinely believed the Claimant:

    81.1. Failed to follow procedures relating to the completion of incident report forms regarding banking discrepancies and that this contributed to a sum of **£4,975.57** which was deemed by the business as missing.

    81.2. Failed to adhere to the petty cash policy by not reconciling petty cash, not evidencing petty cash expenditure by attaching receipts and not evidencing approvals for petty cash spends over £20.

    81.3. Failed to ensure that her team, for which she was responsible, adhered to these policies.

    81.4. Knowing and understanding the Respondent's policies, chose not to follow those policies.

    81.5. Could not be trusted in a position of authority as her failures amounted to eight policy breaches, a lack of accountability meaning that she demonstrated a lack of integrity with regards to her work.

82. All of those factors/beliefs taken together constitute Mrs Lee's reason for dismissal. It was the fourth and fifth factors, however, that tipped her decision in favour of dismissal as opposed to applying a lesser sanction. The fairness of the Claimant's dismissal must be judged by reference to Mrs Lee's genuinely held beliefs as, in the words of Underhill LJ, those were the factors operating on her mind which caused her to take the decision to dismiss the Claimant.

Reasonableness of the belief

83. Assessing fairness involves asking, firstly, whether Mrs Lee had reasonable grounds for her beliefs and conclusions. The answer to that, in my judgment, is yes in relation to the first three but not in respect of the fourth and fifth factors.

<u>The first three factors</u>

84. The investigatory interview undertaken by Ms Summers had its flaws – for example, the interview on which Ms Summers' report was largely based was sprung upon the Claimant on an unannounced visit to the store, the interview was conducted in an area which was inappropriate and Ms Summers did not speak to **DC** to ascertain whether the Claimant had instructed or trained her on banking procedures. However, those matters did not impact on the overall fairness of the decision to dismiss, in my judgement, and did not affect the reasonableness of Mrs Lee's subsequent decision, nor did they amount to procedural unfairness when looked at the process as a whole.

85. Viewed as a whole, Ms Summers undertook a reasonable investigation. She had obtained relevant information from the Respondent's stores support. That information was then contained in a spreadsheet and shown to the Claimant. Ms Summers interrogated the daily envelopes and petty cash spending at the store. She carried out an analysis of the discrepancies and petty cash spends and put the results of her inquiries to the Claimant. She then prepared a report which she sent to Mrs Lee. That report and the information obtained from the investigation as well as the information obtained from the Claimant during the disciplinary hearing itself provided Mrs Lee with reasonable grounds to sustain her belief that the Claimant had failed to do the things set out in paragraph 83.1 to 83.3 above.

86. The Claimant had admitted being aware of the policies and that she had not followed the banking policy of completing incident report forms and that she had not followed the petty cash policy of reconciling petty cash monthly and of evidencing spend by attaching receipts – see paragraphs 18 and 27 above. Although the Claimant had maintained – validly in my judgement - that she could not be expected to report a banking discrepancy if she was not aware of it, that did not explain those many occasions – evidence of which was given to her - where the Claimant had been doing the banking, accepted that she would have been aware of a discrepancy and yet did not complete an incident report form. The belief that the Claimant had not reconciled petty cash was reasonable, as the Claimant admitted it. Further, the belief that the Claimant had not ensured that her team (including her ASMs) adhered to the policies was a reasonably held belief in light of the sheer (and large) number of occurrences. That was the case whether or not she had trained her ASMs.

87. As to the belief that the Claimant's failures led to **£4,975.57** going 'missing', Ms Nketia accepted that there was no direct evidence that money had in fact gone missing (by which everyone understood to mean stolen). She accepted that no investigation had been undertaken into whether any of the money had been stolen (acknowledging that the Claimant had requested just such an investigation). Ms Nketia submitted that the Respondent had proceeded on the basis that the

discrepancies - the difference between what the store expected and what had been banked - led to the Respondent treating the money as missing. Therefore, where Mrs Lee – and others - refers to money having been lost as a result of the claimant's failure, what they really mean is that there were unaccounted-for discrepancies (i.e. discrepancies in respect of which no incident report form had been completed) which resulted in the Respondent deeming the money to be missing. As set out in the factual findings, the Respondent accepted that there was no suggestion that the Claimant herself had acted dishonestly. There was no suggestion she had taken any money or that she believed or suspected that money had been taken by anyone.

88. Although there was no evidence that any money had been stolen, the belief that the money was 'missing' from an accounting and accountability perspective, was reasonable – being one open to a reasonable employer - having regard to the Claimant's acceptance that, at the time, she was and would have been aware of the fact that there had been discrepancies which ought to have been followed up by an incident report. She accepted that she knew or would have known of many of the cash discrepancies as they arose – or shortly thereafter – and that she should have completed an incident form and that she failed to do so**.** There can be no doubt that Mrs Lee's conclusion on the first three factors that operated on her mind was reasonable and sound.

The fourth and fifth factors

89. I turn now to the fourth and fifth factors, those that tipped matters towards dismissal. Those are the conclusions arrived at (or the beliefs held) by Mrs Lee referred to in paragraphs 81.4 and 81.5 above. Mrs Lee had a range of responses at her disposal: she could have issued a written warning or a final written warning; she could have issued a final written warning and recommended training. She could have issued a warning with demotion. She could have imposed changes to the Claimant's role, such as reduced responsibilities or increased supervision or moved her to an alternative role assuming one to be available (see the findings in paragraph 38 above and **page 66** of the bundle). Mrs Lee opted for dismissal because she concluded that the Claimant chose to ignore the policies and that she could not be trusted in future by the Respondent.

90. Essentially, the key issue in this case boiled down to whether the sanction was within the band of reasonable sanctions. I remind myself of the wording of section 98(4) that determination of the statutory question depends on whether in the circumstances the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the Claimant. Those circumstances include the size and administrative resources of the Respondent.

91. The 'circumstances' relevant to determination of the question are as follows:

    91.1. Mrs Lee's conclusions as set out above.

91.2. The Claimant's acceptance and acknowledgement that she had not complied with the Respondent's procedures and had not met the high standards set by the Respondent.

91.3. The Claimant's length of service and previously good record.

91.4. The Claimant was held in high regard by her Regional Manager, Ben Gascoyne, something which was made known to Mrs Lee.

91.5. The Claimant had raised her poor mental health as a factor in explaining how she had failed to meet the high standards.

91.6. That she suffered from poor mental health was not in dispute and the Respondent was sufficiently concerned by it to write, through Mrs Lee, to her GP alerting the GP to the need to support her in the face of an adverse decision on her employment.

91.7. The absence of any allegation or belief of dishonesty.

91.8. The Respondent is a large organisation with substantial administrative resources and easy access to OH.

92. Although she acknowledged fault, 'holding her hands up' and indeed 'misconduct' the Claimant had maintained that her mental health explained or partly explained why she did not perform to the Respondent's high standards. She had put her mental health centre-stage in explaining her conduct and seeking a sanction short of dismissal. There was no dispute about the external chain of events that had adversely impacted on the Claimant's mental well-being and no suggestion that the Claimant had made anything up or was exaggerating. As set out in the factual findings, despite recognising that the Claimant was suffering with her mental health and being so concerned about it that she wrote to the Claimant's GP (see **page 384**) Mrs Lee did not consider whether the Claimant's actions were or might have been explained, partly or fully by her mental health and did not obtain any medical input to help her on this point. Her reasoning for not doing so was that the Claimant had not sought any support from the business at the time and it did not consider it beneficial to the Claimant, there being no known issues with her job fulfilment – see my findings above and also paragraph 27(c) of the Respondent's Grounds of Resistance [**page 33**]. That may be so but what this misses entirely is that the Claimant was putting forward her mental health as an **<u>explanation</u>** for her conduct and as mitigating its effects which was, for her, a matter relevant to sanction. She was not using her mental health as an 'excuse' but as a factor relevant to the very decision that Mrs Lee ultimately had to make.

93. She made the same point, even more explicitly, in her appeal, which is an integral part of any dismissal process. Mr Bray, understood this. Mr Bray accepted that he understood one of the Claimant's appeal points to be that her deteriorating mental health had contributed to her not performing to the Respondent's standards and not

doing this aspect of her job properly but that he was not qualified to make that link (paragraph 55 above). That is all the more reason for the Respondent to seek some medical input before arriving at a final decision on dismissal. Mr Bray, as the appeal manager reviewing Mrs Lee's decision, considered only whether Mrs Lee had given consideration to the Claimant's health – but she had only considered health in the context of adjustments and whether she had been supported (see **paragraph 36** above) – not with regard to it being a factor explaining her failings or as a factor relevant to sanction.

94. I am satisfied that no reasonable employer would have dismissed the Claimant – or dismissed her appeal - without considering and reaching a view on whether her mental health had an impact on her conduct and might be relevant to sanction. I am also satisfied that, <u>in the circumstances of this case</u>, no reasonable employer with the administrative resources of am employer of this size would have dismissed without seeking some input from OH or from the Claimant's GP. The conclusion that the Claimant 'chose' to ignore policies and the conclusion that she could not be 'trusted' were key to the decision to dismiss her. Given the undisputed fact that the Claimant had been a trusted and highly regarded store manager and considering that she had put her mental health fully in the picture, Mrs Lee could not reasonably conclude that the Claimant had 'chosen' to ignore the Respondent's policies or that the Claimant could not be 'trusted' without first considering to what extent her mental health contributed to her failures/poor decision making.

95. It is not only the overall circumstances that are relevant to the question of fairness. Tribunals are directed by section 98(4)(b) that the question of fairness <u>shall be</u> determined in accordance with <u>equity and the substantial merits</u> of the case. It is clear to me that there is substantial merit to the Claimant's case that her mental health impacted on her conduct – there being no suggestion that she did not suffer from poor mental health and no suggestion of dishonesty or exaggeration on her part. Where an otherwise honest and long-serving employee advances her poor mental health as an explanation for her conduct, equity requires it to be be properly considered prior to an employer making a decision on her future employment.

96. Therefore, on the basis that the fourth and fifth factors tipped Mrs Lee's decision to that of dismissal, I conclude that the Responded did not act reasonably in treating the reason for dismissal as a sufficient reason for dismissing the Claimant. By dismissing her without exploring or considering her explanation and without seeking a medical opinion as to whether it may have played any part in her not carrying out aspects of her role properly the Respondent acted outside the band of reasonable responses of a reasonable employer. It was unreasonable of Mrs Lee to reach the conclusion that she could not trust the Claimant going forward, in circumstances where she did not first explore whether the Claimant's mental health might be a factor in her conduct. It was also unreasonable not to explore the issue on appeal, when the Claimant expressly raised it in her appeal.

97. In light of the above, I conclude that the Claimant was unfairly dismissed and I uphold the claim.

Wrongful dismissal

98. As regards this cause of action, the Respondent must prove that the Claimant repudiated the contract of employment. Unlike the position in unfair dismissal cases, it is not a case of me having to confine myself to the facts as found by Mrs Lee as I did when considering unfair dismissal. I am not here considering the reasonableness of the investigation or the reasonableness of her conclusions. I must consider whether the Respondent has proved on the evidence that the Claimant committed gross misconduct – or, I would add, that her actions amounted to gross negligence. As observed in the case of **Adesokan**, the focus is on the damage to the relationship between the parties.

99. I have found that the Claimant did not wilfully ignore the Respondent's policies. She did not intentionally undermine them. The Claimant was shocked when the amount of unaccountable money was put to her. I accepted her evidence, and I found, that for a period of over a year or so, she had been in a bad place in terms of her mental health and this was adversely impacting on her at work. She was not dishonest.

100. If not dishonest or wilful then, I considered that there must be some explanation for a long-serving, honest, hard-working and highly regarded manager to have derogated from her duties to ensure that banking and petty cash policies were followed – by her and her team - over the period in question. The Claimant maintained that these things were put to the bottom of the pile as she concentrated on other things as a busy store manager during a period where she was struggling with her mental health. I accepted that evidence. The Claimant repeatedly made the point that had compliance brought matters to her attention she would have rectified the situation much earlier. Compliance could not do that at the time because their systems were not set up in order to pick up on such discrepancies (although they now are). What I conclude from this, however, is that the Claimant was sincere in her protestation that this was not a deliberate course of action by her and had she realised the extent of the problem, she would have taken steps to rectify it. I conclude that this was not a case of wilful or deliberate contradiction of contractual terms of her employment. The Respondent has not proved that this was a case of gross misconduct.

101. Unquestionably, however, her failure to follow the policies or to pick up on the fact that her team were not doing so was a dereliction of her duty as a store manager and in my judgement unquestionably negligent of her. Although Ms Nketiah did not make any submissions regarding gross negligence, I considered this. The question is whether her dereliction of duty was such as to justify summary dismissal – i.e. whether the Respondent has proved that it was a gross dereliction of duty. In my judgement it has not established this on the evidence. It was conceded that there was no direct evidence that money was missing – indeed no investigation into that matter was undertaken. The Claimant failed to report banking discrepancies and

failed to evidence petty cash spending by attaching receipts and certain approvals of that there is no question. Those are but two aspects of the role of a store manager. I rejected the suggestion that there was any damage to the BT brand or potential for damage to the brand and rejected the suggestion that there was any damage or potential damage to customer retention of which there was not the slightest evidence. Further, the Respondent has not proved that the business suffered an actual loss by the Claimant's failures. Therefore, while a significant issue for the Respondent and whilst it was conduct that merited some sanction it was not conduct that was so grave and weighty as to justify summary dismissal. Her negligence was not gross negligence.

102. I conclude, therefore, that the Claimant did not repudiate the contract, that she was entitled to 12 week's notice of dismissal which was not provided and that she was, therefore, wrongfully dismissed. Her complaint of wrongful dismissal succeeds.

103. I would add one final observation on this part of the claim, where the Claimant is alleged to have committed gross misconduct justifying summary dismissal. I have not only noted that the Respondent has eschewed the suggestion that the Claimant acted dishonestly and noted the Respondent's concession that there was no investigation into whether the 'missing' money had been taken (i.e. stolen). I was, in those circumstances, concerned to note that in the letter of dismissal Mrs Lee had written that the Claimant's '*conduct will be recorded on fraud prevention databases'* and that '*this information may be accessed from the UK and other countries and used by law enforcement agencies and by us and other employers (and potential employers) to prevent fraud* (see paragraph 46 above). That is undoubtedly of some concern for the Claimant. The Respondent's disciplinary policy which I refer to above says: '*should the investigation identify fraud or any other criminal offence we may record the details on a fraud prevention database*….' [**page 66**]. The investigation did not identify fraud or any criminal offence by the Claimant, yet the Respondent has recorded the Claimant's 'conduct' on a fraud database. That is, at the very least, unreasonable and potentially very damaging to the Claimant. I would hope the Respondent would reconsider this in light of this judgment.

Remedy for unfair dismissal – Polkey

104. A conclusion of unfair dismissal is not the end of the matter. Other issues arise relevant to remedy, as set out in the list of issues. I must consider whether the Respondent could have fairly dismissed had it acted as a reasonable employer would have, and, if so, what are the chances that it would have done. As can be seen from my conclusions, I have decided that what rendered the dismissal unfair was the failure to properly consider the Claimant's poor mental health and to obtain medical input to assist with that exercise – she having advanced that matter before her employer. I must now consider what would or might have been the outcome had the Respondent done so. That is not an easy exercise because there was no medical evidence put before me in this hearing regarding the extent of the Claimant's poor mental health and, more importantly, on how it had in fact impacted on her conduct.

105. The 'Polkey' exercise is always a difficult exercise and by its nature speculative. A range of possibilities presents itself. Had Mrs Lee sought a report from the Claimant's GP or an occupational health adviser, they might have said that her mental health was a significant factor in explaining how she had failed in her duties. Alternatively, they might have said that, whilst her mental health impacted on her mood and depression, it did not adequately explain why she failed to adhere to the Respondent's policies over such a lengthy period of time. From this, it seems to me that the Respondent 'could have' fairly dismissed the Claimant had it acted fairly. That is because, even after consideration of any medical input, Mrs Lee might have been in a position to reasonably conclude that the Claimant had chosen to ignore the policies and that she could not trust her in future. But it is not enough to ask 'could' the Respondent have fairly dismissed had it acted fairly and reasonably, I must also consider 'would' it have done so – in other words, what are the chances that it would have done so. I certainly cannot say that the Respondent 'would not' have fairly dismissed. Nor can I conclude that it certainly 'would have' fairly dismissed her. For example, the medical input might have been clear, resulting in Mrs Lee concluding that the Claimant did not 'choose' to ignore policies and she may well have concluded differently on the issue of 'trust'.

106. At the end of the day 'Polkey' is an exercise in evaluating what is a just and equitable outcome in terms of compensating the Claimant for her unfair dismissal and I must assess the chances of what the actual employer would have done (see paragraph 71 above). The parties were at opposite ends of the spectrum on this: the Respondent submitting that the Claimant would have been fairly dismissed and the Claimant that she would not have been. The Respondent must be able to point to some evidence as to the likely outcome. Ms Nketiah relies on the admissions of the Claimant that she failed in her duties. Whilst it is right to say that the Claimant admitted what she had done, that was in the context of her contending that her mental health was poor. It does not address the Polkey issue.

107. I have had regard to the following:

107.1. My findings on the external stressors on the Claimant

107.2. The fact that none of those matters were challenged or doubted by the Respondent

108. I infer that, to a significant extent the Claimant's state of health is bound to have had an effect on her actions and that, had the Respondent acted reasonably by obtaining an OH report or a medical report from her GP, that a medical professional would have referred to her mental health being a factor in her approach to and conduct at work. Such a report would have been based on the account given by the Claimant of the factors that had caused her anxiety and led her to contemplate taking her life. I infer that the account she would have given to OH would have been the same honest account she gave in her evidence. From my findings of fact, I conclude that for some time, the Claimant had 'soldiered on' at work and tried to

address her mental health issues privately, outside of work. It was not until matters came to a head – with Ms Summers' investigation – that the Claimant could bring herself to say to her employer the things that she did, namely that her mental health had been impacting her work life as well as her personal life. This is very likely to have been the subject of discussion with OH, had Mrs Lee sought one. The information obtained in a report would then have factored into Mrs Lee's decision whether to dismiss the Claimant – or Mr Bray's decision whether to uphold any dismissal had he had to consider such matters on appeal. Mrs Lee was, after all, sufficiently concerned about the Claimant's mental well-being to write to her GP in the event that an adverse disciplinary decision might be made. Armed with a detailed report from a third party on her mental health, it is inconceivable that Mrs Lee would not have given the issue of sanction serious thought in light of that information. There is a very good chance that the decision would not have been dismissal and a lesser sanction combined with some form of training and a further referral to occupational health to consider supportive measures for the future. All of this is, of course, reconstructing a world that never happened. However, that is the nature of the speculative Polkey exercise.

109. In light of the above, I find that the chances that this Respondent would have fairly dismissed the Claimant had it acted reasonably to be no more than 20%. The Respondent is a substantial employer and the concern of Mrs Lee regarding trust would more likely than not have been mitigated by a report that outlined not only the catalogue of external stressors but their effects on the Claimant. That would have allowed the decision makers to consider applying a sanction short of dismissal, such as a warning accompanied by training, a referral to OH and an emphasis to the Claimant that she must ask for support when she needs it. Although the Respondent has done enough to warrant some reduction – on the basis that it could have fairly dismissed - it has not satisfied me that had it acted reasonably that the chances it would fairly have dismissed were greater than 20%. Using my experience and exercising my judgement, I am sufficiently confident that medical input would have identified the Claimant's mental health as a factor and that the chances are high that Mrs Lee would have acted on that accordingly. I cannot, of course, be certain. Therefore, the compensatory award will be reduced by 20%.

Contributory conduct

110. The final substantial matter I had to consider was whether to adjust the basic and compensatory awards for the Claimant's contributory fault. The approach I took to this is set out in paragraphs 73-75 above. The Claimant admitted that she had not followed the Respondent's policies, that she had not reconciled petty cash or evidenced receipts and approvals (albeit she had obtained approvals for spends over £20), had not completed incident report forms where she was aware of discrepancies. She accepted that her conducted merited a disciplinary sanction. She contended only that it did not warrant dismissal.

111. I refer back to my findings in particular to paragraphs 9-12 and 18. I am satisfied on the evidence that the Claimant failed to follow the banking and petty

cash procedures. While they might not be the most fundamental or core part of a store manager's role, they are for the Respondent, important functions. As a store manager, she has a responsibility for these things. The Claimant accepted this. Based on her own admissions and on my findings, I am satisfied that the Claimant bears a significant responsibility for contributing to her own dismissal. The conduct which I find to be blameworthy (in the sense described by **Nelson –** see paragraph 73 above) is as follows:

111.1. The failure to report banking discrepancies/ complete an incident report form on those multiple occasions when she had done the banking,

111.2. The failure to attach receipts and to ensure that others attached receipts to petty cash spends,

111.3. The failure to enclose approvals for spends over £20

111.4. The failure to reconcile petty cash monthly

111.5. The failure to ask for support with banking or with her own mental health (when speaking to Mr Gascoyne) – this is 'culpable' in the sense that it was, in my judgement, foolish not to ask for support from a manager who respected and regarded her. Although I accept it is difficult to speak of mental health issues for many, the Claimant did in fact speak to Mr Gascoyne.

112. I must emphasise that this is a different exercise from the 'unfairness' assessment or the 'Polkey' assessment. I am not here judging whether the Respondent acted fairly or assessing the chances that it would have dismissed had it acted fairly. The question here is, when assessing any compensatory award, has the Respondent established that the Claimant's conduct caused or contributed to her dismissal and if so, to what extent should I reduce the compensatory award to arrive at just and equitable compensation? It is at this point where Ms Nketiah's reliance on the Claimant's admissions comes to the fore. The Claimant, in this hearing, said that she accepts there was misconduct – but not gross misconduct. She accepted that she failed to follow the policies. She said that she was not advancing her poor mental health as an excuse but as a factor in her conduct and as something to be taken into account by the employer when considering sanction.

113. I am satisfied that, the Claimant's established and admitted dereliction in duty and her foolish failure not to ask for support contributed to her dismissal. She has not in fact advanced any medical evidence connecting her mental health with her conduct in failing to follow the relevant policies. I have to assess these matters based on the evidence before me, the conclusions that I have reached and the inferences I am able to draw.

114. At best, on the evidence and from my findings regarding the Claimant's poor mental health, I infer that her health played a part in her failure to follow the

Respondent's procedures. There was also the fact that she was extremely busy in the store and that she put these tasks to the bottom of the pile, knowing there was a problem but without realising the extent of the problem that was building. It is extremely difficult, given the absence of evidence either way (either from the employer at the dismissal stage or the Claimant at the litigation stage), to say to what extent her health in fact explained this blameworthy conduct. I fall back on my findings that the external stressors were multiple and were bound to have affected the Claimant's focus and attention to detail at work and that the effects of the external events on her mental health were not challenged. Therefore, whilst I am satisfied that there should be a further reduction in the compensatory award to reflect her blameworthy conduct, that reduction should not be based solely on an assessment of her conduct without taking account of the impact of her mental health as a contributing factor in explaining that conduct. The Claimant's failures were significant and causative, in that they directly contributed to the decision to dismiss but they did not entirely cause her dismissal – Mrs Lee's assessment that the Claimant chose to ignore policies and that she could not trust the Claimant played an equally significant part. In my judgement a just and equitable reduction of the compensatory award would, in the circumstances, be 50% to reflect the Claimant's own conduct which contributed to her dismissal, whilst allowing for the very real possibility this conduct was attributable or connected to her poor mental health.

115. As set out above, the tribunal has a wider discretion to reduce the basic award on grounds of any conduct of the employee prior to dismissal. It is not limited to conduct which has caused or contributed to the dismissal. It is also possible to apply a different percentage reduction. However, I apply the same reduction to the basic award and see no basis for distinguishing between them in the circumstances – and note that none was suggested. Therefore, the basic award shall also be reduced by 50%.

REMEDY

116. The Claimant is entitled to a remedy in respect of both her claims of wrongful and unfair dismissal. I had hoped to be able to deal with remedy in this reserved judgment because there is no challenge on mitigation of losses and I have addressed the 'Polkey' and contributory conduct issues. However, having given it some thought I consider it necessary to hear the parties particularly on the following issues:

116.1. The bonus figures set out in the Claimant's schedule of loss,

116.2. Whether the Claimant should be awarded damages for the notional period of notice (up to **12 February 2023**) with the compensatory award to be made in respect of the period after that date, or whether wrongful dismissal damages should be deducted from the compensatory award. Although it is a matter for the discretion of the tribunal (see **Shifferaw v Hudson Music Co Ltd** UKEAT/0294/15, paras 34 and 35) I would rather hear submissions from the parties first.

116.3. Whether the Claimant received any benefits after her dismissal and if so what.

117. Therefore, unless the parties are able to reach an agreement to resolve the issue of compensation and damages, there shall be a remedy hearing listed on the first available date after **01 July 2023.** That hearing shall be listed for 3 hours and shall be a remote hearing by CVP. I would encourage the parties to attempt to agree remedy without the need for a further hearing and if they are able to do so, they should let the tribunal know as soon as possible.

Employment Judge Sweeney

Date: 21 June 2023