EMPLOYMENT TRIBUNALS

Claimant: Mr Nehman Taj

Respondent: First Source Solutions UK Limited

Heard at: Nottingham Employment Tribunal

On: 4 – 5 April 2018

Before: Employment Judge Dyal (sitting alone)

Representation:

Claimant: In person

Respondent: Mr Searle, Counsel

JUDGMENT having been sent to the parties on 10 April 2018 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

The issues

1. By a claim form presented on 2 August 2017 the Claimant complained of, and only of, unfair dismissal within the meaning of Section 94 and 98 Employment Rights Act 1996. However, in his witness statement and in a document entitled *Reply to Grounds of Resistance* the Claimant made allegations of race discrimination, disability discrimination and wrongful dismissal.

2. At the outset of the hearing the tribunal explained to the Claimant that he could not amend his claim, at least not as of right, by referring to new complaints in documents such as those mentioned above. The tribunal also explained that it had a discretion to allow an amendment to the claim upon an application for one. The Tribunal explored with the Claimant whether he had intended to make an application to amend, and in any event whether he wanted now to make one. His response was that he had not intended to make an application to amend and that he did not wish to make one now. He was content for his claim to remain one of, and only of, unfair dismissal.

3. It was agreed that the issues for adjudication were, in the first instance, these:

    a. What was the reason for the dismissal?
    b. If there was a potentially fair reason for the dismissal, was the dismissal fair in all the circumstances having regard to Section 98(4) ERA?
    c. If the dismissal was unfair:

i. should any reduction be made on account of the Claimant's conduct before the dismissal pursuant to s.122(2) ERA?
ii. did the Claimant cause or contribute to his dismissal to any extent and should a reduction be made pursuant to s.123(6) ERA?
iii. Should a *Polkey* reduction be made?

4. It was agreed that further issues of remedy be deferred pending the Tribunal's adjudication of the issues set out above.

The Hearing

5. The Tribunal was presented with an agreed bundle of documents prepared by the Respondent. A number of further documents were added to the bundle by consent:

    a. The Claimant produced some additional documents in the form of four exhibits. The first two exhibits were in fact already in the bundle. Exhibits three and four were added;
    b. A Schedule of Loss was added;
    c. The *Reply To Grounds Of Resistance* was also added.

6. The tribunal heard evidence from the following witnesses. For the Respondent: Ms Emma Lesley, Deputy Customer Experience Leader (the investigating officer), from Mr James Wall Operations Manager (the dismissing officer) and from Mr Thomas Smith, Sales Manager (the appeal officer. The Claimant gave evidence on his own account.

Findings of fact

7. The Respondent operates a call centre in Derby. Its principal client is the well-known broadcaster Sky. The Respondent's role is to provide telephone customer service support to Sky's customers. The Respondent is a fairly large employer with a dedicated HR team.

8. The Respondent operates in a competitive market. It is set strict targets and customer service levels by Sky. Sky monitors the Respondent's performance closely and measures it against a variety of metrics. The Respondent in turn monitors the performance of its employees closely to ensure that targets and customer service standards are met.

9. Each telephone operative has his/her own headset. The operatives 'hotdesk' and plug their headset into whatever telephone they are using on a given day. Each desk also has a computer which operatives must log into in order to work.

10. On 25 September 2012, the Claimant's continuous employment commenced. He was engaged in the role of Customer Service Advisor. His employment was TUPE transferred on a number of occasions and ultimately to the Respondent on 1 March 2017.

11. During his employment the Claimant worked in a number of different teams. His penultimate team was RST (the Regional Support Team). Towards the end of 2016 the work of that department was gradually transitioned offshore and so the work of the department in Derby gradually wound down. Mr Wall, who was responsible for that department, was able to offer relatively favourable shifts ending at 4.30pm. Towards the end of 2016 or around the beginning of 2017, the Claimant was moved to the Value Department as the local operations of RST ceased.

12. The Value Department dealt primarily with customers wishing to downgrade to a cheaper package or to leave Sky altogether. It also dealt with some billing queries.

The Claimant's role was now a sales-type role where the aim was to persuade customers not to downgrade their Sky package or leave altogether as the case may be. In addition to his basic salary the Claimant received incentive payments based upon his success in persuading customers not to downgrade or leave. This variable element formed a significant part of the Claimant's overall remuneration.

13. Upon moving to the Value Department, the Claimant's shifts changed in a way that made matters difficult for him. He was initially expected to work 10 hour shifts often finishing quite late. This did not suit him for several reasons: firstly, he had a knee problem that made sitting for more than 8 hours difficult; secondly, his mother was unwell and he together with some of his siblings provided some care for her; and thirdly he was about to start an educational course.

14. The Claimant complained a number of times about the shifts he was required to work and made some applications to work flexibly. He eventually involved the HR team. A resolution was reached by around the beginning of February 2017: the Claimant was given permission to work 8 hour rather than 10 hour shifts. However, this did not entirely satisfy the Claimant because he wanted to work fixed shifts of 8.30 am to 4:30 pm. That shift pattern was rejected for business reasons. In essence, the evenings are the busier times for the call centre because that is when it receives a greater volume of calls from Sky customers. The Claimant was therefore expected to, and scheduled to, work evenings regularly.

15. At some point in April 2017, shortly before the disciplinary matters to which the tribunal will now turn came to light the Claimant's line-manager left the business. That is worth mentioning because it meant she was not available to the Respondent to ask her view of the disciplinary issues.

The Disciplinary Issues

16. In April 2017 some irregularities were flagged up by one of the Respondent's electronic employee monitoring systems. It showed that the Claimant had not swiped in or out of work on a variety of occasions on which he had been scheduled to be at work. This raised a 'red flag' alert and prompted an investigation.

17. The matter was passed to Ms Emma Lesley to investigate. She conducted a very careful investigation, the apparent results of which were astonishing. The details of her investigation are summarised in two documents, one at page 112 and one at page 113-114.

18. Page 112, itself a synthesis of raw data that appears at 107 to 111, shows the following:

    a. Between 3rd March 2017 and 31st March 2017, of the 21 days when the Claimant was scheduled to be on shift, he had been absent apparently AWOL for 14 of them.
    b. On the 7 days that he had attended, he had on some of those days been AWOL for several of the hours of his shift.

19. The basis for the above was twofold. Firstly, the electronic records showed that the Claimant had not swiped in and out on certain days suggesting he had not been at work at all. It was necessary to swipe in and out in order to access the workspace, barring some exceptional arrangement. Secondly, there was a quite separate system that monitored each employee's work activity. That system suggested that the Claimant had done no work at all on those days on which the swipe records appeared to show him as absent. He had not even logged in to the computer system. Equally, there were shifts on which the swipe records appeared to show that he had been present for only part of his shift and on those occasions the work activity records

showed no activity during the period in which the swipe records implied that he was absent.

20. This in turn led to a deeper analysis of the work the Claimant *had* done during this period. The calls that employees make and receive are recorded automatically. The software also tracks other information such as when a customer is transferred to another department. Ms Lesley listened to the Claimant's calls, analysed the records and summarised what she found in the document now at p.113 – 114.

21. In short, there appeared to be some astonishing examples of call avoidance. Call avoidance is a well-known phenomenon in the call centre sector, and it can take a number of different forms. In essence it is characterised by the operative in some way avoiding incoming calls or alternatively avoiding the issues raised by the caller if the call is answered.

22. Ms Lesley found multiple examples of multiple forms of call avoidance. The most common issue was the Claimant answering a call and then being completely silent on the call until the customer hung up. There were also variants thereof e.g. greeting a customer, inviting the customer to explain his/her problem but then falling silent. Another example included telling a customer that he would be transferred, putting the customer on hold, but then not transferring the customer. Yet another example included ghosting: ghosting is when the operative transfers a customer to another department, but then remains on the line after the customer has left it. By remaining on the line the line remains open and the operative is unable to accept further inbound calls.

23. It is a fundamental requirement of the customer advisor's job that if for any reason the call with the customer is unexpectedly terminated, the customer advisor, as a matter of duty, must phone the customer back. Very occasionally that is not possible, for example if the customer has called from a private number or withheld number, but that scenario is very much the exception rather than the norm. Normally, the caller's number is automatically linked to the customer's account when the customer calls and it is easy to make a call back. Ms Lesley's investigation found that the Claimant had not called customers back when, for instance following his silence, the customer had disconnected the call.

24. The Claimant was asked to and did attend an investigation hearing with Ms Lesley on 21 April 2018. At the meeting Ms Lesley showed the Claimant the documents that now appear at 107 to 114 of the bundle and read through them with him inviting his explanation.

25. In terms of the AWOL issue, the Claimant's explanation was that he was supposed to be working 11.30 am to 8:00 pm, but that he had asked to work 8:30 am to 5:30 pm. He was shown the report of his swiping in/out activity and said that he did not remember half of the days in question. He commented that there were days when his ID did not work and there had been nothing for him to do, and he commented that at some point when he logged on to the system someone else's ID came up in some sort of IT error. He also said that there were some down-times (when the systems were down) that should have been manually logged but that he was not sure if they had been or not.

26. Call avoidance was also discussed. The Claimant's principal line of defence was that he had not been silent on the calls, but that his headset was not working, such that it appeared to the customer and on the recordings of the calls that he had been silent when in fact he had not.

27. In a letter dated 24 April 2017 the Claimant was invited to a disciplinary hearing. The charges were poorly drafted. The absence without leave charge simply stated "*AWOL*

- *Dates to be discussed in meeting*". The call avoidance charge was very poorly particularised and said simply "*Call Avoidance - Ghosting on calls*". The letter did not enclose notes of the investigation meeting or the documents that Lesley had produced in her investigation, and the Claimant was not otherwise given them. The letter did not warn the Claimant that dismissal was a possibility.

28. On 28th April 2017, the Claimant attended a disciplinary meeting chaired by Mr Wall. The call avoidance issue was discussed and the primary line that the Claimant took was that his headset had been faulty. In terms of the AWOL issue that was also discussed and the Claimant explained that he had requested to change his shift pattern but this had been refused so he was forced to work the hours he needed to because there were things going on at home. He said that he had been coming to work three hours early and leaving three hours early. He maintained that otherwise he had not been AWOL. He said he could not remember dropping calls. At the conclusion of the meeting the Claimant was summarily dismissed. Mr Wall simply did not believe that the Claimant's explanations for call avoidance. He considered that the Claimant had made a partial admission of being absent without leave on some occasions and that the Claimant's case that he had not AWOL on other occasions was not credible.

29. There is a dispute as to whether or not the Claimant was sent a letter of dismissal. The Tribunal finds that he was not. The Respondent has not been able to produce a copy and there is no cogent evidence that a letter was ever written or sent. The Claimant says he never received one.

30. The Tribunal heard oral evidence from Mr Wall as to the reason for the dismissal which the tribunal accepts as being a true account of the reasons for dismissal. The reason for the dismissal was that Mr Wall considered that the Claimant was indeed guilty of call avoidance (as reflected in the document at p.113 - 114) and guilty of AWOL (as reflected at in the document at p.112). He considered these to be the most egregious examples of AWOL and call avoidance he had ever seen, considered that the Claimant was guilty of multiple instances of gross misconduct and that dismissal was the appropriate sanction.

31. The Claimant appealed. His appeal was heard by Mr Smith on 8th May 2017.

32. At some point in 2016 the Claimant had considered raising a grievance, and naming Mr Smith in the grievance because of his concerns about his working hours and those concerns not being dealt with to his satisfaction. He had been encouraged not to raise that grievance on the basis that the hours issue could be resolved without a grievance being raised. He told the HR officer dealing with the appeal against dismissal that he did not want Mr Smith to be a decision maker because of that history.

33. In the event Mr Smith was the decision maker upon the appeal against dismissal. Mr Smith himself was unaware until the Tribunal hearing either that the Claimant had considered raising a grievance about him in 2016 or that there had been any issue as to whether or not he was an appropriate appeal officer.

34. At the appeal hearing the Claimant said that his headset had been faulty since September 2016. He said it was an intermittent fault that affected as many as 30% of his calls. He said that he had raised the issue with his managers, and that he had done so twice, once in September 2016 and once in December 2016. The Claimant's appeal was dismissed and the dismissal was upheld. Mr Smith also found the Claimant's explanations for events impossible to believe.

35. The Claimant's evidence to the Tribunal was that he believed it would cost him £65 to get a new headset and that he would have needed to pay for it. It was also his evidence that he earned in the region of £50 commission per week based upon

successful retention of customers. It was suggested to him that in light of that and in light of his evidence that the headset affected 30% of his calls it seemed irrational to struggle on with a faulty headset. It would undermine his ability to retain 30% of the customers he dealt with and indeed risk those customers being very dissatisfied with the service they had received. At that point in his evidence the Claimant's introduced a new line of explanation which was that there had been insufficient headsets to go around and he said that he could not have purchased one even if he wanted to.

36. The Tribunal prefers the Respondent's evidence that the Claimant would not have had to pay for the new headset (unless he had carelessly damaged the old one and there was no suggestion that he had) and that there would not have been a difficulty in replacing the headset. On the contrary replacing a faulty headset was a matter of priority for obvious business reasons that customers would no doubt be irritated if they called the call centre, eventually got through and had an abortive and useless call with an operative. This, the tribunal considered, made sense at every level. The headset is an inexpensive, basic piece of kit. It was also an essential piece of kit for customer service to be provided. It was in the operative's interest to have a functioning headset and in the Respondent's interest

37. For reasons that are fully explained under the heading of contribution below, the tribunal finds as a fact that:

    a. The Claimant was AWOL on the occasions indicated at p.112;
    b. The Claimant was call avoiding as indicated at p.113 – 114.
    c. There is no adequate explanation for either matter.

Law

38. By Section 94 Employment Rights Act 1996, there is a right not to be unfairly dismissed. It is for the employer to show the reason for the dismissal and that the reason was a potentially fair one. If a potentially fair reason is shown, the fairness of the dismissal turns on the test identified at section 98(4), in relation to which the burden of proof is neutral.

39. In *BHS v Burchell* [1980] ICR 303, the EAT gave well known guidance as to the principal considerations when assessing the fairness of a dismissal purportedly by reason of conduct. There must be a genuine belief that the employee did the alleged misconduct, that must be the reason or principal reason for the dismissal, the belief must be a reasonable one, and one based upon a reasonable investigation.

40. The *Burchell* guidance is not comprehensive, however, and there are wider considerations to have regard to in many cases. For instance, the severity of the sanction in light of the offence and mitigation are important considerations.

41. In *Iceland Frozen Foods v Jones* [1982] IRLR 439, the EAT held that the tribunal must not simply consider whether it personally thinks that a dismissal was fair and must not substitute its decision as to the right course to adopt for that of the employer. The tribunal's proper function is to consider whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted.

42. The range of reasonable responses test applies to all aspects of dismissal. In *Sainsbury's v Hitt* [2003] IRLR 23, the Court of Appeal emphasised the importance of that test and that it applies to all aspects of dismissal, including the procedure adopted.

43. In *Strouthos v London Underground Ltd* [2004] IRLR 636, Pill LJ said:

> *It does appear to me to be basic to legal procedures, whether criminal or disciplinary, that a defendant or employee should be found guilty, if he is found guilty at all, only of a charge which is put to him. What has been considered in the cases is the general approach required in proceedings such as these. It is to be emphasised that it is wished to keep proceedings as informal as possible, but that does not, in my judgment, destroy the basic proposition that a defendant should only be found guilty of the offence with which he has been charged.*

44. The fairness of a dismissal must be judged in the round having regard simultaneously to both procedural and substantive matters. Not all departures from a fair procedure will render a dismissal unfair in the final reckoning. In principle it is possible for an unfairness at an earlier stage of the procedure to be corrected later in the procedure for instance at the appeal stage. See ***Taylor v OCS Group*** [2006] IRLR 613.

45. The *ACAS Code of Practice No.1: Discipline & Grievances at Work* provides as follows at paragraph 9:

> *If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification."*

46. The basic award and the compensatory award can each be reduced on account of a claimant's conduct according to the different statutory tests at Section 122(2), Section 123(6) of the Employment Rights Act. The impugned conduct need not be unlawful so as to justify a reduction but it must be blameworthy. In the case of Section 123(6), the blameworthy conduct must also cause, or partly cause, the dismissal. See further *Nelson v British Broadcasting Corporation (No. 2)* [1980] ICR 110.

47. In *Steen v ASP Packaging Ltd* [2014] ICR 56 the EAT gave some important guidance as to how tribunals should deal with contributory conduct:

    a. It must firstly identify the conduct which is said to give rise to possible contributory fault;
    b. It must secondly having identified it, ask whether that conduct is blameworthy.
    c. It thirdly must ask for the purposes of section 123(6) if the conduct which it has identified and which it considers blameworthy caused or contributed to the dismissal to any extent. If it did not do so to any extent, there can be no reduction on the footing of section 123(6), no matter how blameworthy in other respects the tribunal might think the conduct to have been.
    d. It fourthly must decide to what extent the award should be reduced and to what extent it is just and equitable to reduce it.
    e. A separate question arises in respect of section 122 where the tribunal has to ask whether it is just and equitable to reduce the amount of the basic award to any extent. It is very likely, but not inevitable, that what a tribunal concludes is a just and equitable basis for the reduction of the compensatory award will also have the same or a similar effect in respect of the basic award, but it does not have to do so.
    f. It is an unusual finding to find the Claimant 100% responsible for his dismissal but in principle is a permissible one.

48. Compensation for unfair dismissal must be just and equitable (s.122(1) ERA). Thus, where a dismissal is found to be unfair because the employer has failed to take

steps which fairness required, the question arises: '*if the employer had taken those steps could it have fairly dismissed the employee and would it have done so?*' (see ***Polkey v AE Dayton Services Ltd*** [1987] IRLR 503).

49. Guidance as to the *Polkey* exercise was given in *Software 2000 -v- Andrews* [2007] IRLR 568 which must be read subject to the repeal of Section 98A, but which otherwise speaks for itself. Similarly, in *Scope -v- Thornett [2007] IRLR 155,* Pill LJ said as follows at paragraph 34:

> "*... The employment tribunal's task, when deciding what compensation is just and equitable for future loss of earnings will almost inevitably involve consideration of uncertainties. There may be cases in which evidence to the contrary is so sparse that a tribunal should approach the question on the basis that loss of earnings in the employment would have continued indefinitely but, where there is evidence that it may not have been so, that evidence must be taken into account...*"

DISCUSSION AND CONCLUSIONS

Reason for dismissal

50. The reason for the dismissal was conduct, and in particular the belief that the Claimant had been guilty of multiple instances of call avoidance and absence without leave. The Claimant occasionally alluded to other reasons for the dismissal but did not pursue these with any vigour at all.

51. Mr Wall's evidence as to the reason for dismissal was convincing. He thought this was the worst case of AWOL and of call avoidance that he had ever seen. He thought the conduct was exceptionally serious and that dismissal was the appropriate sanction. It is notable also that Mr Wall's prior experience of the Claimant had been positive and the Claimant likewise was positive about Mr Wall.

Reasonable belief

52. There was a reasonable basis for the belief in the Claimant's wrongdoing. Ms Lesley's investigation produced a very strong *prima facie* case of wrongdoing.

53. In terms of call avoidance there was a reasonable basis to believe the Claimant had been doing this. The Claimant's calls had been listened to and Ms Lesley, analysed and summarised what this revealed at p.113 - 114. Further, the explanations were considered implausible by Mr Wall and Mr Smith. Very briefly:

    a. It was hugely implausible that either the Claimant or his managers would have allowed a situation to continue for months in which his headphones failed a significant part of the time. It was hugely implausible therefore that a faulty headset – the primary explanation - truly explained for instance, the Claimant being apparently silent on calls with customers. Further, the Claimant did not attempt to return customer calls where this happened and it was hugely implausible that this could generally be explained away by the customer having a private/withheld number, since that was the exception not the norm. It was reasonable to believe that the true explanation was that the Claimant was simply avoiding calls. More generally, while it was not literally impossible for the various explanations the Claimant gave to be true the decision makers were ideally placed to assess the likelihood of them being true, understanding the business and the way it worked as they did. There was undoubtedly a reasonable basis upon which they could and did disbelieve the Claimant.

54. In terms of AWOL, there were multiple occasions where the Claimant should have been at work but was not according to two different electronic systems recording on the one hand when he swiped in and out and on the other what work he had been doing. There was also a partial admission from the Claimant that he had been attending work 3 hours early and leaving 3 hours early (thus that he was AWOL for part of some shifts). In more detail:

    a. It was hugely implausible that on the very same days that the Claimant had problems swiping in and out that he then was unable to do any work. This required the coincidental failure of quite separate systems. It was further implausible because for the Claimant's explanation to work the problems would have needed to be strangely intermittent. During the impugned period of time (about three or four weeks) there were days when the Claimant was able to swipe in and to then log-on and work. Then days when he apparently was not able to do any of that; followed by days when he was able to do all of that. It was reasonable to believe that the true explanation was that the Claimant was AWOL. The decision makers had a very clear understanding of what IT issues there had been, the way in which such issues were resolved and how long this took. They were ideally placed to assess the credibility of the Claimant's explanations and considered the explanations totally lacking in credibility.

Reasonable investigation and procedural failures

55. There were some material shortcomings in the investigation process and in the procedure adopted.

56. The Claimant was not given the opportunity to listen to the telephone calls which Ms Lesley had listened to. The tribunal would not have considered this to be outside of the band if the Claimant had been given a copy of the documents Ms Lesley produced summarising the content of those calls. That is because she produced a very good, clear summary that made the issues in respect of the calls very plain and the calls were recent. However, the Claimant was neither given the chance to listen to the calls *nor* given the documents Ms Lesley's investigation produced.

57. Those documents set out a lot of information both in respect of apparent call avoidance and apparent AWOL. Although Ms Lesley and then Mr Wall went through those documents in the investigation hearing and the disciplinary hearing respectively, that was not an adequate substitute for the Claimant having the documents himself to quietly reflect on in preparation for the disciplinary hearing and later the appeal hearing. Without having those documents, it was difficult for the Claimant to 'fact manage' and generally to manage what upon analysis were the many allegations against him. The Tribunal considers that this was an occasion per the ACAS code set out above in which the Claimant should have been given the written evidence that the Respondent relied upon. By 'should' the tribunal means it is what any reasonable employer would have done.

58. The disciplinary charges were very poorly drafted. In terms of call avoidance, only ghosting was referred to, but it is clear that when it came to the disciplinary sanction, Mr Wall and then Mr Smith both had regard to wider issues of call avoidance than simply ghosting. Ghosting is one particular type of call avoidance and was not even the main or most serious call avoidance issue. The predominant allegation was that the Claimant had been silent on actual calls with customers. The sanction was ultimately applied then in respect of matters that went beyond the disciplinary charge.

59. The absence without leave charge was not particularised at all and given that the Claimant had only seen the sheet of allegations once at the investigation hearing, that did not give him a fair proper opportunity really to prepare for the disciplinary hearing.

There was also no warning of dismissal and that too is contrary to the paragraph 9 of the ACAS Code.

60. No reasonable employer would have drafted the charges so poorly in a way that did not identify the essence of the call avoidance issue or state the particulars of AWOL.

61. There was no letter of dismissal nor was the Claimant otherwise given detailed reasons for dismissal. This made preparation for the appeal hearing rather difficult since the detail of the reasons for the dismissal, including the fact that they went beyond the disciplinary charges, was not conveyed clearly to the Claimant. Nor was the Claimant given the written evidence (i.e., the investigation documents) in advance of the appeal hearing. The appeal hearing had no curative effect.

Sanction

62. The Claimant was found to be guilty of two heads of misconduct that were undoubtedly each gross misconduct: call avoidance and AWOL.

63. The very essence of what the Respondent does is customer service. The very essence of the Claimant's job was taking calls from customers and helping them with the issue that had prompted the call. Call avoidance was therefore a matter of the utmost seriousness. To connect to a call with a customer but then to be silent on the line or to go silent having greeted the customer is utterly dismal customer service. It is liable to upset and annoy customers and ultimately the business's most important client, Sky. Call avoidance of the sort which the Claimant was found guilty of was extremely serious indeed.

64. Absence without leave is a classic example of gross misconduct. Here it was repeated on many occasions within a short period.

65. Further, the Claimant did not in any meaningful way take any responsibility for any of the issues. The explanations that he offered were inadequate to explain the conduct and were, in essence, disbelieved.

66. The only matter that was properly explained were the few shifts in respect of which the hours the Claimant worked, were not the scheduled hours. There was an explanation for this: the Claimant was working the hours he wanted in order to care for his mother. Clearly that is a sympathetic explanation that has a degree of mitigatory force. However, it is inadequate to explain (and the Claimant does not in any event purport that it explains) the many occasions on which he was entirely absent on working days, nor does it explain the bizarre call avoidance behaviour when at work.

67. The Claimant had a few years service but the tribunal considers that to be totally outweighed by the gravity of the misconduct.

68. Overall the Tribunal has no hesitation at all in finding the dismissal was a sanction that was open to the Respondent for misconduct of the kind found. There is no doubt about this, but if there were, it would also be notable that the Respondent's disciplinary rules characterise 'absence without leave' as an act of gross misconduct that will usually lead to dismissal. They also characterise any activity that would or could jeopardise the Respondent's client relationship as gross misconduct. That plainly would include cutting calls with customers for no good reason.

<u>Overall conclusion on unfair dismissal</u>

69. The tribunal has stood backed and looked at matters in the round with *Taylor v OCS* group in mind. This is a case there were some significant departures from a fair

procedure, as noted above. These departures were such that in the tribunal's judgment they made the dismissal unfair applying the range of reasonable responses test. That is so notwithstanding the view the tribunal has formed of the exceptionally serious nature of the Claimant's misconduct.

Contribution

70. It falls to the tribunal to decide on the balance of probabilities whether or not the Claimant was in fact guilty of the conduct which the Respondent says caused or contributed to his dismissal.

71. The Tribunal considers that the allegations of apparent call avoidance summarised at p113-4 are indeed well founded.

72. Firstly, the tribunal accepts that the summary and analysis at p.113 - 114 of the bundle are an accurate reflection of what happened on the calls that Ms Lesley listened to. To recap, there were multiple examples of the Claimant taking a call from a customer and then going silent either from the outset or early in the call. There were other examples too: the Claimant telling a customer he/she would be transferred and then not transferring the customer or actually transferring a customer then staying on his line so that no incoming calls could arrive. The tribunal found Ms Lesley to be a very credible, straightforward and helpful witness. The tribunal was satisfied that Ms Lesley had put a lot of work into the investigation she conducted and had faithfully summarised what she found. She had no axe to grind with the Claimant.

73. Secondly, the tribunal rejects the Claimant's evidence which seeks to explain away the apparent call avoidance. The primary explanation that the Claimant offered was that there was a longstanding problem with the microphone on his headset. This created an appearance that he had been silent on calls because neither the customer nor the recording of the call picked up what he was saying. In summary the tribunal rejects this because:

    a. It is odd that these problems should affect some calls but not others on an apparently random basis. It is of course possible that there might be an intermittent fault with the headset but the Tribunal does not accept that was in fact the issue.
    b. The Tribunal thought it significant that the Claimant's evidence was that the headset issue affected some 30% of his calls. If the Claimant's explanation for being silent on calls were true, then, this was not some minor niggle with his headset that he could struggle on with. If customers could not hear him on around 30% of his calls that was a fundamental obstacle to him doing his job properly. The Claimant's evidence was that the issue had been ongoing since September 2016. The tribunal considered it utterly implausible that either the Claimant or the Respondent would have allowed this situation to continue for a lengthy period of time in the way that on the Claimant's account (which the tribunal therefore rejects) it did. In more detail:
    c. The Claimant was pressed in evidence on whether he had ever reported this issue. He claimed that he had on two occasions, once in September 2016 and once around Christmas 2016. The tribunal finds this evidence wholly incredible:
        i. Firstly, if the Claimant really had problems with his headphones that affected about 30% of his calls over a period of about six or seven months it is totally implausible that he would report it just twice and then only informally. The Claimant was in a sales-type job and he was rated *and rewarded* on the basis of his performance. He had every incentive to sort out the headset if it really were the problem. But he did not do so. The Claimant was a longstanding and

confident employee. He certainly had the wherewithal and confidence to escalate complaints (as he in fact did in respect of flexible working). If in truth his headset was not working and if in truth he raised the issue with local management but got no joy, he could and would have escalated the matter.

ii. Secondly, the Claimant's explanation for not taking further action was that he would have had to pay £65 to replace the headset. The tribunal does not accept this evidence. It prefers the Respondent's evidence that there was no requirement to pay for a replacement headset unless the operative was culpable in breaking the old set (and there was no suggestion that the Claimant was). Further, the economics of the Claimant's position do not stack up. He was paid about £50 per week in performance based commission and if 30% of his calls were impeded by a broken microphone it would plainly have made sense to invest in a new headset. If not immediately certainly within a short period of the problem persisting.

d. The Tribunal simply does not believe that the Claimant's managers would have let a serious headset issue go on for any significant period of time. The Respondent operates in a highly regulated, strict and closely monitored environment where performance targets (for everyone including managers) are of the essence. Having an operative who is unable to communicate with customers about 30% of the time because of a broken headset is a scenario that the Respondent simply would not have tolerated. It would be in nobody's interests and indeed, it would be against everybody's interests. The solution to the problem was £65 for a change of headset. If truly there was a headset problem that solution would have been adopted very quickly.

74. Further, it is telling that the Claimant did not call customers back when he had abortive calls with them. Where a call with a customer was disconnected, whether because of a technology problem or otherwise, it was the operative's duty to call the customer back. The Clamant knew this. Yet he did not call customers back on those occasion on which he said the apparent call avoidance could be explained by his headset.

75. The Claimant's evidence as to why he did not call customers back in such circumstances was firstly because his headphones were not working and secondly because the customer's numbers might not have been available. As to the former, the tribunal rejects this explanation. In reality, it underlines the importance of having a working headset and the implausibility of the Claimant's case that he did not have a working headset, raised the matter twice and then let things lie. Further, the Claimant took no steps to ensure that the customer was called back by anyone else. As to the latter, the tribunal also rejects this explanation, because it was the exception rather than the norm for the customer's number to be withheld or unavailable.

76. The Tribunal finds that the Claimant's call avoidance was undoubtedly blameworthy conduct; but that is to understate it. It was incredibly serious misconduct. It involved messing with customers, wasting their time, and was just the sort of thing that might lead to poor feedback for the Respondent. Ultimately to treat customers in this was the very antithesis of the Claimant's job – the essence of which was to provide good customer service and to retain business by doing so.

77. Turning to the AWOL issue. The tribunal finds that the Claimant was AWOL on the occasions set out on p.112.

78. The Claimant says that there were times that he was unable to swipe in because his swipe card did not work. On those occasions he says the receptionist let him in. He claims that he was simultaneously unable to log into the IT system, or parts of the system so was unable to work. When he was pressed on this explanation, and how it

was that the periods of apparent AWOL were punctuated by periods of attendance at work, his explanation developed.

79. The Claimant claimed that he had been given a new swipe card which functioned for a while but then stopped. In order for this explanation to work it had to be repeated because the sequence of being apparently absent without leave then attending work then being apparently absent repeated several times during the relevant period (see p.112). When this was pointed out to the Claimant his explanation developed and he said that there had indeed been multiple swipe card failures followed by multiple new swipe cards. On those days when he was apparently absent, he maintained, he was in fact in work having been let in by the receptionist.

80. In order for this explanation to work the Claimant had to yet further explain why it was that on those days that he appeared to be absent based on the swipe records he had apparently done no work.

81. Quite separately from the swipe card system there is an IT system which users log into using a desktop computer at a desk in the usual way. The IT system has detailed monitoring software which enables a manager reviewing an operative's activity to see what he/she has done on a given shift. The records showed that on those occasions that the Claimant had not swiped in or out, he had also done no work. This deeply corroborated the *prima facie* case that the Claimant had indeed been absent.

82. The Claimant sought to explain this by reference to IT problems. He said he had login problems. In order for these login problems to work as an explanation, they also had to be intermittent because during the relevant period there were many times that the Claimant *did* logon and take calls from customers (although see above he did not do so properly but rather was guilty of call avoidance having logged on). The Claimant's case was therefore that he had intermittent login problems.

83. On the Claimant's case, then, there were a large number of occasions on which he was at work (although the swipe records suggested otherwise) and on which he was unable to work because he could not log-in. The records showed that there must be 14 such occasions in a period of about three weeks. On each such occasion the shift was 8 hours long.

84. The tribunal asked the Claimant what it is that he was actually doing on those 14, eight hour shifts, if he was at work, unable to log-in. His answer was that his managers had authorised him simply to listen in on other colleagues' calls. So he did no productive work at all himself but sat listening to other people's calls.

85. On the Claimant's case then, in a period of about three weeks he spent up to 14 x 8 hours, i.e., 112 hours, at work doing nothing productive.

86. It seems vanishingly unlikely that the Respondent could or would have allowed this state of affairs to arise or continue. It is just so wasteful. Mr Wall's evidence was that there were a few IT problems at this time. However, they were problems that could be and were sorted out quickly and as a matter of priority. Why? Because the Respondent simply wanted its workers to work. It was truly absurd, in his view, to suggest that an IT problem would have been allowed to fester for so long and that the Claimant would have been allowed simply to listen to other people's calls for the duration of multiple shifts. The tribunal accepts Mr Wall's evidence which was credibly given and is corroborated by the business reality of the situation.

87. Overall the tribunal finds the Claimant's explanation of the apparent AWOL to be deeply implausible, requiring as it does a series of matters to coincide in a highly improbable way. Further the tribunal had the opportunity to assess the Claimant's evidence first-hand and did not find him an impressive witness. The tribunal had the

distinct sense that the Claimant was 'firefighting'. Each time, a problem with the explanation he had given was pointed out, a new limb to the story had to be given in order to 'firefight' the problem. The tribunal did not find the Claimant's account credible. Overall, the tribunal considers it far more likely that there were 14 occasions on which the Claimant was AWOL for an entire shift.

88. The tribunal considers that repeated absence without leave for whole shifts was plainly blameworthy conduct to say the least. It was obvious and repeated gross misconduct for which no mitigation was offered (the approach rather was simply to deny).

89. There were also some days where the Claimant admits that he worked different hours to those he was scheduled to work. The reason for working his own hours on those shifts was because the Claimant was caring for his mother. This was also blameworthy conduct but it was less serious (1) because the Claimant at least was working the some hours albeit not at the right times; (2) because there is a sympathetic explanation for what he was doing; and (3) he must get some credit for admitting what he had done. Given the extent of the other blameworthy conduct the conduct referred to in this paragraph takes matters no further.

90. There can be no doubt whatsoever that the blameworthy conduct found here caused or contributed to the Claimant's dismissal, indeed it was *the* cause of his dismissal.

91. Overall, there were multiple instances of gross misconduct which were unmitigated to any material extent. It seems to the tribunal that the Claimant's misconduct was so severe and so extensive that in the assessment of what is just and equitable it totally overwhelms the scales.

92. It is true that there were some procedural shortcomings in the procedure that the Respondent adopted but, in the tribunal's assessment of the justice and equity of the situation, those shortcomings are totally eclipsed by the nature and extent of the Claimant's misconduct as the tribunal has found it.

93. The tribunal does not consider that it would be just and equitable to award either a basic award or a compensatory award and reduces both to nil. The tribunal fully acknowledges that this is an unusual finding. However, this is an unusual case. It is unusual for misconduct to be so gross, so extensive and so unmitigated.

Polkey

94. The Tribunal makes an 85% *Polkey* reduction. It can say with a very high degree of confidence, that the outcome of the internal disciplinary process would not have been any different if the Respondent had acted in all respects fairly.

95. The *prima facie* case against the Claimant as revealed by Ms Lesley's investigation documents was very strong. It would always have been very difficult for the Claimant to persuade the Respondent that the apparent wrongdoing or the sting of it could be explained away.

96. The issues that led to the Claimant's dismissal have had a good airing in this litigation. In this 'cards on the table' litigation the Claimant has seen the investigation documentation, the other disclosure documents, the Respondent's Defence and heard the Respondent's witnesses. His attempt to explain the apparent misconduct revealed by the investigation has been very unconvincing to say the least. Employment tribunal proceedings are not the same thing as a well-run internal disciplinary process: that must be acknowledged. But equally, one cannot ignore the implausibility of the Claimant's explanation to the allegations against him that these

proceedings have revealed when assessing what would have happened in properly run internal disciplinary proceedings.

97. The tribunal's only real hesitation is whether the reduction should be 100% or a slightly lower figure. Ultimately the tribunal considers that a slightly lower figure is more appropriate. It is difficult to be 100% of anything that involves a counter-factual assessment (in this case an assessment of what would have happened had the Respondent acted fairly). The Claimant does present charismatically and was liked within the business so it is just possible (but very unlikely) that he might have persuaded the Respondent of his explanations and/or to take a course short of dismissal given a fairer opportunity to do so in the internal process.

98. All in all the Tribunal considers that there is a chance that an entirely fair procedure might have led to a different conclusion, but that that is a very small chance. An 85% *Polkey* reduction is appropriate.

Employment Judge Dyal

Date: 03.05.2018

REASONS SENT TO THE PARTIES ON

18 May 2018

FOR THE TRIBUNAL OFFICE