EMPLOYMENT TRIBUNALS

Claimant: Mrs G Williams

Respondent: Wilko Ltd

Heard at: **Cardiff (by video (CVP))** **On:** **12 June 2023**

Before: **Employment Judge Leith**

Representation
Claimant: Mr Gloag (Counsel)
Respondent: Mr Leonhardt (Counsel)

JUDGMENT

1. The complaint of unfair dismissal is well founded, and succeeds.
2. The claimant contributed to her dismissal by her own conduct, and her basic and compensatory award will be reduced by 50% to reflect that.
3. The complaint of wrongful dismissal is not well founded, and is dismissed.

REASONS

Claims and issues

1. The claimant claims unfair dismissal and breach of contract (wrongful dismissal).

2. The issues for the Tribunal to consider were discussed and agreed at the outset of the hearing, as follows:

    Unfair dismissal

    a. It is common ground that the claimant was dismissed
    b. What was the reason or principal reason for dismissal? The respondent says the reason was conduct. The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.

c. If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? In particular:
   i. Did the respondent have reasonable grounds for that belief?
   ii. At the time the belief was formed, had the respondent carried out a reasonable investigation?
   iii. Did the respondent otherwise act in a procedurally fair manner?
   iv. Was dismissal within the range of reasonable responses?
d. If the claimant was unfairly dismissed, is there a chance that she would have been fairly dismissed anyway if a fair procedure had been followed? If so, should her compensation be reduced, and by how much?
e. If the claimant was unfairly dismissed, did she cause or contribute other dismissal by blameworthy conduct? If so, would be it be just and equitable to reduce her basic award and/or her compensatory award, and by what proportion?

Breach of contract

f. It is common ground that the claimant was not paid for his notice period.
g. Was the claimant guilty of gross misconduct?

Procedure, documents and evidence heard

3. On behalf of the respondent, I heard evidence from the following:
   a. Miss Sian John, Regional Manager. Miss John conducted the investigation into the alleged misconduct.
   b. Mrs Leila Tambling, Regional Manager (at the relevant time). Mrs Tambling conducted the disciplinary hearing and took the decision to dismiss the Claimant.
   c. Mr Edward Spence, Divisional ER Partner (at the relevant time). Mr Spence held the listening group at the Barry store, and attended the subsequent meetings with colleagues along with Miss John which led to the disciplinary policy being invoked. Mr Spence also attended meetings between Mr Barnes, the appeal officer, and various witnesses.

4. On behalf of the claimant, I heard evidence from:
   a. The claimant herself
   b. Miss Maria Parry, the Store Manager at the time of the misconduct relied upon by the respondent in dismissing the claimant.

5. There was also in evidence before me an agreed bundle of 121 pages.

6. A number of conversations/meetings had been recorded by the respondent, but not transcribed. I indicated to the parties that I would only listen to recordings to which I was specifically directed, or which were played to the witnesses during the course of cross-examination. Some extracts of a conversation between Mr Barnes (the Appeal Officer) and Miss Hussain (the Deputy Store Manager of the Barry store) were played

to the Claimant during her cross-examination. I was not referred to any other recordings.

7. At the conclusion of the evidence, I had the benefit of helpful submissions from Mr Gloag for the Claimant, and Mr Leonhardt for the Respondent. I reserved my decision, which I give now along with these written reasons.

Factual findings

8. I make the following findings of fact on balance of probabilities. I have not made express findings on every issue canvassed in evidence, but I have focused on those necessary to reach a conclusion on the issues before the Tribunal.

9. The respondent is a retailer with over 400 stores in the United Kingdom. It employs approximately 16,000 staff.

10. The claimant was employed by the Respondent from 22 August 2005. At the relevant times she was employed as a Team Supervisor in the respondent's Barry store. It was common ground that, prior to the incidents at the heart of this claim, she had a clean disciplinary record.

11. The Respondent has a No Smoking Policy. The version in the bundle was introduced in July 2014. For retail employees, the policy says this:

> "Team members are not permitted to smoke or use any tobacco related products in or on any part of wilko property, including inside or outside the front or back entrance of any store or goods inwards areas."

12. In respect of rest periods, the policy says this:

> "You must seek authorisation from your line manager if you wish to leave the premises to smoke whilst on a paid rest period. Failure to obtain permission to leave the company premises during a paid rest period, or abuse of rest periods, will be subject to normal disciplinary procedures. You must always follow the signing in/out procedures when leaving the premises.
>
> Team members may smoke on agreed unpaid breaks away from the site/store if they wish to do so, but no additional break for smoking will be allowed."

13. The respondent's disciplinary policy contains a non-exhaustive list of examples of misconduct and gross misconduct. "Smoking in breach of company No Smoking policy (including electronic smoking devices)" is listed as gross misconduct. "Failure to follow company policy and procedure, or reasonable instructions" is listed as misconduct. "Abuse of tea/lunch break rules" is one specific example given of a failure to follow company policy or procedure.

14. In February 2022, the Barry store was identified by the respondent as one of 15 stores that were underperforming. On 16 March 2022 Mr

Spence, Divisional ER Partner, held a listening group in the Barry store. The purpose of the listening group was to allow team members to approach him to discuss confidential issues about their employment and any issues in store. During that process, a number of team members made allegations of bullying, discrimination and favouritism against Mrs Parry, the Store Manager.

15. As a result of that, on 30 March 2022 Miss John, the Regional Manager, spoke individually to 15 team members at the Barry store. She was accompanied at those meetings by Mr Spence. Those meetings were apparently recorded, although I was not referred to the recordings, and the contents of them were not shared with the claimant.

16. The evidence of Mr Spencer and Miss John was that the feedback they received from those meetings was that the claimant, Mrs Parry and Miss Morris would go on several smoke breaks during working time, taken near the back door of the store. I accept their evidence in that regard. Mr Spence took the decision to refer the matter to the respondent's Profit Protection Team. This was because what was being alleged may have constituted a theft of company time, as well as a breach of internal policy.

17. A Mr Barrell from the Profit Protection Team reviewed CCTV footage from the Barry store. On 31 March 2022 emailed Miss John and Mr Spence setting out his findings under three headings. Under the first heading, "Smoking whilst on company property", he said this:

> "On 18/03/22, the following times detail individuals that were seen to be smoking whilst on company property which included Store Manager & 2 x Team Supervisors:
>
> - 11:20am – 11:25am
> - 11:48am – 11:59am
> - 12:56pm – 13:08pm
> - 13:48pm – 13:56pm
> - 15:27pm – 15:35pm
> - 16:27pm – 16:36pm
> - 17:05pm – 17:16pm
>
> On 19/03/22, the following times detail individuals that were seen to be smoking whilst on company property, again, which included Store Manager & 2 x Team Supervisors:
>
> - 10:18am – 10:21am
> - 10:53am – 11.01am
> - 11:42am – 11:49am
> - 12:30pm – 12:37pm
> - 12:51pm – 12:56pm
> - 13:42pm – 13:46pm
> - 14:06pm – 14:17pm"

18. The second heading in Mr Barrell's email was "SSOW Concern", which related to an allegation in respect of the Store Manager. The third heading was "Back Door Control/Security Concerns". Under that heading, Mr

Barrell indicated that the back door was used as a “free for all”, and that the Back Door Access Control sheet was not being completed when the back door was used.

19. The claimant was at work on both 18 and 19 March 2022, although she only worked for part of the day (so could not have been present at each of the times highlighted by Mr Barrell).

20. Miss John decided that a formal investigation was required. Formal investigations were also triggered regarding Mrs Parry and Miss Morris. Both Mrs Parry and Miss Morris resigned before an investigation meeting could take place.

21. Miss John arranged for a letter to be sent to the claimant on 8 April 2022, inviting her to a meeting on 11 April 2022. The letter informed the claimant that she was entitled to be accompanied to the meeting. The claimant chose not to be accompanied.

22. A Miss Purdue attended the meeting as notetaker. A copy of her handwritten notes was in evidence before me. The claimant confirmed that those notes were accurate.

23. The claimant explained in the investigation meeting that her understanding was that the smoking area was at the back of the store, not in the building, and that she had always smoked there. She explained that managers and assistant managers had seen her smoking there over the years, and that nothing had ever been said. When asked if she was aware of the No Smoking policy, the claimant said “yes, not to smoke in store”. Miss John then read the No Smoking policy to her, to which the claimant responded that she was not aware of it. Miss John asked if anyone else smoked in the same area. The claimant named Mrs Parry, Miss Morris and “evenings Dave”, and indicated that there were a couple of other people. The claimant asked why, if she was not permitted to smoke where she had been smoking, no one had ever challenged her on it.

24. Miss John then asked the claimant if she signed in and out for breaks. The claimant explained that she had never done so, and no one had ever said anything about it.

25. Miss John then asked the claimant about her knowledge of the back door policy. The claimant explained that she was aware of the back door log and that it should be signed when the back door is opened. When asked, she explained that she did not know the purpose of it.

26. Miss John asked the claimant about her breaks. The claimant explained that she had been having mental issues due to the menopause, and that she had asked not to have one break but instead to be able to go out for a cigarette when she needed one. She explained that this had verbally agreed by Mrs Parry, although it had not been documented. She was asked if she had ever exceeded 15 minutes break allocation in total, and she replied that she did not think so. She did explain that sometimes when she had gone out for a cigarette, Mrs Parry may then go out and talk to her about work, which was working time rather than break time.

27. Miss John asked the claimant if she had anything else she wanted to add. This exchange then followed:

> "GW I want to make sure the notes are taken properly. Maria smoked there + you was there one or two times when Maria was smoking + no action was taken, I don't expect my regional Manager to admit to seeing it or taking any action.
>
> SJ When I have arrived at the store I have seen Maria smoking at the end of the wall, to my knowledge this is the designated area + Maria was far enough from the building to prevent any accidents, incidents."

28. The meeting was adjourned at 9.35am, then reconvened at 10.06am. Miss John explained to the claimant that she had checked the claimant's training logs. She noted that the claimant had received training on the back door log on 6 August 2020, and training on the Fire & Evacuation policy (which referred to the No Smoking policy) on 8 July 2020 and 10 May 2021. The claimant explained to Miss John that the training records were just put in front of her to sign, and that the policies would not be attached to the signing sheet.

29. Miss John explained that she was suspending the claimant with immediate effect, and that she would be invited to a disciplinary hearing.

30. On the same day, Miss John wrote to the claimant to invite her to a disciplinary hearing. The letter included the evidence relied upon, namely the notes of the meeting with Miss John, photographs of the claimant smoking in the Goods In area, and the relevant policies and training records. The hearing was to consider three allegations:

    a. Serious breach of smoking policy – Smoking on company property
    b. Abuse of tea & lunch break rules
    c. Failure to comply with procedures in shrink audit namely signing in/out & back door log

31. The hearing was to take place on 15 April 2022. The claimant's Trade Union representative was not available on that date, so the hearing was postponed until 22 April 2022.

32. The disciplinary hearing was chaired by Mrs Tambling. There were no notes or minutes of the hearing on 22 April 2022 in evidence.

33. Following the hearing, Mrs Tambling decided that the allegations against the claimant were substantiated, and constituted gross misconduct. She decided to summarily dismiss the claimant. She notified the claimant of her decision in a letter dated 25 April 2022. She set out the rationale for her decision in the following terms:

> "Failure to follow company policies on 3 counts. Smoking policy, Tea and Lunch Break allowances and signing in and out including the back door log. As an employee of over 17 years to not follow these 3 policies is unacceptable.

> During your formal meeting you did not deny any of the allegations, you stated that your line manager was aware that you were smoking in goods inwards and taking more breaks than permitted. You stated to me that as you had been allowed to breach these polices by the Store Manager you are not accountable.
>
> I find this stance very concerning as you knew that you were committing these breaches, team members were also witnessing you do this. As a member of the management team I feel that you had a obligation to follow our policies and procedures, if you had witnessed the Store Manager breaching policy in front of you there are many available routes for you to follow to report this, however you chose to benefit from this personally in terms of smoking on company property, taking additional break times and not following our back door policy which is designed to stop potential shrink, all of these are deemed gross misconduct and therefore I made the decision to summarily dismiss you from your role."

34. Mrs Tambling's evidence to the Tribunal was somewhat sparse. In the course of cross-examination her evidence was that she had seen the handwritten notes of the meeting on 11 April 2022, but could not recall seeing any other evidence. She could not recall whether she had spoken to any other witnesses either before or after the hearing. In particular, she could not recall whether she had spoken to Miss John, or Mrs Parry. She could not recall whether she had found evidence that people were adhering to the back door log when they went for breaks, or whether she had found evidence that the claimant was taking more than 15 minutes for her breaks.

35. The claimant was given the opportunity to appeal against Mrs Tambling's decision. She emailed Mr Spence on 29 April 2022 indicating that she wished to appeal, as follows:

> "I had been smoking outside the store in the same area for 17 years. I was never informed of the location of a "Designated Smoking Area" at anytime.
> It had always been common practice for management and others to smoke in the area outside the store.
> No action was ever taken against me for smoking in that area by management or indeed upper management who were aware of it happening.
> If a designated smoking area had been implemented, I would have used it without hesitation.
> If clear notices had been put up with regard to a designated smoking area, this would have avoided any vagaries as to where and where not to smoke.
> Breaks were taken with the full consent of management. I made this request due to severe menopausal symptoms.
> It was agreed that this was the best cause of action thus avoiding need to take sick leave which could have led to it being long term sick.

> It might have been more prudent of me to have insisted on this agreement being placed on a more formal footing which would have avoided any misinterpretation by others.
> I was unaware of the full extent of the backdoor procedures. It was common practice for all team members and management not to sign in and out on every occasion the back door was used. I feel that under these circumstances, dismissal is too harsh. The severe effects of menopausal symptoms should have been taken into consideration and classed as a disability. My length of service and unblemished work record should also been taken into consideration"

36. Mr Spence emailed the claimant on 6 May 2022 asking if she was available to attend an appeal hearing on 17 May 2022. The claimant responded on the same day indicating that she was suffering from high anxiety levels, and asking if her appeal could be considered without the need for her to attend another formal meeting.

37. Mr Spence emailed the claimant again on 9 May 2022 asking if she would be willing to join the meeting by conference call. The claimant responded as follows:

> "Hi Eddie.
> I will not be able to attend and give you full instruction to proceed in my absence and then inform me at your earliest convenience via email of the outcome.
> Have a good day,,, Gill"

38. Mr Spence responded on 11 May 2022 to explain that that Craig Barnes, Regional Manager, had been assigned as hearing officer. He indicated that Mr Barnes would complete the appeal investigation and confirm his outcome in writing.

39. On 17 May 2022, Mr Barnes held an investigation meeting with Duncan Smith. Mr Smith had been store manager of the Barry store for 18 months in 2017 – 2018. Mr Spence also attended that meeting. Mr Smith explained to Mr Barnes that the smoking areas were at the end of the driveway, and that team members couldn't smoke on the driveway as it was the respondent's property.

40. On the same date, Mr Barnes met Marek Jones. Mr Jones had been the store manager of the Barry store for 8 years, from 2008 to 2016. Mr Spence attended that meeting. Mr Jones informed Mr Barnes that during his time managing the Barry store, smokers were not permitted to smoke anywhere on the respondent's property, and that he had never had to ask a member of staff to leave company property to smoke as they all did so.

41. Mr Barnes also met with Zarah Hussain, the Assistant Manager of the Barry store. The meeting was recorded, and some extracts of the recording were played during the Tribunal hearing. Miss Hussain explained to Mr Barnes that the smoking area was at the end of the respondent's property, and that staff were not permitted to smoke in the yard. Miss Hussain had had two spells working at the Barry store. She explained that during her first spell working there, the smoking policy had

been observed in that staff did not smoke on site. During her second spell at the store, the policy was no longer being observed at the store.

42. Mr Barnes wrote to the claimant on 20 May 2022 to provide her with the outcome of her appeal. Mr Barnes did not uphold the appeal. It is common ground that Mr Barnes did not share the evidence he had gathered with the claimant before coming to his decision.

43. Regarding the first allegation, of smoking on company property, Mr Barnes said this:

> During the course of my investigation, I spoke to previous Store Managers and the current Assistant Manager of the Barry store. In terms of this point none of these individuals supported your claim that you had been allowed to smoke on company property at any time. All were very clear in their understanding of our policy, that being the company has a clear nonsmoking policy and does not allow team members to smoke on any part of its property including our goods inwards areas. A designated smoking area had been set up at the rear of the store off company property, they were very clear about this and also stated that they observed you using the designated area on several occasions during their tenures as Store Manager.
>
> At no time did they observe you smoking in goods inwards (CCTV showed you smoking up to the roller shutter which is a clear breach) and stated they would have investigated this matter if they had observed you doing so. They also stated that at no time had a senior member of management spoken to them about observing you smoking in goods inwards. I can confirm that you were observed smoking in goods inwards by the current Assistant Manager, you did this with 2 other members of staff, all of which have been formally investigated for the same allegation, however these individuals no longer work for the company and therefore cannot be interviewed as part of this investigation.
>
> Our nonsmoking status as a company is covered in our induction process and is covered on training on Safe Systems of Work (SSOW), specifically the fire risk assessment which you have passed annual on 10th May 2021, therefore I am comfortable that you knew that smoking on our premises was a breach of policy. Smoking on company property is deemed Gross Misconduct under our discipline policy. I do not support this point.

44. Regarding the second allegation, about break times, he said this:

> “Regarding this point I wished to seek clarity if this agreement had been communicated to the wider management team in the store as your statement does not include those individuals you had agreed this with. On asking if you had a local agreement was in place no record of any conversation had been recorded or communicated. I would have expected that a team member with these specific requirements as an adjustment would have been known to other members of the management team, however when asked they

were not aware of this agreement. In addition, no referral to Occupational Health had been requested to ask for recommendations to increase the number of breaks as this would have been recorded in writing. I must point out that when taking these 'additional' breaks you then breached the smoking policy by smoking cigarettes in our goods inwards area. Both these breaches are considered Gross Misconduct under our discipline policy. I do not support this point.

45. Regarding the third allegation, about the back door log, he said this:

> "Signing in and out of our back door has been a recent addition to the companies process to reduce our shrink. As part of this introduction of this new process all team members were required to complete 'shrink school', this was recorded within our learning management system to ensure team member compliance. On investigation this was covered at the Barry store, so all were aware of the need to sign the log on exiting the rear goods inwards door. For those observed exiting the rear door the log had not been completed when certain individuals had left the store. This is confirmed by CCTV footage, which was taken as part of the evidence, this clearly showed you exiting the rear door to then smoke on company premises and did not sign the log.

46. Regarding the claimant's menopausal symptoms, he said this:

> In terms of the company not considering the effects of menopausal symptoms and classing this as a disability we have no record in store that discussions with the management team had taken place or further advise had been requested by the Store Manager in relation to whether these symptoms would be classed as a disability, or even any adjustments had been agreed and put in place. As the previous Store Manager no longer works for the company, I cannot substantiate that they were aware of your symptoms and therefore agreeing to further adjustments. However, I do fail to understand how this would have mitigated the fact that the extra breaks taken were then used to breach a long-standing policy in relation to smoking on our premises. Your long service would have been considered as part of the decision however I must be clear with you that smoking on company premises is a very serious offence whereby the company takes a zero tolerant approach classing this as Gross Misconduct. I therefore do not support this point.

47. Mr Barnes did not give evidence before the Tribunal. Mr Spence's evidence was that he would have given his opinion to Mr Barnes, but that it was Mr Barnes' decision. His evidence, albeit given for the first time in the course of re-examination, was that in every case he has been involved in where a breach of the No Smoking policy is alleged, the employee has been dismissed.

<u>Factual findings for breach of contract/contributory conduct</u>

48. Because there is a claim for breach of contract, and because the respondent relies upon contributory conduct, I make the following findings of fact regarding the claimant's conduct.

49. The claimant accepted that she had smoked on the respondent's premises. The claimant accepted also that that was a breach of the respondent's No Smoking Policy, although her evidence was that she was not aware of it at the time.

50. The Respondent's Fire & Evacuation policy noted that "smoking including e-cigarettes is not allowed on any part of the respondent's premises including loading bays and delivery yards". The policy was a relatively short one; it took up only one A4 page.

51. The claimant undertook online training on the respondent's Fire & Evacuation policy on 8 July 2020 and 10 May 2021. Her evidence before the Tribunal was that she had had to completed an online test on the respondent's Learning Management System, and that she didn't look at the policy before undertaking the test on either occasion. Her evidence was that she didn't need to look at the policy because she knew the answers "inside out". Her evidence was that even if she had looked at the policy before completing the online test, she wouldn't have noticed the reference to smoking.

52. Mrs Parry's evidence was that Miss John had seen her smoking in the goods-in area, and had never taken any action about it. Under cross-examination, Mrs Parry was somewhat vague about exactly where Miss John had seen her smoking. Her explanation was that Miss John had seen her doing so on a number of occasions, in various parts of the back yard.

53. The Tribunal did not have the benefit of a site plan, so has had to make findings based on the descriptions given by the witnesses. The terms "Goods In" area and "yard" appeared to be used interchangeably for the area outside the back door of the store.

54. Miss John's evidence to the Tribunal was that she had seen Mrs Parry smoking in the designated smoking area, which was on a public path, not on the respondent's property. Her evidence was that that was on the side of the building, and could be accessed through either the front or the back door. That is somewhat different to the answer she gave when the claimant raised the point in the investigation meeting (quoted in paragraph 27 above).

55. In my judgment, if Miss John had believed that Mrs Parry had been smoking off site, she would simply have said so in the meeting on 11 April. The comment about Mrs Parry being "far enough from the building to prevent any accidents, incidents" would not have added anything. That comment tends, in my judgment to suggest that Miss John had seen Mrs Parry smoking in the yard, but had let it go on the basis that she was far enough away from the back door. Therefore I prefer the evidence of Mrs Parry on the point. I find that Miss John had on occasion seen Mrs Parry smoking in the yard (albeit not right next to the back door).

56. The claimant accepted that she had breached the back door policy by not signing the Access Control sheet every time she used the back door.

57. In 2020, the staff at the Barry store undertook training on the respondent's "Think Shrink" process for Goods-In. The process required that the Backdoor Access Control sheet should be completed every time the back door was opened. The claimant signed a training record on 6 August 2020, confirming that she had received the training and fully understood her responsibilities. The claimant's evidence to Miss John in the investigation meeting was that she had not read the attachment and she didn't think the policy was even attached to the signing sheet. Her evidence before the Tribunal was that she couldn't remember whether the document was attached to the signing sheet or not, but she would not have read it either way. It was put to her in cross-examination that it was part of her job to read relevant company policies. Her evidence was that she hadn't really thought about it, but that as far as she was concerned it wasn't an important part of running the store.

58. The claimant's evidence was that even if a policy or document was attached to the back of a signature sheet, such as the one she signed regarding the "Think Shrink" training, she wouldn't have seen it. When it was put to her that she would only have needed to have turned the page to have seen it, her evidence was that she wouldn't have had time to do it, nobody would have checked, and she wouldn't have thought about it. The evidence the claimant gave to the Tribunal regarding both the Fire & Evacuation policy and the "Think Shrink" process demonstrated a notably casual approach to the respondent's policies.

59. Mrs Parry's evidence to the Tribunal was that the claimant had informed her that she was suffering severe anxiety effects due to the menopause. Her evidence was that to avoid the claimant going off sick, she agreed that she could take breaks as and when she needed them. Mrs Parry's evidence was that that discussion took place in her office, and she kept it confidential at the claimant's request. Mrs Parry's evidence was internally consistent, and was consistent with that given by the claimant to Miss John during the investigation.

60. Making such an adjustment without seeking medical input, and then failing to document it, may be thought to be an unusual management practice. It may very well have given Mrs Parry some difficulty with her own line manager (had she remained in employment). But that is not evidence that it did not happen. I accept the evidence of the claimant and Mrs Parry that an adjustment was agreed between them allowing the claimant to split up her break and go for a cigarette as and when required.

Law

Unfair dismissal

61. Section 94 of the Employment Rights Act 1996 confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under section 111. The employee must show that they were dismissed by the respondent under section 95.

62. Section 98 of the 1996 Act deals with the fairness of dismissals. There are two stages within section 98. First, the employer must show that it had a potentially fair reason for the dismissal within section 98(2). Second, if the respondent shows that it had a potentially fair reason for the dismissal, the Tribunal must consider, without there being any burden of proof on either party, whether the respondent acted fairly or unfairly in dismissing for that reason.

63. Misconduct is a potentially fair reason for dismissal under section 98(2).

64. Section 98(4) deals with fairness generally and provides that the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and shall be determined in accordance with equity and the substantial merits of the case.

65. In misconduct dismissals, there is well-established guidance for Tribunals on fairness within section 98(4) in the decisions in *Burchell v British Home Stores* [1978] IRLR 379 and *Post Office v Foley* [2000] IRLR 827. The Tribunal must decide whether the employer had a genuine belief in the employee's guilt. Then the Tribunal must decide whether the employer held such genuine belief on reasonable grounds and after carrying out a reasonable investigation. In all aspects of the case, including the investigation, the grounds for belief, the penalty imposed, and the procedure followed, in deciding whether the employer acted reasonably or unreasonably within section 98(4), the Tribunal must decide whether the employer acted within the band or range of reasonable responses open to an employer in the circumstances. It is immaterial how the Tribunal would have handled the events or what decision it would have made, and the Tribunal must not substitute its view for that of the reasonable employer (*Iceland Frozen Foods Limited v Jones* [1982] IRLR 439, *Sainsbury's Supermarkets Limited v Hitt* [2003] IRLR 23, and *London Ambulance Service NHS Trust v Small* [2009] IRLR 563)

Polkey

66. In the case of *Polkey v AE Dayton Services Ltd* [1987] UKHL 8, the House of Lords set down the principles on which a Tribunal may make an adjustment to a compensatory award on the grounds that if a fair process had been followed by the respondent in dealing with the claimant's case, the claimant might have been fairly dismissed. Further guidance was given in the cases of *Software 2000 Ltd v Andrews* [2007] ICR 825; *W Devis & Sons Ltd v Atkins* [1977] 3 All ER 40; and *Crédit Agricole Corporate and Investment Bank v Wardle* [2011] IRLR 604.

67. In undertaking the exercise of determining whether such a deduction ought to be made, the role of the Tribunal is not to assess what it would have done Rather, it must assess what the respondent would or might have done, on the assumption that it would this time have acted fairly

though it did not do so beforehand: *Hill v Governing Body of Great Tey Primary School* [2013] IRLR 274 at para 24.

Contributory fault

68. The Tribunal may reduce the basic or compensatory awards for culpable conduct in the slightly different circumstances set out in sections 122(2) and 123(6) of the Employment Rights Act 1996.

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

70. Section 123(6) then provides that: "Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."

Wrongful dismissal

71. An employer is entitled to terminate an employee's employment without notice if the employee is in fundamental breach of contract. This will be the case if the employee commits an act of gross misconduct. If the employee was not in fundamental breach of contract, the contract can only lawfully be terminated by the giving of notice in accordance with the contract or, if the contract so provides, by a payment in lieu of notice.

Conclusions

Unfair dismissal

72. It is common ground that the claimant was dismissed.

Did the respondent reasonably believe the claimant had committed misconduct?

73. I am satisfied that the respondent genuinely believed the claimant had committed misconduct. The claimant had admitted to the first and third allegations, in that she had admitted to smoking on company premises and failing to sign the back door log when using the back door. The claimant had further admitted to splitting up her break, and taking it as a number of short breaks. That, in and of itself, ran contrary to the respondent's normal policy regarding how breaks were to be taken. I accept that Mrs Tambling considered that also constituted misconduct in the circumstances.

74. I am satisfied also that that misconduct is the reason why the claimant was dismissed. The claimant suggested in her witness statement that she was dismissed due to her association with Mrs Parry. That was not put to Mrs Tambling in cross-examination. Not is it supported by the evidence. The respondent treats smoking on its premises as gross misconduct, and

Mr Spence's evidence was that in his experience disciplinary cases relating to breach of the smoking policy have always resulted in dismissal. I therefore conclude that the respondent's belief that the claimant had committed misconduct was the reason for her dismissal.

Did the respondent have grounds for that belief?

75. I turn then to the question of whether the respondent had reasonable grounds for the belief that the claimant had committed misconduct. The short answer to that is that the claimant accepted she had breached the policies in respect of her smoking and her failure to sign the back door log when she went out for a cigarette via the back door. That was sufficient to give the respondent reasonable grounds to believe that the claimant had committed misconduct.

76. In respect of the allegation regarding the way that the claimant took her breaks, the claimant had explained that she had been authorised by Mrs Parry to take her breaks in that way. In light of that explanation, I have carefully considered whether it could be said that Mrs Tambling had reasonable grounds to believe that the claimant had committed misconduct in the way that she took her breaks. That could not, in my judgment, constitute misconduct if it had been expressly approved by Mrs Parry. It was not suggested to me that Mrs Parry would not have the authority to make such an arrangement with the claimant; much less that she would not have the ostensible authority to do so.

77. The only way, then, that Mrs Tambling could reasonably have believed that the claimant had committed misconduct was if she concluded that there was no such agreement in place. I do not read her outcome letter as reaching such a conclusion; rather, it is premised on the suggestion that the claimant was in breach of the policy by splitting her breaks. The respondent was therefore faced with a situation where:

    a. A long-standing employee claimed to have been given some latitude over break times, for medical reasons, by their manager;
    b. That agreement was not documented; and
    c. The manager had subsequently left the organisation in circumstances where the employer was not willing to ask them to comment.

78. In my judgment no reasonable employer would have concluded that the exercise of that latitude by the claimant, in the circumstances of this case, constituted misconduct.

79. I do, however, bear in mind that the smoking allegation was the most serious of the three allegations. It was the only one which was explicitly described as gross misconduct in the respondent's disciplinary policy. The allegation regarding breaks was only described as misconduct in the disciplinary policy. Looked at in the round therefore, I am satisfied that the respondent had reasonable grounds for the belief that the claimant had committed misconduct (notwithstanding my conclusion regarding the breaks allegation).

At the time the belief was formed, had the respondent carried out a reasonable investigation?

80. I turn next to the respondent's investigation. The investigation must be seen through the lens of the fact that the claimant had admitted to breaching the relevant policies in respect of the first and third allegations. In respect of the second allegation, the claimant had (effectively) admitted to the substance of what was alleged, albeit that she was relying on the defence that she had been authorised to do as she did. In that regard, there was not much more that the respondent could have done beyond interviewing Mrs Parry, who had resigned under investigation. I do not consider that failing to interview Mrs Parry could be said to be unreasonable in the circumstances.

81. I therefore conclude that the investigation carried out by the respondent did fall within the range of reasonable responses open to them.

Had the respondent otherwise acted in a procedurally fair manner?

82. I conclude that the respondent acted otherwise in a procedurally fair manner, for the following reasons
    a. The claimant was informed in broad terms of the allegation against her, and was interviewed by Miss Johns and given the opportunity to present her response. She was given the opportunity to be accompanied at that meeting
    b. She was then invited to a disciplinary hearing, and sent the evidence that the respondent relied upon.
    c. At the disciplinary hearing, she was again given the opportunity to be accompanied.
    d. She was allowed to appeal Mrs Tambling's decision. Her appeal was considered, even though she chose not to attend an appeal hearing.
    e. Mr Barnes considered the points raised by the claimant in her appeal, and gathered further evidence to allow him to do so.

83. There were, of course, no notes of the disciplinary hearing in evidence. But it was not suggested by the claimant that Mrs Tambling had conducted that meeting in an unfair manner.

84. There was some criticism on behalf of the claimant of the process followed by Mr Barnes, in that he gathered evidence but did not share it with the claimant before he made his decision. In my judgment, that is exactly what the claimant asked him to do; she made it clear that she expected him to proceed with the appeal in her absence, and notify her of the outcome.

85. Even without the claimant having made that request in such specific terms, I conclude that the process followed by Mr Barnes did not fall outside the range of reasonable responses open to a reasonable employer. While I bear in mind that I did not hear evidence from Mr Barnes, his outcome letter makes it clear that he gathered evidence, weighed it against the existing evidence and the claimant's grounds of appeal, came to a conclusion, and notified the claimant in writing (and in

some detail) of what that conclusion was. That cannot in my judgment be characterised as unreasonable.

Was dismissal within the range of reasonable responses?

86. In considering whether dismissal fell within the range of reasonable responses, I must not consider what I would have done in the respondent's position. Nor must I consider whether an alternative sanction would have been more reasonable. Rather, I must consider whether dismissal fell outside the range of reasonable responses open to a reasonable employer. In doing so, I bear in mind the following factors:

    a. In respect of the smoking allegation, even on the respondent's own case Mrs Parry had permitted colleagues to smoke in the Goods In area, and indeed had done so herself.
    b. Miss Hussain, the Assistant Store Manager, was also aware that the claimant had been smoking in the Goods In area, but there was no evidence that she had challenged the claimant (or anyone else) for doing so.
    c. The claimant's evidence, in the disciplinary investigation, was that a number of other team members also smoked in the yard. Mr Barrell's investigation noted that the team members seen on CCTV smoking in the yard included Mrs Parry, the claimant and Miss Morris. He did not specify who else was seen doing so, even in the period in respect of which he checked the CCTV. But the clear implication of Mr Barrell's email was that others had also done so.
    d. Taken together, that suggests that on the evidence available to the respondent's decision-makers, there was at the very least a culture of smoking in the yard, to which both the Store Manager and the Assistant Store Manager turned a blind eye (and in which the Store Manager had participated).
    e. In respect of the allegation regarding breaks, for the reasons set out above I have already concluded that no reasonable employer would have disciplined the claimant. But it was a relatively minor allegation when compared to the breach of the No Smoking policy.
    f. In respect of the back door allegation, Mr Barrell's finding was that the back door was a "free for all". This was not limited to the smokers; he referred to days with nothing logged on the Access Control sheet despite there being significant activity and to concerns around security (with team members accessing the store via the back door during trading hours to take items to their car).
    g. The claimant had over 16 years' unblemished service. Of course that is something which can cut both ways; it could fairly be said that an employee with over 16 years' service, and in a supervisory position, ought to have known better than she did. But equally, an employee who had served the respondent for the length of time that the claimant had, without any blot on her record, could reasonably expect to be given some benefit of the doubt.

87. Looked at in the round, bearing in mind the blind eye apparently being turned to the respondent's policies by managers and colleagues, alongside the claimant's length of service and clean disciplinary record, I conclude that the claimant's dismissal did fall outside the range of reasonable responses.

88. It follows that the dismissal was unfair.

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89. I have found that the dismissal was substantively unfair. It follows from that conclusion that the claimant would not have been fairly dismissed even if the respondent had followed a different process. So I do not make any reduction on that basis.

Contributory conduct

90. I find that the claimant had engaged in culpable conduct, in that:
    a. She had smoked on the respondent's premises. She accepted that that was a breach of the respondent's policy. The respondent treated smoking on its premises seriously, as it was entitled to do. The disciplinary process made it abundantly clear that breach of the No Smoking policy constituted gross misconduct.
    b. Similarly, the claimant accepted that she had failed to comply with the back door procedures.
    c. Even accepting that the claimant was not specifically aware of the existence of the No Smoking policy, the prohibition on smoking on the respondent's premises was reiterated in the Fire & Evacuation policy. The claimant had had training on that policy in 2020 and 2021.
    d. The claimant's evidence before the Tribunal was that her attitude towards training was entirely cavalier. While I do not treat that as culpable conduct in its own right, it does go to the degree of culpability in breaching both the No Smoking policy and the back door procedures. The claimant was in a position of responsibility. She had completed training and signed documents confirming that she was aware of the relevant policies. Put simply, she ought to have known better.
    e. I bear in mind that the claimant had seen smoking on the respondent's site be condoned (in the sense that it was not actively challenged) by the Store Manager, the Assistant Store Manager, and the Regional Manager. She had also witnessed a culture whereby, in the words of Mr Barrell, the back door was used as a "free for all". I have found, for the reasons I have set out above, that that prevailing culture rendered the dismissal unfair. However, that culture did not absolve the claimant of any responsibility for her own actions.
    f. For the avoidance of doubt, given my factual findings regarding the break issue, I have concluded that the way that the claimant took her breaks did not constitute culpable conduct.

91. In my judgment, having weighed up the factors outlined, the percentage by which it is appropriate to reduce the claimant's compensation is 50%.

Wrongful dismissal

92. The question here is whether the claimant committed gross misconduct.

93. In that regard, the claimant accepted that she smoked on the respondent's site. That was a breach of the No Smoking policy. The respondent took breaches of that policy very seriously (as they were entitled to do). A break of the No Smoking policy was described in the disciplinary policy as constituting gross misconduct. I therefore conclude that the claimant committed gross misconduct. It follows that the claim of wrongful dismissal is not well founded, and is dismissed.

94. The matter will be listed for a remedy hearing in respect of the claim of unfair dismissal.

Employment Judge Leith

Date – 14 June 2023

JUDGMENT & REASONS SENT TO THE PARTIES ON 19 June 2023

FOR THE TRIBUNAL OFFICE Mr N Roche