THE INDUSTRIAL TRIBUNALS

CASE REF: 8544/17

CLAIMANT: **Louise Gorman**

RESPONDENT: **Bean Machine (Northern Ireland) Limited**

DECISION

The unanimous decision of the tribunal is as follows:-

1. The claimant's claim in respect of unlawful deductions from her wages is not well founded and this claim is therefore dismissed in its entirety.

2. The claimant was not unfairly dismissed by the respondent and the claimant's claim for unfair dismissal is hereby dismissed in its entirety.

Constitution of Tribunal:

Employment Judge: **Employment Judge Turkington**

Members: **Mr R Hanna**
Mr P Sidebottom

Appearances:

The claimant appeared at the hearing and was represented by her trade union representative, Mr A Hanna.

The respondent appeared at the hearing and was represented by Mr B Mulqueen, Barrister-at-Law, instructed by Millar, McCall, Wylie, Solicitors.

THE CLAIMS

1. The claimant brought the following claims before the tribunal:-

   (1) A claim for unlawful deductions from wages.

(2) A claim of unfair dismissal.

THE ISSUES

2. The issues to be determined by the tribunal were as follows:-

(1) In relation to the claim of unlawful deductions from her wages, whether the claimant was entitled to be paid at a higher rate of pay as a supervisor for all hours that she worked.

(2) (a) In relation to the claim of unfair dismissal, the tribunal had to consider whether the statutory dismissal procedure had been completed. If not, whether the respondent was responsible for such non-completion and whether the dismissal of the claimant was thereby rendered automatically unfair.

(b) In the event that the tribunal found that the claimant was not automatically unfairly dismissed, the tribunal had to determine whether the respondent had shown the reason for dismissal, whether that reason was a potentially fair reason and whether in light of the reason shown, the dismissal was fair or unfair in all the circumstances.

(c) In the event that the tribunal found that the claimant had been unfairly dismissed, the tribunal would be required to consider the matter of remedy. The claimant sought compensation and a Schedule of Loss was furnished to the tribunal.

CONTENTIONS OF THE PARTIES

3. As regards the claim of unlawful deductions from wages, the claimant's representative contended that the claimant had never received a contract of employment in relation to the supervisor's role. The claimant was adamant that she had been promoted to the position of supervisor in December 2014. The claimant believed that she was treated as a supervisor for all the hours that she was on duty and she was a keyholder at all times.

4. Counsel for the respondent contended that the claimant had become a supervisor around March 2015, but only worked as a supervisor when there was no manager on duty and the claimant was the designated supervisor. Counsel further argued that the claimant had been paid in full the appropriate premium for all hours that she had worked in that capacity.

5. In relation to the claim of unfair dismissal, counsel for the respondent contended that the claimant was dismissed for gross misconduct, namely those allegations referred to in the letter dated 29 August 2017 which confirmed the claimant's dismissal. The respondent's counsel argued that the claimant was dismissed following a reasonable investigation and that dismissal fell within the range of reasonable responses of a reasonable employer in the circumstances.

6. In respect of the claim of unfair dismissal, the claimant's representative contended that the actions of the respondent were not those of a reasonable employer. This process had begun with the claimant raising issues with Lisa Evans, Operations Director of the respondent. He argued that the disciplinary policy of an employer should be used to improve conduct and not to punish. Prior to this disciplinary process, the claimant had a clean disciplinary record and this procedure was used to punish the claimant. The claimant's representative also contended that, in respect of many of the allegations, it was a case of one person's word against that of another. In summary, the claimant's position was that dismissal was outside of the range of reasonable responses of a reasonable employer.

SOURCES OF EVIDENCE

7. The tribunal received witness statements and heard oral evidence from Lisa Evans, Nigel Roddy and John Elliott on behalf of the respondent and from the claimant on her own behalf. The parties also referred the tribunal to a number of documents in the tribunal bundle.

FACTS OF THE CASE

8. Having considered all the evidence presented to the tribunal, the tribunal made the following findings of fact. The areas of disputed evidence were relatively limited in this case. However, where there was a dispute on the evidence, the tribunal generally preferred the evidence of the respondent's witnesses as it found each of the respondent's witnesses to be straightforward and consistent in their evidence, whereas the tribunal found some of the claimant's evidence to be less than convincing. In areas of dispute, the tribunal found the evidence of the respondent's witnesses to be more credible than that of the claimant.

    (1) The claimant was employed by the respondent as Floor Staff from 9 December 2013. She worked in the Hope Café at the McClay Library, Queen's University, Belfast.

    (2) The claimant's hours of work fluctuated, but on average over the course of her employment, the claimant worked approximately 30-31 hours per week. When working as a member of Floor Staff, the claimant received the National Minimum/Living Wage, latterly £7.50 per hour. From March 2015, when neither the café manager or assistant manager were present, the claimant acted as supervisor from time to time when designated to do so. When carrying out such duties, she received an enhancement to her pay which was initially 20 pence per hour and later increased to 30 pence per hour.

    (3) In April 2017, a complaint was received from a customer via social media that she had been refused service at the Hope Café at a time earlier than the published closing time of the café. This complaint was dealt with by Nigel Roddy, Operations Manager of the respondent. Following this, staff of the café were reminded that it should not be closed early without authorisation from management.

(4) On 21 June 2017, the claimant sent an email to the Operations Director of the respondent Lisa Evans as follows:-

> "*Hi Lisa, sorry to bother you, but was hoping to maybe get a chat with you about a few issues in regards to staffing hours in Hope. I haven't felt comfortable enough to talk to Joan about it yet, would you be free for a chat at some point this week?"*

(5) Ms Evans arranged to meet the claimant the next day, 22 June 2017. At that meeting, the claimant outlined an issue with the hours being put on wage forms not being what staff had worked. The claimant said that the café manager had put the claimant and other staff down for a later start time than the start of their shift. Ms Evans enquired if the claimant was actually ready to start working at that time. Later in the discussion, the claimant indicated that she had changed the wage form back to what (in her view) it should have been. Ms Evans then asked the claimant if she had changed the wage form filled in by her manager and the claimant answered "yes". The claimant was then asked if she had spoken to her manager before changing the form to which she replied "no". Ms Evans sought further clarification asking if the claimant had changed a document which had been already filled in by her manager without discussion and the claimant replied "*yes, I probably shouldn't have done that*". At the end of this meeting, Ms Evans confirmed that she would look into the matter further and indicated that she would get back to the claimant after the claimant returned from her holidays on 3 July 2017.

(6) Following the meeting, Ms Evans carried out some investigation regarding the matters raised in the meeting. She spoke to the café manager Joan McLaughlin and reviewed various documents and data including rotas, start and finish times, till and alarm records. A short written statement was obtained from Joan McLaughlin in which she said that on 16 June 2017, she noticed that the hours for a number of staff on a number of days which she had previously recorded had been changed without her authority or knowledge.

(7) Ms Evans then met the claimant again on 3 July 2017. Ms Evans indicated to the claimant that there was a discrepancy between what she had said and what her manager was saying in relation to the correct start and finish times. Since she was unable to decide between the two versions, Ms Evans had decided to put in place a new policy of agreed start times where staff would report to the manager or supervisor in charge when ready to start their shift so that start and finish times could be agreed. The claimant was asked if she agreed with this new policy and she confirmed that she did.

(8) Ms Evans then explained that as a result of the investigation she had carried out, there were a number of issues which came to light regarding a shift on 9 June 2017 when the claimant was supervisor. The claimant was asked why she closed the shop early on that occasion. She replied that she would not have done so had she not been authorised to close early. When asked if she was told to close the shop early, the claimant said that

she could not remember and again repeated that she would not have closed the shop unless told to.

(9) Ms Evans then outlined that the till records showed that the till was cashed off before 5.30 pm (the official closing time for last coffee orders was 5.30 pm) and the alarm was set at 5.31 pm, but yet the wage records showed that the claimant was paid until 6.00 pm. The claimant replied that the wages were already done and she must have forgotten to change them. At the close of the meeting, Ms Evans indicated that these were serious matters and that she was going to have to take the matter further to which the claimant replied "fair enough".

(10) On 5 July 2017, a letter was sent to the claimant inviting her to attend a disciplinary hearing to be held on 7 July. A copy of the respondent's disciplinary rules and procedure was enclosed. The following matters of concern were set out:-

- *"Not closing the shop at the correct time*
- *Falsifying wages*
- *Changing the wage sheet without authorisation"*

The claimant was informed that she had the right to be accompanied by a fellow employee or trade union official. No specific warning was included in this letter that the matters of concern could amount to gross misconduct or that dismissal was a possible outcome of the disciplinary hearing.

(11) In the course of the next week or so, there was email correspondence between the claimant and Ms Evans in which the claimant raised various procedural points and raised various complaints including of alleged harassment and sex discrimination. In a later email, the claimant asked for various documents and records including an investigation report, a list of witnesses and copies of all witness statements. In response, Ms Evans furnished copies of her notes of her meetings with the claimant on 22 June and 3 July along with other documents including the data from the till and the alarm and the witness statement of Joan McLaughlin. It was confirmed that the respondent did not intend to call any witnesses to the hearing.

(12) The disciplinary hearing was adjourned at the request of the claimant to 13 July 2017.

(13) The claimant attended the disciplinary hearing on 13 July accompanied by her trade union representative Mr Hanna. The hearing was chaired by Nigel Roddy, Operations Manager and a note taker prepared notes of the meeting. The claimant's grievance was also dealt with at the beginning of this hearing. At the outset, Mr Hanna formally withdrew the complaints submitted by the claimant in her emails to Ms Evans which Mr Hanna explained had been submitted as a result of incorrect advice. In the grievance section of the hearing, Mr Hanna raised concerns that from the claimant raising what he called a formal grievance in her email of 21 June to Ms Evans, the situation seemed to have been turned round against her.

(14) The disciplinary section of the meeting then began. Most of this section of the meeting was taken up with procedural issues. An issue then arose about previous warnings issued to the claimant and Mr Hanna on behalf of the claimant then raised a further grievance about that issue and asked for an adjournment to allow that grievance to be investigated. Mr Roddy granted that adjournment.

(15) The hearing was reconvened on 27 July 2017 and was again chaired by Mr Roddy with a note taker in attendance. The grievance regarding the previous warnings was dealt with at the beginning of this hearing. Mr Hanna invited Mr Roddy to remove these warnings from the claimant's record.

(16) The disciplinary section of the meeting then commenced. Mr Roddy presented evidence relevant to the disciplinary charges including the data from the till, the time the alarm was set, the minutes from the two meetings with Lisa Evans and the witness statement from Joan McLaughlin. In the course of the hearing, the claimant alleged that it was the assistant manager of the shop Emma Russell who had given her authorisation to close the shop early on 9 June 2017. The claimant was asked for her response to the other allegations.

(17) Following this hearing, on 3 August 2017, Mr Roddy held a disciplinary meeting with Lucy Best, a colleague of the claimant. The allegations against Ms Best were that she had closed the shop early on 16 June 2017 but had recorded the wages until the later time of 6.00 pm. In the course of this hearing, Ms Best alleged that, whilst she had been recorded as supervisor for that day, it was actually the claimant who was the supervisor on shift and it was the claimant who had decided to close early. Ms Best also alleged that it was the claimant who entered the wages for all the staff for 6.00 pm. Ms Best made the same allegations in respect of 23 June 2017. Ms Best provided the handover document for that date which showed that the manager had instructed the claimant to be the supervisor for that day. Ms Best admitted that she had not reported these matters to the manager and alleged that this was due to intimidation by the claimant. Ms Best was warned by Mr Roddy that there may be disciplinary action against her as a result of the matters disclosed at this meeting.

(18) Also on 3 August 2017, an investigatory meeting was conducted with Emma Russell, assistant manager. The claimant's allegation that she had given the claimant permission to close early on 9 June 2017 was put to Ms Russell. She denied that she had given the claimant permission to close early that day. Ms Russell said that the previous summer, the shop had closed early on occasion and at that time it was not seen as "a big deal". However, she said that things had changed after the customer complaint in April 2017 when staff were given strict instruction by Joan McLaughlin not to close early. Ms Russell said that all staff were clear where authorisation had to come from, namely from Mr Roddy. At the end of the meeting, Mr Roddy indicated that all the information would be reviewed and Ms Russell would be informed of the outcome of the investigation in writing.

(19) On 4 August 2017, Mr Roddy sent a letter to the claimant in which he indicated that following the claimant's second disciplinary meeting on 27 July, he had interviewed Lucy Best and Emma Russell. He enclosed minutes of both those meetings. He also enclosed copies of handover records provided by Joan McLaughlin for 21, 22 and 23 June 2017. Mr Roddy then set out a number of fresh allegations which had arisen from those interviews. These were as follows:-

"*i. That on 16 June 2017 when you were supervisor you closed Hope early without authorisation and falsified time records for staff.*

ii. That on 16 June 2017 you were the designated supervisor but falsified records by noting Lucy Best as being supervisor.

iii. That on 23 June 2017 when you were supervisor you closed Hope early without authorisation and falsified time records for staff.

iv. That on 23 June 2017 you were the designated supervisor but falsified records by noting Lucy Best as being supervisor.

v. That your behaviour and conduct is unacceptable and includes intimidation of other staff, use of foul language and a refusal to carry out work instructions, particularly those given by Joan McLoughlin.

vi. That on at least one occasion you have permitted your children to wash dishes at Hope.

vii. That you lied during our meeting as Emma Russell contends she never provided you with authorisation to close early on 9 June 2017.

viii. That you, and the rest of the staff, were given an express instructions by Joan McLoughlin not to close Hope early (following a complaint received from a member of the public on 17 April 2017).

ix. That you lied about Conor Young allegedly shouting and swearing at you in front of a member of the public"

(20) The letter stated that, if substantiated, these allegations would fall into the following categories of misconduct as set out in the respondent's Disciplinary Rules and Procedures:-

- *Deliberate falsification of records*
- *Gross insubordination and/or continuing refusal to carry out legitimate instructions*
- *Serious breaches of health and safety rules*

- *Rudeness (including objectionable or insulting behaviour or bad language towards other employees*

(21) In this letter, the claimant was invited to attend a further disciplinary hearing proposed for 8 August to be chaired by Mr Roddy. It was also confirmed that the first three bullet points fell into the list of examples of gross misconduct in the Disciplinary Rules and Procedures. The claimant was therefore advised that, if there was a finding of gross misconduct, this could result in her summary dismissal. The claimant was reminded of her right to be accompanied at the hearing. She was asked to confirm if Mr Hanna would accompany her again. The claimant was also advised that due to the nature and amount of allegations against her, Mr Roddy had decided that the claimant should be suspended.

(22) Also on 4 August 2017, Mr Roddy sent a letter to the claimant confirming the outcome of her grievance relating to the previous warnings. Essentially, Mr Roddy upheld the claimant's grievance. In respect of what had been described as a verbal warning, Mr Roddy held that this was in fact nothing more than an "off the record informal reprimand". In respect of the written warning, he found that this was invalid and should have no standing. The claimant was given the right to appeal this outcome. Therefore, the claimant had a clear disciplinary record at this time.

(23) On 9 August 2017, the claimant sent an email to Lisa Evans raising a formal grievance in relation to the conduct of Nigel Roddy which had 3 elements, namely:-

- "*Mr Roddy has departed from the company disciplinary policy by proceeding to a disciplinary hearing without affording me a fact find investigation meeting in relation to new allegations raised in other employees disciplinary hearings*

- *Mr Roddy has breached the confidentiality of other employees by giving me the data of their disciplinary hearing*

- *Mr Roddy has departed yet again from the LRA Code of Practice"*

(24) Lisa Evans replied to the claimant by email dated 10 August 2017 saying that since it was clear that the claimant's grievance arises out of and relates directly to the disciplinary process which remained ongoing, the respondent believed it was appropriate for these points to be heard as part of the disciplinary process and decided upon concurrently with it.

(25) The claimant responded by email also dated 10 August saying that she was alarmed but not surprised by the company's decision as outlined in Ms Evans' email. She referred to Mr Roddy having a conflict of interest. The claimant also enquired if the data breach regarding the provision of the disciplinary hearing minutes of Emma Russell and Lucy Best would be reported to the ICO.

(26) Ms Evans replied to the claimant on the same day. She characterised the issues raised by the claimant as effectively her complaints and submissions regarding the disciplinary process and reiterated that the respondent considered it appropriate for these matters to be heard as part of the disciplinary process and decided upon concurrently. It was highlighted that the claimant would have a right of appeal if dissatisfied with the outcome of the disciplinary process. Ms Evans also confirmed that Emma Russell and Lucy Best had both consented to their statements being provided to the claimant.

(27) In further email correspondence, the claimant sought information and documents relating to the disciplinary charges and she also raised a further grievance in relation to charge ix of the disciplinary charges which she said had already been addressed and resolved by a manager. Ms Evans responded to these queries by email dated 11 August 2017. Essentially, Ms Evans confirmed that all relevant evidence had been provided and clarified that those employees who it was alleged had difficulty in working with the claimant were Joan McLaughlin, Emma Russell and Lucy Best.

(28) The claimant began working in another job in a café on the Lisburn Road on a date in August 2017 whilst she was suspended from her post with the respondent. In this job, she worked an average of 16 hours per week.

(29) Having been adjourned, the third disciplinary hearing took place on 21 August 2017. The claimant was once again accompanied by Mr Hanna. At the beginning of the hearing, Mr Hanna handed in a copy of 2 new grievances being submitted by the claimant. The first grievance issue related to the claimant's rate of pay during her suspension. The second alleged that the claimant was offered the post of supervisor around June 2014, but was never given a contract of employment for this post nor did she receive the correct rate of pay. The grievance claimed that the claimant should have been paid for all of the hours she was in work as a supervisor. She sought all monies owed to her.

(30) Mr Roddy explained the background to the letter to the claimant dated 4 August 2017. Since the claimant had alleged that Emma Russell had given her authority to close the shop early on 9 June, Ms Russell had been interviewed and there had also been a disciplinary hearing in relation to Lucy Best. These had led to new allegations against the claimant. The minutes of these meetings and handover duty sheets had been furnished to the claimant as this was the evidence for the new allegations. It was also explained that Lucy Best had made a correction to dates mentioned in the notes of her hearing and an amended version of the minutes of the meeting was provided to the claimant and Mr Hanna.

(31) The claimant was given the opportunity at this meeting to respond to each of the allegations. The response of Mr Hanna and the claimant essentially was that, in respect of the allegations, it was a matter of the claimant's word against that of Lucy Best or Emma Russell and Mr Roddy appeared to be accepting the word of the other employees as fact. A number of procedural points were also raised by Mr Hanna, including the contention that the

claimant had not had any fact finding meeting to respond to the new allegations. Extracts from text conversations between the claimant and her manager and various other employees, including Emma Russell and Lucy Best were provided to Mr Roddy. Included in these text messages was an occasion when Joan McLaughlin, the claimant's manager had used a highly inappropriate term in a text sent to the claimant. The messages also showed that Lucy Best had stayed over at the claimant's house around the beginning of June 2017.

(32) Following the third disciplinary hearing, Nigel Roddy wrote to the claimant on 29 August 2017 setting out his decision in relation to the allegations against the claimant. This was a detailed letter approximately 6 pages long which dealt with each of the charges. In respect of the original 3 matters of concern set out in the letter of 5 July 2017, Mr Roddy concluded that the claimant had closed the shop without authorisation on 9 June 2017. He viewed this as akin to a failure to follow a reasonable work instruction which was classified as major misconduct in the respondent's disciplinary policy. The charges regarding falsification of wages and changing details in wage sheets without authorisation were dealt with together. Mr Roddy found that the claimant had effectively admitted these charges as she had accepted that she had changed the times and this was done without authorisation. Nigel Roddy concluded that these offences did fall within the gross misconduct category as the claimant had falsified records. However, he indicated that he would have reduced the sanction in this case to a final written warning for two reasons. Firstly, because the claimant had not been warned that she could face dismissal for these offences and secondly, he considered that the introduction of the new policy regarding agreed start times should prevent such an occurrence being repeated.

(33) In respect of the allegations set out in the letter of 4 August 2017, Nigel Roddy dealt with the first 4 allegations relating to 16 and 23 June together. Mr Roddy concluded that the claimant was the designated supervisor on the relevant dates and that she had both closed the shop early and falsified records by denoting Lucy as supervisor. Mr Roddy outlined the reasons for this conclusion, which included that the claimant had a history, by her own admission, of changing records and the claimant's demeanour and the manner of her response to the allegations, and that Joan McLaughlin had corroborated that the claimant was the designated supervisor. Once again, Mr Roddy classified closing early as a major misconduct offence and falsification of records as gross misconduct.

(34) In respect of charge (v), Nigel Roddy concluded that he had grave concerns that the claimant's behaviour and conduct is unacceptable. This was based on evidence that one staff member, that is Lucy Best, indicated that she felt intimidated by the claimant and Joan McLaughlin had stated that she found the claimant very difficult to manage. Mr Roddy classified this as a major misconduct offence.

(35) In relation to charge (vi), Nigel Roddy noted that the claimant had not expressly denied this charge, but rather had sought to argue that it could not be proven. He also considered there was no reason why Lucy Best would have raised this issue unprompted. Mr Roddy was of the view that

this was potentially a very serious issue from a health and safety perspective and could give rise to insurance and food contamination risks which potentially called into question the claimant's judgment. Whilst this matter was not addressed expressly in the respondent's disciplinary policy, he considered this equivalent to a gross misconduct offence.

(36) In respect of charge (vii), Nigel Roddy noted that whilst it was the word of Emma Russell against that of the claimant, he noted that the claimant had not told Lisa Evans on 22 June or 3 July that it was Emma Russell who had given her permission to close early. He therefore concluded that the claimant had lied during a meeting with management and that this was a gross misconduct offence.

(37) As regards charge (viii), Nigel Roddy concluded that all the staff of the Hope café were given an express instruction by Joan McLaughlin not to close the café early following the customer complaint in April 2017. He noted that the implications of failing to follow that instruction are dealt with elsewhere in the letter.

(38) Finally, in respect of allegation (ix), Mr Roddy concluded that the claimant probably had lied in relation to the incident with Conor Young. However, since this matter should have been addressed at the time, he did not intend to proceed with this allegation.

(39) In summarising, Nigel Roddy noted that he had found the claimant guilty in respect of 4 counts of gross misconduct and 3 of major misconduct. He concluded that, since there were 4 examples of gross misconduct, there was no option but to dismiss the claimant without notice. He did not believe there were any mitigatory factors which would cause a reduction in the sanction. This was in contrast to the first 3 issues of concern.

(40) In responding to the issues raised by the claimant regarding the respondent's failure to afford her a fact finding interview, Mr Roddy stated that these further issues arose in the course of the initial disciplinary hearings and out of the claimant's contentions. The issues had, Mr Roddy believed, been set out clearly in the letter of 4 August 2017 and the claimant had, in his opinion, received an opportunity to present her version of events and in that respect, he believed she had been given a fair hearing. The claimant was then informed of her right of appeal.

(41) By letter dated 29 August 2017, Mr Roddy also responded to the grievances raised by the claimant in the third disciplinary hearing on 21 August 2017. These grievances related to the claimant's rate of pay during her suspension and the respondent's failure to give the claimant a contract of employment for her supervisor role. Both elements of the grievance were rejected by Mr Roddy. In respect of the second issue, Nigel Roddy explained that supervisory duties are carried out by Floor Staff as part of the functions of that job with a premium being paid to staff whilst carrying out such duties. He concluded that the claimant had been paid in full on each occasion when carrying out such duties.

(42) The claimant lodged an appeal to Mr John Elliott the Managing Director of the respondent against the decision of Nigel Roddy to dismiss her. The grounds of her appeal were that she did not get a fair hearing and she raised several other issues regarding breaches of procedure including that Mr Roddy had failed to consider all the evidence she had presented and that he had failed to interview a number of additional witnesses following the evidence the claimant had presented.

(43) Correspondence followed between the claimant and Mr Elliott regarding the arrangements for the appeal hearing. In the end, the claimant decided not to attend a hearing in person, but instead to provide written submissions outlining the points of her appeal.

(44) In or around September 2017, the claimant became a full time student at Queen's University. From this time, she was only able or willing to work a maximum of 16 hours per week.

(45) Mr Elliott issued his decision in relation to the appeal by letter dated 25 October 2017. Mr Elliott confirmed that his role was to review the paperwork provided to him and the claimant's points of appeal in order to determine whether or not the finding of gross misconduct and the decision to dismiss the claimant should be upheld. He also confirmed that this was not a full re-hearing of the matter.

(46) In his appeal decision letter which ran to approximately 4 pages, Mr Elliott rejected all the claimant's grounds of appeal. He concluded that the claimant had received a fair hearing and that he did not see any reason to overturn Mr Roddy's decision. Mr Elliott noted that the claimant had made a number of allegations regarding the procedures followed by the respondent and Mr Roddy. However, it was Mr Elliott's view that the claimant's appeal submission does not appear to strongly deny or contest that the claimant carried out the actions which gave rise to the disciplinary issues. Therefore, Mr Elliott decided that the claimant should not be reinstated. He also decided that the claimant would not be paid for hours lost nor would the respondent be compensating her for perceived failings in this matter or previous disciplinary issues.

(47) Around December 2017, the claimant left the job on the Lisburn Road and began working for the Ground chain of coffee shops. She continued in this job to the date of the tribunal hearing working on average 16 hours per week alongside her studies at the University. The claimant made no other applications for work following the date of her dismissal.

Statement of Law

<u>Unlawful deductions from wages</u>

9. By Article 45(1) of the Employment (Northern Ireland) Order 1996 ("the 1996 Order"), an employer shall not make a deduction from wages of a worker employed by him unless the deduction is authorised by statute or a relevant provision of the worker's contract or the worker has previously signified in writing his consent to the making of the deduction.

10. Article 45(3) of ERO 1996 provides that:

> "*Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion*".

11. The Court of Appeal in England in the case of ***Delaney –v- Staples (t/a De Montfort Recruitment) [1991] ICR 331***, held that there was no valid distinction to be drawn between a deduction from a sum due, and non-payment of that sum, as far as the relevant statutory provision was concerned.

12. Article 59 of ERO 1996 provides that the definition of "wages", in relation to a worker, means: "... *any sums payable to the worker in connection with his employment, including - (a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise*...", subject to certain statutory exceptions which do not apply to the facts of this case.

<u>Unfair dismissal</u>

13. The statutory dismissal procedure introduced by the Employment Rights (Northern Ireland) Order ("the 2003 Order") applies in this case. In basic terms, the statutory procedure set out in Schedule 1 of the 2003 Order requires the following steps:-

    Step 1 – written statement of grounds for action and invitation to meeting – the employer must set out in writing the grounds which lead the employer to contemplate dismissing the employee.

    Step 2 – meeting – the meeting must take place before action is taken. The meeting must not take place unless –

    (a) the employer has informed the employee what the basis was for including in the statement the grounds given in it, and

    (b) the employee has had a reasonable opportunity to consider his response to that information

    The timing and location of meetings must be reasonable.

    After the meeting, the employer must inform the employee of his decision and notify him of the right to appeal against the decision.

    Step 3 - appeal – if the employee informs the employer of his wish to appeal, the employer must invite him to attend a further meeting. After the appeal meeting, the employer must inform the employee of his final decision. The employee must

be afforded the right to be accompanied at any meetings under the statutory dismissal procedure.

14. By Article 130A (1) of the Employment Rights (Northern Ireland) Order 1996 ("the Order"), where the statutory dismissal procedure is applicable in any case and the employer is responsible for non-completion of that procedure, the dismissal is automatically unfair.

15. A tribunal is required to consider whether the dismissal is automatically unfair under article 130A even where this issue has not been specifically raised by the claimant – see ***Venniri v Autodex Ltd (EAT 0436/07).*** Further, by Article 17 of the 2003 Order, where the tribunal is satisfied that the non-completion of an applicable statutory procedure is wholly or mainly attributable to failure by the employer, it shall increase any award which it makes to the employee by 10% and may, if it considers it just and equitable in all the circumstances to do so, increase it by a further amount up to an increase of 50%.

16. Leaving to one side the question of potentially automatically unfair dismissal as referred to above, pursuant to Article 130(1) of the Order, it is for the employer to show the reason for the dismissal. Further, the employer must show that the reason shown by it is a reason falling within para (2). A reason falls within para (2) if it relates to the conduct of the employee.

17. Article 130(4) of the Order states as follows:-

> "*where the employer has fulfilled the requirements of para (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –*
>
> *(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
>
> *(b) shall be determined in accordance with equity and the substantial merits of the case"*

18. The leading cases in relation to conduct dismissals are summarised in the judgement of the Northern Ireland Court of Appeal in the case of ***Patrick Joseph Rogan v South Eastern Health and Social Care Trust***. In his judgment in that case, the Lord Chief Justice refers to the case of ***Iceland Frozen Foods Ltd v Jones 1983 ICR 17*** where Browne-Wilkinson J said as follows:-

> "(1) *the starting point should always be the words of [article 130(4) themselves;*
>
> *(2) in applying the section an industrial tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the industrial tribunal) consider the dismissal to be fair;*

(3) in judging the reasonableness of the employer's conduct an industrial tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;

(4) in many, though not all, cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;

(5) the function of the industrial tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair."

19. The Court in the ***Rogan*** case also quoted with approval the following passage from the case of ***British Home Stores v Burchell 1980 ICR 303:-***

> "*What the tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. It is the employer who manages to discharge the onus of demonstrating those three matters, we think, who must not be examined further. It is not relevant, as we think, that the tribunal would themselves have shared that view in those circumstances. It is not relevant, as we think, for the tribunal to examine the quality of the material which the employer had before them, for instance to see whether it was the sort of material, objectively considered, which would lead to a certain conclusion on the balance of probabilities, or whether it was the sort of material which would lead to the same conclusion only upon the basis of being "sure," as it is now said more normally in a criminal context, or, to use the more old-fashioned term, such as to put the matter "beyond reasonable doubt." The test, and the test all the way through, is reasonableness; and certainly, as it seems to us, a conclusion on the balance of probabilities will in any surmisable circumstance be a reasonable conclusion*."

20. In the ***Rogan*** case, the Court described the task of the tribunal as follows:-

> "*It is for the employer to establish the belief in the particular misconduct. The tribunal must then consider whether the employer had reasonable grounds upon which to sustain the belief and thirdly whether the employer*

*had carried out as much investigation into the matter as was reasonable in all circumstances. The tribunal must also, of course, consider whether the misconduct in question was a sufficient reason for dismissing the employee. "*The Court of Appeal also noted that "*the judgment as to the weight to be given to evidence was for the Disciplinary Panel and not for the tribunal".*

22. In the case of ***Salford Royal NHS Foundation Trust v Roldan 2010 IRLR 721***, the Court of Appeal in England and Wales held that it is particularly important that employers take seriously their responsibilities to conduct a fair investigation where the employee's reputation or ability to work in his or her chose field of employment is potentially apposite.

As regards the impact of misconduct on the employment relationship, in the case of ***Neary v Dean of Westminster 1999 IRLR 288***, it was held that whether particular misconduct justifies summary dismissal is a question of fact. The character of the institutional employer, the role played by the employee in that institution and the degree of trust required of the employee vis-à-vis the employer must all be considered in determining the extent of the duty of trust and the seriousness of any breach thereof.

23. The tribunal also considered the recent judgement of the Northern Ireland Court of Appeal case of ***Caroline Connolly V Western Health and Social Care Trust***. At paragraph 7 of the majority judgment in that case, Lord Justice Deeny stated:

"The question for that tribunal was whether "in the circumstances … the employer acted reasonably or unreasonably in treating [the reason for dismissal as a sufficient reason for dismissing the employee". But they must determine that "in accordance with equity and substantial merits of the case" per Art 130(4) (b). They should have asked themselves therefore when deciding whether the reason justified summary dismissal whether that was equitable and merited for that is what the statute requires".

24. Further, at paragraph 22 of the above judgment, Lord Justice Deeny also commented on the issue of whether the tribunal should consider if a lesser sanction than dismissal would have been appropriate. He stated:

"I do not see how one can properly consider the equity and fairness of the decision without considering whether a lesser sanction would have been the one that right thinking employers would have applied to a particular act of misconduct. How does one test the reasonableness or otherwise of the employer's decision to dismiss without comparing that decision with the alternative decisions? In the context of dismissal the alternative is non-dismissal i.e. some lesser sanction such as final written warning".

CONCLUSIONS

Unlawful deductions from wages

25. The dispute between the parties was essentially whether the claimant was entitled to be paid a higher rate of pay for all the hours she worked on the basis

that at all times she was working as a supervisor. The tribunal found as a fact that the claimant was only working as a supervisor when designated to do so. On the basis of the evidence it heard, the tribunal had little hesitation in concluding that the claimant was only entitled to be paid as a supervisor when she was specifically designated to be working in this capacity. The tribunal did not find it credible that the claimant, who was clearly a well-informed and articulate person, had not raised this issue at an earlier stage if she thought there was any suggestion that she was not being paid the rate of pay she was properly entitled to. Rather, the tribunal was entirely satisfied that the claimant received the pay supplement for acting as supervisor for all hours when she was designated as supervisor and hence entitled to be paid such an enhancement. The claimant did not at any stage receive less than her full contractual rate for the duties carried out.

26. Accordingly, the tribunal concluded that the claimant's claim in respect of unauthorised deductions from wages was not well founded and this claim is therefore dismissed in its entirety.

Unfair dismissal

27. The tribunal considered firstly whether the statutory dismissal procedure had been complied with in this case. The claimant's representative did not contend that there had been any breach of the statutory procedure. The respondent had sent a letter to the claimant inviting her to attend a meeting in respect of the disciplinary charges against her. The claimant was also furnished with various documents which set out the basis of the case against her. As regards the second invitation letter dated 4 August 2017, the claimant was made aware that, if there was a finding of gross misconduct, this could result in her summary dismissal. The tribunal therefore considered that step 1 of the statutory dismissal procedure was fully complied with.

28. The third disciplinary hearing, which followed this letter, took place on 21 August 2017. The claimant was given the right to be accompanied to all the disciplinary hearings by her trade union representative and she exercised that right. The claimant was given an opportunity to respond to all the allegations. The tribunal concluded that Step 2 of the statutory procedure was completed.

29. The claimant was then given a right of appeal and exercised that right. In the end, the claimant decided not to attend at an appeal hearing, but rather to make written submissions. However, the tribunal was satisfied that the respondent intended to hold an appeal meeting and it was the claimant who decided not to avail of a personal hearing. In those circumstances, the tribunal considers that the respondent complied with Step 3 of the statutory dismissal procedure.

30. The tribunal was therefore satisfied that the statutory dismissal procedure was followed in this case and accordingly, the dismissal of the claimant was not automatically unfair.

31. The tribunal then proceeded to consider whether the dismissal was fair in accordance with general principles. Firstly, the tribunal considered whether the respondent had shown the reason for dismissal. The respondent contended that the claimant was dismissed by reason of her conduct, namely the allegations in

respect of which the claimant was found guilty by Mr Roddy as outlined in his decision letter dated 29 August 2017. The claimant tried to suggest that the reason for her dismissal was that she had raised issues regarding her manager Joan McLoughlin.

32. Having considered carefully all of the evidence, the tribunal was satisfied that the respondent had shown that the claimant's conduct was the reason for her dismissal. The conduct of the employee is a potentially fair reason for dismissal under article 130(2) of the Order.

33. The tribunal then had to determine whether the dismissal was fair or unfair in all the circumstances in accordance with Article 130(4) of the Order. The tribunal followed the steps outlined in the ***Rogan*** case. We reminded ourselves that we must not substitute our own view for that of the employer, although we also had to bear in mind the equity and substantial merits of the case as emphasised by the majority judgment in the Court of Appeal in the case of ***Connolly***.

34. The tribunal began by considering whether the employer in this case had established its belief in the particular misconduct. The tribunal had the opportunity to assess the evidence of the main decision-maker in this case Nigel Roddy when he was cross-examined during the hearing. It was clear from the evidence of Mr Roddy that he had a genuine belief that the claimant was guilty of the misconduct in respect of those charges which Mr Roddy upheld in his decision letter. Whilst the appeal in this case was simply a review of the matter by Mr Elliott based on the papers and the claimant's written submission, the tribunal was also satisfied that having carried out that review conscientiously, Mr Elliott also formed a genuine belief in the claimant's guilt.

35. The next issue for the tribunal to determine was whether the decision-makers had reasonable grounds on which to sustain this belief. In this regard, the tribunal was mindful of the guidance given by the Court of Appeal in the ***Rogan*** case that "*the judgment as to the weight to be given to evidence was for the Disciplinary Panel and not for the tribunal".* Whilst there were no witnesses called at any of the disciplinary hearings, copies of relevant documents were furnished to the claimant before the respective hearings. These included till and alarm records, the statement of Joan McLoughlin, minutes of the investigatory/disciplinary meetings with Lucy Best and Emma Russell and handover records.

36. The claimant was given an opportunity to answer the case against her. For the most part, at the various disciplinary hearings, the claimant and her representative did not engage with the detail of the case against her, but rather argued that, in respect of many of the allegations, it was simply the claimant's word against that of another witness. Further various perceived procedural flaws were raised. It was clear to the tribunal that, essentially, the decision-makers simply found that the weight of the evidence was against the claimant. It is a matter for the decision-makers rather than the tribunal to consider the claimant's response to the allegations. Mr Roddy's reasons for preferring the evidence of other witnesses were explained in his decision letter issued to the claimant. Those reasons appeared to the tribunal to be reasonable. At the appeal stage, Mr Elliott found no reason to overturn the decision of Mr Roddy.

37. Having carefully considered all of the evidence in the case, the tribunal was satisfied that Mr Roddy did have reasonable grounds to sustain his belief that the claimant was guilty of those disciplinary charges on which Mr Roddy found her guilty.

38. The tribunal then had to consider whether the respondent had carried out as much investigation into the matter as was reasonable in all the circumstances. In this regard, the tribunal was mindful of the cautionary note in the ***Salford*** case, albeit the claimant seems to have had little difficulty in moving on to other employment.

39. The course of the disciplinary process in this case was somewhat unusual. The genesis was essentially the email from the claimant to Lisa Evans dated 21 June 2017 in which she asked to speak to Ms Evans about a few issues concerning staff hours in Hope. This of course led to the meeting between the claimant and Ms Evans on 22 June 2017 during which the claimant admitted changing the wage sheets filled in by her manager without first discussing this with her manager. The claimant also candidly accepted that she "*probably shouldn't have done that".*

40. Following this admission, Ms Evans had decided to investigate matters further and this had brought to light that the shop had been closed early on 9 June 2017 when the claimant was the designated supervisor. This issue was then raised with the claimant on 3 July, which was only about 3 weeks after the relevant date. Ms Evans was clearly not satisfied with the explanation given by the claimant on this point and this led to the claimant being invited to the disciplinary hearing on 13 July 2017 which was then adjourned to 27 July.

41. It was at this re-convened hearing that the claimant alleged for the first time that it was the Assistant Manager Emma Russell who had given her authority to close the shop early and this in turn caused the respondent to put this allegation to Ms Russell. It was allegations made by Ms Russell and particularly Lucy Best in her interview that essentially formed the basis of the disciplinary charges put to the claimant in the invitation letter dated 4 August 2017.

42. As outlined above, the course of this process was somewhat unusual in that, at each stage, it was effectively matters raised by the claimant which led to further investigations and additional charges against her. Whilst the process did not follow a typical pattern, the tribunal was satisfied that over the course of the disciplinary process as a whole, the claimant was given ample opportunity to provide her response and explanation for the alleged misconduct. The claimant was represented by an experienced trade union representative of her choice, namely Mr Hanna, at each of the 3 disciplinary hearings. It is clear from the notes of the hearings that Mr Roddy invited the claimant on several occasions to give her version of events. For the most part, the approach of the claimant and her representative at the hearings was to focus largely on procedural issues rather than the substance of the charges.

43. The tribunal is satisfied overall that the amount of investigation carried out by the respondent in relation to these matters was reasonable in all the circumstances.

44. The tribunal then had to consider whether the misconduct which the respondent found proven against the claimant was sufficient grounds for her dismissal bearing in mind equity and the substantial merits of the case. Essentially, the claimant was found guilty of the following offences which Mr Roddy considered constituted gross misconduct under the respondent's Disciplinary Rules:-

> Falsification of wages records on 2 occasions, namely 16 and 23 June 2017 when Mr Roddy concluded that the claimant was designated supervisor but had recorded Lucy Best as the designated supervisor – this was considered to be falsification of records.
>
> Permitting her children to wash the dishes in the café. This was considered equivalent to a gross misconduct offence.
>
> The claimant had lied to management when she alleged that Emma Russell had given her authority to close the café early.
>
> In addition, the claimant was found guilty of a number of other disciplinary offences which Mr Roddy treated as major misconduct.

45. As outlined above, the test is usually expressed as being whether dismissal fell within the band of reasonable responses of a reasonable employer. The evidence of Mr Roddy was that he had formed the view that the character and conduct of the claimant was not befitting of an employee of the respondent. Essentially, Mr Roddy believed that the claimant's conduct had seriously damaged the respondent's trust and confidence in the claimant. He also considered that there were no mitigatory factors which would cause his to reduce the sanction from dismissal. He contrasted this to the view he took on the 3 original matters of concern where he would have issued a final written warning.

46. In considering this question of the band of reasonable responses, the tribunal was of the view that there was a theme in this case of a lack of trust in the claimant. In view of the nature and extent of the misconduct which the claimant was found guilty of, the tribunal concluded that it was reasonable for the respondent to have decided that trust and confidence in the claimant had broken down. The tribunal also considered that summary dismissal did fall within the band of reasonable responses of a reasonable employer in the circumstances of this case and essentially was merited. The fact that Mr Roddy had considered and been prepared to impose a sanction of a final warning in respect of the original matters of concern demonstrated the respondent had not closed its mind to alternative sanctions. As it was encouraged to do by the majority judgment in the ***Connolly*** case, the tribunal reviewed the reasonableness of the respondent's decision by comparing that decision with a non-dismissal sanction. In the tribunal's view, it could not be said that a final warning or some other sanction short of dismissal was the sanction which right thinking employers would have applied to these particular acts of misconduct.

47. In summary, the tribunal has concluded that the dismissal of the claimant was fair in all the circumstances in accordance with equity and the substantial merits of the case.

48. Accordingly, the claimant's claim of unfair dismissal is dismissed. It was not therefore necessary for the tribunal to formally determine the issue of remedy.

Contributory fault

49. Had the tribunal found that the claimant was unfairly dismissed, for example, for procedural reasons, the tribunal would have found that the claimant had contributed to her dismissal to the extent of 100%.

Potential compensatory award - loss of earnings

50. Had it been necessary for the tribunal to formally consider the question of remedy, the tribunal would have concluded that the claimant suffered no loss of earnings as a result of her dismissal. The tribunal had started alternative employment whilst she was suspended by the respondent and before her dismissal. The claimant has continued to work fewer hours by choice as she is now a full time student. The tribunal is satisfied that the claimant is working as many hours as she wants to work following her dismissal. Accordingly, the claimant has not suffered any loss of earnings as a result of her dismissal and any award of compensation in this case would therefore have been Nil.

Employment Judge:

Dates and place of hearing: 8, 10 and 11 May 2018, Belfast.

Date decision recorded in register and issued to parties: