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## EMPLOYMENT TRIBUNALS

**Claimant:** Ms P Wenham  
**Respondent:** Tesco Stores Limited  
**Heard at:** East London Hearing Centre  
**On:** 8<sup>th</sup> June 2018  
**Before:** Employment Judge Reid (sitting alone)  
**Representation**  
**For the Claimant:** Miss Walsh, union representative  
**For the Respondent:** Mr Holloway, Counsel

## JUDGMENT (RESERVED)

The judgment of the Employment Tribunal is that:-

1. The Claimant was unfairly dismissed by the Respondents contrary to s94(1) Employment Rights Act 1996.
2. The Tribunal's findings as to a reduction of the compensatory award under *Polkey v Dayton Services* [1987] IRLR 503 are set out below in the Reasons. The Tribunal's findings as to a reduction of the basic award under s122(2) Employment Rights Act 1996 are also set out below. It is anticipated that with these findings the parties will be able to agree the amount of the basic award payable to the Claimant. If that is not possible the parties can request a remedy hearing.

## REASONS

### Background

1. The Claimant was employed by the Respondent from 23<sup>rd</sup> October 2000 until she was dismissed with immediate effect for gross misconduct on 20<sup>th</sup> October

2017. She worked 16 hours a week as a customer assistant. She had received no prior warnings about disciplinary matters as at the time she was dismissed.

2. Both parties attended the hearing. I identified with Miss Walsh that whilst the Schedule of Loss now also contained claims for notice pay and for holiday pay (page 25) the only claim brought in the claim form presented on 28<sup>th</sup> January 2018 was a claim for unfair dismissal, which she accepted was the case. There was a one file bundle. The Respondent's two witnesses (Mr Dalmalitis, decision to dismiss and Mr Pindoria, appeal) gave evidence and the Claimant gave evidence. I heard oral submissions on both sides.

### Findings of Fact

#### The Claimant's employment

3. The Claimant was employed by the Respondent from 23<sup>rd</sup> October 2000 to 20<sup>th</sup> October 2017 and had thus 16 complete years service by the time she was dismissed. The Claimant initially gave the start date as 20 October 2000 in her claim form but I find 23<sup>rd</sup> October 2000 to be the correct start date because the Respondent has the records and the Claimant agrees with this revised date in her witness statement (para 1).
4. I find that whilst there had been customer complaints made about the Claimant at previous stages in her employment, no disciplinary action had been taken in relation to these matters. These comprised a complaint received in May 2015 (page 26) from a customer that the Claimant was aggressive and slapped her hand and a complaint received in June 2017 (page 31) that she was verbally abusive to a colleague.

#### Events on 4<sup>th</sup> August 2017

5. I find that on 4<sup>th</sup> August 2017 the Claimant spoke to her manager Mr Mo Azram about some sick pay she said had not been paid to her (C para 7). The Claimant had raised the matter in a letter the previous day (page 32). I find that the Claimant and Mr Azram had an argument about this with the Claimant asking for her money and Mr Azram saying that she should have raised it with him and not Personnel (C para 8). I find things got heated and the Claimant was angry and upset because she felt she had not been paid a significant amount of sick pay, which money she needed. I find that both of them were agitated and upset after the discussion.
6. After the discussion I find that the Claimant went back to the shop floor (C para 10). Her colleague Reheela Sindhu was nearby and the Claimant spoke to a customer. I find that Mr Azram walked past and the Claimant rudely barged into him in front of the customer before walking off to go and see her union representative about her sick pay. Whilst there was competing evidence as to whether or not the barging incident happened (the Claimant and the customer Ms Dowden (page 69) saying it did not and Ms Sidhu (page 63) and Mr Azram (page 60) saying it did) I take into account that the Claimant was already angry and upset with Mr Azram and had had previous problems with managing her anger at work in a public way (page 26,31), most recently in June 2017. I have

to decide what is more likely than not to have happened and on balance I find that the barging incident happened. I find there was physical contact and that it happened in a public space. The Claimant had pushed her manager angrily and rudely in a public way in front of a colleague and in front of a customer.

Investigation and disciplinary process

7. The Claimant was asked later that day to speak with Ms Razna Uddin (Customer Experience Manager) about the incident. Whilst there are no notes of this meeting it was an informal one to get the Claimant's account and I do not find any unfairness to arise because notes were not taken at that first informal meeting because the key thing was to get the Claimant's account at an early stage which she gave (C para 12) namely that the barging incident had not occurred at all. The informality of that first meeting was in line with the Respondent's own policy (page 25C). The Claimant asked two colleagues into the meeting (C para 13) and Ms Sindhu confirmed that the barging incident had occurred. Navera said she had not seen anything.
8. The Claimant requested preservation of any CCTV footage on 7<sup>th</sup> August 2017 (page 33). The Respondent was criticised for not checking whether there was CCTV footage at this early stage. However I find based on Mr Dalmalitis' and Mr Pindoria's oral evidence and their witness statements that there had never been any CCTV footage of the events. This was not therefore a case of CCTV evidence being lost because not preserved quickly enough; there never had been any in the first place. I therefore find that no unfairness to the Claimant arose because this was not checked sooner.
9. An investigation was held by Mr Amit Popat (page 35, 71) and he interviewed the Claimant (page 50) on 10<sup>th</sup> August 2017 and also interviewed Mr Azram (page 60) Ms Sindhu (page 65) and Ms Martin (page 74). The Claimant was therefore formally interviewed within a week of the incident with notes taken and her account was the same as it had been in the informal meeting, namely that the barging incident had not happened (page 51) and that the reason Mr Azram made the allegation was because he did not like the Claimant. Mr Popat asked the Claimant again about other witnesses (page 51) apart from Ms Sindhu but the Claimant referred only to Navera and she already knew Navera had said she did not see anything (C para 13). The Claimant raised the issue of the CCTV footage (page 52). Mr Azram's account to Mr Popat was that the incident had happened as alleged (page 60) which is what Ms Sindhu also stated (page 65). Ms Martin confirmed that she had not been present at the time of the incident, only going to the meeting later that day (page 74). I find these interviews to have taken place during August and September 2017 following which the Claimant was invited to an investigatory meeting (page 71). Whilst the investigations had taken longer than the usual 14 days anticipated in the Respondent's disciplinary procedure (page 25D) I do not find that the delay before the investigation meeting was unreasonable and caused any unfairness to the Claimant given her account had been obtained on the day and a documented meeting held with her within a week and with Mr Azram and Ms Sindhu within a reasonable period after that.

10. I find that it was clear to the Claimant what the investigatory meeting was about as regards inappropriate behavior at work because she already had been interviewed about what had happened on 4<sup>th</sup> August 2018. I however find that the second ground (not living the values at work) was rather vague in terms of it being clear where those values were to be found (if they were written down) and which value she had breached. Based on Mr Damalitis' oral evidence I find that there is no company values document or statement which the Claimant could have looked at but that what the Respondent was meaning when it used this term was the first two paragraphs on page 25C at the beginning of the disciplinary policy.
11. The investigatory meeting was held on 6<sup>th</sup> October 2017 (page 80). Mr Popat told the Claimant that there was no CCTV footage (page 81) but said he would check again. The Claimant said again she had not pushed Mr Azram (page 81). The Claimant said that Mr Popat had refused to interview the customer Ms Dowdon (C para 19). Whilst I find it was not necessarily unreasonable for the Respondent to wish to avoid actively seeking statements from customers by interviewing them it was unreasonable of Mr Popat not to consider doing so given the customer was already volunteering to do so (C para 19). I find that this omission at this stage however resulted in no overall unfairness to the Claimant because firstly the statement the customer then gave to the store manager (C para 20-21, page 69) was available to and taken into account by both Mr Dalmalitis and Mr Pindoria (see findings below) and secondly had Mr Popat taken into account the statement it would have been even clearer to him that there was a factual dispute about what had happened; the customer's statement supported the Claimant's account but Mr Popat was still looking at two other witnesses who said the barging incident had occurred. The customer's statement was therefore relevant evidence but its existence did not change matters to such an extent that proceeding to a disciplinary hearing was unfair.
12. In passing the matter forward for disciplinary action Mr Popat included the May 2015 and June 2017 complaints.
13. The Claimant was invited to a disciplinary meeting on 13<sup>th</sup> October 2017 (page 83) with Mr Dalmalitis. The letter repeated the vague second ground. The meeting was held on 13<sup>th</sup> October 2017 (page 85) but was postponed for a week (page 85, 86). I find that the reason for this was that he wanted more time to review the material (YD para 14) but he specifically identified at this stage that there was 'historic' material, in addition to the documents about the 4<sup>th</sup> August 2017 incident. I find this to be a reference to the May 2015 and June 2017 complaints. Whilst Mr Dalmalitis said he put these historic matters to one side (YD para 16) at this stage, I find from his subsequent behaviour (see below) that he ultimately did not. I find that in the gap until the next meeting he checked again there was no CCTV footage (YD para 16).
14. The meeting reconvened on 20<sup>th</sup> October 2018 (page 102). The Claimant said again that Navera's account was that she had not seen anything (page 103) from which I find that it was not unreasonable that the Respondent did not question Navera further given she said from the outset that she had seen nothing and the Claimant had by now accepted that this was Navera's account

such that it was not unreasonable for the Respondent not to probe further. The Claimant said again that the allegation was made because Mr Azram did not like her (page 103). She alleged that Ms Sindhu had lied in the past (page 104) but the account she gave as to why she thought this was very unclear (page 104). In essence she was saying that there was a conspiracy (YD para 20) but I find that she did not give Mr Dalmalitis enough detail about past issues to enable him to investigate anything further such that not following up on the conspiracy allegation meant that the Respondents were not acting reasonably in the conduct of the disciplinary process. Mr Dalmalitis read the statement from Ms Dowdon the customer (page 104) and specifically took a break in the meeting to do so. I therefore find that he knew it was relevant and read it and although he omitted to record it on the checklist on page 116 as evidence not supporting the allegation, he nonetheless had read it and took it into account (page 105). I find Mr Dalmalitis gave the Claimant the chance to comment on the positives of her employment (page 104) and was aware of her long service and that she had been a forum representative (page 104). I find that whilst there was a small discrepancy between the statement of Mr Azram and Ms Sindhu as regards whether the barging incident had occurred on the way in or the way out of the office I find this not to be material because the issue was whether it happened at all not whether it was on the way in or out.

15. However having said he had separated out the historic matters (YD para 16) identifying that they were separate to what had happened on 4<sup>th</sup> August 2018 (para 14), Mr Dalmalitis then asked the Claimant about them (page 106). Whilst Mr Dalmalitis said (YD para 22) that he raised them because she was presenting herself as a model employee I find from para 27 of his witness statement that he ultimately took the two past complaints into account when weighing up his decision to dismiss, and not just as a credibility aid to understand what was likely to have happened on 4<sup>th</sup> August 2017 (which was his oral evidence and in para 26). He did more than 'touch on' the past issues (YD para 22). Although Mr Dalmalitis was aware no disciplinary action had resulted from these two complaints (so it was not a misunderstanding that there were prior warnings) he nonetheless took them into account in considering the sanction of immediate dismissal which was unfair. This was compounded by the fact that the Claimant was not even aware until this meeting of the June 2017 complaint (page 106) immediately telling Mr Dalmalitis that no-one had told her about that. I find she was hijacked by this allegation at the meeting which was then used as part of considering the sanction of dismissal (YD para 27). The two complaints about which no disciplinary action had been taken were referred to in the decision rationale (page 116) as if they had only been relevant to the Claimant's credibility but I find that they were taken into account as part of the decision to dismiss for the wider reason that the Respondent considered that the Claimant had behaved rudely or aggressively in the past in a similar way as if disciplinary action had been taken about those complaints. This was unfair on the Claimant. The dismissal letter (page 123) still did not tell the Claimant what value it was she had not lived, though the first finding was clear.
16. The Claimant appealed (page 124). Mr Pindoria conducted the appeal and was given the same pack of papers as provided to Mr Dalmalitis. I find that he spoke to Mr Dalmalitis before the appeal meeting to understand Mr Dalmalitis'

reasoning behind the decision to dismiss. I find that although Mr Pindoria was satisfied from that conversation that the two past complaints had not been taken into account I have found that they had been taken into account as part of considering dismissal, as if they had amounted to past warnings on the Claimant's file. The Claimant maintained the incident had not happened (page 139). Mr Pindoria summarised the grounds of appeal in 10 points (page 149) and went through each one. Mr Pindoria knew that no disciplinary action had been taken about the two complaints (hence his later recommendation (page 162) that this be made clearer in the future). Mr Pindoria had the statement from the customer Ms Dowdon and I find from the questioning on page 143-144 that Mr Pindoria was reasonable to be sceptical about the circumstances in which the customer letter had been obtained (HP para 23) which affected the weight he ultimately gave it when considering the appeal.

17. I make the following findings as regards each ground of appeal. As regards ground 1 (CCTV) no fairness arose because there had never been any footage. As regards ground 2 the fact that the Respondent did not arrange mediation between the Claimant and Mr Azram (even knowing their relationship was not particularly good) was not unreasonable given what the Respondent had to decide was whether the incident which was serious had happened or not; even if they had a poor relationship if found to have occurred the Respondent could reasonably conclude that a poor relationship did not excuse the behaviour, taking into account that the Respondent's disciplinary procedure (page 25H) states that physical abuse of colleagues can amount to gross misconduct. As regards grounds 3 and 4 the customer statement had been read and taken into account by Mr Dalmalitis and also by Mr Pindoria; although the Claimant's and the customer's accounts had ultimately not been accepted the Respondent had to decide whose account to accept and it reasonably accepted that of Mr Azram and Ms Sindhu. There was no need to interview a customer who had already provided a written account by the time of the disciplinary hearing and appeal and which was taken into account; any earlier refusal by Mr Popat to consider the customer's evidence did not affect the outcome as put right at a later stage. As regards ground 5 taking into account the above findings the process did not become unreasonable because there were no notes of the first informal meeting. As regards ground 7 the Claimant did not have the right to choose who conducted her disciplinary meeting. As regards ground 8 the support she received on return to work did not affect whether or not the incident in fact happened. As regards ground 9 I find that the Respondent accepted that in future the pack should specifically record whether or not action had been taken about past matters (HP para 40). In the event however neither Mr Dalmalitis nor Mr Pindoria had been under any misapprehension about this as they both knew there was no past disciplinary action when taking their respective decisions.
18. As regards appeal grounds 6 and 10 (May 2015 and June 2017 customer complaints) I find that this matter was not 'put right' by the appeal. Mr Pindoria was under the misapprehension that Mr Dalmalitis had not taken them into account as if they had been past disciplinary warnings when I have found that he had. I find he was wrong to feel comfortable about this (HP para 36). Although Mr Pindoria correctly identified that the records provided should note that no past disciplinary action had been taken (HP para 39) that slightly missed

the point. There was no confusion about past disciplinary action (both managers knew there had been none); the issue was that Mr Dalmalitis had taken the past complaints into account in ultimately making the decision to dismiss and not just as an aid to assessing the credibility of the Claimant's account of what happened on 4<sup>th</sup> August 2017. Mr Pindoria did not put that matter right on appeal because he went off on the tangent of whether the documents should have noted no past action and did not consider, despite seeing notes of the disciplinary meeting showing that the Claimant was taken by surprise by the June 2017 complaint and despite seeing the reference on page 116 to the two complaints under 'rationale', whether the ultimate decision to dismiss had unfairly taken into account the two complaints about which no disciplinary action had been taken. In the appeal outcome letter (page 152) Mr Pindoria did not state that the 2015 and 2017 complaints had not been taken into account by him when reviewing Mr Dalmalitis' decision to dismiss consistent with his thinking that they had not been considered by Mr Dalmalitis, even though there was evidence to suggest that they had been, contrary to the assurance given to him by Mr Dalmalitis. In his appeal checklist he said that the pack had not been fair (page 161) but he did not consider that the unfairness of the documents included had unfairly tainted the actual decision to dismiss.

#### Relevant law

19. The relevant law for unfair dismissal is s98 Employment Rights Act 1996 (fair reason and fairness of dismissal) and the test in *BHS v Burchell* [1978] IRLR 379 for conduct dismissals, namely that the employer must have a genuine belief that the misconduct has occurred, on reasonable grounds and following a reasonable investigation.
20. The range of reasonable responses test in *Iceland Frozen Foods Ltd v Jones* [1982] IRLR 439 applied to the dismissal and as that test applies to the reasonableness of the extent of an investigation, *Sainsburys v Hitt* [2003] IRLR 23.
21. The case of *Polkey v AE Dayton Services* [1987] IRLR 503 was relevant to the assessment of the compensatory award. Reduction of the basic award for conduct under s122(2) of the Employment Rights Act 1996 was also relevant. The conduct must be blameworthy (*Nelson v BBC (No 2)* 1979 IRLR 346).

#### Reasons

##### *The decision to dismiss – unfair dismissal*

22. Taking into account the above findings there was a fair reason to dismiss (the Claimant's conduct on 4<sup>th</sup> August 2017). There had been a reasonable investigation and the Respondent genuinely believed on reasonable grounds that the Claimant had deliberately physically barged into her manager in a public area because angry with him. I find however that the Claimant was unfairly dismissed because of the unreasonable and unfair taking into account by the Respondent of the past customer complaints in the final consideration of the decision to dismiss, when weighing up what the sanction should be. No disciplinary action had been taken about these (and the Claimant was not

aware of the June 2017 one till the middle of the disciplinary meeting) and they were not used solely to assess credibility as claimed. The dismissal of the Claimant was therefore not within the band or range of reasonable responses for this reason when considering s98(4) Employment Rights Act 1996.

23. The procedure followed by the Respondent was fair because based on the above findings there was a reasonable investigation and the Respondent genuinely believed that the Claimant had barged Mr Azram on 4<sup>th</sup> August 2017 on reasonable grounds and following a reasonable investigation though ultimately it failed on the last hurdle, namely the overall fairness of the dismissal under s98(4) Employment Rights Act 1996. The procedure adopted complied with the ACAS Code of Practice in terms of the stages in the process.

Deduction under Polkey

24. I find however that the Claimant would have been fairly dismissed in any event. I assess that likelihood at 100%. Even without the customer complaints (used partly but not solely to assess credibility) I find that the Respondent would have acted within the range of reasonable responses in concluding, based on its reasonable investigation, that the Claimant had physically barged her manager Mr Azram in a public area because she was angry with him. Ultimately the Respondent had to decide whose account to believe and it reasonably accepted that of Mr Azram and Ms Sindhu over that of the Claimant and the customer Ms Dowdon.

Conduct relevant to s122(2) Employment Rights Act 1996

25. Taking into account the above findings I find that the conduct of the Claimant before she was dismissed was such that it would be just and equitable to reduce the basic award. I assess this as a reduction of 75% to her basic award.

Employment Judge Reid

9<sup>th</sup> June 2018