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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104816/2019

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Held in Dundee on 22, 23 and 24 October 2019

Employment Judge I McFatridge

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Miss L Dunn

**Claimant
Represented by
Mrs Fox
Solicitor**

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WM Morrison Supermarkets plc

**Respondent
Represented by
Mr Dunlop
Advocate**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is the claimant was unfairly dismissed by the respondent. The respondent shall pay to the claimant a monetary award of Five Thousand One Hundred and Twenty Four Pounds and Fifty Two Pence (35 (£5124.52)). This sum includes a reduction of 50% in the basic and compensatory awards to take account of contribution. The prescribed element is Four Thousand Two Hundred and Sixty Six Pounds and Eighty Seven Pence (£4266.87). The monetary award exceeds the prescribed element by Eight Hundred and Fifty Seven Pounds and Sixty Seven Pence (£857.67).

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E.T. Z4 (WR)

REASONS

1. The claimant submitted a claim to the Tribunal in which she claimed that she had been unfairly dismissed by the respondent. The respondent submitted a response in which they denied the claim. It was their position
5 that the claimant had been summarily dismissed for gross misconduct and that the dismissal was procedurally and substantively fair. During the hearing evidence was led on behalf of the respondent from Mr G Bridgeford their Market Street Manager and Mr G Dodds a Store Manager with the respondent. The claimant gave evidence on her own behalf. A
10 joint bundle of productions was lodged. I have referred to them by number. Many of them are handwritten and the handwriting is difficult to read. Where I have not been able to read the document (even after seeking clarification in evidence) I have simply left a question mark. On the basis of the evidence and the productions I found the following essential matters
15 relevant to the claim to be proved or agreed.

Findings in fact

2. The claimant was employed by the respondent from 4 November 2013 until her employment was terminated when she was dismissed for gross misconduct on 20 December 2018. She was employed as a customer
20 assistant in the respondent's Dundee supermarket. Her role was effectively that of a cashier.
3. The respondent is a large plc operating retail supermarkets throughout the UK. They have over 100,000 employees although many of these work part time. Within the Dundee store there are 150 employees. The
25 claimant's contract of employment was lodged (p41-42). The respondent has a disciplinary policy and an appeal policy. These were lodged (p29-35 and 36-39).
4. When the claimant started with the respondent she went through a two day training. During this time she signed her training card confirming that
30 she had been inducted in various matters. This was lodged (p28).
5. Up until the events which led to this claim being made the claimant had a good record of employment with the respondent. The respondent

operates an appraisal policy. A note from this headed "My Performance Plan" was lodged (page 43). The claimant's comment was

5 "I speak with my customers and have a laugh with them. I also advise them of products that are on offer and other products that are better than the ones they have bought. Give great customer service."

Under "What I can do to improve" it states

"Remember to highlight my receipts."

Under "My manager's comments" is written

10 "Linda is a great member of our team, she is always willing to help other members of staff and is very good with the customer. Well done Linda."

6. During 2017/18 the claimant was diagnosed with breast cancer. She undertook treatment for this which included radiotherapy. She was advised that the treatment had been successful. Whilst her treatment was ongoing the claimant only took time off to attend actual radiotherapy sessions but continued to attend work apart from this.

7. The claimant also had various other health difficulties. She requires to take diabetes medicine. She suffers from anxiety and depression. She has arthritis.

20 8. In July 2018 she collapsed whilst working on the till at work. She took 20 minutes out to recover and then went back to work. She subsequently collapsed again whilst on holiday. She consulted her GP who referred her to hospital where she was told she was due to take various tests. The claimant had a heart scan. She was due to have a brain scan on 25 20 December. The claimant was concerned about the brain scan since her sister had died of a brain tumour. In addition to this the claimant had difficulties in her personal relationships. She had fallen out with her partner and also with her daughter. This caused her considerable distress. She was absent for two days on account of anxiety/depression in late November returning to work for her shift on 1 December 2018.

Whilst working this shift an incident occurred which was the subject of the disciplinary proceedings which led to her dismissal.

9. Shortly after the incident the claimant had a return to work with her manager. This was lodged (p60-61). Page 60A notes in the first box in response to the question “How are they feeling now?” the claimant answered

“Wanted to get back to work – still not 100%.”

The next box states

“Are they able to carry out normal hours and duties? If not, discuss parameters of a phased return, how long will it last, what can and can't the colleague do? Think about physical capability required to do the job e.g. sit/stand/lift/carry etc. as well as mental capability e.g. are they able to assist customers/are they ready to deal with paperwork etc.?”

Under this it is recorded the claimant said ‘yes’. The form goes on to note that the claimant had spoken to her GP and was “Getting severe pains in neck/face. Worrying about a brain scan.” The form indicates that the claimant was on diabetes medication, prozac and lanzoprazole. The claimant did not consider her illness to be work related but did consider it to be the result of an existing health condition which she described as low mood/depression. The outcome stated was

“Continue to discuss issues/appointments with check-out manager/service manager.”

10. At 1pm on 1 December the claimant was serving a customer who placed a number of energy drinks on the conveyor. The claimant was familiar with the customer and considered her to be “difficult”. As the conveyor was moving one of the cans fell off the belt, hit the claimant and landed on the floor where it burst open. The can burst open and a substantial amount of energy drink went over the claimant. The energy drink was sticky. The customer behaved in a way which the claimant considered to be disrespectful and asked that the can be replaced. A colleague of the claimant who was also a member of the respondent's staff (CB) was in the queue immediately behind the customer. She arranged for the checkout

supervisor Sophie Orr to obtain a replacement can. The customer then left the checkout area. Shortly thereafter the customer returned to the checkout area shouting at the claimant that she could lip read and that she would be reporting the claimant. The customer then went to the Customer Service Desk and spoke to Stuart Rae a Trading Senior Manager with the respondent. She complained to him that she had seen the claimant mouthing the word "bitch".

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11. The claimant remains on her till for a period of time. During this period the respondent alleged that the claimant made various disparaging remarks about the customer to other customers and staff. The claimant was then taken off the checkout. That day the claimant had her return to work meeting earlier referred to. It is unclear whether it was before or after the incident in question. At some point that afternoon a written statement was obtained by the respondent from CB who was the member of staff in the queue behind the customer. This was lodged (p63). It stated

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"I was standing near the till when I heard Linda talking about the customer in a bad way. The customer heard what Linda said, about her (Customer) then the customer said 'I can lip read you know'. Linda said something back to her which resulted in an argument/disagreement. The customer then walked off to the Customer Service desk to complain about the remarks and attitude."

A handwritten statement was also obtained from ZC, another colleague of the claimant who had been on an adjacent checkout. This was lodged (p62). It stated

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"From the replacement of the energy juice is when my attention was drawn to Linda's till. The customer was given the juice and left the till. I then seen Linda proceed to make faces behind the customer. I then heard Linda call the customer an 'obnoxious fat little cunt'. I then witnessed the customer return from the café to declare that she could lip read and did not appreciate Linda's words. I then heard Linda tell various customers what had happened. Linda then later made a fist gesture at me and said she was annoyed at the woman.

And when asked what happened she replied 'I'm not putting up with it ... Fat little snobby obnoxious cunt.' That is all I heard of the incident."

12. In the meantime, one of the customers in the queue (called Heather) who was not previously known to the claimant told the claimant that if the claimant needed a witness to say what had actually happened then she was happy to give her name and telephone number. Two other customers in the queue also said that they would be willing to speak up on the claimant's behalf if this was required. They wrote out their names and telephone numbers on a piece of paper. This piece of paper was lodged (with telephone numbers redacted) (p64).

13. A decision was made by Kenny Downs, a manager with the respondent, that the claimant be suspended and the claimant was advised of this and given a letter. The letter was lodged (p67). The letter stated

"As a result of the incident on 1st December 2018 you are suspended from work on basic contractual pay until further notice. You should not attend work whilst suspended and should not contact anyone other than Lynne Henderson, People Manager. If you are a union member you can contact a union representative. ...

To allow us the opportunity to investigate this incident/allegation, please be advised you are required to attend an investigation meeting on Thursday 6th December 2018 at 10.00am at Morrisons Dundee in the presence of Irene Bryceland, Market Street Senior Manager. ..."

A decision was made that Irene Bryceland investigate the incident. Ms Bryceland did not give evidence to the Tribunal but documents were lodged which I accepted were handwritten notes which Ms Bryceland had taken of various meetings she had.

14. The respondent's disciplinary policy lists the procedure to be followed in respect of investigations. The relevant section was lodged (p33). It states

"Investigation
For serious matters, an investigation will be conducted as soon as possible to establish the facts and evidence and to confirm whether

there is a case to answer, and therefore if a disciplinary hearing is appropriate.

It's crucial to establish the facts of the case and to ensure we make informed decisions. As an investigation manager you'll be impartial, keeping an open mind and exploring all avenues, actively looking for evidence to support both sides of events. This may involve:

- Holding investigatory meetings (or if not possible, taking witness statements) with colleagues, customers or anyone involved with or who saw the incident, collating and reviewing training records, schedules, swipe records, CCTV images and other such documentation

Colleagues do not require notice to attend an investigatory meeting, nor do they need to be invited in writing, given documentation beforehand or have the right to have a representative present.

The investigation manager will prepare any questions, including who, what, when, where, why and how, to understand the context behind the incident. If you're being investigated, you will need to give a full and thorough account and sign the minutes.

Once an investigation is planned and all issues/allegations/evidence has been identified, the grid method is a really useful tool to work through the investigation and help stay on track. A template 'Investigation Grid' is available in the toolkit.

Once the investigation is complete, an investigation report should be completed and passed, along with all the facts to the disciplinary manager should any further action be deemed necessary."

15. Ms Bryceland appears to have commenced investigation by taking a witness statement from Mandy Gray the Checkout Team Leader. Ms Gray was not on duty at the time of the incident. The checkout team leader at that time was Sophie Orr. Sophie Orr was not interviewed by Ms Bryceland or indeed at any point during the investigation. Ms Gray's statement bears to be signed by her on 4 December 2018. It is completed by Ms Bryceland in manuscript. The interview appears to have lasted 10 minutes. The statement begins

"IB Do you want to tell us what happened?

MG Sophie contacted me at the start of my shift.

IB What did she say?

5 MG Had an issue with a member of staff and a customer, staff member was Linda and the customer had gone to the desk to complain about her. Whoever was on the desk got Stuart Rae down to speak to her. I spoke to Stuart – who said could I speak to her – felt uncomfortable as (?) was not there. I went and spoke to Grant.

IB At what point did you hear?

10 MG When Linda called me over.

IB She was still on a checkout?

MG Yes.

IB She was on a checkout and asked to speak to me.

15 MG Yes, called me over, there were no customers, she said a customer had words with me and said I was abrupt. A can of energy juice – customer threw it and it hit Linda.

IB She told you this?

MG Yes. Customer walked away, to café, she said the customer said that I can lip read you know.

20 IB Did she say what the customer had said.

MG No.

IB Did she say anything else? Just customer can lip read?

25 MG Yes, Linda said that the customers behind said that the customer had behaved outrageously. They gave Linda their details. Clare was in the queue. I never heard Linda say anything.

IB Didn't speak to customers or C?

MG No, Grant did that.

IB Anything else you can think of?

30 MG No, Z and C did their statements, I folded them over and brought them upstairs." (p68-68A).

The next interview which is recorded is the investigatory meeting with the claimant which took place on 6 December 2018. In advance of this the claimant produced a statement. The statement was lodged (p69-70).

16. In her statement the claimant set out what she considered to be her good record with the company. She then went on to say

“As regards the incident on Saturday 1st December 2018:

- 5 • The customer in question loaded the belt with all her shopping including a number of high energy drinks.
- Unfortunately through no fault of mine one of the cans fell off the belt hit my knee and landed on the floor.
- The can exploded on impact and the juice from the can soaked me, the floor, the till, and some cans on the belt.
- 10 • Whilst trying to compose myself and dry the till, the floor and myself, the customer in question, demanded in what I can only describe as a degrading manner, a cloth and a replacement can of juice.
- On receiving the new can of juice from another assistant, I duly took her card and her money after which she went on her way.
- 15 • The customers who were next to being served remarked on the behaviour of the woman and stated that staff should never be subject to such abuse. I replied that the majority of customers are very nice and courteous and it's only the few that could be abusive and disrespectful.
- 20 • After a few minutes the customer in question came back shouting at me saying she lip read what I was saying from the café and was going to report me to management.
- At this moment in time the customers I was serving said they would be a witness to what happened and stated she the customer in question was totally out of order. They then gave me their names and address to act as a referee.
- 25

30 To conclude I believe that I am a valuable member of staff who works hard to please both management and customers. I have been extremely distressed with this incident which has had a detrimental effect on my health and wellbeing. I would like to thank you for your time attention and should be pleased to forward further information if required.”

17. The investigation meeting took place on 6 December 2018. It was attended by the claimant and Jim Wilson her union representative. Ms Bryceland was accompanied by Lynne Henderson a People Manager from the respondent's HR department who took notes. Ms Henderson's notes were lodged (p71-78). They are initialled on each page by the claimant and Ms Bryceland and signed on the first page by the claimant and Ms Bryceland. I accepted that these were a reasonably accurate but not verbatim account of what took place at the meeting. The claimant was asked if she had received the letter of invitation. The claimant replied that she had and that "that's all I've got". At that stage the claimant had not been sent copies of the statements taken by ZC or CB on 1st December. The claimant was then asked to talk through the incident. The claimant said that she had been off sick two days prior to this on the Tuesday and Wednesday. The note then goes on to state

15 "Everything (?) – should in hindsight been to GP for line.

IB What was happening?

LD Have got depression, fell out with daughter, split up with ex partner, under investigation at Ninewells due to series of collapses. Heart scan already – waiting for a brain scan. All in all feeling not mentally fit – should have gone to the GP and got a line for 1/2 weeks, should have stepped back. Came back to work Saturday, doing what I do, customer comes through, know her, name is Morrison, very stern never a please/thank you, not happy person. Put shopping up, energy drink, big cans, very heavy, can tipped over, not anyone's fault, exploded everywhere, all over me. I was soaked, uniform, over till and floor. Looking at me – looking at me like I was trash, was trying to wipe scales, till and myself. She said get me a cloth so I can wipe down my cans. Another colleague in queue overhear and a customer. Another customer said you have enough to deal with. Said about what about my other can that exploded – C went and got one, Sophie came over. She walked away. Customer next in queue, gave her details to me. Customer went to café (customer) said I've lip read everything you said to me, I was really upset, said I'm going to report you, then she went to Stuart. Went on my break, Stuart

was upstairs and was very nice, did say he had to ask customer to keep voice down. Kenny did my return to work, then he said there had been a serious allegation against you – customer said that you swore at her. I didn't swear at the customer. Kenny told me that I'd be suspended. ...

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Linda has witness names for Irene.

IB When customer said I can lip read were you facing café.

LD Wasn't full on to the café – just said I can lip read. Been through till before.

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IB Can you remember anything you said after you (?)

LD Just said that I can't believe that have to put up with behaviour like that. If I saw it in Asda or elsewhere. Worked in NHS – won't take abusive behaviour.

IB Was she abusive?

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LD Just way she stood and said get me a cloth. Came out of the café was shouting and at Stuart.

IB Do you think you were loud?

LD No.

IB Did she say that she heard what you said?

20

LD No just said she could lip read.

IB Served that lady and she went away?

LD Yes.

IB Then C?

LD Yes

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IB The lady, who served C did you say anything to C – were you animated?

LD Yes, was agitated.

IB Put on light for help.

LD Can't remember (?) on next till who was on next till, was soaking.

30

IB Was it busy at this point?

LD Started at 12 – between 1-1.30am, had had my break – Kenny saw me at 4pm.

IB Spoke to C first.

35

LD Yes, how should you have to put up with this, the next customer, spoke about what had happened, said here is my number I'll back you up, said that I'll get hauled up for this, there was Heather, and

another lady don't think she witnessed it, said here is my name as you are always pleasant.

IB Must have spoken about it to a few people. Lady not in queue but must have bothered you.

5 LD Was really upset.

IB Spoke to Heather?

LD Stuart, spoke to Sophie to ask if I could get upstairs. Stuart said you get then had to get customer to lower tone, almost don't worry about it.

10 IB When did you get break?

LD An hour or so after – don't remember wasn't right away.

IB Who was running tills.

LD Just Sophie.

IB How many times do you think you spoke to afterwards?

15 LD Perhaps 4 or 5, was really upset, customers I would normally speak to. Make a blether here too.

IB Once she'd been through, gone away, do you think it was then you spoke to C or afterwards.

LD Thinks so, C was there.

20 IB Can't think what the customer would have lip read but you were upset?

LD Yes.

IB Did you speak loudly or upset?

LD yes.

25 IB Do you think you swore?

LD Don't think I did.

IB Could you have?

LD Don't know can't remember.

IB Angry and upset?

30 LD Yes, should have gone to GP don't like being off – just that one customer.

IB Can we adjourn for a moment?

LD Yes.

35 The meeting adjourned for 25 minutes. After this Ms Bryceland said that she needed to speak to further witnesses and that the claimant would

continue to be suspended until the investigation was concluded. The claimant's union representative made a number of points including reminding Ms Bryceland that the claimant had recently fallen out with her daughter and partner and that he understood how Linda felt. He made the point there was nothing in place to support her. The claimant then said that Sophie would have known about it and known to speak to Stuart. The claimant also mentioned again that she was still waiting on an appointment for her brain scan from Ninewells. The note indicates that the meeting lasted for around one hour.

18. The respondent wrote again to the claimant on 11 December 2018. The letter confirmed that the claimant was suspended. The claimant was invited to a further investigation meeting which was to take place on 17 December. This letter was lodged (p79).

19. In the meantime it would appear that on 13 December 2018 Ms Bryceland spoke to Stuart Rae a Trading Senior Manager with the respondent. A note of this meeting was lodged (p80-82). The note records that Mr Rae was called down to the Customer Service desk. It then goes on to state

“IB Who called you – Mandy?

GR Don't know – just called. Went to desk woman is 70s, very irate, wanted to complain about staff member, energy drink burst open, went over cashier, cashier didn't say anything but was moaning, actually left the till, didn't apologise at all.

IB Got up and went away?

GR Yes, just got up and went away, went all over cashier, she never apologised, came back continued transaction didn't offer replacement, no interaction. Then customer went to café, customer said she overheard conversation, she said saw customer said to colleague behind she is a bitch. I apologised to the customer as hadn't heard what was said.

IB So said she heard?

GR No said she saw her mouthing the words 'customer was a bitch'. Defused with with customer, apologised profusely, didn't know what had been actually said from (?) point of view, apologised to witness and said I'd deal with it. Approached by Mandy, who

asked what had happened. Told her Mandy said if Linda comes in she is in bad mood then she is in bad mood. Didn't hear Linda what she said but saw what had been mouthed. Linda approached me – got her side, said customer had thrown stuff at her, said customer was obnoxious. Said she should have apologised, offered replacement even if customer's fault. As far as I know had spoken to customer and now speaking to you, as far as I was concerned customer service could have been better but it was done and over. Kenny then spoke to me. Interesting Linda used word obnoxious – Kenny told me what she had said – customer didn't mention these words.

IB No other interaction?

GR No – had heard both sides at that point didn't think it was going any further. Linda said that she'd had that customer before, almost like being targeted. Did suggest that she called next time she came to the till, said couldn't stop customer coming through, need to make others aware. Felt at that point, Linda's side, spoke to customer, had to take her word, gave advice about customer service and that was it.”

20. Ms Bryceland's notes then show she spoke to the colleague ZC on 16 December. This was the colleague who had provided a written statement on 1 December. The note of the meeting with ZC was lodged (p83-86). ZC confirmed that he was opposite the claimant facing her. He said it was busy. When asked “how were you aware?” he replied

“Linda getting replacement for something – someone bringing it – (?) I think – Clare coming over - then aware then that's when it happened.

IB Can you tell me what happened then?

ZC Customer got replacement can and left checkout –

IB Hadn't heard anything at this point.

ZC No.

IB No raised voices?

ZC No. Customer then left to lockers @ café – Linda making faces – learned that there was an incident with the can – customer hadn't apologised. Customer had gone into café – sitting at table with

others. Then that's when I heard what she was saying. I heard Linda say the customer was snobby and stuck up – called her a 'snobby cunt'

IB Clare there?

5 ZC Yes.

IB Other customers?

10 ZC Yes. Linda kept saying things along those lines speaking to Clare and the customers. Customer came over said I read lips and know what you are saying about me. Linda said don't appreciate how rude you are. Customer left I assume to complain and went to CSD. Linda then spoke to every customer telling them what happened. I then got taken off my till for a statement.

IB Is this your writing?

ZC Yes.

15 IB Did she make a fist gesture?

ZC Yes – J gestures a fist. Said snobby fat cunt – just left it at that.

IB Was she upset – angry?

ZC Yes – I think she took it very seriously.

IB Was she wet?

20 ZC Didn't notice – but bags were wet.

IB Did she say she was soaking?

ZC Not to me – but heard her say to a customer.

IB How many customers were there?

ZC About 8 to 15 customers.

25 IB When repeating story – was she still annoyed?

ZC Yes.

IB Did she still swear?

ZC Yes. Some customers were agreeing.

IB Was she saying the c word?

30 ZC Yes.

IB She kept repeating the story until taken off the checkout?

ZC Yes.

IB Do you know if she put on her light for a supervisor?

ZC Yes I think she did as she said she need a supervisor.

35 IB Did anyone come?

ZC I think Sophie.

IB Did she stay on till?

ZC Think she came off till and went to the podium.

IB Was it busy at the time?

ZC No customers when she came off.

5 IB After the incident did she put light on immediately – time between incident and speaking to 8 to 15 customers.

ZC I don't know how long – if Clare was there – don't know how long she was waiting.

IB Did she continue to tell customers after Sophie?

10 ZC Yes.”

21. The productions also disclose that Ms Bryceland spoke to CB on 16 December. She spoke to CB just after ZC. CB was the other colleague of the claimant who had given a statement. The note was lodged (p87-92). It is signed by CB.

15 22. This shows CB confirming that she was in the queue right behind the customer. She was then asked to say what had happened. The note shows the following exchange:-

“CB There was a bit of tension, Linda was giving daggers – over a can of Rock Star – bag of something – customer agitated.

20 IB Was transaction going on?

CB Yes – had jacket on on my lunch – got another one – was tension – customer asked for something to wipe her hands with. Linda asked if she could take it up – Linda asked if she could have it back so could put it in the bin - customer walked away.

25 IB Linda asked customer for the tissue to put in bin?

CB Yes, then things kicked off. Customer walker to café. Linda still speaking shouts.

IB Had raised voice.

CB Yes?

30 IB Saying what?

CB This that raised voice – think said b..... Customer turned around – could still hear Linda come back and said I can hear you.

IB Linda facing café.

CB Looking towards café.

IB Remember what till.
CB Almost between café/tills.
IB Near lockers? So customer could see?
CB Yes and raised voice, customer said I can lip read you know. She
5 said to customer going through bad time, have depression, don't
need this. Could hear her saying all this to other customers.
IB Customer – did she go away? Did she say anything else to Linda?
CB She went down towards CSD to complain. Linda asked me to
speak to Sophie.
10 IB So she (??) you – what did she say?
CB Raving on, voice raised, think she was swearing.
IB Did you hear what customer said or what it was about?
CB Not sure, can had burst, think it was way customer put it on the
belt, got soaked, said had split up with partner and daughter.
15 IB Said that at till?
CB No told me before – shouldn't have happened. Said Karen will get
her. Linda calling her everything under the sun all turned around
– Linda said I've been suspended.
IB Jumping ahead – customer didn't witness it?
20 CB No, just what Linda had said.
IB Then you approached – did you say you shouldn't have said that?
CB Yes. I did was speaking about man feeling really upset as had
liked her – tells everyone.
IB Spoke to Sophie?
25 CB Yes before I went to my break – said to Sophie briefly what had
happened.
IB You came back downstairs – how much later?
CB Think it was half hour break. She was still ranting on.
IB What till 14?
30 CB Yes.
IB Linda?
CB Her (??) up – I was (?) up. Still could hear her.
IB (?)
CB Yes.
35 IB (?) – hear her?
CB Couldn't hear exactly.

IB Could see her pointing at you?

CB Yes.

IB Could tell what she was speaking about?

CB Yes.

5 IB Half an hour later?

CB Yes.

IB How long did it go on for?

CB Don't know.

IB When did you finish?

10 CB 3:45pm – checking out – Linda said that she'd been suspended,
not allowed to come to night out

23. The claimant attended the further investigation meeting with Ms Bryceland fixed for 17 December. She was accompanied by Jim Wilson a union representative. Ms Bryceland was accompanied by Lynne Henderson
15 People Manager who took notes. Ms Henderson's notes were lodged (p93-100). The claimant has signed each page of the notes to confirm she agreed the content.

24. Ms Bryceland asked the claimant if, now she had more time to think, she was able to provide more clarity about what was said to the customer and
20 afterwards. The note goes on to state

“LD No was so upset and angry – if that can hadn't bounced off the belt and customer's attitude wouldn't have been in this situation.

IB Just go over that again – can fell off – wet you – what did you say to each other.

25 LD Everything was all over the place – all soaking myself, floor, till, scales, trying to wipe it off, new trainers.

IB Saying that out loud?

LD Can't remember – just turned and she said get me a cloth so I can wipe down the cans. That's just the way she spoke – not can I
30 ask someone to help you or anything.

IB It was what she said and how she said it.

LD It was (?) – it was nobody's fault it fell off the belt – I would have asked if I could get help or whatever.

IB Multipack?

LD No – but she had a lot all piled on top of each other – moved with belt. Just said get me a cloth – took the money – finished transaction – she said what about my other can – Clare was in the queue so she got Sophie.

5 IB Apart from that was that the only conversation - asked for cloth?

LD Yes but way it was said.

IB Clare in queue.

LD Yes

IB Next customer?

10 LD Yes, the customer behind. That was women who was a witness – gave you her name.

IB Do you think the woman was there when you served the woman?

LD Yes, she was shaking her head and said what a way to speak to you.

15 IB Served Clare, next lady, then woman came back?

LD Yes.

LD Her words to me – I am able to lip read. I'm away to report you. Customer said I'll give you my name and address as that was ridiculous. Gave you name and the number.

20 IB Yes.

LD I was off 2 days that week – should have gone to the doctor.

IB Do you feel you overreacted?

LD Maybe I did. Worried sick about my health.

Linda visibly upset. ...”

25 The note goes on to state Lynne left room for hankies, Jim leaves to get Linda a cup of tea. There appears then to have been an adjournment from 11:50 until 12:52. The note indicates prior to this

“Linda’s appointment Thursday @ 6.00pm (brain scan).”

30 It would appear to indicate that Mr Wilson advised Ms Bryceland that the claimant had an appointment for a brain scan on Thursday at 6:00pm.

25. The note indicates the meeting reconvened at 12:52 and continues

“IB See when you said you were wet – did you put on light?

LD Spoke to Sophie – then Stuart came down as customer had gone to him – was on the till for an hour until got off – wanted to get off to speak to Stuart.

IB In that hour were you aware of talking to other customers?

5 LD More like customers saying hi – what kind of day are you having, stressful day.

IB Do you think you talked about that customer?

LD I would have.

IB Do you think it was detrimental to customer

10 LD Would have said how I got treated, what she said, soaking, just what she said and

There was then further discussion before the meeting again adjourned. The note is unclear as it states for the first time it adjourned at 11:50 and reconvened at 12:52 whereas the second adjournment is said to have
15 been between 11:55 and 12:00. Both cannot be correct. The note states

“IB Do you remember when Clare was in the queue – Clare said you shouldn’t have spoken like that.

LD No.

IB Don’t think there is anything else I need to ask Linda.”

20 The claimant’s union representative asked if the claimant had anything to add. The claimant had said

“Friend concerned that I hadn’t answered the phone – Police came to house, wanted to take me to Carseview – that’s when I went up to stay with friend.

25 IB Have support?

LD Yes.”

The claimant’s union representative then spoke about the background and the build up of stress and the claimant’s mitigation. The claimant then went on to confirm that she had been back at her doctor’s the previous
30 week. She had got more tablets and had injections in her knees. She had gone about her arthritis. There is then a further note that the meeting adjourned between 12:05 and 12:10. The note goes on to state that Ms Bryceland indicated “have no alternative but to invite you to a

disciplinary meeting.” The claimant was asked whether she would prefer the meeting on Thursday or Friday and asked if it could be on Thursday. Ms Bryceland went on to say that a different manager will deal with it and the outcome could be dismissal, disciplinary warning or other outcome.

5 26. Following this it would appear that Ms Bryceland completed an investigation report. This document was lodged (p101-102). Ms Bryceland also completed a checklist at page 103.

27. The manager who dealt with the disciplinary hearing was Mr Bridgeford. Mr Bridgeford effectively works back to back with Ms Bryceland.
10 Accordingly, the only information he had was that contained in the written notes. He did not at any point speak to Ms Bryceland regarding her investigation.

28. Mr Bridgeford wrote to the claimant on 17 December 2018 inviting her to a disciplinary hearing on 20 December. The letter was lodged (p104-105).
15 The letter was hand delivered to the claimant’s house on 17 December. The claimant was advised that the allegation was that “On Saturday 1st December 2018, you behaved in an inappropriate manner towards a customer and engaged in inappropriate dialogue on the shop floor.” Enclosed with the letter were the notes of the claimant’s investigation
20 meetings on 6 and 17 December 2018, the witness statement from Stuart Rae, Mandy Gray, ZC and CB. The claimant was also sent a copy of the disciplinary policy and the representation guide. The claimant was advised of her right to be accompanied. The claimant was advised that the allegations were serious and a potential outcome of the disciplinary
25 hearing could be her dismissal for gross misconduct.

29. The disciplinary hearing took place on 20 December. This was the same day as the claimant was due to attend her brain scan. She was accompanied by her union representative Mr Wilson. Mr Bridgeford was accompanied by Lynne Henderson a People Manager with the respondent
30 who took notes. Ms Henderson’s notes were lodged (p106-116). I considered these to be an accurate though not verbatim record of what took place at the hearing. Mr Bridgeford asked the claimant to take him back to what happened that day. The claimant said

5 “Couple of days I was off - lots going on with state of mind family issues felt couldn’t cope – with hindsight should have got line but decided to come back, always like to work. Customer came through till – name (M) ... never says good morning, thanks – on this day pile of cans but however she placed them on belt came off belt hit me on knee – totally soaked, all over me, new trousers, floor sailing, all over till, she just stood – body language with a bit of a smirk – said get me a cloth, smirking at me. She wiped down the cans – went on to finish transaction – forgot about the can on floor.

10 GB Did you leave the till?

LD no, she wanted the other can, Clare was next in line as customer. Clare went away. Sophie came back with a new can.

GB Who was next in line?

15 LD Clare – was looking in a state – next customer said what a customer. Customer went into the café. Clare went to end where got shopping. Said to customer – suffering depression – what you need to put up with, customer said give you my name. Customer came back.

GB Why?

20 LD Said she could lip read me – said reporting me – said that’s what to do. Customer in the queue next said give me her details. According to Stuart customer said that I’d called her a bitch – I wouldn’t use those words.

GB If you’d not said anything or said that why would she say that?

25 LD I didn’t say that.

GB Have two witnesses saying you also bad mouthed if only customer that may be one thing – but the statements say you were loud.

LD I was totally distressed.

30 GB Look at Clare’s statement – things kicked off – customer at café, Linda shouting, think she said bitch – customer said she could hear me.

LD She could not.

GB (?) ... customer could see.

35 LD How could Clare see where she was. Customer didn’t hear said she could lip read.”

The claimant went on to confirm that she was upset and couldn't remember. The claimant confirmed that she had put her light on but had remained soaking on the till. It was put to the claimant that ZC had said she was speaking to customers and that CB had said the claimant was still speaking when she came back from break. The claimant's response was "Don't know how she can say that was further down and laughing at me how she could say that I was contacting her." The claimant then became upset and the meeting was adjourned for a few minutes before being reconvened. The claimant's position essentially was that she accepted that she was loud and had "lost her cool". She did not accept that she had sworn. She was certain that she had not sworn or used the word bitch either to the customer or where the customer could see/hear. Her position regarding what she had said to the other customers who were waiting in line was that she accepted she had lost her cool but could not remember. She accepted that she had been loud and upset but indicated that this was in response to the other customers in line showing her sympathy and asking her how she was.

30. At the end of the meeting Mr Bridgeford adjourned from 3:40 until 4:58. During this period he prepared his disciplinary report. This was lodged (p117-119). He also completed a blank piece of paper setting out his reasoning (p120).

31. Mr Bridgeford decided to dismiss the claimant. In his report he said that he was satisfied on the balance of probabilities that the claimant did what was alleged. He stated that he had considered and formed a response to mitigating factors. In his report he states

"Reasonable belief that Linda used abusive language which customer has seen/heard and reported to senior with two witness statements corroborating the allegation. Linda never admitted until pushed that she had said something that upset the customer but was fully prepared for mitigating circumstances as though she was denying the allegation. So the trust to the management team and company has been broken twice with her she spoke about customer and her refusal to believe she had done anything wrong. Thought about could we give final written warning instead but feel to cases of broken trust negates

this possibility. ... Feel that this incident would have a strong possibility of recurrence if Linda stayed on.”

In the sheet at page 120 Mr Bridgeford noted

5 “Linda did say something about the customer to the next customer which was overheard or seen mouthed by Linda. Linda continued to tell the tale to other customers.

This act has had an adverse impact on the Morrisons brand.

Trigger for customer to come back to Linda. Rude and offensive to a customer.”

10 100% sure that is the case.”

An arrow pointing to mitigation and notes

“Nothing on file 1.75% absence

Not on file apart from B.C.”

He then has in a box

15 “I have no trust in Linda that she would not do it again.”

Mr Bridgeford then advised the claimant that she was dismissed.

32. Mr Bridgeford wrote to the claimant on 20 December 2018 confirming his decision. The letter was lodged (p121-122). The claimant was dismissed with effect from 20 December 2018. She was advised of her right of
20 appeal.

33. The claimant submitted an appeal in writing on 27 December. The letter was lodged (p123-124). The claimant set out three grounds. These were

“1. Procedure

25 I believe the procedure was flawed in that key witnesses were not interviewed. The writings within all the documents were difficult to read and understand. I also think that one full business day was insufficient time to prepare my case.

2. Facts

30 I believe that all the facts pertaining to my mitigation circumstances and relating to the incident may not have been seriously considered.

I was extremely distressed and upset by the incident and my actions were completely out of character.

3. Severity of sanction

5 I believe the severity of the sanction ie summary dismissal, was disproportionate to the allegation especially given the mitigation factors. I was employed by Morrisons for over 3 years during which time my service was unblemished. I was a conscientious caring, committed and flexible employee who worked hard to please management and customers. In fact I was commended for my customer service skills, conduct and performance.

10

Whilst this one off incident has had a detrimental effect on my life, health and wellbeing I would like to thank you for your time and attention and should be pleased to attend any meetings to discuss my appeal.”

15 34. In a letter dated 2 January 2019, the claimant was invited to an appeal hearing which took place on 11 January 2019. The claimant was sent further copies of the respondent’s Guide to Representation and Appeals Policy. The appeal meeting took place on 11 January. The appeal was carried out by Garry Dodds the Store Manager. The claimant attended accompanied by her union representative Mr Wilson. Jen Hamilton a People Manager with the respondent took notes. Ms Hamilton’s notes were lodged (p128-135). I was prepared to accept that these were a reasonably accurate although not verbatim record of what took place at the hearing.

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25 35. At the outset of the hearing the claimant was asked to go through her grounds of appeal. She started by apologising. The note states:

30

“Ok, would just like to apologise for actions. (Very apologetic. Believe that mitigating factors are due to health and situation at the time. Believes Sophie who was the supervisor was not interviewed. Mandy who was interviewed was not on duty at the time, why was she not interviewed and Mandy was. Customer wasn’t interviewed

During the hearing the claimant confirmed her position. Mr Dodds adjourned the meeting from 14:17 to 14:35. Following the adjournment

he told the claimant that he was upholding the decision to dismiss her. Following the appeal meeting Mr Dodds wrote to the claimant confirming his decision. The letter dated 27 January 2019 was lodged (p136-137). Mr Dodds set out the claimant's grounds of appeal and then confirmed that he had decided to uphold the decision to summarily dismiss the claimant for gross misconduct. He went on to say

"My findings have been based on the following grounds:

- In answer to point 1. You believe the procedure was flawed in that key witnesses were not interviewed. The writing in the documents was hard to read and that one day was not enough time to prepare your case. It is morrison's company policy that you are allowed 24 hours notice of any disciplinary which you received. Also you had in fact been given the choice of the meeting being held on Thursday the 20th of December 2018 or the following day Friday the 21st of December 2018, of which you chose the Thursday. With regards the writing in the documents I did not find them to be illegible and was able to read them all. At the appeal hearing on the 11th of January 2019, I asked you what benefit interviewing Sophie Orr the checkout Team leader would have brought to the investigation to obtain if a crucial part of the investigation had been missed and from your account Sophie Orr's statement would have supplied no additional factors to the investigation. During the appeal hearing on 11.01.2019 you also asked why the customers had not been interviewed as part of the investigation and as I explained this is not part of the Morrisons process.
- In answer to point two. You believe that your mitigating circumstances had not been taken into account. You were extremely distressed and upset by the incident and your actions were out of character. Your record shows no previous problems with the customer service you gave and I am fully aware that on occasion we have some challenging customers to deal with. I also believe that you did not use abusive language directly towards the customer as you have stated. However we have a customer who complained about your behaviour and when investigated two colleagues that have stated abusive language was used about the

customer who complained whilst talking to other customers. I would like to remind you that ZC states you referred to the customer as a 'snobby fat cunt' and CB corroborates this saying that you had been ranting and swearing about the customer in front of other customers. When I questioned you about the incident as you had been questioned in the disciplinary hearing you are able to remember not swearing directly at the customer when serving her at your checkout, and that a can of energy drink fell from the belt onto the floor at which point you felt the customer asked you for a cloth to wipe the other cans and also a replacement for the one that fell to the floor in a rude manner. However when I asked you what you had said to other customers and the words you had used about the customer you could not recall. It is my belief based on the investigation that you used abusive language on the shopfloor in front of customers and colleagues which is unacceptable. Using swearing and abusive language towards or about a customer or even just in conversation is totally unacceptable in our business and in fact gross misconduct.

- In answer to point 3. The sanction was too severe and disproportionate to the allegation. You have had 3 years service with an unblemished record. As an employee you were committed, consistent, caring and flexible. It is my belief that the sanction was correct in this instance as using swearing and abusive language about a customer on the shopfloor during conversation with other customers which colleagues overheard is totally unacceptable and potentially damaging to our business and does not support the Morrisons customer service expectation."

36. Following the termination of her employment the claimant applied for and obtained Universal Credit. The sums she received in respect of this were set out on page 138. The claimant is required to apply for jobs on the gov.uk website. She requires to maintain a certain level of job search as a condition of maintaining her benefits. The claimant has met this condition. The claimant lodged a list of the jobs which she had applied for from her gov.uk account (p139-148). The claimant applied for a total of

41 jobs. The claimant made appropriate attempts to mitigate her losses. She was unable found another job on or around 22 August, albeit this was temporary. The respondent lodged a list of jobs which they consider the claimant could have applied for. There were around 60 jobs. Many of the jobs had been applied for by the claimant. Of the ones which had not some were clearly unsuitable for her and in respect of others they were in locations which she would not be able to attend due to lack of public transport. The claimant is now on a disability related benefit but is still looking for work. As at the date of the hearing she remains unemployed.

10 **Matters arising from the evidence**

37. There was little dispute between the witnesses in relation to the facts which were relevant to the matter before the Tribunal namely those relating to the respondent's investigation and the various meetings which had taken place thereafter. So far as those meetings which were attended by the claimant the claimant had signed the note of meeting and I was happy that these notes provided a reasonably accurate, although not verbatim, account of what had taken place. I had absolutely no evidence before me in relation to the meetings which took place between Ms Bryceland and others nor any information as to Ms Bryceland's thought processes in relation to who she decided to interview and in what order. I also had no information as to the decision making process by which someone within the respondent's organisation had decided that the matter should be referred to a disciplinary hearing. The claimant's position was that she had been told right from the outset that she would be attending a disciplinary hearing i.e. before the investigation took place. Her evidence as to precisely who had told her this was somewhat lacking but in general terms the evidence did not give me any confidence that this was a matter which had ever been considered objectively by anyone.

38. Since part of the claimant's case was that the respondent's decision makers had pre-judged matters and made various assumptions which were detrimental to the claimant without properly investigating it is probably as well that I comment individually on the evidence.

39. I would agree with the claimant's representative that although Mr Bridgeford started off in a straightforward and apparently candid manner he became much less candid during the course of cross examination and appeared to be prepared to give evidence which would
5 bolster his position rather than honestly answer the questions. He conceded that Sophie Orr the checkout team leader had witnessed the event. He also conceded that the customers had not been spoken to although their names had been given. Initially he appeared to suggest that only the names had been given and he did not have any contact
10 details. He subsequently conceded that in fact the unredacted version of the note lodged at page 64 did have the customer's telephone numbers. His position was that he did not interview these people because "I had what I needed". He also confirmed in evidence that, as stated in his reasoning, he considered the fact that the claimant had been able to put
15 forward good quality and clear mitigation somehow detracted from her denial of guilt. It appeared to me that Mr Bridgeford had approached the matter with a somewhat closed mind. The extent of his confirmation bias could be seen from the fact that on a number of occasions he indicated that CB had provided corroboration that the claimant had used the word
20 "bitch" as alleged by the customer. This was in response to a line in cross examination where the claimant's representative pointed out that none of the witness statements from CB and ZC coincided either with each other or with the customer's statement. Even when taken to the specific document which states "b...." Mr Bridgeford continued to state that it said
25 bitch. Whilst I consider this to be a small point I did feel that, given Mr Bridgeford had not spoken to the investigating officer, it demonstrated a certain state of mind where he was prepared to accept anything that went against the claimant at face value without investigating it further. It appeared to me having witnessed him give his evidence that the
30 claimant's criticism that he was only interested in seeking evidence to support a dismissal was justified.

40. Mr Bridgeford also gave evidence that CB's statement showed that the claimant had been "ranting on for at least half an hour". When it was
35 pointed out to him that CB's statement states that she was away for half an hour and that the claimant had simply had been talking about it when

she left and when she got back he entirely failed to see the issue. When asked why he did not speak to Sophie Orr who, after all, was supervising the checkout and may be thought to have been in a position to confirm or deny that the claimant was swearing at customers for over half an hour he again said that "I felt I had enough". Mr Bridgeford also in his summing up states that he felt there was a strong possibility of reoccurrence of such an incident but was not in any position to say what this was based on.

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41. Mr Dodds' evidence was in my view similarly flawed in that once again I considered that he was trying to give what he thought was the correct answer. He reluctantly agreed that Sophie Orr might have been a relevant witness. He then said that he thought she had changed her shift and so would not have seen the second part of the incident where the claimant was allegedly swearing to customers although he had not mentioned this up to that point and this did not appear to be in line with the evidence of the claimant and was not mentioned in the appeal outcome. With regard to the customers, his evidence was that he did not feel the customers would have brought anything to it as the issue was that the claimant was bringing the company into disrepute. He gave evidence that he had considered the matter carefully but decided not to. He could not in any way explain why, if this was the case, it states in his appeal outcome letter that he did not interview the customers because this was contrary to the company policy.

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42. Generally, I would agree with the claimant's representative that the claimant gave her evidence honestly and was credible and reliable throughout. She was candid in her evidence. She was absolutely clear that she had not sworn at the customer. She did candidly accept that she had lost her cool and was upset and that she had perhaps raised her voice. She was apologetic for this. She says that she became so distressed that she could not remember exactly what she said. She was also clear that whatever was said was in the context of customers, who she knew, asking her what kind of day she was having and she would then tell them she was having a "day from hell".

Issues

43. The sole issue which I required to determine was whether or not the claimant had been unfairly dismissed.

Legal provisions

5 44. The respondent's representative referred to the specific legal provisions in his written submissions. The relevant legislation is section 94 and section 98 of the Employment Rights Act 1996. In considering applying section 98.4 the ET should have regard to the test in ***British Home Stores Limited v Burchell [1980] ICR 303***. The ET should not substitute its own
10 views for those of the employer (***Foley v Post Office [2000] ICR 1283***) and an ET should not consider what it may have done differently. The Tribunal has to consider whether the decision to dismiss fell within the band of reasonable responses (***Iceland Frozen Foods v Jones [1982] IRLR 439***). If some employers would dismiss and others would not
15 dismiss then the dismissal is fair (***British Leyland UK Limited v Swift [1981] IRLR 91***). In assessing the reasonableness of a disciplinary process it is necessary to look at the procedure as a whole (***Khan v Stripe Star Limited*** and ***Taylor v OSC Group Limited [2006] ICR 1602***). I have somewhat galloped through these provisions since the claimant's
20 representative indicated at the outset of his submissions that he was in agreement with the respondent's representative as to the appropriate legal provisions to consider.

Discussion and decision

25 45. As noted above the parties were in agreement that the reason for dismissal was conduct which is a potentially fair reason for dismissal falling within section 98(2)(b) of the 1996 Act. Both were agreed that in approaching the question posed by section 98(4) it was appropriate for me to follow the guidance in the case of ***British Home Stores Limited v Burchell***. This famously sets out a three-fold test. First there must be
30 established by the employer the fact of his belief in the guilt of the employee of that misconduct at that time. The employer must show he did believe the claimant was guilty of the misconduct in question. Second it must be shown that the employer had in his mind reasonable grounds

upon which to sustain that belief and third the employer at the stage at which he formed that belief on those grounds must have carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

5 46. I considered that on the basis of the evidence the two managers involved did have a genuine belief in the claimant's guilt. In this case the claimant's position was that the respondent had not carried out as much investigation as was reasonable in the circumstances of the case. I observe that in considering the general issue of fairness in terms of section 98 I am
10 required to take into account the size and administrative resources of the employer's undertaking. I would agree with the claimant's submission that in this case they were substantial. As noted above I was somewhat hampered in this case by the fact that the respondent chose not to lead evidence from Ms Bryceland who had carried out the investigation. It was
15 unclear who took the initial statements from ZC and CB. Both are dated on Saturday 1 December which was the date of the incident. CB's later statement confirms that she went off shift and left at 15:45 so they were presumably given to someone that afternoon. CB's later statement said that by 15.45 the claimant had been suspended. ZC refers to being taken
20 off his till for a statement but doesn't say when or to whom it was given. In any event the claimant was suspended at some point before 15.45 on 1 December. Ms Bryceland starts her formal investigation by speaking to Mandy Gray on 4 December. Mandy Gray begins by telling Ms Bryceland what Sophie Orr told her about the incident. There is no explanation as to
25 why Ms Bryceland chose to speak to Mandy Gray who was not present rather than Sophie Orr who was present. The claimant then attends her first investigation meeting, provides her statement and also provides the names and telephone numbers of the three customers. We do not know why Ms Bryceland decided not to speak to the customers at that stage.
30 The gist of the first investigation meeting is that Ms Bryceland is simply asking the claimant what happened. She does not seek to put to the claimant what other people i.e. ZC and CB said has happened. The claimant's evidence was that at that stage she did not have any information about what ZC or CB were actually saying. Bear in mind the
35 claimant's position in evidence (which I accepted) was that she herself

was aware that she had lost her cool but could not remember what she had been saying to customers after the initial altercation this was unfortunate. The claimant's position at this meeting is that she denies that she swore but accepts that she spoke loudly. She does raise the issue of mitigation and says she should have gone to her GP and been signed off work.

5

47. The claimant is then invited to a further investigation meeting which took place on 17 December. She is not sent any witness statements or given any further detail about what people allege she was saying. In advance of this meeting (and after the letter was sent to the claimant) Ms Bryceland interviews Mr Rae on 13 March and speaks again to CB and ZC on 10 16 March. ZC states that the claimant called the customer a "snobby cunt" which is different from what he said on the day. From the minutes supplied by the respondent it would appear this was not commented upon or 15 challenged in any way by Ms Bryceland. CB did not confirm what ZC says but does say that she heard the claimant call the customer a b.... . Both Mr Dodds and Mr Bridgeford were of the opinion that the word referred to was bitch and the reason the word was not spelled out was because of some delicacy on the part of CB. That may well be the case but in my 20 view this is something which Mr Dodds and Mr Bridgeford should not simply have assumed but should have investigated since it was not clear from the investigation carried out by Ms Bryceland precisely what it was that CB was saying and whether or not this did in fact corroborate ZC or the customer. There was then a second investigation meeting with the 25 claimant but once again the precise words she is alleged to have said are not stated. By this stage the respondent can be in no doubt about the claimant's mitigation.

48. As noted above there is no indication why Ms Bryceland did not interview Sophie Orr who was the checkout supervisor at the time nor why she did 30 not interview the customers. That was the extent of the investigation carried out by the respondent.

49. The case of **Sainsbury's Supermarkets v Hitt [2003] IRLR 23 CA** makes it clear that the range of reasonable responses test applies as much to the question of whether an investigation into suspected misconduct was

reasonable in all the circumstances as it does to other procedural and substantive aspects of the decision to dismiss a person from his employment for a conduct reason. The issue I required to consider therefore is whether the investigation carried out by the respondent was within the band of reasonable responses. In my view there are a number of relevant matters to consider. The first of these is that on any view of the matter Sophie Orr was a relevant witness. She was the supervisor in charge of the checkouts at the time. The allegation against the claimant was that she had sworn at a customer which had led that customer to complain to Mr Rae and that subsequent to this she had engaged in inappropriate dialogue on the shop floor. Whether or not the respondent believed Sophie Orr saw the initial incident (and I was never given any information as to how or indeed if they had come to that view), Sophie Orr was charged with supervising the claimant for the half hour during which it is alleged by Mr Bridgeford that this inappropriate dialogue was carried on. Mr Bridgeford's view of the matter and the basis on which he dismissed was that the claimant had been in his words "ranting on, swearing to customers for over half an hour". It is my view that no reasonable employer would have failed to interview Sophie Orr to find out what she had seen and what had been going on. The claimant's position was she had been upset and had simply been speaking to customers who had been supportive of her. The allegation that the claimant had been talking to customers in an inappropriate way for the whole half hour was supported only by the evidence of CB who said she had been doing this (without giving any real detail) before CB went on her break and also when CB came back from her break half an hour later. There was no witness apart from ZC speaking to what happened in the half hour and his statement is extremely vague. In my view no reasonable employer would have failed to interview Sophie Orr.

50. The second matter which I consider relevant is the respondent's own policy. This was quoted by the claimant to the witnesses. This states

"It's crucial to establish the facts of the case and to ensure that we make informed decisions. As an investigation manager you'll be

impartial, keeping an open mind and exploring all avenues, actively looking for evidence to support both sides of events. This may involve:

- Holding investigatory meetings (or if not possible, taking witness statements) with colleagues, customers or anyone involved with or who saw the incident. Collating and reviewing training records, schedules, swipe records, CCTV images and other such documentation.”

The investigation manager will prepare any questions, including who, what, when, where, why and how, to understand the context behind the incident.”

In my view it is axiomatic that a reasonable employer follows its own published policy and procedures. In my view it is not the act of a reasonable employer to publish a policy and then decide to ignore it when carrying out the investigation. I note first of all that the investigating officer is required to be impartial, keeping an open mind exploring all avenues actively looking for evidence to support both sides of events. In my view this does not appear to have happened in this case. I also note that the investigation manager is required to prepare questions with a view to understanding the context behind the incident. It appears to me that there was no investigation of the context of the incident. During evidence both Mr Bridgeford and Mr Dodds indicated that they felt the claimant was exaggerating when she said she was soaking wet. There was absolutely no evidence to support this suggestion and I entirely accepted the claimant’s evidence that an unfortunate event had occurred as a result of which she had been covered in sticky energy drink. Both of the respondent’s witnesses also seemed to think that the customer had been splashed with energy drink however there was absolutely no evidence from Mr Rae or to suggest this and the claimant indicated that she was the only one who had been soaked. I also note that the context of the latter part of the offence was therefore that the claimant remained on the till for at least half an hour afterwards, was sitting in soaking wet clothing and, in her view at least, responding to enquiries from customers who she knew and dealt with regularly. I should also say that, contrary to what is said in the policy, there is absolutely no evidence that Ms Bryceland prepared any questions to the investigatory meetings.

51. As above I consider that a reasonable employer would follow their own published procedures and in this case the respondent did not.

52. Finally, I feel that in the particular circumstances of this case, including the existence of the respondent's policies, a reasonable employer would not have failed to interview the customer or the one named Heather whose name has (witness) in parenthesis immediately after her name and who the claimant indicated was the person immediately behind the customer during the incident which sparked everything off. I come to this conclusion with some hesitation. There will undoubtedly be many reasonable employers who decide that in circumstances where an incident has taken place witnessed by customers they will not seek to involve these customers in their own internal investigation. I consider that this case is different for three reasons. The first of these is that the respondent's own published policy says that they will interview customers where appropriate. As noted above Mr Dodds' evidence as to why he maintained the view that the customers should not be interviewed when the claimant specifically raised this on appeal was somewhat scattergun. He said in his appeal outcome letter that interviewing customers was contrary to the respondent's policy when this is quite clearly not the case. The second point is that the reason given by the respondent for treating the matter so seriously was the effect on the respondent's reputation. The claimant's position was that the customers had all been very supportive of her and believed that she was responding entirely appropriately to a rude and unreasonable customer. All three customers had given their name voluntarily. It was not suggested that the respondent had canvassed this information. In my view this would be strong reason for speaking to these customers if the respondent took seriously their stated policy of "exploring all avenues, actively looking for evidence to support both sides of events".

53. I am well aware of the authorities which make it clear that an investigation into misconduct by an employer is not to be viewed in the same way as any judicial or quasi judicial process. The issue is whether it is within the band of responses of a reasonable employer. In my view the investigation in this case fell short of that.

54. With regard to the third element of the **Burchell** test it is also my view that the respondent did not have, at the time they made this decision, reasonable grounds on which to come to the view they did. It is my view that the claimant's assertion that the respondent had pre-judged the matter was substantially correct. They did not address their minds to the matter in a fair and open handed way. Had they done so in my view they would have re-opened the investigation.

55. Given that I have found that the respondent was not entitled in terms of employment law to come to the view they did as to the claimant's guilt the issue as to whether or not dismissal was within the range of reasonable responses is to some extent otiose. My view is that had the respondent carried out a proper investigation and thereafter found the claimant guilty of the alleged misconduct then, provided the additional information obtained from the investigation gave them reasonable grounds on which to believe the claimant guilty the dismissal would not be outwith the range of reasonable responses. The allegation is that the claimant swore at one customer and then continued an inappropriate dialogue swearing at other customers when describing what had happened with the first customer for a period of over half an hour. On any view, despite the claimant's extensive mitigation it could not be said that dismissal in those circumstances was outwith the band of reasonable responses. Given my findings with regard to the investigation stage my view however is that the dismissal was unfair.

Remedy

56. The claimant produced a schedule of loss (p265-266). I accepted that the claimant's gross weekly wage was £262.39. She had three full years' service as at the date of dismissal during all of which she had been over the age of 41 years. She is therefore entitled to a basic award of £1180.76 (4.5 x £262.39). With regard to the compensatory award it was the respondent's position that the claimant had not taken adequate steps to mitigate her loss. I rejected this argument. It appeared to me that the claimant had been taking steps which were reasonable. She had applied for over 41 jobs. I find the evidence of other jobs being available produced by the respondent to be unconvincing. Many of these were quite clearly

unsuitable for the claimant through either being too far away or being generally unsuitable. The claimant's age is against her in the job market and she suffers from various types of ill health. Although the matter was not referred to in evidence I understand from the schedule of loss that the claimant did in fact obtain new employment from 22 August 2019 from which she earned £235.48 per week.

57. It is my view that the claimant should receive her full wage loss for the period of 35 weeks between 20 December 2018 and 22 August 2019.

58. The claimant was also seeking payment of the differential of £8.34 per week between the wages in her new role and her old role for the period up to the date of the Tribunal (nine weeks) and a period of eight weeks' thereafter as future loss. I consider this as realistic. I therefore award a total amount (before deduction) for wage loss of £8675.48 (35 x £243.82 + [17 x £8.34]). The claimant sought £475 for loss of statutory rights. I consider this to be on the high side, I would award £300 under this head. The claimant also sought payment in respect of the respondent's bonus scheme. The evidence agreed between the parties was that the last bonus amounted to $\frac{9}{12}$ of 3.25%. The total wage loss figure as noted above is £8675.48. I therefore consider it appropriate to add 2.43% to this ($\frac{9}{12}$ x 3.25%) to take account of bonus. The lost bonus is therefore £210.81. The total compensatory award (before deduction) is therefore £9186.29.

59. The respondent's position was that the basic and compensatory award should be reduced to take account of the claimant's contribution to her dismissal. I consider that this submission is well founded. On the claimant's own admission she "lost her cool". Whilst, due to the failures of the investigation, it is not possible to say precisely what happened or whether the claimant did indeed refer to the first customer as a bitch and whether she did in fact swear to the other customers it is clear that an incident took place which caused the first customer to complain and that, on the claimant's own admission, she raised her voice and continued to discuss the matter with customers (albeit on her case in response to enquiry) for some time afterwards.

60. The provisions regarding contribution in respect of the basic award are contained in section 122(2). This states that where the conduct of the complainant before the dismissal was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent the Tribunal shall reduce or further reduce that amount accordingly. The provisions in relation to the compensatory award are worded slightly differently and are contained in section 123(6) which states

“Where the tribunal finds that the dismissal was so 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.”

61. In this case I consider it appropriate to bear in mind the claimant’s mitigation. The incident occurred because of the unfortunate accident with the can. She was covered in sticky juice and soaked. In her view the first customer provoked her by behaving unreasonably. Despite her putting on her light and the supervisor coming the supervisor left her on the till for a substantial period in this state. I also take into account the general mitigation. The claimant was suffering from depression. She was worried about her oncoming brain scan. She had suffered breakdown in two relationships which were very significant for her. That having been said I considered that being just and equitable involves me taking into account the respondent’s legitimate concerns as well as the claimant’s. I considered it is appropriate to reduce the basic award by 50% and the compensatory award by the same amount.

62. It was also the respondent’s position that the compensatory award ought to be further reduced on the **Polkey** principle given that, had a fair procedure been carried out in this case, the claimant would have been fairly dismissed in any event. Whilst both of the respondent’s witnesses stated on more than one occasion in their evidence that no matter what additional evidence they had found out following further investigation it would have made no difference to the outcome I treated this evidence with some suspicion. In my view all it shows is that the respondent’s decision makers had prejudged the case. In any event it is my view that the failures in this case were much more than procedural. In my view no reasonable

5 employer would have failed to interview the other witnesses. It is not possible for me at this stage to say what would have happened had these other witnesses been interviewed and the matter been approached by a fair minded decision maker aware of the various mitigating factors. In my view the failures go beyond the merely procedural and go to the fairness of the dismissal itself. On that basis I am not prepared to make any deduction on the *Polkey* principle.

10 63. The basic award is therefore reduced from £1180.76 to £590.38. The compensatory award is reduced from £9186.29 to £4593.14. The claimant was in receipt of recoupable benefits for the period between 20 December 2018 and 22 August 2019 (35 weeks). The prescribed element is therefore £4266.85 (50% of 35 x 243.82) and relates to the period between 20 December 2018 and 22 August 2019. The total monetary award is £5124.52. It exceeds the prescribed element by £857.67.

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30 **Employment Judge:**
Date of Judgment:
Date sent to parties:

Ian McFatridge
19 November 2019
19 November 2019