



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Ms A Vas

v

Asda Stores Ltd

Heard at: Cambridge

On: 30 November, 1 and 2 December 2019

Before: Employment Judge Johnson
Mr C Davie (Member)
Mr B Smith (Member)

Appearances

For the Claimant: In person

For the Respondent: Mr A Rozychi (counsel)

Interpreter: Dr A Denby, Hungarian speaking

JUDGMENT

1. The Claimant's claim of discrimination by reason of direct race and sex discrimination and harassment on grounds of race and sex are not well founded. This means that the Respondent did not discriminate against the Claimant because of her nationality or sex.
2. The Claimant's complaint of unfair dismissal is well founded. This means that the Claimant was unfairly dismissed by the Respondent.
3. The decision that the Claimant was unfairly dismissed will be subject to:
 - a. an increase in the compensatory award by 20% due to the Respondent's failure to reasonably comply with the Acas Code of Practice on Disciplinary and Grievance Procedures; and,
 - b. a reduction in the compensatory award by 20% due to a finding of contributory fault on the part of the Claimant.
4. The case will now be listed for a Remedy hearing on a date to be confirmed with a hearing length of 1 day.

REASONS

Introduction

1. The Claimant was employed by the Respondent as a warehouse operative from 14 June 2010 until her dismissal for gross misconduct as a result of an altercation with another member of staff on 30 November 2017.
2. The Claimant commenced proceedings in the Employment Tribunal on 23 March 2018 following a period of Acas Early Conciliation from 9 February 2018 until 5 March 2018. She presented a claim of unfair dismissal and complaints of discrimination on grounds of sex and race/nationality. The Respondent presented a Response on 29 May 2018.
3. The case was the subject of a Case Management Order of Employment Judge Foxwell dated 4 September 2018 when he carried out a preliminary hearing case management and appropriate case management orders were made.
4. The hearing was originally listed for a hearing commencing on 21 October 2019, but it was postponed due to the non-availability of a Hungarian interpreter.

The Evidence Used in the Hearing

5. For the Claimant, the Tribunal heard witness evidence from the Claimant and her son Lajos Miko, who also worked for the Respondent.
6. Employment Judge Foxwell had identified at the Preliminary Hearing on 4 September 2018, that although the Claimant had good conversational English and to some extent was supported by her son, for the final hearing she would need the support of a Hungarian interpreter. Dr Andrea Denby was instructed by the Tribunal to support the Claimant and to interpret for her. She was sworn in having given the appropriate oath, at the beginning of the hearing.
7. For the Respondent, the Tribunal heard oral evidence from Paul Dodridge (the manager who dismissed the Claimant) and Adrian Baxter (a general manager who heard the Claimant's appeal against dismissal).
8. The Respondent also relied upon the statement of Aaron Richards who was the alleged victim of the Claimant in the altercation which gave rise to the dismissal. Unfortunately, Mr Richards was unwell and in hospital. Accordingly, he could not attend the hearing. The statement which initially introduced was unsigned and undated. However, before the end of the hearing a signed and dated copy was obtained by the Respondent and produced. The Tribunal confirmed that while this statement would be included as part of the witness evidence, it could not be given the same

weight as those statements where the witnesses had given oral evidence under oath. This was explained to the parties who confirmed that they understood this decision

9. This was a case where the hearing bundle was a single lever arch file and which had been agreed by the parties and prepared by the Respondent. No additional documents were introduced during the proceedings. The documents related primarily to the disciplinary process which resulted in the Claimant's dismissal.
10. Although documentation was included concerning the Claimant's mitigation in seeking alternative employment post dismissal, this was not used during the hearing which was concerned with questions of liability.
11. The parties were allowed regular breaks and were able to request additional breaks as necessary. The Tribunal took notice of the fact that the Claimant was unrepresented and was not familiar with tribunal or court proceedings.

The Issues

12. The issues in this case were identified in the Case Management Order of Employment Judge Foxwell dated 4 September 2018 and taking into account the Amended Grounds of Resistance presented by the Respondent on 28 September 2018.

Unfair Dismissal

13. What was the principal reason for the dismissal?
14. Was it a potentially fair reason in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 (ERA)?
15. If so, was the dismissal fair or unfair in accordance with ERA section 98(4)?
16. Did the Respondent in all respects act within the so called 'band of reasonable responses'?
17. Did the Respondent comply with the Acas Code of Practice on Disciplinary and Grievance Procedures (the 'Code')? If it did, was such a failure unreasonable? If the Claimant is found to have been unfairly dismissed, is it just and equitable to increase compensation?
18. If the Claimant is found to have been unfairly dismissed, did the Claimant cause or contribute significantly to her dismissal? If so, should the Claimant's compensatory award be reduced and if so, by what percentage?

Discrimination because of Race (nationality) or Sex

Time limits

19. Was the Claimant's complaint of harassment relating to Mr Richards conduct on 25 October 2017 presented within the time limits set out in sections 123(1)(a) & (b) of the Equality Act 2010 (EQA)? It was noted by the Tribunal that the question of time limits is not raised by the Respondent in relation to the complaint of direct discrimination concerning the investigatory and disciplinary process.
20. If not, did this issue involved an act and/or conduct extending over a period, and/or a series of similar acts or failures?
21. Alternatively, was it not reasonably practicable for this complaint to be presented within the primary time limit and if so, should time be extended on a 'just and equitable' basis?

EQA, section 13: direct discrimination because of Race (nationality) or Sex

22. It is not in dispute that the Respondent's managers subjected the Claimant to an investigatory and disciplinary process following the incident on 25 October 2017.
23. Was that treatment 'less favourable treatment', i.e. did the Respondent treat the Claimant as alleged less favourably than it treated or would have treated others ('comparators') in not materially different circumstances? The Claimant relies upon hypothetical comparators.
24. If so, was this because of the Claimant's race or sex and/or because of race or sex more generally?

EQA, section 26: harassment related to Race (nationality) or Sex

25. Did Mr Richards who was an employee of the Respondent engage in conduct involving a provoked or manufactured incident with the Claimant when he sought to take the Totes on 25 October 2017?
26. If so, was that conduct unwanted?
27. If so, did it relate to the protected characteristics of Race or Sex and/or was it of a sexual nature?
28. Did the conduct have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

Findings of Fact

29. The Respondent is a large employer in the retail sector with 300 stores in the UK with around 170,000 employees. With so many stores to supply, the Respondent runs a number of distribution centres including one at Brackmills near Northampton.
30. The Claimant was employed at the Brackmills Distribution Centre ('BDC') as a warehouse operative and had been employed by the Respondent in this capacity since 14 June 2010. Initially, the Claimant was employed as a fixed term employee, but from 2 January 2011 her contract became permanent. Accordingly, her period of continuous employment commenced on 14 June 2010.
31. The Claimant is a Hungarian national by birth, but has lived in the UK for a significant period of time. The Respondents employed around 500 'colleagues' at the BDC and a number of these were non-UK nationals. From the evidence that we heard, the workplace appeared to be very diverse in terms of gender and race/nationality. The Claimant had good conversational English in less formal settings, but could find the language used in more formal settings to be difficult to follow or understand.
32. The Claimant's contract of employment described her hours of work as being 160 hours per 4 week period on a rota basis 'of any 20 from 28 shifts including weekends and bank holidays. The contract also refers to the Respondent's Disciplinary and Grievance Procedures. The hearing bundle included copies of the Disciplinary Policy, Appeals Policy, Diversity and Inclusion Policy and Suspension Policy.
33. The Disciplinary Procedure (Distribution) in 'Section D-F', confirmed that employees had a right to be accompanied at each stage of the procedure by a GMB representative or colleague. It also advised that '*Subject to discretion, a colleague may bring a Representative who is not a colleague or GMB Representative (for example, a member of your family or a translator) where this will help overcome a disability or any language barriers*'.
34. The Policy also outlined the disciplinary procedure and identified examples of disciplinary offences: Misconduct, Serious Misconduct and Gross Misconduct, The Policy explained that Gross Misconduct would normally result in summary dismissal. Previous findings of misconduct which had resulted in warning of some description and which was still in force, could be taken into account in the event that subsequent issues of misconduct arose. Inappropriate behavior or comments towards other work colleagues was described as amounting to misconduct. '*Fighting, physical assault, threatening behavior or serious provocation of any person on Company premises...*' was described as amounting to gross misconduct.

35. It was understood by the Tribunal that until the incident arose which gave rise to the dismissal, the Claimant had an unblemished employment record with the Respondent.
36. On 25 October 2017, the Claimant was working in the BDC with her colleagues in the 'Box Receiving Area'. Her job was to receive packages called Totes and put them away in the correct place. The Claimant believed that the Totes that were in this work area were her colleagues and her to process during her shift. At around 19.45 hours, Mr Aaron Richards, who was a work colleague working in the 'Box Put Away Area', came down to the Box Receiving Area and proceeded to take some Totes so that he could process them himself. This was because he had run out of work in the Box Put Away area where he had been working that shift.
37. At this point, the Claimant took exception to Mr Richards taking these Totes and told him that they were for her colleague Poonam to process. He said to her that he had run out of work to put away. There was an argument between them and he may have sworn at her. He refused to leave the Totes and insisted on taking them away on a 'Dolly' which appeared to be a kind of trolley. As he was walking away towards the lift, the Claimant followed him and there was physical contact between them and some shouting. Mr Richards claims that the Claimant grabbed him by the waist with both of her hands and pulled him back very 'aggressively' and then grabbed his shoulder and collar, pulling him back so that she could take the Totes from him. The Claimant says that she simply tried to grab his hand. While there were statements taken by management from colleagues working in the nearby areas during the hours and days following the incident, we were not convinced that they actually saw the extent of the physical contact which had taken place and instead saw the aftermath of the argument having reacted to the shouting which took place. There was clearly some dispute between Mr Richards' recollection and the Claimant's recollection as to the severity of the incident. What is not in dispute is that there was a disagreement between them concerning the Totes which became heated and that the Claimant contacted Mr Richards, as he took the Totes away towards the lift.
38. The Departmental Manager Nicolae Besleaga overheard the Claimant and Mr Richards arguing and went over to sort the matter out. After placing himself between them, he spoke with them both. He told them to return to their work areas. It appeared that nothing further happened after this altercation and the Claimant returned to her workplace for the remainder of her shift. Mr Richards did not complain about the Claimant at this point.
39. Mr Richards may have spoken to the Claimant shortly after this incident, but no further altercations took place between them. Later on during the shift, Mr Richards did make a complaint against her to another manager. Handwritten witness statements from him and also colleagues whom he believed had witnessed the incident. These statements were taken over several days from 25 to 30 October 2017.

40. The Claimant attended work on 29 October 2017 and nothing happened in relation to the incident on that day. However, on 30 October 2017 she was asked to attend a meeting with Adrian Morris, who was a shift manager at the BDC. He explained to her that he would like to take a statement from her. She requested that the meeting did not take place until her son Lajos Miko could be called to attend the meeting with her. This was because she did not feel her English was good enough for a formal meeting, whereas her son who also worked in Asda as a Planning Manager was effectively bilingual in Hungarian and English and would provide appropriate support. Mr Morris was not prepared to wait for Mr Miko and instead the Claimant was supported by a colleague Warmahia Farah who did not speak Hungarian.
41. At this meeting a handwritten statement was prepared and the Claimant denied grabbing Mr Richards and said she was trying to get hold of his hand to talk to him. She felt that Mr Richards was trying to provoke an argument. At the end of the meeting the Claimant was informed by Mr Morris that she was being suspended on full pay while a disciplinary investigation took place. She was handed a letter confirming this decision and invited to an investigatory interview on 2 November 2017.
42. The investigatory meeting actually took place on 7 November 2017 and Mr Miko attended with the Claimant. Mr Morris conducted the interview. It was made clear by Mr Miko at this meeting, that they were not happy that the suspension meeting took place without it being delayed in order that he could attend. Concern was also expressed by Mr Miko that statements had been taken while Mr Richards was still in the workplace and that no action to suspend had been taken until 30 October 2017. The Claimant continued to assert that she did not grab Mr Richards in the way that was alleged by him and said that she simply tried to touch him.
43. What is strange is that during the interview, Mr Morris made the following statement to the Claimant: *'I will apologise for asking this, but I need a clarification, every year at this time of year you go off with stress, have you manufactured an event so that it can happen again?'* When the Claimant replied that she was not off sick with stress, he then said: *'So, have you created an event which causes a stressful situation?'* Not surprisingly the Claimant replied: *'You cannot be serious!'* Unfortunately, Mr Morris was not called by the Respondent to give evidence at this hearing to explain his reasons for raising this issue.
44. The Claimant did raise concerns regarding the behaviour of Mr Richards towards her and other employees and suggested that he had been provoking them. She gave four names and asked Mr Morris to investigate this matter further.
45. Following the Investigation Meeting, Mr Morris produced his report which was described as an 'Adjournment Note' and was dated 13 November 2017. In this report he summarized the points raised by the Claimant at her Investigatory Meeting and then made his findings. He believed that there was independent witness evidence which suggested that the

Claimant grabbed Mr Richards. He did not feel it was necessary to investigate Mr Richards on the basis that no complaint had been formally raised against him and he was satisfied that no collaboration had taken place between witnesses. He was still concerned about the Claimant's sickness record and made the following point in his findings: *'In 2015 and 2016, you have taken time off for Christmas through sickness. I requested clarification whether the alleged incident was an act to generate that could lead to you going off work again, and therefore gain Christmas off work. You denied this claim and there is no evidence at this point to warrant further investigation of this matter'*. The fact that Mr Morris felt it necessary to address this issue further suggests that it was still something that was playing on his mind.

46. He then made a finding that the Claimant had been dishonest with Mr Morris by discussing her suspension on social media using WhatsApp. A single page of the bundle contained a screen shot from Surglia Poonam's mobile phone of an undated conversation on WhatsApp between the Claimant and her. It appears to have been sent shortly after the meeting on 30 October 2017 and simply involves the Claimant telling Ms Poonam that she was suspended, it related to the incident Mr Richards and that she believed he was a liar. She then told Ms Poonam not tell anyone and the message appeared to end quickly. The Claimant denied during the disciplinary hearing that she did not message Poonam and suggested that somebody had cloned her phone number and sent it without her knowing. While this might well be possible, the Tribunal finds that this was unlikely to have happened. What is more likely, is that the Claimant sent this message to a work colleague and quickly realised that she shouldn't have raised the issue with her and closed the conversation down quickly.
47. While the Claimant may have convinced herself that she did not send the message, we do not find that this particular issue materially affects the conduct being investigated by the Respondent's management. Mr Richards did however, describe the Claimant as having showed; *'clear dishonesty in this investigation'*.
48. Mr Morris was a Manager who was acting as an Investigating Officer and would presumably have been trained in the Respondent's Disciplinary Policy. Given his findings, it is reasonable to assume that his conclusion would have been that it had become apparent to him that formal disciplinary action was needed and that this matter should be dealt with at a formal hearing. It is therefore surprising to observe that he felt that he was able to conclude his report with a decision that *'the allegation is proven'*.
49. The Claimant was then invited to attend a disciplinary hearing on 22 November 2017. In the letter dated 16 November 2017 which invited her to the meeting, she was warned that she was alleged to have behaved in a manner that was threatening or seriously provocative towards another colleague and that this is regarded as gross misconduct which could result in summary dismissal if proven.

50. The disciplinary hearing actually took place on 23 November 2017. The hearing officer was Paul Dodridge who is a Transport Operations Manager at the BDM. The Claimant was again supported by Mr Miko.
51. A handwritten note was available within the bundle of the hearing. Mr Miko raised concerns about the way in which the process was handled and he noted that the Departmental Manager Mr Besleaga did not take any action at the time the incident took place and that the witnesses who were not called to the hearing, could not have seen the incident from where they worked. Also, he complained that no investigation had taken place concerning the four colleagues whom the Claimant had mentioned at the investigatory meeting with Mr Morris and whom she felt had been provoked by Mr Richards.
52. The Claimant maintained that she did not grab Mr Richards in the way that he had suggested and that she had instead tried to touch him. Upon being questioned, she asserted that Mr Richards swore at her and insisted that he was taking the Totes. She mentioned that there were ongoing issues concerning the way in which Mr Richards works and that he is always waiting for the 'good stuff' which we find to mean easier or less complicated tasks. Upon being questioned by Mr Dodridge as to why she did not complain to her Departmental Manager about Mr Richards' behaviour generally, she confirmed that both she and colleagues did, but they became fed up because they didn't do anything about it.
53. Mr Dodridge decided to adjourn the hearing in order that he could make enquiries regarding the witnesses who might assist with his consideration of the case. Accordingly, the hearing was relisted to resume on 30 November 2017.
54. In the meantime, Mr Dodridge produced a document entitled 'Disciplinary Hearing – Agnes Vas' on 28 November 2017. This was described by Mr Dodridge as being a provisional judgment and in it he concluded that the Claimant had behaved in a threatening manner and this amounted to gross misconduct. As a consequence, he determined that she should be summarily dismissed. A copy was contained within the hearing bundle which was heavily annotated and which included additional comments attributed the Claimant. These notes appear to be signed on 30 November 2017, but it is recorded on the document that the Claimant declined to sign it. What was clear to the Tribunal is that Mr Dodridge had made up his mind two days before the disciplinary hearing resumed, that gross misconduct had occurred and that summary dismissal was the appropriate sanction to impose.
55. At the resumed disciplinary hearing on 30 November 2017, Mr Dodridge read out his adjournment note following his consideration of the issue which had been raised by Mr Miko concerning inconsistencies with the witness statements taken shortly after the incident. These statements had only reached the Claimant following the initial disciplinary hearing when it became clear to Mr Miko that they had not been made available. Before he read out the adjournment note, Mr Dodridge annotated it to say that he

felt that the consistencies in these statements outweighed their inconsistencies. The Claimant was very unhappy with the decision to dismiss her and sought to argue further that the witnesses stated different things and that no consultation concerning any CCTV footage.

56. During the hearing Mr Dodridge confirmed that he did not speak with the other work colleagues identified by the Claimant at the first disciplinary hearing. He said that instead he had simply asked Mr Richards about the matter and he said that he had no previous issues with the individuals identified. He also confirmed he had read the papers before the hearing, but did not know about the need to call witnesses and said that the Claimant did not request them herself.
57. The question of CCTV evidence was also raised by the Tribunal during the hearing. Mr Dodridge said that the BDC did have CCTV installed at the time of the incident, but that it was poor and that there was no coverage of the floors. While we did not hear any convincing evidence to the contrary during the hearing, it does seem surprising that a company of the Respondent's size and resources, handling goods which could sometimes be of high value, did not have CCTV coverage of the floor areas.
58. Mr Dodridge produced a letter on 4 December 2017 which summarized the hearing, the findings and it confirmed that the Claimant was summarily dismissed for gross misconduct. She was therefore deemed to have been dismissed on 30 November 2017 when she heard his decision and was offered the right of appeal.
59. The Claimant did raise her appeal with the Respondent on 7 December 2017. She argued that Mr Dodridge behaved unreasonably in relying upon statements which were inconsistent and that he had not relied upon CCTV evidence and the evidence of a First Aider. The appeal was originally arranged to take place on 19 December 2017 but was moved to 3 January 2018.
60. The appeal was heard by Mr Baxter who is a General Manager at the BDM and again the Claimant was supported by Mr Miko. The Claimant raised concerns about the witnesses to the incident and argued that two of them were biased because they had not spoken to her for two years and also that one of them was working so far away that she did not see anything. Mr Baxter decided to adjourn the appeal in order that he could speak with the witnesses identified.
61. Mr Baxter then proceeded to interview a number of witnesses to the incident and resumed the appeal hearing on 7 February 2018. Valerie Frazier when asked about Mr Richards stated that he had tried to 'ask her out' on several occasions. Laura Ivancu suggested that he likes to bully people and had bullied her. Mr Besleaga confirmed that Mr Richards did not make a complaint to him about the Claimant and that he simply wanted her to leave him alone. Diana Epureanu said that Mr Richards did talk behind her back and he would have a 'go' at colleagues, especially

women. Ms Mwangi said that the Claimant touched Mr Richards on his shoulder. It should be noted that Mr Baxter did not interview Mr Richards.

62. A note of the resumed appeal hearing was not available in the hearing bundle. However, Mr Baxter's decision was contained in his letter of 1 February 2018. He outlined the Claimant's grounds of appeal, the witnesses whom he had interviewed following the initial appeal hearing and his findings. He found that the Claimant was not in a position to decide who would take the Totes and that she should have raised any issues with management rather than take matters into her own hands. He found that unwarranted physical contact had taken place between the Claimant and Mr Richards and that as a consequence, he upheld the decision to dismiss.
63. Under the Respondent's disciplinary procedure, the Claimant was entitled to raise a further appeal where there had been a decision to dismiss and this was notified to her in this letter. However, the Claimant decided not to pursue this right. During the hearing she explained that she was concerned about the time limit for presenting a claim in the Tribunal and that Acas during early conciliation had warned her that an appeal might take longer than the remaining time available.

Legal Issues

Direct Discrimination

64. Section 13 of the Equality Act 2010 sets out the legal test for direct discrimination. A person (A) discriminates against another (B) if, because of a protected characteristic (race or sex in this case), A treats B less favourably than A treats or would treat others.

Causation

65. If the act is not inherently discriminatory, the Tribunal must look for the operative or effective cause. This requires consideration of why the alleged discriminator acted as he did. Although his motive will be irrelevant, the Tribunal must consider what consciously or unconsciously was his reason?

Comparators

66. For the purposes of direct discrimination, section 23 of the Equality Act 2010 provides that on a comparison of cases there must be no material difference between the circumstances relating to each case. In other words, the relevant circumstances of the complainant and the comparator must be either the same or not materially different. Comparison may be made with a hypothetical individual.

Harassment

1. The definition of harassment is set out in section 26(1) EQA. A person (A) harasses another (B) if:
 - (a) A engages in unwanted conduct related to a protected characteristic (race in this case); and
 - (b) the conduct has the purpose or effect of:
 - (i) violating B's dignity, or
 - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
2. Section 26(4) provides that whether conduct has the effect referred to in subsection 1(b), each of the following must be taken into account:
 - (a) the perception of B;
 - (b) the other circumstances of the case;
 - (c) whether it is reasonable for the conduct to have that effect.
3. Thus, the test contains both subjective and objective elements. Conduct is not to be treated as having the effect set out in section 26(1)(b) just because the complainant thinks it does. The Tribunal is required to take into account the Claimant's perception, the other circumstances of the case, and whether it is conduct which could reasonably be considered as having that effect.
4. In Richmond Pharmacology v Dhaliwal [2009] IRLR 336, the Employment Appeal Tribunal held a Tribunal should address three elements in a claim of harassment: first, was there unwanted conduct? Second, did it have the purpose or effect of either violating dignity or creating an adverse environment: Third, was that conduct related to the Claimant's protected characteristic?
5. When considering whether conduct is related to a protected characteristic, the Employment Appeal Tribunal in Warby v Wunda Group plc UKEAT/0434/11 relied upon the judgments of the House of Lords in James and Nagarajan and held that alleged discriminatory words must be considered in context. In Warby the Employment Appeal Tribunal upheld the decision of the Employment Tribunal which found that a manager had not harassed an employee when he accused her of lying in relation to her maternity because the accusation was the lying and the maternity was only the background.

The Burden of Proof in Discrimination Cases

67. Section 136 EQA sets out the burden of proof that applies in discrimination cases. Subsection (2) provides that if there are facts from

which the Tribunal could decide, in the absence of any other explanation, that person (A) has contravened the provisions concerned, the Tribunal must hold that the contravention occurred. However, subsection (2) does not apply if A shows that A did not contravene the provision.

68. The Tribunal must consider a two stage process. However, Tribunals should not divide hearings into two parts to correspond to those stages. Tribunals will wish to hear all the evidence before deciding whether the requirements at the first stage are satisfied and, if so, whether the Respondent has discharged the onus that has shifted; see Igen Ltd v Wong and Others CA [2005] IRLR 258.

Unfair Dismissal

69. The Respondent bears the burden of proving on a balance of probabilities that the claimant was dismissed for misconduct; see section 98(1) ERA. If the Respondent fails to persuade us but it had a genuine belief in the Claimant's misconduct and that it dismissed her for that reason, the dismissal will be unfair. If the Respondent does persuade us that it held but genuine belief and that it did dismiss the Claimant for that reason, the dismissal is only potentially fair. To complete our enquiry, we must go on to consider the general reasonableness of that dismissal under section 98(4) ERA.
70. Section 98(4) ERA provides that the determination of the question of whether a dismissal is unfair depends upon whether in the circumstances (including the Respondent's size and administrative resources) the Respondent acted reasonably or unreasonably in treating this conduct as a sufficient reason for dismissing the Claimant. This should be determined in accordance with equity and substantial merits of the case. The burden of proof in this regard is neutral.
71. In considering the question of reasonableness, we must have regard to the decisions in British Home Stores Ltd v Burchall [1980] ICR 303 EAT; Iceland Frozen Foods Ltd V Jones [1993] ICR 17 EAT; the joined appeals of Foley v Post Office and Midland Bank plc v Madden [2000] IRLR 82 CA; and Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23 CA. In short, when considering section 98(4) ERA, we should focus our enquiry on whether there was a reasonable basis for the Respondent's belief and test the reasonableness of its investigation. However, we should not put ourselves in the position of the Respondent and test the reasonableness of its actions by reference to what we would have done in the same or similar circumstances.
72. In particular, it is not for us to weigh up the evidence that was before the Respondent at the time of its decision to dismiss, (or indeed the evidence that was before the hearing before the Respondent at the time) and substitute our own conclusion as if we were conducting the process afresh. Employers have at their disposal a band of reasonable responses to the alleged misconduct of employees and it is instead our function to

determine whether, in the circumstances, this Respondent's decision to dismiss this Claimant fell within that band. The band of reasonable responses applies not only to the decision to dismiss but also to the procedure by which the decision was reached.

73. In the event that the Tribunal makes a finding that the Claimant was unfairly dismissed, it may reduce the compensatory amount awarded by such proportion it considers just and equitable where it considers in accordance with section 123(6) ERA that the dismissal was caused or contributed to by any action of the Claimant.

Discussion and Analysis

Claims race or sex discrimination

74. The Claimant was a Hungarian national and nationality falls within the protected characteristic of race. The Claimant also complains of sex discrimination on grounds of her sex as a woman.

The Alleged Harassment by Mr Richards on 25 October 2017

75. The alleged conduct which could amount to harassment was the incident with the Totes on 25 October 2017 and whether he provoked this incident with the Claimant in a way that amounted to unwanted conduct.
76. The first issue however, to consider is whether this particular complaint was presented in time in accordance with section 123(1) EQA. Given that this incident took place on 25 October 2017, the final day upon which a claim could be presented was 24 January 2018. The Claim Form was presented on 23 March 2018. While section 140B EQA allows for Acas early conciliation potentially allows for the time limit of three months to be extended, it should be noted that the Claimant did not contact Acas until 9 February 2018, which was after the expiry of the three month period under section 123(1) EQA.
77. The Tribunal has considered the question of whether the alleged harassment could be treated as having extended over a period of time ending on later date in accordance with section 123(3). However, this matter relates to a single act of 25 October 2017 by Mr Richards and the other allegation of discrimination relating to the conduct of management in the disciplinary process is separate to the actual incident on 25 October 2017. Accordingly, the claim in relation to this complaint was not presented in time.
78. We do however, believe that it is just and equitable to extend time for the presentation of this complaint to 23 March 2018 when the Claim Form was presented. This was because the Claimant had left work on 25 October 2017 assuming that the incident had concluded following the intervention of Mr Besleaga and did not feel it necessary to raise a complaint. However, it was the disciplinary process which commenced following the later complaint being raised by Mr Richards about this incident which

started a chain of events which concluded in her dismissal and later unsuccessful appeal. It is reasonable to conclude that the Claimant would not have reflected upon all of the issues until she was dismissed and accordingly it is just and equitable to extend time in this way.

79. In terms of the actual alleged conduct, it is fair to say that Mr Richards appeared to have some history within the BDC of provoking colleagues in order to get a reaction. Based upon the evidence of the witnesses interviewed by Mr Baxter during the appeal and having heard the Claimant, it does seem likely that Mr Richards dealt with the Totes on 25 October 2017 in a way that he knew would 'wind up' the Claimant. While this does not justify the reaction from the Claimant, it is not surprising that some sort of reaction would result and having not had an opportunity to hear Mr Richards oral evidence and made the findings of fact above, we conclude that unwanted conduct took place.
80. What we have more difficulty with, is the question of whether Mr Richards' conduct related to either of the protected characteristics of race or sex. It seems that the Claimant and Mr Richards had previously had a reasonably good working relationship and in fact there is evidence within her witness evidence and the disciplinary process that she had previously shown genuine concern about his health issues. The Respondent's workplace appeared to be diverse and there was no evidence available to us which suggested that it ongoing issues where Mr Richards had treated the Claimant in the way that he did because of her race or sex. Based upon the evidence available, we believe that the real reason behind Mr Richards' behaviour was his tendency to enjoy 'winding up' people in a way that superficially appeared to be innocent. There was insufficient evidence available for us to infer that this was motivated by the Claimant's race or sex. Accordingly, we are unable to identify that Mr Richard's treatment of the Claimant amounted to unlawful discrimination on grounds of race or sex in the form of harassment.

Alleged direct discrimination by management on grounds of race or sex in relation to the disciplinary process

81. The Claimant was subjected to an investigatory and disciplinary process which resulted in her dismissal for gross misconduct. The decision related to behaviour which could amount to gross misconduct justifying summary dismissal
82. It was clear to us that Mr Richards did not seek to raise a complaint against the Claimant when he was questioned by Mr Besleaga on the 25 October 2017. For some reason, Mr Morris decided that the matter should be investigated formally and he sought to interview witnesses before deciding to suspend the Claimant. At no stage did he appear to take any interest in the behaviour of Mr Richards which led to the incident nor the decision by Mr Besleaga as a line manager who was close to the incident and who felt it unnecessary to take any further action than to send them back to their workplaces.

83. At the suspension meeting Mr Richards suggested to the Claimant that she had engineered the altercation to create a situation which would justify her taking leave at Christmas on grounds of ill health caused by stress. He suggested that this had happened in previous years and seemed more concerned about this matter than the actual incident which took place. He repeated these questions at the investigatory meeting and his adjournment note. The Tribunal therefore feel that Mr Richards was using the process to pursue a particular grievance that he had against the Claimant with regards to sick leave and a lack of trust that he had in her. This is supported further by his decision that the allegations of gross misconduct were proven rather than simply fulfilling his role as an investigating officer and determining that the case should proceed to a disciplinary hearing. It is unfortunate that he was not available at the hearing to give evidence, but given the available witness evidence and documentation, it is reasonable for the Tribunal to draw these conclusions
84. Mr Dodridge and Mr Baxter did make some attempt to properly follow procedure at the disciplinary hearing and the subsequent appeal. However, they did not address the issue of Mr Morris's decision making regarding the disciplinary procedure and did not seek to correct issues raised by the Claimant significantly in order that these matters could be rectified.
85. It is for these reasons that we find that the treatment of the Claimant in relation to the disciplinary process was less favourable than how the Respondent would have treated others who had been involved in an altercation similar to that experienced by her.
86. Having reviewed the evidence, the Tribunal does believe that the Claimant was treated less favourably than other employees who conducted themselves in a similar way.
87. However, the motivation for this treatment by Mr Morris appears to relate to his belief that she had a tendency to create incidents at work as a means of alleging that her mental health had suffered necessitating sickness absence over the Christmas period. While this might be the case, we have not heard or seen any evidence which would suggest that at any time this treatment was because of or connected with the Claimant's protected characteristics of race or sex.

Unfair Dismissal

88. The Claimant was dismissed by the Respondent and this was for the potentially fair reason of conduct.
89. The dismissing officer was Mr Dodridge and he clearly felt that the Claimant committed the misconduct of behaving in a threatening manner, attempting to physically restrain another colleague while shouting at them.
90. Was this belief held on reasonable grounds? Mr Dodridge did have an investigating officer's report and witness statements from Mr Richards and

other colleagues present at the time of the incident. However, he did not seek to question this evidence to any significant degree and in particular did not pay attention to Mr Richards's initial unwillingness to take this matter further and Mr Besleaga's decision that the matter simply required the Claimant and Mr Richards to return to work. These decisions did not indicate a matter of conduct which was so serious as to warrant a formal disciplinary process. While subsequently Mr Richards provided a statement, which suggested that the Claimant had behaved aggressively, there was clearly a difference of opinion between him and her. There was no independent witness evidence available which supported a conclusion that the Claimant had behaved aggressively to a significant degree. Additionally, Mr Dodridge did not make further enquiries of Mr Richards concerning his behaviour leading up to the incident and whether he had behaved provocatively.

91. Was there a fair and reasonable investigation? We find that this was not the case. Although the Respondent has a clear policy concerning investigations in disciplinary matters, we are not satisfied that the Investigating Officer Mr Morris behaved in a fair and objective manner. He displayed an attitude towards the Claimant which amounted to suspicion and maintained a belief that the incident was one which she engineered to justify taking sickness absence at Christmas. This line of questioning was wholly irrelevant, but does bring into question how open minded the Investigating Officer Mr Morris was in this matter.
92. The Claimant was not allowed the support of her son at the suspension meeting. While the procedure did not require managers to agree to this request, it was reasonable to assume that as a Hungarian national with English as a second language, she would want to be supported by her son. He would have been able to explain a process to her which was more formal than her day to day interactions at work. This was demonstrated perfectly during the hearing when it was clear that the Claimant struggled at times with the hearing despite having some English and her interpreter worked hard to provide appropriate translation.
93. The hearing procedure generally, appeared to be conducted in an appropriate manner in terms of the letters sent, the hearings that were offered, together with appropriate representation being allowed from Mr Miko. However, both Mr Dodridge and Mr Baxter failed to properly consider the failure of Mr Morris to deal with the investigation fairly and to make further enquiries with Mr Richards. Ultimately, in terms of substance, the handling of this disciplinary process left a lot to be desired.
94. Was dismissal a fair sanction? There is evidence to demonstrate that the Claimant did not behave appropriately towards Mr Richards. However, while that might be the case, the evidence available to Mr Dodridge should have suggested to him that there was an issue concerning the behaviour of both parties to the incident. At most, there was relatively minor misconduct on the part of the Claimant in how she reacted to Mr Richards deciding to take the Totes. It was difficult to see how she could be considered to have been violent or aggressive towards him. In our view a

reasonable employer could not have decided to dismiss the Claimant for her behaviour towards Mr Richards based upon the evidence available to Mr Dodridge. The Claimant had a long record without any previous warnings and the whole process appeared to be motivated by Mr Morris who had issues concerning the Claimant's previous absences.

95. Accordingly, we do find that the Claimant was unfairly dismissed. Even if the disciplinary process had been carried out with proper consideration of the issues that were raised in this judgment, we are not satisfied that this would reasonably have resulted in a finding of gross misconduct and as a consequence dismissal would not be within the band of reasonable responses available to Mr Dodridge as the dismissing officer. Accordingly, a reduction in the compensatory award in accordance with the procedural unfairness principles established in the case of Polkey v A E Dayton Service Ltd 1988 ICR 142 HL would not be appropriate.

Application of the Acas Code of Practice

96. As a large and well resourced employer, it is expected that the Respondent's managers will be familiar with the Acas Code of Practice on Disciplinary and Grievance Procedures.
97. To some extent the Respondent has followed the framework of the process in that by taking formal action it sought to establish the facts, notify the employee in writing, hold meetings as appropriate and allow the employee to be accompanied at meetings.
98. In reality however, the process got off to a bad start in the way that the suspension and subsequent investigation meetings were handled by Mr Morris together with the conclusions he reached in his report where he determined that the case was proven.
99. Unfortunately, neither Mr Dodridge or Mr Baxter sought to rectify these issues and moreover, Mr Dodridge decided to write up his decision concerning the disciplinary action he was going to take before the adjourned hearing resumed. While this may have been a preliminary decision, it is difficult to see how he had not made his mind up by this stage.
100. For these reasons and taking into account the size and resources available to the Respondent, we find that it is appropriate to apply an uplift of 20% to the Claimant's award for remedy in accordance with section 207A of the Trade Union & Labour Relations (Consolidation) Act 1992.

Contributory Fault on the part of the Claimant?

101. For there to be a finding of contributory fault, the Tribunal must identify something which has the characteristic of culpability or blameworthiness.
102. In terms of the Claimant's behaviour at the incident on 25 October 2017, we do find that she did behave inappropriately and made unwanted

physical contact with a work colleague in a way which could amount to misconduct.

103. Additionally, even though we do not find that it indicated a general dishonesty throughout the proceedings, her failure to behave honestly concerning the WhatsApp messages undermined her credibility with her managers.
100. Accordingly, the Tribunal find that the Claimant behaved in a way that did contribute to her dismissal and there should be a finding of contributory fault on the part of the Claimant. We therefore find that the amount of the compensatory award to be assessed at Remedy should be reduced by 20%.

Conclusion

104. For the reasons given above the conclusion of the Tribunal is that the Claimant's claim of detriments due to direct race and sex discrimination and harassment are not well founded. This means that the Respondent did not discriminate on grounds of the Claimant's nationality or sex and these claims are unsuccessful.
105. The Claimant's complaint of unfair dismissal is well founded. This means that the Claimant was unfairly dismissed and this complaint is successful.
106. The decision that the Claimant was unfairly dismissed will be subject to:
 - 106.1 an increase in the compensatory award by 20% due to the Respondent's failure to reasonably with the Acas Code of Practice on Disciplinary and Grievance Procedures; and,
 - 106.2 a reduction in the compensatory award by 20% due to a finding of contributory fault on the part of the Claimant.
107. The case will now be listed for a Remedy hearing on a date to be confirmed with a hearing length of 1 day.
108. A Hungarian interpreter will be instructed to support the Claimant at this hearing and appropriate case management orders for the hearing will be made in due course.

Employment Judge Johnson

Date: 31 December 2019

Sent to the parties on: .08.01.20.....

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For the Tribunal Office