EMPLOYMENT TRIBUNALS

Claimant: **Ms S Phillips**

Respondent: **Community Transport Waltham Forest Ltd**

Heard at: **East London Hearing Centre**

On: **9 July 2020**

Before: **Employment Judge C Lewis**

Representation

Claimant: Ms P Mathur

Respondent: Mr T Hussain

RESERVED JUDGMENT

Unfair dismissal

1. The Claimant's claim for unfair dismissal succeeds.

1.1 The Claimant contributed to her dismissal and her compensation is reduced by 50% under s 122 (2) and 123(6) of the Employment Rights Act 1996.

Wrongful dismissal

2. The Claimant's claim for wrongful dismissal fails and is dismissed.

REMEDY FOR UNFAIR DISMISSAL

3. The Claimant is awarded the following amounts in respect of her claim for unfair dismissal.

3.1 Basic award of £568.40 calculated as follows:

3.1.1 The Claimant was 47 at the date of dismissal and had completed

four years' service. She was entitled to and one and a half weeks' pay for each complete year of service. The Claimant's gross pay was £189.48 per week. The total basic award before any deductions is therefore £1136.80. (4 x 1.5 x £189.48 = £1136.00).

3.1.2 Deduction under s122 (2) for contributory conduct @ 50%
£1136.80 x 50% **= £568.40**

3.2 Compensatory award of £305.06 calculated as follows:

3.2.1 Loss of earnings at 100% for 2 weeks, from date of dismissal to date fair procedure would have been completed, 2 x £189.48 = £378.96 (subject to any deductions for tax and national insurance.)

3.2.2 10 % of lost earnings from the date the Respondent would have been able to hold a fair hearing (2 weeks) to the date by which the Respondent would have dismissed fairly for further conduct or some other substantial reason (a further 8 weeks) 8 weeks x £189.48 = £1515.84 x 10% = £151.58.

3.2.3 Less deduction under s 123(6) for contributory conduct @50%
£378.96 + £151.58 = £530.54 x 50% = £265.27

3.2.4 Uplift to compensatory award of 15% for failure to follow the ACAS Code
£265.27 x 15% = £39.79.

3.2.5 Total compensatory award **= £305.06**

3.3 Grand total award

3.3.1 The grand total sum **of £873.46**
(Basic award of **£568.40** and compensatory award of **£305.06)** is payable to the Claimant by the Respondent forthwith.

REASONS

The issues

1. A list of issues headed "Agreed list of issues" and also a "Draft list of issues" was presented to the tribunal. One list of issues omitted the question of contributory fault otherwise the issues were almost identical. The issues identified were as follows:

Unfair dismissal

1. What was the reason for dismissal?

1.1 The Respondent relies on the Claimant's conduct, which is a potentially fair reason under section 98(2) Employment Rights Act 1996 (ERA).

2. Did the Respondent believe that the Claimant had committed the alleged misconduct?

3. Did the Respondent conduct a reasonable investigation into the alleged misconduct?

4. Did the Respondent have reasonable grounds, following it investigation, for concluding that the Claimant had committed the alleged misconduct?

5. If so, did the sanction of dismissal fall within the range of reasonable responses?

6. If so, having regard to all the circumstances, did the Respondent act reasonably in treating the Claimant's conduct as sufficient reason for dismissal?

Polkey

7. If the tribunal find that there was some procedural unfairness in the Claimant's dismissal, to what extent does the tribunal consider that the Claimant would have been dismissed in any event?

Contributory fault

8. If the tribunal consider that the dismissal was unfair, to what extent does the tribunal consider the Claimant caused or contributed to her own dismissal?

Remedy

9. If the tribunal find that the dismissal was unfair, what compensation should the Claimant be entitled to, having regard to her duty to mitigate her loss?

Wrongful dismissal

10. Was the Claimant's conduct such the Respondent was entitled to terminate her employment summarily?

The hearing

2. The hearing was conducted using the Common Video Platform. The Claimant was supported by her daughter and represented by Ms Mathur of Counsel. The Respondent was represented by Mr Hussain. Witness Statements were exchanged and filed before the hearing and an agreed bundle sent to the tribunal in PDF format with additional pages added the day before the hearing in a revised bundle which was also in PDF format.

3. Ms Helen Tredoux gave evidence for the Respondent and was cross-examined.

Mrs Phillips gave evidence on her own account and was also cross-examined. Both parties' representatives made oral submissions. After some clarification the parties agreed the figures in the schedule of loss in principal. There was not enough time to deliver a judgment the end of the day and the decision was reserved. I apologise for the delay in providing this reserved judgment and can only point towards the volume of other cases and the current pressure on judicial and administrative resources.

Findings of fact

4. Having heard from both witnesses I made the following findings of fact.

5. The Claimant was employed by the Respondent from 29 January 2015 to 25 October 2019. Ms Tredoux was the disciplinary hearing officer and dismissed the Claimant for serious misconduct. The Respondent had raised a number of issues with the Claimant during the course of her employment however they did not result in any formal disciplinary action against the Claimant and it was Respondent's practice to seek to resolve issues informally wherever possible.

6. On 29 April 2019 Michelle Eastmond held a meeting with the Claimant to discuss an incident involving the Claimant and the vehicle valet cleaner, she also raised the following matters 1) writing slogans on CTWF vehicles (the Claimant had continued to write on the vehicles having received a memo telling her to stop) 2) incorrect disposal of litter 3) lack of respect for following standard protocols, minutes of that meeting were at pages 90 to 92 of the bundle.

7. At that meeting the Claimant presented Ms Eastmond with two letters of complaint dated the 18th and 21st of February 2019. The Claimant was asked why she had not submitted those letters before [page 91] and said that she had not felt comfortable leaving them in anyone else's care and had forgotten to give them to the Director (Ms Tredoux). In her evidence to the Tribunal the Claimant confirmed that she had not presented those to anyone until the meeting on 29 April and that she had not left them on Ms Tredoux's desk or in the office because other drivers sometimes went around looking on the desks or even in the desk drawers.

8. The outcome of the meeting was that the Respondent did not take any further action in respect of the issues raised but took the view that the Claimant would now be aware of how seriously it considered the matters and the need to conduct herself appropriately in the workplace.

9. On 23 June 2019 the Claimant wrote in relation to the letters she had presented at the meeting on 29th of April and Ms Tredoux responded on 24 June [pages 94 to 95], admitting there had been an oversight in relation to addressing them. Ms Tredoux provided a detailed response in her letter dated 24 June 2019 which included an offer of additional training for conflict resolution so that the Claimant would be better able to find the solutions to issues in future. Ms Tredoux also offered to arrange a meeting between the Claimant and her supervisor as a way of clearing the way to future working relationships. The

Claimant did not take up either offer.

10. On 8 July the Claimant wrote to Ms Tredoux about another incident in which the Claimant alleges her supervisor swore at her.

11. On 14 August 2019 Respondent received a complaint from the London Borough of Waltham Forest in respect of the Claimant and her conduct towards personal support staff and her manner and disrespect shown to service users. The Claimant was informed of this complaint and told that she would be replaced on the relevant service [page 100], which she accepted.

12. On 21 October 2019 the Respondent received another complaint from the Claimant's supervisor in relation to the Claimant's conduct at the workplace. The complaint alleged the Claimant was aggressive towards and made inappropriate remarks about her supervisor and suggested that the Claimant's comments were homophobic [page 101].

13. The Claimant was contacted by telephone and asked to attend a meeting. Ms Tredoux told the tribunal that the Claimant became very aggressive and that she had to ask a number of times for the Claimant not to shout at her but finally the Claimant stated that she would attend the meeting saying, "I know exactly what was said and if I'm going down, she is going down too" Ms Tredoux recorded this in a note dated 23 October 2019 [page 106].

14. Ms Tredoux accepted that she did not offer the Claimant an opportunity to bring anybody with her to this meeting; she explained that due to the seriousness of the Claimant's discriminatory comments and the Claimant's angry response to her call she only felt able to invite her to the meeting to explain the nature of the allegations, she did not get an opportunity to say anything more on the phone. She did not put the allegation in writing. Ms Tredoux was certain that the Claimant knew exactly what the meeting was about and what it was alleged she had done and this was borne out when the Claimant turned up at the meeting with her written statement dated 22 October [page 105]. Ms Tredoux took the statement into account and told the Tribunal that she gave the Claimant a full opportunity to respond to the allegation against her.

15. The Claimant denied knowing that she was being accused of homophobic comments, as opposed to a general altercation with her supervisor. Ms Tredoux believed that the Claimant understood the seriousness of the allegations before she came to the meeting and indicated as much by saying in the meeting that she knew she was going to lose her job. Ms Tredoux believed that the reason the Claimant declined her offer to record the meeting was because she knew exactly what she had done and did not want it recorded. At the meeting Ms Tredoux read from the 'statement' (email) from the Claimant's supervisor setting out the allegation.

16. Ms Tredoux acknowledged that there was a difficult working relationship between the Claimant and her supervisor, she had spoken to the supervisor about her conduct in the past and she had been referred to HR training, which she had completed. She contrasted this with the Claimant who had declined the

offer of training and had declined the offer to try to resolve matters. She had not responded to the offer made in June of a meeting to try to resolve the issues or conflict resolution training [p95]. The Claimant told the Tribunal that she didn't respond to that letter and didn't take up the offers because she did not believe that she needed training for her behaviour.

17. Ms Tredoux did not consider the supervisor's behaviour to be bullying: the supervisor had 23 vehicles and numerous drivers to oversee and one employee who was constantly playing her up and calling her 'the Devil' and 'Satan'; the supervisor had previously acknowledged that she did sometimes use inappropriate language (swearing) out of frustration and had agreed to attend HR training.

18. The Claimant denied calling her supervisor 'the Devil', Ms Tredoux put to her that other staff had heard her call her supervisor Satan, the Claimant also denied this, saying she had simply been "singing from the Scriptures" while waiting to speak to her supervisor.

19. In reaching her conclusion as to what was more likely to have taken place Ms Tredoux took into account what she knew about the Claimant's conduct – both from observing her conduct in the office and from the history of complaints about the Claimant, which she considered showed a pattern of behaviour; she was aware of other incidents of antagonistic behaviour by the Claimant towards her supervisor and others, and similar issues in the past where the Claimant had made comments about passengers that could be considered discriminatory. Ms Tredoux also took into account that the Claimant accepted she had repeated the rumour about her supervisor and another driver, the Claimant's defence to that allegation was that everyone was doing it (spreading the rumour), which Ms Tredoux considered to be blatantly untrue. Ms Tredoux had received feedback from other drivers who were upset that the Claimant was spreading rumours about her supervisor.

20. Under cross examination Ms Tredoux stated that the were so many incidents with the Claimant that she could be 'doing a disciplinary every day' and that the incidents over the years were increasing rather than decreasing. The Claimant constantly made reference to her supervisor's sexuality despite the fact that the supervisor was happily married. Ms Tredoux had observed a decline in the relationship between the two of them (referred to in the email from the supervisor) and a deterioration in the Claimant's attitude. She concluded that the Claimant had approached her supervisor and asked her if she fancied her [in the course of an argument or disagreement between them] and that this was homophobic conduct.

21. Ms Tredoux also raised with the Claimant the allegation of defacing a log sheet, [page 100A]. The Claimant accepted she wrote a comment "you will never change" on the log sheet, which was directed at and would have been seen by her supervisor, knowing that she ought not to, but claimed that she only did so in order to draw attention to clients complaining about dirty buses. The Claimant explained there was an ongoing issue with the cleanliness of the bus which was why she had taken to writing slogans, which she described as "of peace and

love", or "good words", on the buses. She accepted she had been told not to write on the buses and that she had been told the messages might offend some people but she continued to write them; she explained this by saying that she only wrote messages on the inside of the buses not on the outside.

22. Ms Tredoux prepared a report setting out her account of the meeting, her findings and her recommendation to the Management Committee [p106 and 107]. She found the Claimant guilty of serious misconduct and recommended dismissal. She confirmed in evidence that this was in relation to the discriminatory homophobic comment made by the Claimant to her supervisor.

23. In reaching the decision to recommend dismissal Ms Tredoux had in mind the flouting of the Respondent's Positive Working Environment policy, she found that the Claimant's conduct had crossed the line in respect of her supervisor's sexuality, which Ms Tredoux believed was "not tolerable", she could deal with the other aspects of the Claimant's behaviour but that [crossing the line] was not tolerable. The Positive Work Environment Policy [p70] states that "Harassment and bulling are unacceptable behaviour at work and will be treated as misconduct, which may include gross misconduct warranting dismissal".

Procedure

24. The Claimant received a call from Ms Tredoux at 11 am on 21 October 2019 [Claimant's w/s paragraph 10] informing her that due to the incident which had occurred between herself and her supervisor that morning Ms Tredoux was going to hold an investigation and that she would receive the details of the meeting soon. The memo in the bundle states that Ms Tredoux was advised of an incident between the Claimant and her supervisor that morning in the car park and that,

> "the serious nature of the conversation now requires a full investigation and I am requesting that you attend a meeting with me as soon as possible. …" [p97].

That afternoon the Claimant received a memo with the time and date of the meeting which took place the following day.

25. I am satisfied that the Claimant was aware of what the meeting was going to be about in general terms, i.e that it was about her interaction with her supervisor and that Ms Tredoux told the Claimant the specific details of what the allegations were at the meeting; she read the supervisor's account of the incident to the Claimant and gave her an opportunity to respond. The Claimant did not mention any witnesses or ask Ms Tredoux to speak to anyone else that may have witnessed the incident.

26. The Claimant was not informed of her entitlement to bring someone with her to the meeting. The Claimant told the tribunal that had she been informed, she would have been able to arrange for someone to accompany her either that day or the next day.

27. The Claimant accepted that in the dismissal letter dated 30 October Ms Tredoux set out what she needed to do in order to appeal and also informed her that she could be accompanied by a colleague. The Claimant sent an email stating she wanted to appeal but did not pursue the appeal because she had been told that the appeal would be to Ms Tredoux (the Director) and the Management Committee, the same people who had already made the decision. Although in cross examination the Claimant accepted that Ms Tredoux dealt with the complaint fairly but she disagreed with the outcome.

28. The statement of main terms of employment [pages 33- 37] provides for an appeal to be raised with the Director and refers to the procedure in the employee handbook [pages 38-82]. The Disciplinary Procedure [p78] and the Appeal Procedure [p79] are both described as not forming part of the contract of employment.

29. The relevant parts of the Disciplinary Procedure provide as follows*:*

"If it is necessary for the Organisation to take action under the disciplinary procedure you will be issued with a written statement setting out the nature of the conduct, capability or other circumstances that may result in a disciplinary warning or dismissal. You will only be issued with a disciplinary warning or dismissed following a formal disciplinary meeting, at which you will have been given the right to be accompanied by a fellow employee or an accredited trade union …

You should make every effort to attend the meeting.

Throughout the disciplinary procedure, you will be given the opportunity to respond to any complaint before any decision on a disciplinary warning or dismissal is taken."

The relevant parts of the Appeal Procedure provide*:*

"If you wish to appeal against any disciplinary warning or a decision to dismiss, you should apply in writing within 5 working days. You will be invited to attend a meeting and you should take all reasonable steps to attend.

After the appeal meeting, you will be informed of the decision.

You should address your appeal to the person stated in your Statement of main terms of employment.

You will be given the opportunity to be accompanied at the meeting by a fellow employee or accredited trade union…"

Relevant law

Unfair Dismissal

30. The employer must show a potentially fair reason for dismissal within section 98

of the Employment Rights Act 1996. The Respondent relies upon conduct within section 98(2)(b). The legal issues in a conduct unfair dismissal case are well established and were set out in the case of **BHS –v- Burchell** [1978] IRLR 379, namely:

(1) Did the employer genuinely believe that the employee had committed the act of misconduct?

(2) Was such a belief held on reasonable grounds? And

(3) at the stage at which it formed the belief on those grounds, had the employer carried as much investigation as was reasonable in all the circumstances of the case?

31. Section 98(4) of the Employment Rights Act 1996 requires the Tribunal to determine whether the Respondent acted reasonably or unreasonably in treating any such misconduct as sufficient reason for dismissal in accordance with equity and the substantial merits of the case. This will include consideration of whether or not a fair procedure has been adopted as well as questions of sanction.

32. In an unfair dismissal case it is not for the Tribunal to decide whether or not the Claimant is guilty or innocent of the alleged misconduct. Even if another employer, or indeed the tribunal, may well have concluded that there had been no misconduct or that it would have imposed a different sanction, the dismissal will be fair as long as the **Burchell** test is satisfied, a fair procedure is followed and dismissal falls within the range of reasonable responses.

33. The test for the range of reasonable responses is not one of perversity but is to be assessed by the objective standards of the reasonable employer rather than by reference to the Tribunal's own subjective views, **Post Office –v- Foley, HSBC Bank Plc –v- Madden** [2000] IRLR 827, CA. There is often a range of disciplinary sanctions available to a reasonable employer. As long as dismissal falls within this range, the Tribunal must not substitute its own views for that of the employer, **London Ambulance Service NHS Trust v Small** [2009] IRLR 563.

34. The employer will normally not act reasonably unless he investigates the complaint of misconduct fully and fairly and hears whatever the employee wishes to say in his or her defence, or in explanation or mitigation. In the case of **Alexander v Brigden Enterprises Ltd** [2006] IRLR 422, the EAT held that the employee had to be given 'sufficient detail of the case against them to enable them properly to put his side of the story'.

35. The need to apply the objective standards of a reasonable employer, applies as much to the adequacy of an investigation as it does to other procedural and substantive aspects of the decision to dismiss, see **Sainsbury's Supermarkets Limited v Hitt** [2002] IRLR 23, CA. The extent of investigation reasonably required will depend, amongst other things, upon the extent to which the employee disputes the factual basis of the allegations concerned. As confirmed

in **A v B** [2003] IRLR 405, EAT and **Salford NHS Trust v Roldan** [2010] ICR 1457, CA, in determining whether an employer carried out such investigation as was reasonable in all the circumstances, the relevant circumstances include the gravity of the charges and their potential effects upon the employee. There is a spectrum of gravity of misconduct which needs to be taken into account in deciding what fairness requires in any particular case.

36. It is at least desirable that a hearing should be given by the person ultimately deciding upon the dismissal. In **Budgen & Co v Thomas** [1976] ICR 344 the EAT upheld a tribunal decision that a dismissal was unfair in circumstances where the task of hearing the employee had been detailed to a security officer but the actual decision to dismiss was taken by a personnel officer who had not heard the employee at all. Phillips J emphasised the two separate objectives of a hearing as follows:

> "One is the process of investigating the complaint; the other is the process of deciding whether or not dismissal is the right penalty. Very often, those separate functions will be undertaken by the same person or body, and, when that happens, there is no problem. But if, as here, the investigation of what happened is undertaken as a separate exercise, then whatever the outcome of that investigation, and however serious the offence disclosed, it is still necessary, when a decision is being taken whether dismissal is to follow, for the employee to have an opportunity to say whatever he or she wishes to say to the person who will take the decisions. It is not possible or desirable to elaborate that at greater length. The tribunal put it admirably in a single sentence which is short, pithy and correct: "A statement to a security officer is not a substitute for an interview with the management who will eventually dismiss." That really is what this case is all about'.'

37. Depending on the circumstances it may not always be necessary to ensure that the person actually implementing the dismissal carries out the hearing. Fairness may be satisfied where an investigating officer provides a full report, including any potentially mitigating factors, to the officer dismissing.

38. In **Slater v Leicestershire Health Authority** [1989] IRLR 16 the Court of Appeal held that it was not unfair for the same individual to carry out the investigation and conduct the disciplinary hearing. As Purchas LJ commented in the Court of Appeal in **Sartor v P and O European Ferries (Felixstowe) Ltd** [1992] IRLR 271, 'there is nothing strange in the employer making his own enquiries and then reaching the decision whether he should or should not dismiss the employee'. In *Slater* Parker LJ commented that it was ill advised in the circumstances of that case, but in the light of these two Court of Appeal decisions, it cannot simply be said that a dismissal is unfair merely because the investigator is also the judge.

39. In deciding whether the dismissal was fair or unfair, the tribunal must consider the whole of the disciplinary process. If it finds that an early stage of the

process was defective, the tribunal should consider the appeal and whether the overall procedure adopted was fair, see **Taylor –v- OCS Group Limited** [2006] IRLR 613, CA per Smith LJ at paragraph 47.

40. The Tribunal must have regard to the ACAS Code of Practice which sets out basic principles of fairness to be adopted in disciplinary situations, promoting fairness and transparency for example in use of clear rules and procedures. This includes the requirement that employers carry out necessary investigations to establish the facts of the case.

41. If a dismissal is unfair due to procedural failings but the appropriate steps, if taken, would not have affected the outcome, this may be reflected in the compensatory award, **Polkey v A E Dayton Services Ltd** [1987] IRLR 503, HL. This may be done either by limiting the period for which a compensatory award is made or by applying a percentage reduction to reflect the possibility of a fair dismissal in any event. The question for the Tribunal is whether this particular employer (as opposed to a hypothetical reasonable employer) would have dismissed the Claimant in any event had the unfairness not occurred.

The ACAS Code

42. Paragraph 4 of the Code provides:

- Employers should inform employees of the basis of the problem and give them an opportunity to put their case in response before any decisions are made.
- Employers should allow employees to be accompanied at any formal disciplinary or grievance meeting.
- Employers should allow an employee to appeal against any formal decision made

Paragraph 5: It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case. In some cases this will require the holding of an investigatory meeting with the employee before proceeding to any disciplinary hearing. In others, the investigatory stage will be the collation of evidence by the employer for use at any disciplinary hearing.

Paragraph 6: In misconduct cases, where practicable, different people should carry out the investigation and the disciplinary hearing.

The Code further provides:

Paragraph 9. If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification.

Paragraph 10. The notification should also give details of the time and venue for the disciplinary meeting and advise the employee of their right to be accompanied at the meeting.

The Code recognises that depending on the size and resources of employers it may sometimes not be practicable for them to take all the steps set out in the Code.

Contributory fault

Basic award (s122(2) ERA 1996)

43. A tribunal may reduce a basic award where it considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such as it would be just and equitable to reduce or reduce further the amount of the award to any extent.

Compensatory award (s123(6) ERA 1996)

44. Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, the tribunal shall reduce the amount of the compensatory award by such proportion as it considers just and equitable.

45. To fall into this category, the Claimant's conduct must be 'culpable or blameworthy'. In respect of the compensatory award, such conduct must cause or contribute to the Claimant's dismissal, rather than its fairness or unfairness. Such conduct need not amount to gross misconduct (**Jagex Ltd v McCambridge** UKEAT/0041/19).

46. A tribunal should first assess the amount of loss under s 123 (1) ERA 1996 and then consider the question of contributory fault. Where an initial reduction has been made under s 123(1), this might alter the extent of the reduction under s 123(6). Accordingly, it may turn out that the reduction from the compensatory award under s 123(6) would be less than the reduction which it was just and equitable to make to the basic award under s 122(2) ERA 1996.

47. The EAT in **Steen v ASP Packaging Ltd** *UKEAT/0023/13, [2014] ICR 56* (Langstaff P Presiding) observed that a finding of 100% contributory conduct is an unusual finding, albeit a permissible finding. A Tribunal should not simply assume that because there is no other reason for the dismissal therefore 100% contributory fault is appropriate. It may be the case but the percentage might still require to be moderated in the light of what is just and equitable: see **Lemonious v Church Commissioners** *UKEAT/0253/12 (27 March 2013, unreported)* (Langstaff P presiding).

48. In **Rao v Civil Aviation Authority** [1994] IRLR 240 the Court of Appeal held that the same conduct can be considered under both *Polkey* and contributory fault in assessing compensation. Where there is a significant overlap between

the factors taken into account when making a *Polkey* deduction and when making a deduction for contributory conduct, the Tribunal should consider expressly, whether, in the light of that overlap, it is just and equitable to make a finding of contributory conduct, and if so, what its amount should be. This is to avoid the risk of a Claimant being penalised twice for the same conduct (see **Lenlyn UK Ltd v Kular** UKEAT/0108/16/DM).

50. In assessing contribution the tribunal should in turn, 1) Identify the relevant conduct; 2) assess whether it is objectively culpable or blameworthy; 3) consider whether it caused or contributed to the Claimant's dismissal; and 4) If so, determine to what extent it is just and equitable to reduce any award. (See **Steen v ASP Packaging Ltd** UKEAT/0023/13/1707).

Submissions

51. I have had regard to all of the submissions that were made to me but in the interests of brevity shall not set them out in full here. I deal with the arguments I considered to be central to my decision in the conclusions below.

Conclusions

52. I accept Ms Tredoux's evidence that the conduct foremost in her mind when she reached the decision to dismiss was the homophobic comment. Ms Tredoux had herself observed the Claimant's conduct and I find that it was legitimate for her to take that into account when balancing who she believed; she had worked in the same office over a number of years and had occasion to observe the Claimant in her interactions with both her supervisor and other members of staff. The Claimant had admitted having been involved in spreading homophobic rumours about her supervisor. In reaching her conclusion Ms Tredoux looked to the balance of probability and considered it a relevant factor that it was not likely that the supervisor would make the allegation maliciously. I find that Ms Tredoux had formed a genuine belief in the Claimant's misconduct and that belief was based on reasonable grounds.

53. I have however found that there were procedural defects in the process followed. The Claimant was not informed of her right to be accompanied, the Claimant was not informed in writing of the charges against her and although she may have had a general idea that it related to her interaction with her supervisor it is not clear that she was told specifically that the allegation amounted to an act of homophobia contrary to the Respondent's Positive Work Environment Policy. The Respondent decided to hold an investigatory meeting but did not hold a separate disciplinary hearing. Ms Tredoux having carried out the investigation and written her report also took part in the decision to dismiss. The Claimant was not given an opportunity to address the panel that made the decision (the management committee together with Ms Tredoux). The panel was provided with Ms Tredoux's report which contained a full account of her meeting with the Claimant and set out the Claimant's response to the allegation but there was no evidence that any potentially

mitigating factors were put forward to the decision-making panel on her behalf.

54. The Claimant was told that the appeal was to be addressed to the same body that made the decision to dismiss, there was no attempt to separate out individuals who might be involved in the initial decision from those who might conduct any appeal.

55. I find that the procedure followed fell below that standards of fairness required of a reasonable employer and that as a result of the procedural defects identified the dismissal was unfair within the meaning of section 98(4) of the Employment Rights act 1996.

Wrongful dismissal

56. I find on the balance of probabilities that it is more likely than not that the Claimant made the disputed remarks to her supervisor. The Claimant accepted that she had at least repeated the rumour about her supervisor and another driver, even if she did not accept that she started the rumour. I accept Mrs Tredoux's evidence that the other drivers had complained to her about the Claimant spreading rumours about the supervisor, and that the Claimant used the words 'Satan' and 'the Devil' towards her supervisor. The Claimant's explanation in respect of those remarks, that she was singing words from the Scriptures to pass the time was simply not credible. I find that the comment, or question, "Do you fancy me" was said and that it was an unwanted and homophobic comment made with towards the supervisor. I am satisfied that it amounted to a breach of the Respondent's Positive Work Environment Policy.

57. I also find that it was not an isolated comment and find that the remark indicated an escalation to the homophobic antagonism shown towards the supervisor. I am satisfied that the fact that it was not a one-off makes it more serious and that it amounted to gross misconduct in the circumstances.

REMEDY

Polkey reduction

58. Doing the best I can on the evidence before me I am satisfied that the Respondent could have arranged for another manager, for instance Michelle Eastmond, to conduct either the investigation or the disciplinary. I find that it would have taken at most 2 weeks to arrange for the investigation and disciplinary to be dealt with separately and to allow the Claimant to be accompanied at both stages. I therefore find it would have taken no more than two weeks to have dealt with the matter fairly.

59. I find that had a fair procedure been followed the decision as to whether the Claimant was guilty of the misconduct alleged would in all likelihood have been the same. However, I also find that there is a chance, although no higher than

10%, that had the Claimant been given the opportunity to address the decision-making panel that they may have decided to mitigate the sanction to a final warning rather than summary dismissal. I therefore find that that there is a 90 % chance the Claimant would have been dismissed by the Respondent had a fair procedure been followed.

60. I am satisfied that had the procedure find that dismissal was within the range of reasonable responses in the circumstances, homophobia was taken very seriously and this was the last in a series of incidents which shed light on the Claimant's conduct at work and attitudes to colleagues. I am satisfied that the conclusion that on this occasion the Claimant had crossed a line was one that was open to Ms Tredoux and the Management Committee.

61. I also find that the Respondent was faced with a breakdown in the relationship between the Claimant and her supervisor. The supervisor had agreed to and had undergone training whereas the Claimant had declined dispute resolution training. The problem was continuing and complaints about the Claimant's behaviour were increasing and were coming from service users and other staff. The supervisor had made it clear that she was considering her position if nothing was done. I am satisfied that if the Respondent had not dismissed the Claimant for gross misconduct in respect of the incident in October further incidents would have arisen within the next 8 weeks and that the Respondent would have dismissed the Claimant either for misconduct or for some other substantial reason, that is, as a result of the break down in the relationship with her supervisor.

Contributory fault

Reduction under sections 122(2) and 122 (6) to reflect the Claimant's conduct

62. I find that the Claimant's conduct was culpable and blameworthy conduct and contributed to her dismissal. I find that it is just and equitable to reduce the compensatory and basic awards to reflect the Claimant's conduct before dismissal.

63. In considering the amount of reduction it is just and equitable to apply in respect of contributory conduct I have taken into account that I have already applied a reduction of 90% for a period of 8 weeks and then 100% thereafter, under s 123 (1), to reflect the likelihood of a fair dismissal (the *Polkey* reduction). I have in mind the potential for double counting and am satisfied that it is appropriate to moderate what would otherwise be the degree of contributory fault that would reduce the award. I have assessed the further reduction for contributory conduct at 50% to avoid the injustice of an excessive and disproportionate reduction despite my find that the Claimant committed the misconduct and her conduct was culpable and blameworthy to a significant degree. I apply the same reduction to both the basic and compensatory awards.

Basic award

64. The figures provided in the Schedule of Loss were agreed by the parties. The figure provide for gross and net weekly pay was the same, £189.48. Doing the best that I can given the information before me I have calculated the Claimant's award as follows.

65. The Claimant was 47 at the date of dismissal and had completed four years' service. She was entitled to and one and a half weeks' pay for each year of service. She earned £189.48 gross per week. The total basic award before any deductions is therefore £1136.80.

Total basic award

66. After deducting 50% to reflect my finding on contribution the total basic award is £568.40.

Compensatory award

67. The Claimant is entitled to be compensated for her loss of earnings at 100% for 2 weeks, from date of dismissal to the date I have found a fair procedure would have been completed, calculated as follows: 2 x £189.48 = £378.96 (subject to any deductions for tax and national insurance).

68. I have also found that the Claimant is entitled to 10 % of her lost earnings for 8 weeks, that is from the date the Respondent would have been able to hold a fair hearing (2 weeks) to the date by which the Respondent would have dismissed her fairly for further conduct or some other substantial reason: 8 weeks x £189.48 = £1515.84 x 10% = £151.58.

69. I make no award in respect of loss of statutory rights and expenses claimed in respect of looking for employment based on my finding that a fair dismissal would have taken place within 10 weeks in any event.

70. The total figure for the compensatory award before the reduction for contributory fault is £530.54, which falls to be reduced by 50%. The total before any uplift for failure to follow the ACAS Code is therefore £265.27.

Uplift for failing to follow the ACAS code

71. I have found that the Respondent failed to inform the Claimant of her right to be accompanied to the disciplinary meeting and that there was a failure to arrange for a separate investigatory and disciplinary meeting. As a result the Claimant was denied the opportunity to put forward any mitigating circumstances to the decision making panel. I am satisfied that the failures by the Respondent were inadvertent rather than deliberate but that they were nevertheless unreasonable.

72. The Claimant was offered an appeal and was informed of her right to be accompanied at that appeal. Given the Respondent's size and the limited resources available to it I do not find it unreasonable that the appeal was to the same body, the Management Committee, which made the decision however nor have I found the Claimants' failure to pursue the appeal to be unreasonable in the circumstances.

73. I am satisfied that the award should be uplifted by 15 % to reflect the unreasonable failures I have identified at paragraph 71.

Total compensatory award

74. The total compensatory award is therefore £305.06 (£265.27 x 15% = £39.79).

Grand total award

75. The grand total award of **£873.46** (Basic award of **£568.40** and compensatory award of **£305.06)** is payable to the Claimant by the Respondent forthwith.

Employment Judge C Lewis
Date: 12 November 2020