EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4110872/19

In Person Hearing Held in Edinburgh on 2nd and 3rd November 2020

Employment Judge A Jones

Miss A Spence	**Claimant** **Represented by:** **Miss H Hogban, Counsel** **Instructed by USDAW**
Sainsbury's Supermarkets Ltd	**Respondent** **Represented by:** **Mr Haddow, Advocate instructed by Lewis Silkin Solicitors**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

It is the judgment of the Tribunal that the claimant was unfairly dismissed and the respondent is ordered to pay to the claimant the sum of £8357.20 as compensation for unfair dismissal. The claimant's claim for unpaid holiday pay is dismissed.

Reasons

Introduction

1. The claimant brought a claim of unfair dismissal and unlawful deduction from wages in relation to an allegation that she was not paid her entitlement to holiday pay on termination of her employment. Both parties were represented by counsel at the final hearing and a joint bundle of productions was

produced. It had been agreed in advance that written witness statements would be used in the hearing. The respondent had intended to call three witnesses, but it transpired that one of them had been required to self -isolate following guidance in relation to COVID, and subsequently became unwell. Therefore, only two witnesses were called by the respondent to give evidence in person. It was recognised by all parties that the evidence of the witness who could not attend in person was not likely to be crucial, as she had dealt with the claimant's appeal against dismissal. It was accepted that the appeal was not a rehearing but simply a review of the decision to dismiss and therefore could not cure any procedural irregularities. The claimant gave evidence on her own behalf. The witness statements which had been provided were taken as read and formed the evidence in chief of the witnesses.

2. Although evidence was concluded during the days allocated for the hearing, there was insufficient time for submissions from the parties. Therefore, parties were directed to provide written submissions by Friday 13th November. Parties were advised that if they wished to comment on the opposing submissions they should do so within seven days thereafter. Should either party form the view that a hearing was required in order to deal with submissions, they should advise the Tribunal accordingly.

3. In the course of its deliberations, the Tribunal also invited comment from the parties of the relevance of an authority to which neither party had made reference in their submissions, *Bandara v BBC* UKEAT/335/15. Both parties provided further written submissions in that regard.

Findings in fact

4. Having listened to evidence and considered the documentation to which reference was made and written submissions, the Tribunal made the following findings in fact.

5. The claimant had been employed by the respondent from 4 October 1995 until her employment terminated on expiry of her notice period on 17 July 2019. At that point she was 68 years old.

6. The claimant had latterly been employed by the respondent as an Online Shopper, which involved preparing the orders of customers which had been made online, for delivery. She worked in the respondent's premises at Cameron Toll in Edinburgh.

7. The claimant was paid £9.20 per hour and she normally worked 2 shifts per week of 6.5 hours, of which she was paid for 6 hours. Her average take home pay was around £364 per month.

8. The management structure in the Cameron Toll store at the relevant time was that there was a Store manager, Mr Bainbridge, an Operations Manager and then further managers. There were nineteen managers in total.

9. The respondent has various HR policies which were located on the respondent's intranet. It was not clear to the Tribunal how those staff who were employed 'on the shop floor' were expected to be able to access the respondent's intranet.

10. The respondent does not have a relationships at work policy but has a conflict of interest policy. This policy was not provided to the Tribunal.

11. The respondent has a Equality Diversity and Inclusion Policy which was provided to the Tribunal. The claimant had never received any training on this policy.

12. The Equality, Diversity and Inclusion Policy narrates that 'line managers must make sure their colleagues understand the policy and are behaving in an appropriate way.' The claimant had never had any communications with any managers about this policy (other than in the context of disciplinary proceedings against her).

13. The respondent had a one page document called 'social media guidelines: top 10 rules for colleagues using external social media' which listed dos and don'ts. The respondent also has a social media policy which refers to

'misconduct and social media'. The claimant had never received any training on these policies.

14. The respondent also has a Fair Treatment policy and a Disciplinary and appeal policy.

15. The claimant's daughter created a profile for her on Facebook in July 2017. The claimant understood that all posts made by her would be private. The page referred to her as a 'Customer Services Assistant at J Sainsbury PLC'. The claimant asked her daughter to remove the reference to J Sainsbury, but she did not do so.

16. In August 2018, the claimant sought to reduce her hours due to a disability. Her request was refused by Mr McBride, the claimant's line manager unless she was willing to start work at 5am which she could not do due to the times at which she had to take medication. The claimant appealed that decision to Mr Hogg, who refused the appeal. The claimant then went to Mr Bainbridge, who was the Store Manager who overruled Messrs McBride and Hogg.

17. Prior to September 2018, the claimant had never been the subject of disciplinary proceedings by the respondent.

18. The claimant posted on Facebook on 8 September 2018 in response to a post from a former colleague. The claimant mistakenly believed that she was communicating with the former colleague on Messenger rather than Facebook and had understood that no one else would be able to see her posts.

19. In the conversation with her former colleague on 8 September 2018, the claimant said 'we r having problems at work with new manager he's a young idiot hasn't got a clue how to run the department will tell u about it next time I c u take care'.

20. As a result of the relevant settings, only seven other people could view this posting, including an existing colleague, who was a manager, who took a screen shot of the post and provided it to the respondent.

21. The claimant was then subject to an investigatory meeting and subsequent disciplinary hearing for 'bringing the brand into disrepute and a breach of the company's fair treatment and equality, diversity and inclusion policies.'

22. A disciplinary hearing was chaired by a Customer Trading Manager, a Ms Fraser who was also based at the Cameron Toll store. This was the first disciplinary hearing Ms Fraser had chaired. The claimant was represented during the process by her a trade union official, a Mr Ireland.

23. The claimant was issued with a final written warning by letter dated 24 October 2018 which was to remain active for twelve months.

24. The claimant was advised by Mr Ireland not to appeal against the decision and she accepted this advice.

25. The claimant did however raise a fair treatment at work complaint against the colleague who had provided the respondent with a screen shot of the facebook conversation which led to her receiving a final written warning. This complaint was not upheld.

26. The claimant raised a grievance on 1 February 2019 in relation to her treatment by a line manager Mr Macbride. Mr Macbride had been the subject of the claimant's facebook comments which resulted in her receiving a final written warning. The grievance related to her treatment since he became her line manager and was titled 'Discrimination arising from my disability'.

27. The respondent did not follow its policies in dealing with this grievance, in that there was no meeting with the claimant to discuss the grievance. The claimant was advised by letter dated 18 February that her grievance had not been upheld and that she had not been treated unfairly. The decision maker was a Mr Hogg, who was the operations manager at the store. The claimant was unaware as to whether Mr Hogg had carried out any investigations at all into her grievance.

28. When Ms Fraser was on annual leave in January 2019, Mr Ireland informed Mr Macbride that the claimant had asked Mr Ireland if he knew whether Mr Macbride and Ms Fraser had been in a relationship during the disciplinary process conducted by Ms Fraser. Mr Macbride then informed Ms Fraser of this conversation on her return from holiday.

29. By letter incorrectly dated 16th February 2018 (rather than 2019), Ms Fraser wrote to Ms Kirstyn Mitchell, who is a Manager at another store, raising a 'formal fair treatment' against the claimant. The complaint related to allegations that the claimant had been asking questions about when Ms Fraser had entered into a relationship with Mr Macbride and 'insinuating that it was during the time of her disciplinary and if so she was going to raise a fair treatment against myself'. The grievance referred to comments being made to Michael Grant and Russell Ireland.

30. Ms Mitchell conducted an investigation into the complaint made by Ms Fraser.

31. Ms Mitchell had previously dealt with a grievance by the claimant about her treatment by her colleagues.

32. That investigation involved Ms Mitchell speaking to Ms Fraser, Mr Deacon, Mr Ireland and Mr Grant.

33. Ms Fraser was interviewed by Ms Mitchell on 23 February. During that meeting, Ms Fraser was asked 'Would you be happy to some mediation if she (the claimant) agreed to it.' Ms Fraser responded 'If she wants to, then fine, but she won't.' (page 388). The claimant was never asked whether she would be willing to engage in mediation with Ms Fraser.

34. During the investigatory interview, Ms Fraser stated that the claimant had 'a notorious reputation' and 'I used to work in online and I know what she's like, she wants everyone with paper and a note taker'. She also indicated that she was first advised of the claimant questioning her relationship with Mr McBride was as a result of Mr Ireland giving him a 'heads up' while Ms Fraser was on holiday.

35. Mr Deacon provided a brief written statement dated 25/2/2019. It was not clear to the Tribunal how Mr Deacon could have become involved in the grievance as no mention had been made of him either in the written grievance or the interview with Ms Mitchell. The statement referred to a conversation which was said to have taken place that day (that is after Ms Fraser's grievance had been lodged).

36. Mr Ireland was interviewed on 7 March. Mr Ireland confirmed that he had informed Ms Fraser about what he been said by the claimant to him. He made no mention of also having advised Mr McBride.

37. A brief written statement was provided by Mr Grant on 11 March. It referred to an alleged conversation with the claimant in January.

38. At some point towards the end of 2019, Ms Fraser and Mr McBride became romantically involved. At no stage did Ms Mitchell or anyone else in the respondent's employment carry out any investigation into when Ms Fraser and Mr McBride had entered into a personal relationship. At no stage was Ms Fraser ever asked by anyone what status her relationship was with Mr McBride when she was carrying out disciplinary proceedings against the claimant.

39. Ms Mitchell wrote to Ms Fraser by letter dated 14 March stating

> "Dear Amy
>
> I write further to the fair treatment complaint that you initially raised on Saturday 16 February 2019, relating to a situation where you felt that a colleague Alexis Spence has been making inappropriate comments about your relationship and questioning your integrity. You indicated that you did not believe that your complaint could be resolved informally, through the conciliation process, and that you would like to make a formal complaint.
>
> I can confirm that the company has completed its investigations and my decision is to uphold your complaint, I believe you were treated unfairly.

I can also confirm that the Company has taken what it believes to the appropriate action to resolve the situation and prevent a reoccurrence."

40. Ms Mitchell then wrote to the claimant inviting her to a meeting to 'investigate your alleged Conduct', namely "A breach of the company's fair treatment and equality, diversity and inclusion policies. Between January and February you have been making inappropriate comments about Amy Fraser and her relationship with Greg McBride and also inappropriate comments about her integrity as a manager. This behaviour is not tolerated by Sainsburys under the fair treatment, equality, diversity and inclusion policies."

41. A meeting with the claimant took place on 20 March. The claimant was accompanied at the meeting by her brother who is also an employee of the respondent. No further investigations into the allegations against the claimant were carried out by Ms Mitchell.

42. During that meeting Ms Mitchell stated 'Based on what I've got in front of me – I don't believe they (referring to those who had provided statements) are lying and they have provided true statements.'(page 102)

43. The claimant was then invited to a disciplinary hearing by letter dated 22 March on 27 March 2019. The allegation was in exactly the same terms as the letter inviting the claimant to the meeting on 20th March. The hearing was to be chaired by Mr Hogg. The letter stated "You should be aware that as you currently have a final written warning for your conduct, that this allegation if upheld, could result in your dismissal from Sainsbury's."

44. Ms Savage (the colleague who had provided the respondent with a screenshot of the facebook post which led to the claimant receiving a final written warning) wrote to the claimant on 3 April advising her that 'your sick pay has been held from you as you are pending disciplinary action') (page 299)

45. The claimant raised a grievance against this decision and her pay was subsequently reinstated (page 336) although this was after the decision to dismiss the claimant had been taken.

46. The disciplinary hearing was postponed and subsequently took place on 24th April. The claimant was accompanied by a trade union representative Mr Humphries.

47. Mr Hogg was not provided with the notes of the meetings between Ms Fraser and Ms Mitchell in advance of the hearing, so was not aware that it had been Mr Ireland who had initially disclosed to Mr McBride that the claimant had asked him about Mr McBride and Ms Fraser's relationship.

48. Mr Hogg was aware that Mr Grant was an ex-boyfriend of Ms Fraser.

49. Mr Hogg chaired the hearing. He had been provided with the statements which had been provided during Ms Mitchell's investigation and the notes of the meeting with the claimant. Prior to the commencement of the hearing, Mr Hogg had determined that there would be two possible outcomes of the hearing: no action or dismissal with notice of the claimant.

50. At an early stage during the hearing, Mr Hogg expressed the view that there were only two potential outcomes to hearing: dismissal with notice or no sanction. There were a number of adjournments during the hearing and in total the hearing lasted for around 75 minutes.

51. During the disciplinary hearing of the claimant, the issue of Mr Grant's statement was discussed and reference was made to notes of the meeting with Ms Mitchell. The claimant had asked Ms Mitchell when this conversation was said to have taken place, Ms Mitchell said 15th January (page 99). At the disciplinary hearing, the claimant's representative indicated that 15th January was a day on which the claimant wasn't working. Mr Hogg's response was 'Kirstyn might have made a mistake while reading it' page 122/3'. Mr Hogg did not conduct any investigations into this inconsistency.

52. The claimant alleged during the disciplinary hearing that she had been bullied and had raised various grievances in relation to the treatment of her by her colleagues (page 127). Mr Hogg was unwilling to listen to the claimant's concerns in this regard.

53. The claimant also alleged that she had been told that Mr McBride had stood over Mr Deacon when he was typing up his statement and told him what to write (page 120). No investigations were conducted into this allegation.

54. There was then an adjournment for Mr Hogg to consider the matter. After an adjournment of 33 minutes, Mr Hogg advised the claimant that she was being dismissed with notice. During that adjournment, Mr Hogg had a telephone conversation with the respondent's Employment Relations department and also filled out a document called 'decision making summary'.

55. Mr Hogg's decision was then confirmed in writing to the claimant by letter of 24 April and the claimant was advised that her employment would terminate with effect from 17 July.

56. The claimant was advised by the Store Manager Mr Bainbridge that she should not attend work during her notice period.

57. The claimant appealed against her dismissal. Following a hearing on 29 May, the claimant was advised that the appeal was unsuccessful.

58. Neither Ms Mitchell nor Mr Hogg were familiar with the ACAS code of practice on handling discipline and grievance.

59. The claimant had intended to retire on her 70th birthday, by which time she would have worked for the respondent for 25 years.

Observations on the evidence

60. The respondent's witnesses were generally credible and reliable, although Mr Hogg in particular could not remember whether he had investigated the claimant's grievance which he had been appointed to deal with. The Tribunal

found this surprising given that it was in close proximity to the disciplinary hearing of the claimant. Mr Hogg was also vague on any steps which he might have taken in relation to the disciplinary proceedings against the claimant. For instance, he was asked whether he had spoken to Ms Mitchell about whether the recording of 15th January was a mistake and he said 'probably', but that there was no note of this. Given that Mr Hogg adjourned for such a short period of time before advising the claimant of his decision, the Tribunal thought it very unlikely that he had in fact taken any steps at all to conduct any investigations into the matters raised by the claimant in the hearing. He also couldn't remember whether he had asked the respondent's Employment Relations advisors as to whether he should pause the disciplinary proceedings to deal with the issues the claimant was raising with him. Again, the Tribunal thought it very unlikely that Mr Hogg had either thought of taking such action or sought advice on the issue. He did however ask whether the conversations between the claimant and her union representative could be said to confidential and had been advised that they would not be unless the claimant was involved in a disciplinary or investigation process.

61. The claimant's evidence was given through the lens of her ongoing distrust of the respondent and its witnesses. The claimant was at times quick to answer questions without giving proper consideration to the question being asked. In particular, there was some confusion in her evidence as to whether she accepted that her written witness statement was accurate and whether she had read it at all. She indicated she had read it, but on her mobile phone.

62. While the claimant did say in evidence that she had deliberately withheld information from the respondent during the internal proceedings, it was clear to the Tribunal that by this stage, her relationship with the respondent had entirely broken down and she was suspicious of all those who were involved in the procedure. The information withheld was that she was conducting her own investigations into when the relationship between Ms Fraser and Mr McBride had commenced. The Tribunal did not find the claimant's conduct during the procedure against her unreasonable or in any way to have

hampered the respondent's investigation. The claimant had been subject to disciplinary proceedings for asking her trade union representative and allegedly other managers when this relationship had commenced. It was not therefore surprising that she did not wish to disclose that she was seeking to find out for herself. While the Tribunal accepted that in general, the claimant was a reliable and credible witness, it did find her evidence (and indeed the position adopted by her representative) in relation to her claim for unpaid holiday pay confusing and contradictory.

63. The respondent argued that the claimant's evidence should be treated with caution as she was said to have raised unfounded and 'arguably malicious' grievances against colleagues. The Tribunal could not accept that this was the case. While it was common ground that the claimant had raised a number of grievances, there was no evidence that these had been malicious. Indeed one grievance for the withholding of sick pay was upheld. In addition, her application to have her hours amended was upheld eventually.

Issues to be determined

64. A joint list of issues had been produced by the parties in advance of the hearing which was set out at pp39-40 of the bundle.

65. By the conclusion of the hearing, the issues had essentially been narrowed to:

- Had the claimant's dismissal been fair in terms of section 98(4) Employment Rights Act 1996,
- If not, what, if any, compensation should the Tribunal award, and
- Was the failure of the respondent to pay the claimant in lieu of the two days holiday which had been booked by her during the period of notice an unlawful deduction from her wages.

Submissions

Respondent's submissions

66. The respondent invited the Tribunal find that its witnesses were both credible and reliable. The claimant was criticised for expanding the scope of the challenge to the fairness of the claimant's dismissal during the hearing and in particular in cross examination of the respondent's witnesses. The Tribunal was invited to accept that this hampered the ability of its witnesses to address wider issues which were raised during the course of the hearing, in particular in relation to the evidence of its witnesses regarding their handling of the grievances which had been raised by the claimant during her employment.

67. The Tribunal was invited to find that the claimant's evidence was likely 'to have been partial, self-serving and with a view to achieving a perceived vindication in these proceedings rather than being a genuine effort to present the objective truth and assist the ET with reaching a fair and just decision.'

68. The respondent referred the Tribunal to the accepted leading authorities in determining whether a dismissal was fair and reminded the Tribunal that the range of reasonable responses test applied to the procedure adopted by the employer as well as the ultimate decision to dismiss (*Sainsbury v Hitt* 2003 ICR 111).

69. The respondent also referred to *ASLEF v Brady* UKEAT/0130/06/DA as support for the proposition that if the claimant relied on the argument that she had been dismissed out of pique or antagonism, this had to be put with a proper basis in evidence. The claimant was criticised for expanding the basis of challenge to the respondent's decision to dismiss her. Nonetheless, the Tribunal was invited to accept that the manner in which the respondent had dealt with the claimant both in relation to the final written warning issued to her and her dismissal was fair and within the band of reasonable responses. It was denied that there was any evidence to support the claimant's position that her dismissal had been predetermined.

70. The Tribunal was also invited to find that the evidence of the claimant's trade union representative (provided in the course of the investigation) clearly did not consider the conversations between him and the claimant regarding the potential for a conflict of interest on the part of Ms Fraser as either being 'a confidential request for advice or guidance, nor a legitimate enquiry in respect of a potential appear or grievance'. The Tribunal was specifically invited to find that the respondent acted within the band of reasonable responses when deciding to take account of the union representative's evidence.

71. The respondent's submission in relation to the claim of an unlawful deduction from wages was that it should be dismissed. In particular, the changing nature of the claim was highlighted. Further, the respondent was entitled to require the claimant to take any unused leave during her notice period.

72. In terms of remedy, in the event that the Tribunal did not accept the respondent's primary submissions, the Tribunal was invited to find that the claimant had substantially contributed to her dismissal, both in relation to her failure to appeal the final written warning and also in her conduct during the proceedings leading to her dismissal. Further, the respondent submitted that the claimant had not engaged in good faith with the investigative and disciplinary process leading to her dismissal.

73. The respondent submitted that the claimant had failed to mitigate her losses by making inadequate efforts to obtain alternative employment prior to her reaching the age of 70, when she had stated that she would retire. She also had no claim for loss of statutory rights and had not vouched any claim for staff discount privilege.

74. Finally, the respondent submitted that even if there were procedural errors in the claimant's dismissal, her dismissal was inevitable and therefor applying Polkey, any compensation should be reduced by 100%.

75. In response to the request for comments on *Bandara v BBC*, the respondent accepted that if the Tribunal found that the final written warning given to the

claimant was manifestly inappropriate, then the Tribunal would be bound to conclude that the claimant was dismissed unfairly.

76. However, the respondent's position was that the Tribunal should decline to re-open the final written warning. It was submitted that the claimant lacked credibility and the allegations of bad faith made by her had no real substance.

77. Further, the Tribunal was invited to accept that the final written warning was within the band of reasonable responses and that the sanction cannot be 'manifestly inappropriate'.

Claimant's submissions

78. The claimant did not dispute that the respondent had established a potentially fair reason for dismissal, being conduct. The claimant's submissions were focused on the question of fairness. Again, reference was made to the leading authorities in this respect and the ACAS Code on Disciplinary and Grievance Procedures.

79. Reference was also made on the claimant's behalf to the case of *W Wendell & Co Ltd v Tepper* 1980 IRLR 96.

80. The claimant relied in particular on the second and third limb of the *Burchell* test. The background to the circumstances leading to the claimant's dismissal were highlighted and in particular the difficulties the claimant had experienced in relation to her managers Mr McBride and Mr Deacon arising out of her medical conditions. It was submitted that the issuing of a final written warning was unduly harsh in all the circumstances.

81. The decision of Ms Mitchell to uphold Ms Fraser's complaint before investigating the allegation against the claimant was criticised, as was the failure of Ms Mitchell to investigate whether there was any potential bias on the part of Ms Fraser in relation to the issuing of the final written warning, given her comments about the claimant during her interview with Ms Mitchell in relation to her grievance. Ms Mitchell was also criticised for failing to take

steps to investigate the claimant's belief that Ms Fraser and Mr McBride may have been in a relationship when Ms Fraser issued the claimant with a final written warning. The claimant submitted that there were breaches of the ACAS code particularly that what investigation was conducted was entirely one-sided and the result pre-determined.

82. The treatment of Ms Mitchell of the evidence of Mr Ireland, the claimant's trade union representative was the subject of particular criticism by the claimant. It was submitted that whether Ms Mitchell took advice on the role of Mr Ireland or not, the conclusion she reached that his position as a union representative was 'irrelevant' (P94) and 'it was therefore appropriate for him to mention the conversation he had with Alexis to Amy' was fundamentally flawed.

83. In addition, the failure of Ms Mitchell to explore mediation with the claimant and Ms Fraser was criticised.

84. Turning to the role of Mr Hogg, the claimant submitted that he was not impartial given his previous dealings with the claimant. In particular, his refusal to uphold the claimant's appeal against Mr McBride's decision not to reduce the claimant's hours was criticised. That decision had been overturned by Mr Bainbridge and it was said that this would have been embarrassing for Mr Hogg.

85. It was also submitted that Mr Hogg had made a predetermined decision to dismiss the claimant which was demonstrated by him beginning the meeting outlining the possible sanction before listening to the claimant. Mr Hogg's failure to investigate the claimant's position on the potential bias of Ms Fraser was also criticised and was said to amount to a breach of the ACAS Code. Mr Hogg's failure to take any steps to investigate the claimant's concerns about being bullied was also said to amount to a breach of the ACAS Code.

86. Mr Hogg's conclusion that the claimant had committed misconduct was said to be fundamentally flawed. It was also said that he had failed to properly

consider the other options open to him in terms of the respondent's procedure, such as a final written warning with conditions attached.

87. The Tribunal was also invited to find that the breaches of the ACAS made it appropriate to increase any award by 25%.

88. The claimant denied she had contributed to her dismissal, and that any argument that she had failed to mitigate her losses should be rejected.

89. Finally in terms of the claimant for unlawful deduction from wages, it was said that the Tribunal should award the claimant payment for two days' holiday pay in relation to holidays booked on 17 and 19 June when the claimant was on notice of termination of her employment.

Relevant law

Unfair dismissal

Section 98(2) of ERA sets out the potentially fair reasons for dismissal. Section 98(2)(c) states that the dismissal of an employee for a reason which relates to conduct is potentially fair.

It will then be for the Tribunal to determine whether such a dismissal was fair in all of the circumstances of the case.

Section 98(4) states that whether a dismissal will be fair (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and (b) shall be determined in accordance with equity and the substantial merits of the case.

Therefore, a dismissal may be unfair because there were procedural flaws or because a reasonable employer would not have dismissed the employee in the particular circumstances. This has been described as acting 'within the band of reasonable responses'.

It is also important to bear in mind the provisions of the ACAS Code of Practice when considering whether a dismissal was fair or unfair.

Finally, it is crucial that the Tribunal in considering these issues does not adopt what has been termed 'a substitution mindset'. The Tribunal is required to consider whether the employer's actions were within the band of reasonable responses, not whether or not it agreed that the employer's actions were justified.

Where an employer has taken a previous sanction such as a final written warning into account the Employment Tribunal's approach flows from the wording of section 98(4) (*Bandara v BBC* 2016 WL 06639476 (2016), which made reference to *Davies v Sandwell Metropolitan Borough Council* [2013] IRLR 374 and the comments of Mummery J who summarised the position at paragraph 22 therein.

His Honour Judge David Richardson made reference to the further comment Mummery J at from paragraph 22 at *Bandara*:

> "First the guiding principle in determining whether a dismissal is fair or unfair in cases where there has been a prior final warning does not originate in the cases, which are but instances of the application of s.98(4) to particular sets of facts. The broad test laid out in s.98(4) is whether, in the particular case, it was reasonable for the employer to treat the conduct reason, taken together with the circumstances of the final written warning as sufficient to dismiss the claimant.
>
> Secondly, in answering that question, it is not the function of the ET to reopen the final warning and rule on an issue raised by the claimant as to whether the final warning should or should not have been issued and whether it was a legally valid warning or a nullity. The function of the ET is to apply the objective statutory test of reasonableness to determine whether the final warning was a circumstances, which a reasonable employer could

reasonably take into account in the decision to dismiss the claimant for subsequent misconduct.

Third, it is relevant for the ET to consider whether the final warning was issued in good faith, whether there were prima facie grounds for following the final warning procedure and whether it manifestly inappropriate to issue the warning. They are material factors in assessing the reasonable of the decision to dismiss by reference to, inter alia, the circumstances of the final warning.

Unlawful deduction from wages

Part II of the Employment Rights Act addresses the issue of unlawful deduction from wages.

Discussion and decision

Unlawful deduction from wages

90. The claimant's claim for unlawful deductions from wages altered both at the commencement of the hearing and during the hearing itself. In the end, it amounted to a claim that the claimant ought to have been paid in lieu in of two days holiday she had booked prior to notice of termination of her employment being served on her. There was no evidence that the claimant indicated that she did not intend to take holidays during her notice period, as she was entitled to do. She was advised not to return to work during her notice by the respondent and while the claimant did lodge a grievance in relation to her pay (page 348), her complaint in relation to holiday pay initially appeared to be arising from a confusion about the way in which the claimant's payslip set out the payments being made to her.

91. The respondent did not expressly require the claimant to take remaining annual leave during her notice period, and indeed there was no communication about this at all. The Tribunal did not have the benefit of sight of the claimant's contract of employment in order to consider whether the

respondent had a contractual duty to require the claimant to take unused annual leave.

92. The letter of dismissal states that outstanding holiday monies would be paid to the claimant (page 152) but this letter predated the instruction that the claimant should not attend work.

93. Taking all of the evidence into consideration, and in particular that the claimant did not make any representations that she could not take the annual leave which had been booked, the Tribunal concluded that there had been no unlawful deduction from the claimant's wages in respect of any entitled to holiday pay on termination of her employment.

Unfair dismissal.

94. In addressing the question of the claimant's dismissal, the Tribunal had regard to the statutory test set out in section 98 (4), the authorities to which reference was made by the parties and the *Bandara* case above together with the ACAS Code. The Tribunal was particularly mindful that it should not adopt a substitution mindset and focus on the reasonableness of the respondent's action in the context only of the statutory test.

95. The Tribunal first considered the final warning issued to the claimant by Ms Fraser. There was no dispute that Mr Hogg had relied on this final written warning when reaching the decision to dismiss. The Tribunal had no hesitation in concluding that the final written warning was manifestly inappropriate. It appeared that one of the principal reasons that Ms Fraser had determined that a final written warning was appropriate was that the claimant did not show remorse (page 88). The claimant had indicated that she made a mistake. It appeared in fact that she was issued with a final written warning because she maintained what she had said was her genuine opinion of Mr MacBride and that she would tell him personally what she thought of him. It appeared that she was disciplined for refusing to change an opinion she held.

96. Moreover, no account appears to have been taken of the fact that to that date, the claimant had an unblemished disciplinary record with twenty three years' service. No account appears to have been taken of the (unchallenged) evidence that only eight people were able to view the post which had been made by the claimant. No account appears to have been taken of the apparently accepted position of the claimant that she had understood that the offending post had been a private message. No account appears to have been taken of the fact that no individual was mentioned in the post. The allegation against the claimant was framed as a breach of the fair treatment at work policy and bringing the brand into disrepute. There was no evidence that the brand had been brought into disrepute. Further it was only because the claimant told the respondent who she had been referring to in her post that the respondent could determine their identity.

97. A final written warning appeared to the Tribunal to be entirely disproportionate in the circumstances and was manifestly inappropriate. The claimant was criticised for not appealing against the final written warning. The Tribunal accepted that she was following the advice of her trade union representative in that regard. The fact that the claimant did not appeal against the decision does not however impact upon its conclusion that it was manifestly inappropriate.

98. There was no suggestion made by the respondent that the claimant would have been dismissed had the final written warning not been given. It was clear from Mr Hogg's evidence that the only options he saw as available to him were no action or dismissal. In these circumstances, the dismissal of the claimant was not within the band of reasonable responses and therefore unfair.

99. However, the Tribunal was mindful that the circumstances in which a warning relied upon when dismissing an employee is likely to be manifestly inappropriate will be rare. Therefore, then Tribunal went on to consider whether the claimant's dismissal would have been fair if Mr Hogg had been entitled to rely on the final written warning. In that regard the Tribunal was

careful to consider whether the investigation and the ultimate decision to dismiss the claimant could be said to be within the band of reasonable responses.

100. There were a number of aspects of the procedure adopted by the respondent in relation to the investigation which were of concern and in the view of the Tribunal did not fall within the band of reasonable responses.

101. In particular, Ms Mitchell concluded that the claimant had treated Ms Fraser unfairly before conducting what was said to be a disciplinary investigation into the allegations against the claimant. This is clear from her letter to Ms Fraser (p362).

102. In reality, Ms Mitchell did not conduct any investigations into the allegations against the claimant. The information relied upon as amounting to a disciplinary investigation was in fact the information obtained when addressing Ms Fraser's grievance. No further investigation were carried out at all. It is true that Mr Ireland approached Ms Mitchell again to set out his position, but that did not amount to an investigatory step on the part of Ms Mitchell. There was no separation between the grievance and disciplinary processes at all.

103. The statements which were obtained by Ms Mitchell were clearly accepted by her as accurate prior to her giving the claimant an opportunity to comment upon them. Ms Mitchell could not explain how Mr Grant came to be contacted at all. She suggested it must have been raised by Ms Fraser, but there was nothing in the notes of the meeting with Ms Fraser to suggest that.

104. It also appeared to the Tribunal that there may well have been further discussions with the witnesses which were not documented. For instance, Ms Mitchell subsequently made reference to the allegation that the claimant had spoken to Mr Grant 'in January' as 15th January.

105. There did not appear to be any attempt by Ms Mitchell to critically analyse the statements. Mr Grant's statement simply stated that the claimant on one occasion had asked him when Ms Fraser and Mr MacBride had started a

relationship. It was Mr Grant who was said to have asked the claimant why she wanted to know and only then did she allegedly say to him that it was because Ms Fraser had conducted her disciplinary hearing and if they were going out with each other at the time, that would have been a conflict.

106. The statement from Mr Deacon stated that the claimant had allegedly said on one occasion that 'we were out to get her' and questioned whether Ms Fraser had a conflict when she had disciplined her. Ms Mitchell did not take any steps to investigate on what basis the claimant had thought that 'we were out to get her'. This was particularly of concern as the claimant had by this time raised a grievance against Mr McBride (which was dismissed by Mr Hogg apparently without investigation).

107. The Tribunal was also extremely concerned at the way in which Mr Ireland's evidence was approached. He had indicated in his statement that the claimant raised the question of Ms Fraser's relationship with him 'half a dozen times;' While Ms Mitchell indicated that she took advice as to whether the conversations between Mr Ireland and the claimant were confidential, and concluded that they were not, she did not question Mr Ireland at all on this. She did not for instance ask Mr Ireland whether he had warned the claimant that if she persisted in her questioning, he would have to raise the matter with others. Mr Ireland was not asked whether the claimant ought to have known that he apparently no longer saw himself as acting in the capacity of a representative for her. He was not asked for any specifics about the 'half a dozen times'.

108. Ms Mitchell appeared to rely on advice that if discussions were not in the context of a discipline or grievance investigation they would not be confidential. However, Ms Mitchell was aware that it was Mr Ireland who had advised the claimant not to appeal against the final written warning issued by Ms Fraser. Mr Ireland had been her representative in that matter. It is very difficult to understand how Ms Mitchell could conclude that the discussions were not in the context of a discipline or grievance matter. It was not reasonable for her to have done so.

109. Further Ms Mitchell did not take any steps to find out if there was any information which might support the claimant. At no stage did she ever seek to find out what sort of relationship Ms Fraser had with Mr McBride when Ms Fraser was conducting the disciplinary proceedings against the claimant. That of itself renders any investigation inadequate and outwith the band of reasonable responses.

110. While it was accepted, albeit reluctantly, by Ms Mitchell in evidence that had there been a relationship between Ms Fraser and Mr MacBride at the relevant time, then Ms Fraser should not have dealt with the disciplinary matter, Ms Mitchell did not take any steps to investigate the matter. She said that she understood that Mr McBride disclosed the relationship around 24 December 2019, however, as was pointed out in cross examination, relationships do not just emerge out of a vacuum. Ms Fraser and Mr MacBride had been working together, and while they may not have been in a stable romantic relationship at that point, their relationship may still have been sufficiently close that Ms Fraser should not have dealt with any disciplinary matter in which Mr MacBride featured.

111. It is also noteworthy that the allegation against the claimant was framed as the claimant having made inappropriate comments about Amy Fraser and her relationship with Greg McBride ***and also*** inappropriate comments about her integrity as a manager (emphasis added). The only comments made by the claimant which were founded upon were her questioning when the relationship had commenced and that if had been ongoing at the time of the disciplinary proceedings against her, Ms Fraser should not have conducted the proceedings. It seemed to the Tribunal that the allegations were framed in such a manner as to suggest that the claimant had criticised Ms Fraser's integrity more widely, when the claimant did not question her integrity at all, beyond raising the possibility of bias.

112. Ms Mitchell did not take any steps to determine whether the allegations raised by the claimant during her meeting with her had substance. The claimant made clear that she felt that she was being bullied. It appeared to the Tribunal that Ms Mitchell did not approach the investigation with an open

mind. She also was noted as stating 'Based on what I've got in front of me – I don't believe they are lying and they have provided true statements'. (p102)

113. Further, despite Ms Fraser indicating that she would consider mediation if the claimant did, no steps were taken by Ms Mitchell to explore this with the claimant.

114. Ms Mitchell went on to record her 'Decision making summary' (pp104-105) following the meeting with the claimant. She did not make any note of the claimant's position that she was being bullied or victimised. Rather she concludes 'It is not acceptable conduct to discuss colleagues/managers personal life with other colleagues/managers'. It is clear that rather than conducting a balanced fact finding exercise, Ms Mitchell simply maintained the decision she had reached when she upheld Ms Fraser's grievance.

115. Taking all these factors into account the Tribunal had no hesitation in concluding that no fair investigation was carried out in relation to the allegations against the claimant. The investigation was not within the band of reasonable responses. Ms Mitchell did not comply with the ACAS when conducting the investigation. It was not balanced.

116. The Tribunal then went on to consider the fairness of decision to dismiss itself and whether that met the requirements of section 98 (4).

117. There was no suggestion that Mr Hogg carried out any investigations of his own, he simply relied on the information provided to him by Ms Mitchell. Given that the Tribunal has already concluded that the investigation was not adequate, open, balanced or in accordance with the ACAS Code, then it must follow that the decision to dismiss was unfair.

118. However, in the event that the Tribunal was wrong about the investigation, it went on to consider the decision-making process itself. The Tribunal was of the view that Mr Hogg did not approach the matter with an open mind. At the commencement of the hearing, Mr Hogg indicated that the sanction would be dismissal with notice given the claimant's length of service or no action. That was indicative to the Tribunal of him not approaching the matter with an open

mind. The Tribunal was also mindful that Mr Hogg had previously been overruled in his refusal to allow the claimant to vary her hours as a result of her disability. He had also apparently summarily dismissed a grievance raised by the claimant against Mr McBride. While these factors of itself did not render it inappropriate for him to deal with disciplinary proceedings against the claimant, they certainly raised the possibility that Mr Hogg may be influenced by past events and not approach matters with an open mind. For the reasons set out below, the Tribunal concluded that this did in fact transpire to be the case.

119. While Mr Hogg was also advised that the evidence of Mr Ireland was relevant as the discussions had taken place outwith a disciplinary investigation, it seemed to the Tribunal that in his evidence before it, he had concerns about that advice. He said he asked a number of times, albeit it was not clear when he had asked as there was no record of the advice sought or obtained by Mr Hogg from the internal Employment Relations advisors. While he may have received advice on the matter, it was his decision as to what weight to place on that evidence.

120. Mr Hogg accepted in evidence that had Ms Fraser issued a final written warning when she was in a relationship with Mr McBride that would not have been appropriate.

121. In addition, Mr Hogg accepted that it would have caused him concern had he known that the allegations against the claimant had arisen from Mr Ireland approaching Mr McBride. Mr Hogg did not have that information to hand as he did not take any steps to investigate the background the situation.

122. The Tribunal concluded that Mr Hogg also approached the disciplinary hearing with a closed mind. While it may often be appropriate for the chair of a disciplinary hearing to set out potential sanctions at the beginning of a hearing, the manner in which Mr Hogg approached this was in conflict with his evidence before the Tribunal which was that he came to a view about potential sanctions during the hearing. In fact, it was clear that he had concluded that either the claimant would be dismissed or no action would be

taken against her before the hearing had even commenced. It did not appear to the Tribunal that Mr Hogg gave proper consideration to the claimant's length of service and that prior to the final written warning which was inextricably linked to the circumstances surrounding the allegations before him, she had not been subject to any disciplinary action in a 23 year career with the respondent. All of those factors together with the background with the claimant where he had been overruled in a decision in relation to her hours, he had failed to follow procedure in relation to a grievance the claimant had raised and the fact that he adjourned the hearing for such a short period of time during which he completed his decision making summary and had a telephone call with his employment relations advisers, led the Tribunal to the conclusion that Mr Hogg did not approach the hearing with an open mind.

123. Therefore, the claimant's dismissal was unfair.

Remedy

124. The Tribunal then went on to consider the question of remedy. It was agreed that the claimant's basic award was calculated as £3390. The claimant's net weekly pay was £93.60. The Tribunal accepted the respondent's position that there had been no evidence in relation to the staff discount the claimant had when employed by the respondent and therefore could make no award in that respect. Further, given that the claimant was now retired, the Tribunal accepted the respondent's submission that it was not a case where an award in respect of loss of statutory rights was appropriate.

125. The claimant had indicated that she had intended to retire aged 70, which would have been 21 October 2020. Therefore, the Tribunal determined that it would be appropriate to make a compensatory award of the loss of income of the claimant between 17 July 2019 and 21 October 2020. The Tribunal was limited to making an award in respect of one year's loss of income which amounted to £4867.20.

126. The Tribunal considered the arguments made by the respondent that, the claimant had contributed to her dismissal, that she had failed to mitigate her

losses and that she would have been dismissed in any event, absent procedural irregularities. The Tribunal could not accept any of these arguments.

127. While it was clear that the claimant had become a thorn in the side of the managers to whom she reported, the Tribunal did not accept that the claimant raising genuine and valid questions as to whether a manager who had issued her with a final written warning had a conflict of interest at the relevant time amounted to blameworthy conduct. Neither was there anything in the respondent's submission that the claimant had raised spurious grievances and not acted in good faith during the disciplinary procedure.

128. Neither could the Tribunal accept that the claimant had failed to mitigate her losses. The claimant was nearly 69 at the time of her dismissal with various significant health issues. She had only worked two shifts a week. She had been dismissed for conduct. The Tribunal accepted that the claimant made some, albeit limited, efforts to find employment. The claimant could not be criticised for failing to try and secure employment during the pandemic when she had a number of underlying health conditions.

129. The Tribunal then considered the claimant's submission that there should be an uplift in the award of compensation due to the failure of the respondent to follow the ACAS Code. While the Tribunal found that the Code had not been complied with, the Tribunal had already applied the statutory cap on a compensatory award and therefore any uplift would then be disapplied. The Tribunal would have made an uplift of 10% to the compensatory award as a result of the failure to comply with the ACAS code in relation to a failure to conduct a fair investigation. However, the application of the statutory cap would then reduce any increase which had been made.

130. Therefore the Tribunal orders that the claimant is entitled to receive a basic award of £3390 together with a compensatory award of £4867.20, being a total amount of £8,357.20.

Employment Judge: Amanda Jones
Date of Judgment: 09 December 2020
Entered in register: 10 December 2020
and copied to parties