EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
MS LITA EVANS	**v**	**HOUSE OF COMMONS COMMISSION**

Heard at: London Central (by video) **On**: 5,6 & 7 May 2021

Before: Employment Judge P Klimov, sitting alone

Representation

For the Claimant: Mr D. Panton (solicitor)

For the Respondent: Ms M. Tutin (of Counsel)

This has been a remote hearing which was not objected to by the parties. The form of remote hearing was by Cloud Video Platform (CVP). A face to face hearing was not held because it was not practicable due to the Coronavirus pandemic restrictions and all issues could be determined in a remote hearing.

JUDGMENT having been announced to the parties and the reasons having been given orally at the hearing on 7 May 2021, and written reasons having been requested by the Respondent at the end of the hearing, in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

Background and Issues

1. By a claim form presented on 18 September 2019 the Claimant brought a complaint of unfair dismissal. The Respondent admits dismissing the Claimant but denies that the dismissal was unfair. The Respondent avers that it dismissed the Claimant for misconduct, namely for making rude and offensive remarks

about a colleague in a public place, and that in the circumstances, in particular, where the Claimant had an extant final written warning in respect of a similar conduct, it was reasonable for the Respondent to treat this reason as a sufficient reason for the dismissal.

2. The Claimant denies making rude or offensive remarks. She accepts that the reason for her dismissal was related to the conduct, however, she claims that the dismissal was procedurally unfair because the Claimant has failed to carry out a reasonable investigation and therefore had no reasonable grounds to believe that the Claimant had committed the alleged misconduct, and there were other procedural flaws in the process making the decision to dismissal unfair.

3. At the hearing, the Claimant was represented by Mr Panton and the Respondent by Ms Tutin. I am grateful to both of them for their submissions and assistance to the tribunal.

4. The Respondent called three witnesses, Ms Doreen Irving (investigation officer), Mr Ryan Auvache (disciplining officer) and Mr Robert Gibbs (appeal officer). They all gave sworn evidence and were cross-examined. The Claimant gave sworn evidence and was cross-examined. Mr Kirk Porter (the Claimant's trade union representative) also gave sworn evidence for the Claimant and was cross-examined.

5. I was referred to various documents in the common bundle of documents of 339 pages the parties introduced in evidence.

6. There was an agreed list of issues:

1. Claimant's Unfair Dismissal Claim

1.1 Was the Claimant unfairly dismissed by the Respondent contrary to section 98 ERA 1996?

1.2 In particular, was the reason for the Claimant's dismissal:

1.2.1 Relating to the conduct of the Claimant within the meaning of section 98(2)(b) ERA 1996; and/or
1.2.2 Some other substantial reason within the meaning of section 98(1)(b) ERA 1996?

1.3 Was the Claimant's dismissal fair having regard to the reason(s) shown by the Respondent and in the circumstances (including the size and administrative resources of the Respondent's undertaking) did the Respondent act reasonably in treating it as a sufficient reason for dismissing the Claimant, in accordance with s98(4) ERA?

2. Issues on remedy which would arise if the Claimant succeeds on liability

a. Has the Claimant taken all reasonable steps to mitigate her losses?
b. Should any award of compensation be made? If so, in what amount, and should any part of it be subject to adjustments by reason of (i) the principle in *Polkey v AE Dayton Services Ltd [1988] AC 344*; (ii) any contributory conduct of the Claimant; (iii) just and equitable grounds; and/or (iv) any non-compliance with a relevant code of practice?

7. At the start of the hearing, I discussed with the parties the list of issues. As the Claimant accepted that the reason for her dismissal was related to her conduct and the Respondent was not advancing any other reason in the alternative, it was agreed that I did not need to deal with the issue 1.2. It was also agreed with the parties that I should deal with the liability issue first, and after I have given my judgment on it, the remedies issues (if relevant) would need to be determined.

Findings of Fact

8. The Respondent is responsible for the administration and services of the House of Commons ("the House"), including employing staff of the House.

9. The Claimant was employed by the Respondent from 1 June 2009 until her dismissal, most recently as a Reception & Facilities Co-ordinator in the Service Delivery Team in In-House Services.

10. The Claimant's role was to provide reception and accommodation services to Members of Parliament ("Members"), their staff, staff of the House and the public; welcome visitors to the House on behalf of Members; escort visitors to venues; and ensure they made contact with their hosts. She was also required to respond to a wide range of customer queries by telephone, email or in person; ensure facilities were fit for purposes and provided in accordance with customer requests and requirements, and work collaboratively with multiple teams.

Relevant Terms

11. Her contract of employment incorporated the Respondent's Staff Handbook, which, *inter alia*, set the rules on conduct and discipline and contained the following terms (*my emphasis*):

2.1 The House of Commons disciplinary procedures are aimed at upholding standards of individual conduct. *They are designed to ensure that all cases are handled consistently and fairly and that any alleged disciplinary offence is fully and properly investigated*.
2.2 If your conduct falls short of the expected standards, your Line Manager *will normally try to bring about an improvement through training, coaching, counselling, advice and encouragement or an informal action*. In most cases, these informal methods will be successful in improving conduct.
2.3 However, where informal methods do not succeed and conduct does not improve, it may be necessary to begin disciplinary procedures. *Your Line Manager may also instigate formal disciplinary procedures without going through an informal stage if the case involves something which is regarded as serious or gross misconduct, or has had a considerable impact on others*.
2.4 *Your Line Manager must always consider disciplinary cases against as full an understanding of the situation as possible, including relevant personal, domestic or social circumstances*. Managers must also take into consideration any advice or assistance which the Diversity and Inclusion Manager or Parliamentary Health and Wellbeing Service may be able to give.

7.1 It is most important to the House of Commons that staff should maintain high standards of conduct. Most breaches of conduct will be handled by informal means as detailed above. However more serious misconduct, gross misconduct, or repeated minor breaches are likely to warrant formal action. *The purpose of such action is to correct the misconduct, in the interests of the organisation and the individual, rather than to punish the employee*. It is the policy of the House that if you are subject to formal disciplinary procedures:

- *you should be told of the alleged misconduct as soon as formal procedures start, if not before*
- *you should be subject to formal procedures only if there is good reason and evidence of an alleged offence*,

normally compiled through preliminary enquiries

- *any investigation and sanctions should be appropriate to the nature of the alleged offence*
- any sanctions should be demonstrably fair and consistent with previous action in similar circumstances
- you have the right to be represented by a Trade Union Representative or fellow employee of the House during any interview or hearing which could lead to a warning or some other disciplinary procedure
- you have the right of appeal against any disciplinary action

7.4 *Any potentially formal case will require an investigation of the evidence. The purpose of the investigation is to establish, fairly, whether there is a case for the employee to answer*. *Any evidence gathered will normally be done so in line with the guidance on evidence used in investigations*. Formal investigations may include:

- interviewing witnesses
- collecting witness statements
- reviewing relevant documentation or other evidence
- overseeing or commissioning searches
- preparing an investigation report

7.5 *Further details can be found in the management guidance on the Intranet at: Managing discipline*

Disciplinary hearings

7.12 *The purpose of the disciplinary hearing is to consider all the evidence relating to the allegations, decide based on that evidence whether the allegations are true and decide what sanction, if any, is appropriate*. The hearing will be conducted by a manager advised by a representative from HR.

7.14 *You will be given in writing*:

- at least seven calendar days' notice of the hearing
- *details of the alleged offence, and supporting evidence*
- an opportunity to respond to the allegation in writing
- notice that the interview is a disciplinary one
- Details of your rights to be accompanied by a Trade Union Representative or a fellow employee of the House of Commons Service (see paragraphs 7.2 and 7.3).

8. Disciplinary Sanctions

8.1 The appropriate level of disciplinary sanction will be affected by the circumstances of the offence. *It is not necessary in every case to begin with a First Written Warning and to proceed to a Final Written Warning. For example, for serious misconduct, an immediate Final Written Warning may be appropriate.* In cases of gross misconduct, summary dismissal may be appropriate.

Final Written Warning

8.6 A Final Written Warning will be issued when:

- there is still a failure to improve and conduct is unsatisfactory or
- a further offence occurs within the 12-month period or
- *If the initial misconduct is sufficiently serious but not serious enough to justify summary dismissal*.

8.7 A Final Written Warning will state:

- the reason for the warning
- the improvement required
- the date by which improvement must be made
- warn that dismissal will result if there is no satisfactory improvement within a given timescale
- the expiration date of the warning
- your right to appeal

8.8 *If there is no sustained change in behaviour, misconduct is repeated or other misdemeanours occur during an unexpired previous warning, further action under the disciplinary procedures may be taken which could result in your dismissal.*

Dismissal

8.10 *If your conduct remains unsatisfactory after a Final Written Warning, dismissal may result*.

9. Levels of Misconduct

9.1 *There is no code automatically assigning particular sanctions to particular offences. The disciplinary hearing panel will take full account of the circumstances in deciding what the sanction should be.* The following is set out for guidance only and the list is not definitive. Some items are listed under more than one heading. *The seriousness of the offence will depend on the circumstances of the case*

Informal action

9.2 Examples of misconduct where informal action may be appropriate might include an isolated incidence of:

- bad time keeping
- inappropriate offensive language
- *insubordination*
- minor violations of, or failure to maintain appropriate standards of dress or personal hygiene
- other minor misbehaviour

Misconduct

9.3 *Examples of misconduct where a First Written Warning may be appropriate might include*:

- refusing or neglecting to follow an instruction by management
- misuse of alcohol or illegal drugs in the workplace (this could be more serious depending on the circumstances - see below)
- *rude, offensive or unacceptable behaviour to colleagues, Members or others either directly, by email or via social networking sites*
- unauthorised possession of official equipment or property
- bad time keeping or unauthorised absence
- refusing or neglecting to follow prescribed working procedures
- minor breaches of confidentiality
- more serious violations of, or failure to maintain appropriate standards of dress or personal hygiene
- excessive use of the email and Internet systems for personal, social or recreational reasons during work time

9.4 *Particularly grave, or repeated, instances of the above might be viewed as serious misconduct*. Alternatively, if there were powerful mitigating circumstances, an offence which would normally be serious misconduct might be regarded as misconduct.

Serious Misconduct

9.5 *Serious misconduct where a Final Written Warning may be appropriate might include*:

- consumption of alcohol during duties or working after consuming alcohol for those engaged in hazardous or dangerous work, working at a height, or whose actions might cause a danger to third parties
- persistent bad timekeeping or unauthorised absence
- breaches of health and safety procedures
- misuse of official equipment or property including telephones, computers or office stationery
- misuse of personal information, as prohibited under the Data Protection Act
- conviction for a criminal offence other than a traffic offence (but see section 10 below)
- breaches of the Behaviour Code which do not constitute harassment, bullying or sexual misconduct

12. The Managing Discipline management guidance document referred to in the Staff Handbook has the following relevant terms (*my emphasis*):

Disciplinary procedure

Key Points:

- Understand why we have a disciplinary procedure
- *Act fairly and objectively at all times*
- *Make preliminary enquiries to establish whether a full investigation is needed*

- *Conduct a full investigation, if required*
- Remember that employees have the right to be accompanied at all formal stages
- *Evaluate the evidence thoroughly before making any decisions*
- *Follow the procedure at all times*

The disciplinary procedure allows managers to deal fairly and consistently with employees who breach disciplinary rules or guideline for behaviour and conduct.

Formal Action - The Investigation

A formal investigation needs to:

- *Confine itself to establishing the facts*
- enquire into the circumstances surrounding the suspected misconduct
- gather and review all relevant documentation and other evidence
- collect witness statements, if relevant
- oversee or commission searches
- give the employee a chance to offer an explanation
- *take a balanced and impartial view of the information that emerges*
- conclude with a report

Adequacy of the Investigation

- In order to check whether the investigation has been adequate ask the following three questions:
  - are there reasonable grounds to believe that the employee's conduct is at fault?
  - are there reasonable grounds for that belief on the balance of probabilities?
  - *has the most thorough investigation possible in the circumstances been conducted*?

- *If the answer to any of these question is 'no' you will need to explore whether there is actually a case to answer or whether further investigation is needed*.

Analysing the evidence

- *The Investigating Manager is responsible for evaluating all the evidence and identifying the facts as far as possible. They then need to examine the facts and come to a conclusion as to whether there is a case to answer*.

Working through the following questions can help establish if there is a case to answer:

- *where an act of misconduct is disputed, does the balance of evidence lead to a reasonable conclusion that there has been misconduct?*
- *is that belief based on reasonable grounds?*
- was the employee entirely at fault, was someone else responsible, or was there some failure outside of the employee's control?
- did the employee know about the disciplinary rule that has been broken and did they know the consequences of breaking it?
- *has there been misconduct on the balance of probabilities?*
- objectively, how serious is the misconduct?
- has the employee put forward mitigating circumstances and do these appear to be genuine?
- do they fully or partially mitigate the misconduct?

Formal Action - Conducting a Hearing

Key Points:

- *Ensure there has been an adequate investigation*
- Arrange the hearing and invite the employee, giving at least seven calendar days' notice
- Ensure the employee understands the right to be accompanied
- Ensure the employee has the opportunity to put their case
- Adjourn to make a decision

The purpose of a hearing is to provide the employee with a full and fair opportunity to state their side of events, to explain *their conduct and to submit any mitigating factors*.

Preparing for the hearing

In preparation, you must:

- ensure that the hearing occurs in a private location, away from interruptions
- make any reasonable adjustments for example if the employee has a
- disability or language difficulties
- *study the investigation and think of any questions you need to ask the employee and the witnesses*
- ensure that the employee has full briefing on the evidence
- *brief yourself on any rules relevant to the alleged misconduct*
- ensure that you have all the relevant facts and evidence to hand
- *consider what explanations the employee may offer and if possible check them out*
- *you may call to the hearing any witnesses whose personal appearance will provide specific and relevant evidence over and above what is contained in the written statements already collected by the investigator*; you should provide the employee with their names and the reasons why they are attending; you should do this by at least two days in advance of the hearing, (as stated in letters 2 and 6).
- *The employee must likewise notify you of any witnesses they wish to produce, by the same deadline*
- a Contact the HR Advisory team, who will provide a representative to give advice and take notes at the meeting

*You must **ensure** that the hearing covers the following*:

- introduce those present and explain how the meeting will be conducted
- ensure that all parties understand the role of the companion, which is to put or sum up the employee's case: respond on their behalf to any view expressed at the meeting and to confer with the employee. They may not, however, answer questions on the employee's behalf, address the meeting against the employee's wishes or prevent the employer for explaining their case.
- if the employee brings no companion, ensure that they understand they have the right to be accompanied if they wish
- state the precise nature of the complaint/allegation/misconduct and set out the supporting evidence
- *call and question any witnesses who contributed to the investigation and who are attending the hearing*
- *give the employee an opportunity to question the witnesses*
- *submit any statements of evidence from witnesses not present*
- *give the employee an opportunity to comment on such statements*
- *if the employee is calling witnesses, they should be questioned first by the employee and then by you*
- give the employee an opportunity to make a full statement answering the allegations, either orally or in writing
- ask questions on the statement and discuss with the employee
- *ask the employee if there are any special or mitigating circumstances to take into account*
- sum up the meeting,
- ask the employee if they have anything further to say
- explain that you are adjourning the meeting and tell the employee when they will know the outcome.

Deciding on action, including formal sanction

Key Points:

- *Ensure a full investigation and disciplinary hearing have taken place before deciding on a sanction*
- *Consider all the evidence thoroughly and objectively and assess it, using the balance of probabilities principle*
- *Consider any special circumstances or mitigating factors*
- Decide on the most appropriate sanction, in consultation with HR

Consider all of the following points before deciding to recommend any disciplinary sanction:

- *the seriousness of the offence, and whether the disciplinary procedure gives guidance on the most appropriate sanction*
- the penalty imposed in similar cases in the past
- the employee's disciplinary record and general service
- *any mitigating circumstances*
- whether the proposed penalty is reasonable in all circumstances

Managing an Appeal

The manager nominated to hear the appeal must:

- inform the employee of the arrangements for the appeal hearing and their rights under the procedure: use Letter 9.
- review all the relevant records and understand the reasons for the disciplinary action
- arrange for an HR representative to be present in order to take notes and provide procedural advice if necessary

During the appeal hearing:

- introduce those present, explain the purpose and format of the hearing
- ask the employee to set out their grounds for appeal
- *pay particular attention to any new evidence and discuss it further with the employee*
- *explore all the relevant issues*
- summarise the facts and conclude the hearing
- inform the employee of the timescale for the decision

13. At the end of the Guidance document, there is a detailed checklist for managers for each stage of the process.

First Disciplinary and Final Written Warning ("FWW")

14. In December 2017 – January 2018, four complaints were made about the Claimant in quick succession. They were from unrelated members of the Parliamentary community, but all concerned allegations of rude and improper behaviour towards Members, their staff or staff of the House by the Claimant.

15. Following an investigation into the complaints the matter proceeded into a formal disciplinary hearing on the charge of the Claimant demonstrating repeated behaviour which could be seen as rude, offensive or unacceptable.

16. The matter was considered at a formal disciplinary hearing on 3 May 2018 by Mr Mansfield (the disciplining manager), who concluded that the incidents were established in likelihood and noted the Claimant had made the visitors' lives difficult, leaving them feeling at best embarrassed and at worst angry and upset. He was particularly concerned regarding the Claimant's handling of a situation involving a Member, then Minister for International Development and Africa, and his guest, the Sudanese Foreign Minister. The Claimant could have offended them, thereby bringing the department and the House into disrepute.

17. Mr Mansfield concluded that a final written warning was the appropriate sanction, with a recommendation of further training. The outcome letter warned the Claimant that if there were further misconduct within the following 24 months, the Respondent would consider moving to the next stage of the disciplinary process, which could include her dismissal.

18. The Claimant did not appeal the FWW. The Claimant's reason for not appealing the decision was because the appeal had to be presented within seven days and her trade union representatives were unavailable.

19. One of the four complaints for which the Claimant was disciplined was a case of "mistaken identity". Her colleague, Ms Doreen Shaw, told the Claimant that she had heard Ms Kim Murney admitting that it was her and not the Claimant who had been involved in the incident for which the Claimant was blamed. In October

2018, the Claimant spoke with Mr Mansfield about that matter, and he told her that if she could provide evidence, he would look into that matter again.

20. Ms Shaw, however, was reluctant to come forward because she did not wish to cause any problems for Ms Murney, and the Claimant did not wish to betray Ms Shaw's confidence. The Claimant spoke with her line manager, Ms Doreen Irving, and she told the Claimant that it was too late to do anything about that. Eventually, Ms Shaw agreed to come forward with this information, and on 15 March 2019 she prepared a short statement confirming what she had heard.

Second Disciplinary, Grievance and Dismissal

Complaint and Investigation

21. On 19 December 2018, Ms Irving received an email from Ms Claire Dore, a recently promoted colleague of the Claimant, complaining about the Claimant's conduct.
22. The relevant parts of the complaint email read (***my emphasis***):

> *I have recently found out that Lita Evans has been talking about me to other SDC's of a damning nature in a public area, PCH Visitors Reception desk to Tom Gallagher.*
>
> ***She was discussing (although seeming petty) the fact that all I have achieved while working here is because of favouritism, that she has seen my previous board report from the first SDM interview and saw where I had failed in the interview and that I was a failure. That I have had an unfair advantage as I have been coached. She has also spoke about other colleagues to me siting you are showing favouritism to them**.*
>
> *This unfortunately Is not the first time she has said things like this about me. I previously, being a new member of staff didn't want to raise this as an issue and thought it would 'blow over'.*
>
> *I feel I need to bring this to your attention now as I have now been given the position of Service Delivery Manager, this kind of 'chatter' could undermine me as a manager and could potentially affect the relationships I have with the current SDC's and any new members of staff as colleagues and as a Manager, **this could also undermine the panel that interviewed me insinuating they show favouritism**. I **am also concerned that she says she has seen my board report as these should be completely confidential** – what other information has she seen? The fact that she was discussing these things with my colleagues could cause friction and unnecessary stress, and in a public area does not give a good impression to the visitors coming through. The fact that she is showing no respect for our management and freely discusses this with colleagues concerns me. It also concerns me that as Managers we want to give opportunities encourage and support those we line manage but when this is being done they are accused of favouritism, this does not help the coaching culture we are trying to embrace.*

23. Ms Irving consulted HR and was told that because the Claimant had an unexpired FWW, the matter needed to be fully investigated. She started a formal investigation and interviewed the Claimant, Mr Tom Gallagher, Mr Mark Herdman (who was present and overhead the conversation between the Claimant and Mr Gallagher) and Ms Dole.
24. The Claimant denied making rude or offensive remarks about Ms Dole. She admitted telling Mr Gallaher that Ms Dole was the favourite to get the Service Delivery Manager job. She said that she meant it in a positive way and said it because Ms Dole had been doing that job on an acting basis. She said that

many people said that Ms Dole was the favourite, and it was not derogatory and not meant it nastily.

25. She denied saying that Ms Dole was a failure or that she had been shown favouritism. She said that she had not seen the panel report and had never spoken about it. Ms Irving told the Claimant that she must keep their meeting confidential and must not discuss the investigation with anyone.

26. In his interview Mr Gallagher told Ms Irving that the Claimant called Ms Dole a failure 4-5 times and that the appointing board was "*bend[ing] over backwards for her*". He also said that there was a tension between Ms Dole and the Claimant. He said that Ms Dole "*would mention the Claimant unless there was a reason*" and that the Claimant "*goes out of her way to put [Ms Dole] down*". He commented that the Claimant "*can't go around saying that [Ms Dole] was a failure and being given favouritism*."

27. In his interview with Ms Irving, Mr Herdman said that he had overheard the Claimant's conversation with Mr Gallagher. He heard the Claimant saying that Ms Dole was a favourite and that Ms Dole had been coached. He did not say that the Claimant called Ms Dole a failure or that she had been shown favouritism. Ms Irving asked Mr Herdman what he thought the Claimant's motivation was – "*jealousy, nastiness"*. Mr Herdman replied that there was "*a lot of jealousy*" and that there were "*some very small-minded people*". Ms Irving asked Mr Herdman again if the Claimant was "*vindictive*", whether it was "*meanspirited or seeking attention*". Mr Herdman replied that he felt that the Claimant "*needed attention*" and "*loved to know everything that was going on*". Ms Irving asked Mr Herdman if he felt that the Claimant was "*nasty on purpose*". He replied that the Claimant would make "*her opinion know when it was inappropriate*" and that "*it was nasty to talk about a person when she was not there to defend herself*".

28. On 11 February 2019, Ms Irving completed her investigation and concluded that there was a case to answer and recommended to proceed to a formal disciplinary hearing. In her investigation report she summarised her findings of fact as follows (***my emphasis***):

> ***Facts which emerge from the evidence****:*
> ***The two witnesses*** *that were on the service delivery desk at the time that Lita is alleged to have made the derogatory comments about Claire* ***both confirmed that the comments were made by Lita in the manner that Claire put in her complaint****.*
> ***Both stated that Lita simply does not like Claire and has a problem with her, and while both could make guesses as to why this was, they did not know for certain****.*
> ***Both were specific that they heard the particular comments Lita is alleged to have said – that Claire was a failure and that she was shown favouritism****.*
> *The comments were unnecessary, rude and derogatory. They were not invited by Tom (to whom they were made) or Mark (who overheard) –* ***Lita made them, in their views, simply to be nasty about Claire***.

29. She stated as the reasons for her conclusion that:

> *"The comments were rude, offensive and derogatory, and demeaning towards Claire Dore. They were not invited, but rather made with the sole intent to be nasty.*

Disciplinary Meeting

30. On 13 February 2019, the Claimant was invited to attend a disciplinary hearing to be heard by Mr Mansfield on 20 February 2020. The disciplinary charge against the Claimant was formulated as follows:

> *It is alleged that you demonstrated rude, insubordinate, and unacceptable behaviour regarding a colleague, Claire Dore. Specifically; that you called Claire a failure for not passing the Service Delivery Manager board, that she had been unfairly coached, and that she was shown favouritism to pass the board the second time.*

31. On 16 February 2019 and again on 19 February 2019, Mr Panton, acting on behalf of the Claimant, wrote to the Respondent making various submissions in relation to the disciplinary process and advising that the Claimant would not be able to attend the hearing because she was signed off sick until 10 March 2019. The Claimant also objected to Mr Mansfield hearing her disciplinary on the ground that the Claimant would be raising a grievance against Mr Mansfield in relation to his handling her previous disciplinary process.

32. The disciplinary hearing was re-scheduled for 25 March 2019 to be heard by Mr Ryan Auvache, however, due to unavailability of the Claimant's chosen trade union representative the disciplinary meeting had to be re-scheduled again and finally took place on 4 April 2019.

33. On 25 March 2019, the Claimant wrote to Ms Grace Keyworth of the Respondent's HR asking that Ms Dore, Mr Mansfield and Ms Doreen Shaw were called as witnesses at the disciplinary hearing. Ms Keyworth refused on the basis that the Respondent's disciplinary process did not allow for witnesses to present at hearings. She told the Claimant that she could approach them and present their witness statements at the hearing. Ms Keyworth confirmed that the management would not be calling any witnesses.

34. On 31 March 2019, the Claimant wrote to Ms Irving, copying the Respondent's HR, asking her to clarify the charge of "*insubordination*". In particular, she asked.

> *1) Which management instruction is it being said I disobeyed?*
>
> *2) When is it being alleged I disobeyed this instruction?*
>
> *3) Who gave me the instruction and when did this occur?*

35. The Respondent did not reply to the Claimant.

36. On 4 April 2019, the Claimant's disciplinary case was heard by Mr Auvache. Ms Keyworth was at the meeting as HR support to Mr Auvache. Mr Kirk Poter, the Claimant's trade union representative, attended as the Claimant's companion.

37. At the meeting, Mr Poter read out detailed submissions prepared by Mr Panton. The submissions criticise the disciplinary process highlighting various flaws in the investigation and inconsistencies between Ms Irving's conclusions and evidence she had obtained through her interviews. The Claimant's submissions contained the following key points:

    a. paragraph 37 - "*Why did Ms Irving consider the alleged conduct of the Employee to be rude, offensive and insubordinate? Why did she prefer the evidence of the Employee's accuser over and above that*

of the Employee? What weight did she give to the oral evidence provided during the investigation? What was the demeanour of those interviewed during the interview? Did that have an impact on her findings?"

b. in paragraphs 40 – 42 the Claimant disputed using the alleged words. In relation to the "*unfairly coached*" it said: "*She compares her commentary with that put forward by one of the witness interviewed by Ms Irving, Mr Herdman. Mr Herdman stated that he thought it was possible that Ms Dore 'was helped to reach the mark'. It is averred that there is little meaningful difference between Mr Herdman's comments and that of the Employee.*"

c. paragraph 43 - "*Further whilst the panel will hear directly from the Employee they will not have heard from either her accusers or the investigation officer. So the weight they give to her accuser's account of matters must in the circumstances be negligible and especially given the Employee's denial*".

38. Following the hearing, and after an exchange of correspondence between the Mr Panton and the Respondent, in which Mr Panton threatened to apply for an injunction to stop the Respondent dismissing the Claimant until the Respondent has complied with the contractual disciplinary procedure, it was agreed that the disciplinary hearing would be reconvened to allow the Claimant to call witnesses to give oral evidence. The Claimant wished to call 5 witnesses. Ms Dole, Mr Gallagher and Mr Herdman all declined the Claimant's invitation. Ms Doreen Shaw and Ms Linda Mould attended the hearing and gave evidence.

39. The adjourned hearing took place on 4 June 2019. A further written statement prepared by Panton was read out at the meeting by Mr Porter, in which he made additional arguments concerning errors in the investigation and the disciplinary process. Ms Shaw gave evidence that someone else was responsible for one of the four incidents for which the Claimant had received the FWW. Ms Mould gave evidence about Ms Dole perception that the Claimant was ignoring her and the Claimant asking Ms Mould to pass her apologies to Ms Dole if that was how Ms Dole felt.

Grievance

40. On 18 February 2019, the Claimant submitted a grievance. She complained that Mr O'Nions, who had dealt with the investigation into the four previous complaints against the Claimant, had breached her confidentiality by telling the Claimant's colleague that he was conducting a disciplinary investigation into that matter, and that Mr Mansfield had failed to investigate that breach of confidentiality or advise her of the outcome of any investigation.

41. On 12 June 2019, the Claimant's grievance was heard by Mr Jaggs. The Claimant attended the grievance meeting with Mr Porter. The Claimant raised the issue that her FWW was unfair and presented evidence that she

was not responsible for one of the four incidents in December 2017-January 2018 for which she had been disciplined.

42. On 12 June 2019, after the grievance meeting, the Claimant wrote to Mr Jaggs. In her email she stated (***my emphasis***):

Further to our meeting today12th June 2019 mine and Kirk's understanding of what was agreed is as follows

1. That you will investigate my originating grievance concerning the alleged breach of confidential information and Mr Mansfield's failure to investigate my complaint in a timely manner

2. ***You also undertook to investigate my complaint which was added at today's hearing with your agreement, and that concerned the 2 year final live warning.*** *As noted in the hearing I have secured new written evidence which proves that the allegations which led to me being disciplined last year was manifestly inappropriate.* ***In particular I am grateful that you recognised the overlapping nature of this grievance with the current disciplinary process that I am being subjected to****. This new documentary evidence is available for your consideration.* ***I understand that you will speak to the Chair of the Disciplinary panel as part of your investigation****.*

43. On 18 June 2019, Mr Poter sent a follow up email to Mr Jaggs stating: "*In the absence of your acknowledging the below e-mail, we assume you agree with its content*".

44. Mr Jaggs did not reply. He did not speak with Mr Auvache about the issue of the appropriateness of the FWW in light of the new evidence raised by the Claimant at the grievance meeting.

45. Mr Jaggs interviewed Mr O'Nions and Mr Mansfield. On 15 July 2019, he wrote to the Claimant dismissing her grievance. His finding was that there was "*insufficient evidence to support these allegations".*

Dismissal

46. On 18 June 2019, Mr Auvache wrote to the Claimant stating that he had reached his decision. His decision was that the Claimant was guilty of misconduct and dismissal was the appropriate sanction. The relevant parts of his letter read (***my emphasis***):

> ***Two witnesses confirm that you demonstrated rude, insubordinate, and unacceptable behaviour regarding a colleague, Claire Dore****.* ***Specifically, that you called Claire a failure*** *for not passing the Service Delivery Manager Board,* ***that she has been unfairly coached, and was shown favouritism to pass the board the second time****. As this incident is evidence of further misconduct I have decided that dismissal is the appropriate sanction in this case.*
>
> ***At the hearing on 04.04 .19 you accused both Mark Herdman and Tom Gallagher of lying, but you have not presented any evidence to support this claim. I can see no reason why the witnesses would lie and in the absence of any evidence to support this, I can only conclude that the remarks were made****. The remarks were uncalled for* ***and were made to be nasty about Claire*** *and I believe calling a colleague a failure is rude and offensive.* ***You state that you did say Claire was "coached", but you explain this as relating to the supportive coaching that employees may receive in an acting up position. However, this is not supported by the witness accounts.***

Appeal

47. The Claimant appealed her dismissal. The grounds for appeal were set out in Mr Panton's email to the Respondent. These were as follows:
1) there are new facts and evidence that were not considered at the original hearing
2) that in dismissing our client her former employer failed to follow correct procedures
3) that the penalty of dismissal was disproportionate, severe and inconsistent with penalties awarded in similar situations
4) that the decision to dismiss was arbitrary and unfair
5) That her former employer in dismissing our client, acted unreasonable and further failed to act in good faith.

48. On 26 July 2019, the appeal was heard by Mr Gibbs. The Claimant attended the appeal with Mr Porter. At the appeal meeting the Claimant raised the issue that Mr Jaggs had promised her to investigate the matters she had raised at the grievance, including new evidence showing that she had been previously disciplined for someone else's misconduct. Therefore, she said, the disciplinary process should be paused until Mr Jaggs completed his review of the 2018 disciplinary issues.

49. On 2 August 2019, Mr Gibbs wrote to the Claimant with his decision to dismiss her appeal. In his appeal report, Mr Gibbs noted under "Facts which emerge from evidence" (***my emphasis***):

• Lita highlighted that there were new facts that were not considered in the previous case in 2018 and these were not considered.

• In the hearing of the present case, she sought the above point to be considered but this was disregarded.

• The point was made that the House only permitted further witnesses when Lita's solicitor threatened action and questioned the role of Karen Bovaird who it was felt had too much exposure to the case.

*• **Lita did not understand the charge of insubordination and felt the investigation disregarded the importance of her comprehension of the allegation**.*

*• **The point was made that the dismissing officer did not put questions to the investigating officer and the witnesses, which it was felt to be unreasonable**.*

• Lita questioned the accuracy of minutes and her ability to influence any changes she might have sought to those minutes.

• Lita felt that HR were driving the final decision and not the hearing manager.

• Lita did not appeal her 2018 disciplinary investigation due to technical difficulties consulting her union representative.

*• **The case was made that much of the witness evidence could have been down to misinterpretation** and question why the matter was not handled as part of the grievance process rather than a disciplinary investigation.*

• Lita referencing Claire's notes and what she said 'if [the Claimant] keeps her job', it implied a decision had been made.

50. In the "Reasons for this conclusion and recommendation" section of the report, Mr Gibbs wrote:
Lita sought to appeal her decision by reverting to the first disciplinary

hearing in 2018. Each hearing follows a clear process of investigation, consideration and appeal, where applicable. In the case of an appeal, it must be done within the time guidelines of the hearing. It is therefore not for this appeal hearing to consider a previous disciplinary hearing and I am unable to use this as evidence. In making this conclusion I have been mindful to Lita's circumstances for failing to adhere to the appeal timelines, but I do not see any evidence that Lita sought the advice of HR for failing to comply to timelines and looking for some dispensation. I believe HR would have reacted favourably to an extension in their timelines if there had been a request.
Lita's points and views on process are subjective and unfounded. The role of HR managers and representatives are to advise and guide managers through formal procedures as set out in the staff handbook. They ensure compliance and consistency in application. I therefore do not see any issue with the involvement of Karen Bovaird or her HR representatives in this case.
Notes of meetings are not verbatim and are subject to changes before they are published, and I feel there was the opportunity for Lita to raise these and amended in the correct way.
Lita questioned if the investigation should not have been handled as a grievance instead. I am satisfied by following the investigation route the House was mindful of its duty to its staff and customers alike. Given Lita's role is customer facing, unfailing customer and stakeholder engagement is paramount.
I therefore uphold the decision for the reasons stated and believe no demonstrable new evidence was presented that permitted me to override the decision.

The Law

51. The law relating to unfair dismissal is set out in S.98 of the **Employment Rights Act 1996 (ERA)**. In order to show that a dismissal is fair, an employer needs to prove that the dismissal was for a potentially fair reason (S.98(1) and (2) ERA):

"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –

(a) The reason (or, if more than one, the principal reason) for the dismissal; and

(b) That it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it –

…….

(b) Relates to the conduct of the employee;

52. If the employer shows that the reason for the dismissal is a potentially fair reason under section 98(1) ERA, the tribunal must then consider the question of fairness, by reference to the matters set out in section 98(4) ERA which states:

Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(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.

53. In a misconduct case, the test set out in *British Home Stores v Burchell* [1978] IRLR 379 should be applied. The three elements of the test are:

a. Did the employer have a genuine belief that the employee was guilty of misconduct?
b. Did the employer have reasonable grounds for that belief?
c. Did the employer carry out a reasonable investigation in all the circumstances?

54. In reaching my decision, I apply the principle that the tribunal must determine whether the employer's decision was within a range of reasonable responses which a reasonable employer could come to in the circumstances. It means that the tribunal must review the employer's decision to determine whether it falls within the range of reasonable responses, rather than to decide what decision it would have come to in the circumstances of the case.

55. In looking at whether dismissal was the appropriate sanction, the question is not whether some lesser sanction would, in the tribunal's view, have been appropriate, but rather whether dismissal was within the range of reasonable responses that a reasonable employer could come to in the circumstances. The tribunal must not substitute its view for that of a reasonable employer. *(Iceland Frozen Foods Limited v Jones* 1982 IRLR 439*, Sainsbury's Supermarkets Limited v Hitt* 2003 IRLR 23*, and London Ambulance Service NHS Trust v Small* 2009 IRLR 563*).*

56. It is legitimate for the employer to rely on a live final written warning in taking its decision, and the tribunal should be slow to go behind that and it is only in exceptional circumstances, where for example the final written warning was issued in bad faith, it cannot be relied upon (*Davies v Sandwell Metropolitan Borough Council* [2013] EWCA Civ 135).

57. When an employee is dismissed for a reason of his or her conduct, the "range of reasonable responses" tests applies both to the decision to dismiss and to the procedure by which that decision was reached, including the investigation stage of the process. (*HSBC Bank plc v. Madden 2000* ICR 1283 CA). However, the correct approach is not to consider this as two separate questions, but as relevant considerations the tribunal must have regard to in answering the single question posed by section 98 (4) of ERA (see *USDAW v Burns* EAT 0557/12).

58. The principle that the tribunal must not substitute its view for that of a reasonable employer equally applies in relation to the question of credibility of witnesses, based on whose evidence the employer took the decision to dismiss (*Morgan v Electrolux Ltd* [1991] IRLR 89). It is not for me to decide whether the Respondent should have believed the Claimant, and not her accusers. The question for me is whether in all the circumstances of the case it was within the range of reasonable responses for the Respondent to prefer the version of events it had constructed based on the collected evidence.

59. Where there are problems with the disciplinary hearing itself, those can in some circumstances be remedied on appeal, even if the appeal is not a complete rehearing, however the procedure must be fair overall (*Taylor v OCS Group Limited* [2006] IRLR 613).

60. In a case where the employer dismissed an employee for a substantively fair reason but failed to follow a fair procedure, the compensatory award (but not the basic award) may be reduced to reflect the likelihood that the employee would still have been dismissed in any event had a proper procedure been followed. Such reduction can be reflected by a percentage representing the chance that the employee would have been dismissed. In exceptional cases, the award can be reduced to nil if it can be shown that a fair procedure would have resulted in a dismissal anyway (*Polkey v AE Dayton Services Ltd* 1988 ICR 142, HL).

61. The burden of proving that an employee would have been dismissed in any event is on the employer (*Britool Ltd v Roberts and ors* 1993 IRLR 481, EAT). In assessing a *Polkey* reduction a degree of speculation is expected (*Thornett v Scope 2007* ICR 236, CA). However, "*there will be circumstances where the nature of the evidence for this purpose is so unreliable that the tribunal may reasonably take the view that the exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on the evidence can properly be made. Whether that is the position is a matter of impression and judgement for the tribunal*" (per Mr Justice Elias, the then President of the EAT, in in *Software 2000 Ltd v Andrews and ors* 2007 ICR 825, EAT).

62. **Section 122(2) of ERA** states that: *"Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent.*"

63. **Section 123(6) of ERA** states that*: "Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."*

64. In finding contributory conduct the tribunal must focus only on matters, which are "*causally connected or related*" to the dismissal (*Nejjary v Aramark Ltd* EAT 0054/12) and evaluate the employee's conduct itself and not by reference how the employer viewed that conduct (*Steen v ASP Packaging Ltd* [2104] ICR. 56).

65. In determining whether to reduce an employer's unfair dismissal compensation on grounds of contributory conduct, the tribunal must consider three questions. Was there conduct by the employee connected with the unfair dismissal which was culpable or blameworthy? Did that conduct caused or contributed to some extent to the dismissal? Is it just and equitable to reduce the amount of the claimant's loss to that extent? *(Nelson v BBC No. (2)* 1979 IRLR346).

66. Turing to the case of *Alexander v Brigden Enterprises Ltd* [2006] IRLR 422, upon which Mr Panton relies in submitting 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*'. Having read it, I find it is not to the point. It appears to be considering issues arising from the statutory dismissal procedure (no longer in force), where the dismissal was for reason of redundancy.

67. However, it is correct that for a fair process it is important that the employee knows full allegations against him or her. The Court of Appeal in *Strouthos v London Underground Ltd* [2004] IRLR 636, CA said that disciplinary charges should be precisely framed, and that evidence should be limited to those particulars. Not only is it important that the employee should know the case against them, but they should also know what evidence the employer is relying on.

68. However, there is no general rule that a failure to make that evidence available to an employee either before, or at the beginning of, the disciplinary hearing will always result in unfairness. That needs to be assessed in all the circumstances of the case and by reference to the ultimate statutory test under s98(4) ERA.

69. Neither there is a rule that such information should be given at the investigation stage. The ACAS of Practice on Discipline and Grievance Procedures ('the ACAS Code") does not say that. It states that, once the investigation has been completed, and a disciplinary action is considered necessary, the employer should inform the employee in writing of the charge(s) against him or her and the possible consequences of the disciplinary action (see para 9). This communication should contain enough information to enable the employee to prepare an answer to the case and should give details of the time and venue for the disciplinary hearing (see para 10). It would normally be appropriate to provide copies of any written evidence, including witness statements.

Analysis and conclusions

What was the reason for the dismissal?

70. The Claimant accepts (and I agree) that the reason for her dismissal was related to her conduct, namely the alleged conversation between the Claimant and Mr Gallagher. He alleged that she called Ms Dole "*a failure*", said that she had been "*unfairly coached*" for the service delivery manager ("SDM") role and that she was "*shown favouritism*" in getting appointed to that role. That conversation was overhead by Mr. Herdman.

71. It was accepted by the Claimant that if those phrases had been used, in particular, calling Ms Dole "a failure", this would have been misconduct on her part. However, she denies using those phrases. She admits telling Mr Gallagher that Ms Dole was coached to get the SDM role. She claims she said it was because she had been doing the job for a year on an "acting" basis and that she meant it in the supportive and not disparaging way. She also admits saying that Ms Dole was the favourite to get the job, but not that she had been given favouritism by the appointment panel.

Burchell test

Genuine belief

72. Turning to the question of whether the Respondent had a genuine belief that the Claimant was guilty of the misconduct.

73. I find that it had. On the face of it there was a complaint against the Claimant that was clearly, if proven, would amount to misconduct.

74. I find, and the Claimant did not argue otherwise, that the dismissing officer, Mr Auvache, when taking his decision to dismiss the Claimant was genuine in his view that the Claimant was guilty of misconduct. This, however, is just the first step in the enquiry I need to undertake.

Reasonable grounds

75. The next question is whether the Respondent had reasonable grounds to believe that the Claimant was guilty of the alleged misconduct.

76. To answer this question, I must also decide whether at the time when the belief in the Claimant's misconduct was formed on such grounds, the Respondent had carried out as much investigation into the matter as was reasonable in the circumstances. In other words, the issue of reasonable investigation and having reasonable grounds to believe go hand in hand.

77. It is also important to note that the question of whether the Respondent had reasonable grounds to believe that the Claimant was guilty of misconduct must be determined by reference to the knowledge of the person who made the decision to dismiss, in this case Mr Auvache.

Did the Respondent carry out a reasonable investigation in all the circumstances?

78. How much investigation should be undertaken depends on the circumstances of each case and there are no hard and fast rules. The employer is not expected to leave no stone unturned. However, the more serious the allegation and a potential disciplinary sanction, the more thorough the investigation ought to be.

79. Where the Respondent knew that the Claimant was at risk of being dismissed for the alleged misconduct, in my judgment, it had to apply the same rigour and thoroughness in discovering and testing evidence which pointed towards the Claimant's innocence as evidence pointing towards her guilt.

80. I am mindful that I must not fall into the error of substitution, and it matters not what investigation I or another hypothetical reasonable employer would have carried out in those circumstances. What matters is whether the investigation as it was carried out by this Respondent was open to a reasonable employer to carry out in those circumstances.

81. In the circumstances where the key facts, namely, the exact words used in the conversation were in dispute, and the Claimant consistently denied that she had spoken those words, it was incumbent on the Respondent to carry out as much investigation as reasonably possible in the circumstances to have sufficient evidential basis to compare conflicting accounts and decide which story was more probable.

82. I find that the Respondent fell short of that mark. I find Ms Irving investigation was insufficient to assemble the necessary factual evidence to give Mr Auvache reasonable grounds to form a reasonable belief of the Claimant's guilt.

83. Her interview notes do not show that both Mr Gallagher and Mr Herdman said that the Claimant called Ms Dole "a failure" or that either of them said that the Claimant had said that Ms Dole had been "unfairly coached", yet in her conclusions she writes that both of them have confirmed that. This conclusion is plainly not supported by the contents of the interview notes.

84. It seems the term "*unfairly coached*" has somehow "migrated" from Ms Dole's complaint letter and even there this is not what she said. The relevant sentence reads: "*That I have had an unfair advantage as I have been coached*." It is not clear on what evidential basis Ms Irving then decided that in her conversation with Mr Gallagher the Claimant had used the phrase "*unfairly coached*", when according to her own interview notes neither Mr Gallagher nor Mr Herdman said that she had used those words.

85. It appears from the dismissal letter that Mr Auvache had reached his decision that the Claimant was guilty of using those words because there was corroborating evidence from two witnesses on that point. He did not interview them personally or speak to Ms Irving and made that decision purely based on the written record of Ms Irving's interviews.

86. With respect to the allegation that the Claimant had said that Ms Dole was shown favouritism, the Claimant denied saying that but admitted saying that Ms Dole was a favourite to get the job. The investigation interview notes with Mr Gallagher and Mr Herdman are at best ambiguous on what exactly the Claimant said. Mr Gallagher's remark that the Claimant "*can't go around saying that Ms Dole is a failure and being given favouritism*" can be read in different ways: as the Claimant actually saying that, or Mr Gallagher saying that she must not be doing that and using the term "*favouritism*" as his interpretation of the Claimant saying that Ms Dole was a favourite for the job.

87. Mr Herdman's interview notes (the first version, which appears to be the one that was used by Mr Auvache for his disciplinary), appear to be more explicit on that and say that the Claimant was "*calling [Ms Dole] a favourite*" but do not have any reference to favouritism. Later Mr Herdman amended his interview note to replace "*calling [Ms Dole] a favourite*" with "*[the Claimant] was mentioning favouritism*". It appears however that the amended note was presented to Ms Keyworth of the Respondent's HR only on 10 April 2019 (after the disciplinary pack had been put together) and it was not copied to the Claimant. The Respondent did not make further enquiries as to why Mr Herdman had made that change to the interview notes.

88. I accept that it was possible that the Claimant said that Ms Dole was shown favouritism whether, at the time of her saying that she or anybody else, knew the results of the interviews for the SDM role. This, however, does not change my overall conclusion on the adequacy of investigation.

89. I also accept that Ms Irving's decision that the allegation that the Claimant had said that she had seen the board report was not worth pursuing as a separate matter of a possible breach of confidentiality or data protection was not unreasonable. Ms Irving thought that it was very unlikely that the Claimant could have had access to the report, and that was a reasonable conclusion for her to come to. This, however, does not mean that the Claimant could not have said that, or that Mr Gallagher evidence on the use by the Claimant of the offensive words against Ms Dole were unreliable (as that was argued by Mr Panton).

90. Ms Tutin says that Mr Panton is wrong in raising all these discrete points and breaking down the allegation by each phrase alleged to had been used by the Claimant. She says I must look at them "*in the round*".

91. I accept that it is not meant to be a fine linguistic examination of all possible meanings that could be ascribed to different words and phrases. However, these were the precise words that the Respondent said that the Claimant had used and that in the Respondent's view saying those words were acts of misconduct the Claimant was guilty of. The Respondent could not have been more clear on that. In its disciplinary letter of 13 February 2019, it writes:

"It is alleged that you demonstrated rude, insubordinate, and unacceptable behaviour regarding a colleague, Claire Dore. Specifically, that you called Claire a

failure for not passing the Service Delivery Manager board, that she had been unfairly coached, and that she was shown favouritism to pass the board the second time."

92. I cannot see how the Respondent could put that as the case for the Claimant to answer and then say that it did not really matter what was actually said in the conversation and one has to look at the allegation "*in the round*".

93. Mr. Auvache preferred the investigation reports records to the Claimant's clear and unequivocal denial of using those words. In my judgment, on review of those documents, he did not have reasonable grounds to do so.

94. That, of course, does not mean that he necessarily had to believe the Claimant and disbelieve Mr Gallagher. I am not saying that he should have preferred the Claimant's evidence. However, in those circumstances, in my judgment, Mr Auvache simply did not have enough by way of reasonable grounds to form a reasonable belief in the Claimant's guilt. Given that Mr Gallagher's evidence did not fully support the alleged use of the offensive words and Mr Herdman's evidence was not corroborative Mr Auvache had to undertake a further enquiry to satisfy himself that the alleged words were used, as indeed was required by the Respondent's disciplinary process ("*Ensure there has been an adequate investigation")*. In doing so, he would not have needed to leave "no stone unturned". However, he did not bother to turn any of them, where these were readily available to him.

95. In fact, the Respondent positively resisted calling any witnesses at the hearing, with HR telling the Claimant that it was part of the Respondent's process, which was plainly not true. It only allowed the Claimant to call witnesses after Mr Panton had sent a draft injunction court application.

96. It is not for the Tribunal to make its own assessment of the credibility of witnesses on the basis of evidence given by them to the employer. The relevant question is whether an employer acting reasonably and fairly in the circumstances could properly have accepted the facts and opinions which they did. Ms Tutin refers me to the case of *Linford Cash & Carry Ltd v Thomson* [1989] IRLR 235.

97. However, I do not believe this case assists the Respondent. It appears to me, though not being "*on all fours*" with the present case, it supports my view that in those circumstances further investigation was required.

98. It should have been clear to Mr Auvache that the Claimant's account was completely different to that of Mr Gallagher. On calling Ms Dole "*a failure*", Mr Gallagher's account was not corroborated by Mr Herdman. Neither of them said that the Claimant had said Ms Dole had been "*unfairly coached*". That should have been apparent to Mr Auvache from reading the investigation interview notes. The notes state that they are not verbatim. However, Mr Auvache did not interview Mr Gallagher and Mr Herdman himself. Therefore, his belief in the Claimant's guilt was formed on the basis of what was recorded in the interview notes and what the Claimant said at the disciplinary hearing.

99. In the ***Linford Cash& Carry*** case, the EAT did direct the tribunals that they must not substitute its own view for that of the employer but consider whether, on the facts and circumstances reasonably accepted after sufficient investigation, the employer acted fairly and reached a reasonable and reasoned decision.

100. In doing so, the EAT also set out guidance to the employers on appropriate procedure to adopt where the so-called "informants" are involved but do not wish their names to be revealed. That case concerned the employer dismissing two employees based on an allegation of theft made by two informants and corroborated by the discovery of missing and forged credit notes. The employees denied any wrongdoing, but the employer still decided to dismiss them on the ground that it did not believe them.

101. In giving its guidance the EAT identified the followings steps that the employer should be taking in such circumstances (***my emphasis***):

- *the information given by the informant should be reduced to a written statement*
- *such a statement should detail specific incidents, circumstantial evidence, etc (**any possible reason why the informant might fabricate allegations should be noted**)*
- ***further investigation should then be carried out***
- ***where an informant refuses to attend a disciplinary hearing, the disciplining manager should interview the informant***
- *the informant's written statement (with omissions to avoid identification) should be made available to the employee **and the hearing adjourned where the employee wishes an issue to be raised with the informant***
- *full and careful notes should be taken of the proceedings*
- *evidence provided by an investigating officer should be prepared in written form.*

102. As I have said earlier, although the circumstances of the present case are different to ***Linford Cash & Carry***, I find the EAT guidance on what investigation steps a reasonable employer should undertake in the situation when allegations are made against an employee, which cannot be independently verified, and the accusers are not willing to attend a disciplinary hearing are equally applicable to this case. Furthermore, the Respondent's contractual disciplinary procedure specifically states that the disciplining manager: "*may call to the hearing any witnesses whose personal appearance will provide specific and relevant evidence over and above what is contained in the written statements already collected by the investigator."*

103. Mr Auvache did not undertake any further investigation. He did not interview Mr Gallagher or Mr Herdman or even Ms Irving. He simply took the investigation notes as giving him sufficient information to disbelieve the

Claimant. The fact that Mr Gallagher and Mr Herdman declined the Claimant's invitation to come to the disciplinary meeting did not relieve the Respondent of its duty to conduct a thorough investigation, as was merited in the circumstances. Mr Gallagher and Mr Herdman were the key witnesses, and their evidence were critical to the whole case against the Claimant. For the reasons I have explained above I find that the interview notes as the record of their evidence were insufficient for Mr Auvache to form a reasonable belief that the Claimant was guilty of the charges against her. Therefore, the Respondent had to make further enquires to establish facts.

104. In his evidence Mr Auvache said that he thought that the Claimant was lying but could not explain why he held that view. I asked him what it would have taken him to believe the Claimant, what else she could have said to make him to believe her. He said that she should have given him "*something or anything*" but could not explain what that "*something or anything*" was. Curiously, he then said that she could have said that the conversation had not happened. But that would have been a lie. I do not understand how the Claimant lying about the fact that the conversation had taken place would have made Mr Auvache to believe her about the content of the conversation, which she would be saying did not happen at all.

105. Further, Mr Auvache in his dismissal letter says that the Claimant accused Mr Herdman and Mr Gallagher of lying but she presented no evidence to support this. He says he saw no reason why they would lie and could only conclude that the "*remarks were made*".

106. Firstly, it was Mr Auvache who suggested to the Claimant, as she was getting up to leave the disciplinary hearing, that by her denying the allegations about the words used, she was saying that Mr Gallagher and Mr Herdman were lying, and she nodded in agreement. That, by itself not a big issue, but still shows a somewhat skewed record of that conversation.

107. Further, Mr Auvache's conclusion that the "*remarks were made*" appears to be based on his view that Mr Gallagher and Mr Herdman had no reason to lie. However, at that stage it was not a question of Mr Gallagher and Mr Herdman lying or not lying, but what they were actually saying. When Mr Auvache says in his dismissal letter that he could only conclude that the "*remarks were made*", which remarks was he referring to? As I have just gone through the review of the offensive remarks, apart from Mr Gallagher saying that the Claimant had said that Ms Dole was a failure, their remarks, as recorded in the interview notes, do not show that the Claimant had said that Ms Dole was shown favouritism or had been unfairly coached.

108. I do not accept Ms Tutin's suggestion that it was reasonable for Mr Auvache to conclude that the Claimant had said "*unfairly coached*" because she admitted saying that Ms Dole was "*coached*" or to deduce that the Claimant accusing Ms Dole (and indeed the appointment panel) of favouritism because she admitted saying that Ms Dole was a favourite.

109. These are quite different matters. It is an unfounded allegation of unfair process and unfair advantage – i.e. unfair coaching and favouritism, that could reasonably be viewed as unacceptable behaviour, rather than a statement that someone has been coached on the job to take that job on a permanent basis and therefore must be a favourite to get it.

110. In short, I find that in the circumstances, and applying the range of reasonable responses test, the Respondent has failed to carry out a reasonable investigation providing reasonable grounds to believe that the Claimant was guilty of misconduct.

111. Another factor in my decision that the investigation was unreasonable is that the investigation interview process was poor and not conducted even-handedly. Reading the interview notes it appears that Ms Irving was far more predisposed to believe Mr Gallagher, Mr Herdman and Ms Dole than the Claimant:

    a. She told the Claimant that she must not to discuss the matter with anyone else but does not say that to Ms Dole and to the other two witnesses.

    b. She did not ask the Claimant to name any other witnesses who could corroborate her story, despite receiving evidence from Mr Gallagher that there were others present who in his words "*rallied around*" the Claimant.

    c. In interviewing the Claimant, she puts to her the accuser's version of the events, but in her subsequent interview with Mr Herdman she does not mention that the Claimant had strongly denied saying those words.

    d. Even more troubling, she herself introduces the notion of "*nastiness and jealousy*" as a possible motive of the alleged the Claimant's conduct. That creates a further negative spin, and in my judgment, clouds the entire disciplinary process. Ms Irving in her investigation report says that it was Mr Gallagher and Mr Herdman who thought that the Claimant wanted to be nasty to Ms Dole "[the Claimant] *made [the offensive remarks], in their views, simply to be nasty about Claire*". Mr Gallagher in his interview says nothing of the kind. It was Ms Irving who suggested that as a possible explanation to Mr Herdman and kept pressing on that point by posing further and further questions such as "[*Ms Irving] asked if [the Claimant] was being vindictive? Was it meanspirited, or seeking attention? [Ms Irving] asked if [Mr Herdman] felt [the Claimant] was being nasty on purpose*. "*The nastiness*" then becomes part of the charge and specifically stated in the dismissal letter "*remarks were made to be nasty*".

112. Ms Irving's role was to establish the facts, not to speculate on possible motives for the Claimant's actions which were she had not yet established. In her witness statement Ms Irving says that the Claimant made the comments with "*the sole intent to be nasty*". Yet, she did not even put that

proposition to the Claimant during her investigation interview. The Respondent's Disciplinary Guidance clearly states that the formal investigation must "*Confine itself to establishing the facts."*

Did the Respondent adopt a fair procedure?

113. I also find that the Respondent has failed to follow a fair procedure in other aspects. It appears to have put the burden firmly on the Claimant to prove that she was not guilty as charged. Ms Tutin submits that the Claimant had been told that she could present whatever evidence she wanted, and even allowed to call witnesses. The Claimant did call witnesses and Mr Panton prepared a long list of submissions, which Mr Porter read out at the meeting. Albeit not in the same detail that Mr Panton put to the Respondent's witnesses during the Tribunal hearing, there was sufficient to show that the Claimant disputed the key facts which the Respondent relied upon and that the Respondent's evidence was insufficient (see paragraph 37 above).

114. All that was read out at the meeting, yet no proper consideration was given to these issues by Mr Auvache. I do not accept Ms Tutin's submission that none of that was to the point. On the contrary, I find these were the very issues which the Respondent should have considered thoroughly.

115. The charge of insubordination is another example of a serious procedural failure. While I accept that it could be, as Ms Tutin puts it, just a label, and it could have simply meant "*indiscipline*". Nevertheless, it was a specific charge brought against the Claimant and it was not unreasonable for the Claimant to ask what was meant by that. The Respondent's Disciplinary Guidance document refers to "insubordination" as an example of misconduct normally meriting just an informal action.

116. If all that was meant by the charge of "*insubordination*" was the same as the other charge of "*rude and unacceptable behaviour*" it could not have been easier for the Respondent just to confirm that to the Claimant.

117. It had not done that. Ms Tutin says the Claimant knew what it was all about. It was about that incident and what she said during the conversation with Mr Gallagher. However, the Claimant maintained that she did nothing wrong and could not understand how that incident could have led to any disciplinary charges against her.

118. It was the Respondent who charged the Claimant with those disciplinary offences under the labels chosen by the Respondent, and it was not for the Claimant to guess what they might have meant. She wanted to know exactly what she was being accused of and that was not unreasonable.

119. In her email of 31 March 2019, the Claimant specifically asked what was meant by the charge of "*insubordination*" posing three very sensible questions. She did not receive any reply. At the disciplinary meeting Mr Porter specifically asked whether the charge of insubordination had been dropped. The reply from HR was as follows: "*[Grace Keyworth – Snr HR*

adviser] says she accepts that [the Claimant] doesn't fully understand the reference to insubordination, but it is unreasonable to ask [Mr Auvache] to commit to striking that out at this moment. [Mr Auvache] will go away and consider all the evidence and it will be for him, as Hearing Manager, to gather any further information relating to the case."

120. In his evidence Mr Auvache accepted that he had not seen a reply to the Claimant email asking to clarify the charge of "*insubordination*". He could not even recall the Claimant's email asking the charge to be clarified. However, he said that he had assumed that HR would have replied to the Claimant answering her questions and explaining the charge, but at the same time he admitted that he had not seen that reply himself.

121. Therefore, based on Mr Auvache's evidence, he did not know what the substance of the charge under the label of "*insubordination*" was. On cross-examination he could not give a clear answer what he had understood by the charge of "*insubordination*". Yet he found the Claimant guilty of "*insubordinate behaviour*".

122. This seems a Kafkaesque situation where not only the Claimant did not understand (as was accepted by HR at the disciplinary meeting) what she was charged with under the label of "*insubordination*", but the disciplining officer, Mr Auvache, when he decided the Claimant was guilty of insubordinate behaviour, did not know what he was finding her guilty of.

123. Further, Mr Auvache admitted not even reading the management guidance document while dealing with the matter. He said HR was helping him, but that was his specific duty, as the disciplining officer, to conduct the process in accordance with the set process. The process is detailed (some 26 pages) and clear on all issues that need to be considered and steps taken to ensure a fair process. It talks in prescriptive terms. For example, it says that in preparation for the disciplinary hearing "***you must***"

- *ensure that the employee has full briefing on the evidence*
- *brief yourself on any rules relevant to the alleged misconduct*
- *ensure that you have all the relevant facts and evidence to hand*
- *consider what explanations the employee may offer and if possible check them out*
- *you may call to the hearing any witnesses whose personal appearance will*
- *provide specific and relevant evidence over and above what is contained in*
- *the written statements already collected by the investigator;*

124. The guidance document is specifically mentioned and hyperlinked in the Chapter 20 of the Staff Handbook, which formed part of the Claimant contract of employment. Further, in her email of 8 April 2019 the Claimant specifically asked whether Mr Auvache was familiar with the management guidance.

125. Mr Auvache not being aware of its content is troubling, to say the least. I do not understand Ms Tutin's argument that the version supplied to the Tribunal came from the Claimant and therefore might not have been the right one. Is there is a different version, which is the right version, the Respondent should have disclosed it. In any event, Mr Auvache admitted not reading any version before conducting the disciplinary hearing.

126. Further, Mr Auvache admitted not even considering any mitigating circumstances when deciding to dismiss the Claimant. Whether or not he had the Management guidance available or relied on "ad hoc" HR advice, it was a necessary consideration for any fair disciplinary process. The Respondent's Disciplinary guidance document clearly says that: "*Consider all of the following points before deciding to recommend any disciplinary sanction …. any mitigating circumstances*". Not even applying your mind to that, in my judgment, was unreasonable.

127. I shall briefly deal with the final written warning ("the FWW"). I accept Ms Tutin's submission that it is not for me to decide whether the FWW was fair or unfair. It is only in exceptional circumstances it will be unfair for the employer not to revisit a prior disciplinary sanction (see *Davies v Sandwell Metropolitan Borough Council* [2013] EWCA Civ 135). I accept that in the circumstances it would not have been outside the range of reasonable responses for the Respondent not to reopen the FWW. However, I find that in the circumstances:

(i) where the Claimant presented credible evidence that one of the four counts for which she was given the FWW was not her fault,

(ii) when she was allowed to call witnesses to the disciplinary hearing to corroborate her evidence on that point,

(iii) when Mr Jaggs said that he would speak to Mr Auvache about that issue,

the Respondent should have considered that matter as a potential mitigating circumstance when deciding on an appropriate sanction. Instead, it simply dismissed the whole matter as being irrelevant, despite it being very relevant to the Respondent's decision to dismiss the Claimant.

128. The Respondent heavily relied on the Claimant's FWW in reaching its decision to dismiss her. It appears that the FWW was key to the Respondent's decision to deal with the incident through the formal disciplinary route and not informally or as a grievance by Ms Dole. It also appears to have influenced the Respondent conduct of the process in terms of assessing the Claimant's credibility as a witness.

129. However, despite such heavy reliance on the FWW, the Respondent was not prepared to even consider any evidence that tended to show that the FWW as the basis for the decision in relation to the disciplinary issue in question might not have been sufficiently strong.

130. For completeness, and while I do not find that to be of a particular significance, I shall add that I accept the Claimant's evidence that she had received her disciplinary investigation letter a half an hour after sending her

email of 7 January 2019 to Mr Poter about raising a grievance in relation to the FWW. Therefore, I do not find that her raising that issue was simply a response to the new disciplinary charge. And even if it were, it would not have been improper for the Claimant to attempt to challenge the FWW knowing that it could cause her to lose her job for the new alleged offence, even when such new offence was not serious enough to be considered as "serious misconduct" under the disciplinary rules.

Did appeal rectify procedural unfairness?

131. Turning to the appeal. In my judgement, even by that stage it was not too late for the Respondent to put things right and have a fair process, which might still have resulted in a decision to dismiss, and such decision could have been within the range of reasonable responses. However, considering all the previous procedural failures, to get itself "back on track", in my judgment, the Respondent would have had to consider the matter afresh and review all evidence and potentially call for a further investigation as part of the appeal process.

132. It did not do that. Of course, there is nothing wrong *per se* with the Respondent choosing to run the appeal just as a review of the procedural aspects of the disciplinary process.

133. However, having made that choice and having been presented with evidence which in my judgment clearly showed serious procedurals failings, the appeal manager ought to have called into question the fairness of the decision to dismiss the Claimant. Mr Gibbs decided that there was nothing wrong with the process. For the reasons, I have already explained there was a good deal that was wrong with the process, from the very start through to the decision to dismiss.

134. Mr Gibbs in his evidence to the Tribunal said that if the Claimant had presented her case as Mr Panton had done for her at the hearing "*it could have been a different story*". He said that the Claimant did not go into that level of detail, and it was meant to be a "*two-way process*". That is true, but it was his job as the appeal manager to investigate the issues and to test the reasonableness of the process by which Mr Auvache had arrived at his decision.

135. It appears that Mr Gibbs took the position that everything was fine unless the Claimant could convince him otherwise, but then he chose not to believe the Claimant whatever she was saying. The Claimant is not a lawyer, and it would be unreasonable to expect her to put her arguments with the same level of skill and meticulousness as Mr Panton did during this hearing. However, she and Mr Poter clearly explained to Mr Gibbs what they thought was wrong with the disciplinary charge and the process.

136. Mr Gibbs' findings of fact as recorded in the appeal outcome summary include:

- "*that the Claimant did not understand the charge of insubordination,*

- *that the issue was raised that not interviewing witnesses by Mr Auvache was felt to be unreasonable, and*
- *that the case was made that the witness evidence relied upon could be down to misinterpretation"*.

137. That, in my judgment, was sufficient for Mr Gibbs to consider that there were some serious failings in the disciplinary process, even on the limited scope of his appeal process.

138. He, however, concluded that no demonstrable evidence was presented to override the decision. He decided that without making any further enquiries.

139. He simply dismissed the Claimant's evidence. He, as did Mr Auvache, preferred inconsistent evidence (as recorded in the investigation interviews notes) to that of the Claimant. When Mr Gibbs was asked by Mr Panton why, his answer was that even though the written records did not show that the alleged words had been spoken by the Claimant there were other "*implicit words and feelings*".

140. I cannot see how it can be said to be reasonable to conclude that even if written evidence did not stack up, the decision to dismiss based on such evidence was reasonable because of some unspoken words and "*implicit feelings*".

141. Ms Tutin's submits that "*In light of the Claimant's refusal to accept any wrongdoing or demonstrate any remorse, the Respondent concluded that she did not understand the seriousness of the allegations against her or the effect her conduct had on others*" and therefore, she argues, the Respondent was reasonably entitled to conclude that the dismissal was the appropriate sanction.

142. I would have accepted that if I had found that the Respondent, having undertaken a reasonable investigation, had reasonable grounds to believe that the Claimant was guilty of the misconduct. However, my findings are that the Respondent has failed to carry out a reasonable investigation and did not have reasonable grounds to believe that the Claimant was guilty of the alleged misconduct.

143. Therefore, I cannot see how the Claimant not showing any remorse or accepting wrongdoing in the circumstance when she kept protesting her innocence could be taken as a reasonable ground for the Respondent to conclude that she was guilty of the offence and that dismissal was the appropriate sanction.

144. While each of the above procedural failings on its own might not have made an otherwise reasonable process unfair, stepping back and looking at all these issues, I find that in those circumstances the decision to dismiss the Claimant fell outside the range of reasonable responses. It follows, that I find that she was dismissed unfairly.

Polkey reduction

145. Turning to the issue of *Polkey*, I do not accept Ms Tutin's submission that it was just a matter of time before the Claimant did something else bad and would have been dismissed. There is no reliable evidence for me to conclude that.

146. I did consider evidence related to her FWW and I am not persuaded that they show that the Claimant had a propensity of rude or otherwise unacceptable behaviour.

147. She had a clean record until those incidents. She was going through difficult times for personal reasons, she was working in a high-pressured environment and under heightened security due to the August 2018 terrorist attack on Parliament.

148. Looking at the incidents for which she received the FWW, I find that they more call into question the appropriateness of the FWW rather than showing that the Claimant has a tendency of rude and unacceptable behaviour. It appears that all four incidents (and one of the four was mistakenly assigned to the Claimant) were the Claimant simply trying to enforce the Respondent's meeting room booking/access and visitors badge wearing procedures. It was her responsibility to ensure that all visitors abide by the relevant rules. All four complaints appear to be in relation to her being more direct and less humble than the complainants expected.

149. In any event, she said she had learned her lesson, and I see no reasons for me to conclude that she was not being genuine about that.

150. For 12 months after the original four incidents there appear to have been no issues with her conduct. Ms Irving, as her manager, admitted that it was a surprise for her to have received Ms Dole's complaint.

151. To be clear, I am not saying that the FWW was wrongly issued. It is not a matter for me to decide as part of these proceedings. I did not take the appropriateness or otherwise of the FWW into account in deciding the liability point in these proceedings. I reviewed the FWW materials, as I was invited to do by the Respondent, simply to determine whether they give me sufficient grounds to decide that there was a good possibility that the Claimant would have committed further misconduct before the expiry of her FWW. I find that they do not disclose any such grounds.

152. In short, I find that any *Polkey* reduction on the basis that the Claimant might have committed other misconduct before the expiry of her FWW would be speculation not based on evidence. Therefore, in my judgment, it is not just and equitable to apply any Polkey reduction to the Claimant's compensation.

153. For the sake of completeness, I shall add that I reject Ms Tutin's invitation to give weight to Ms Dole's allegation that there had been two prior incidents of unpleasant remarks. No written evidence was in front of me about the alleged remarks. The Respondent did not call Ms Dole or any

other witnesses to give evidence to the Tribunal in relation to those prior incidents.

Was there conduct by the employee connected with the unfair dismissal which was culpable or blameworthy?

154. Based on the evidence I heard and the documents in the bundle I do not find that I can conclude on the balance of probabilities that the Claimant has made the offensive remarks. There is simply not enough evidence in front of me to make that finding. I have no reason to disbelieve the Claimant, who was clear in her evidence that she did not use the offensive words ("a failure", "unfairly coached", "shown favouritism").

155. The remarks that she admits making, that is Ms Dole was being coached or being a favourite for the job, in my judgment, are not rude or offensive or otherwise inappropriate. Therefore, even those remarks are causally connected with her dismissal, I do not find that her conduct in making them was in any way culpable of blameworthy.

156. I do not follow Ms Tutin's submission that the fact that the Claimant never apologies for them or failed to conclusively state she would not act in such a way again should be taken as showing her culpability. The Claimant's position is that she did not make any offensive remarks and therefore has nothing to apologise for.

157. I also do not understand Ms Tutin's "*highly likely*" point. Ms Tutin appears to suggest that because the Claimant accepts saying "coached" and "favourite", I should find that she in fact said: "unfairly coached", "a failure" and "shown favouritism". I reject this. I have already explained why I see these phrases as connoting completely different meanings. I also do not see how the Claimant's acceptance of using non offensive remarks should lead me to conclude that she has made offensive remarks too. I do not see that being "*highly likely*" or even probable.

158. For these reasons, I find that it will not be just and equitable to apply any reduction to the Claimant's compensation under sections 122(2) or 123(6) of ERA.

Overall conclusion on liability

159. To sum up, I find that the Claimant was unfairly dismissed, and the Respondent shall pay her compensation for unfair dismissal without any reduction applied under *Polkey* or sections 122(2) or 123(6) of ERA. The exact amount of compensation, unless agreed by the parties, shall be decided at a remedy hearing to be listed by the tribunal on a first available date.

Employment Judge P Klimov
14 June 2021

Sent to the parties on:

14/06/2021

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For the Tribunals Office

Notes

Public access to employment tribunal decisions

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