EMPLOYMENT TRIBUNALS

Claimant: Mrs A Sokolova

Respondent: Humdinger Limited

Heard at: Hull

On: 14, 15, 16, 17 June 2021.
18 and 21 June 2021
(in chambers).
22 and 23 June 2021.

Before: Employment Judge D N Jones
Mr D Crowe
Mrs N Arshad-Mather

REPRESENTATION:

Claimant: In person
Respondent: Ms A Del Priore, counsel

JUDGMENT having been sent to the parties on 30 June 2021 and written reasons having been requested by the claimant by email of 28 June 2021, in accordance with Rule 62 of the Employment Tribunals Rules of Procedure 2013 the Tribunal provides the following

REASONS

Introduction

1. This is a claim for unfair dismissal, direct race discrimination and indirect sex and race discrimination.

2. The issues were identified at a preliminary hearing on 6 December 2020 by Employment Judge Evans.

Evidence

3. The tribunal heard evidence from the claimant, Edyta Kowalczyk, former line leader, Ewelina Chmiel, former production operative and Zuzana Bandri, former production operative. The respondent called Kay Cheney, production supervisor, Nicola Sommerville, production supervisor, Eric Scott, reserve line leader, Karen

Beharall, site technical manager, Jeanie Caulfield, line leader, Amanda Keaton, QA supervisor and Paul Ramsay, operations director.

4. The parties produced bundles of documents of 62 and 160 pages.

Background/Findings of fact

5. The respondent is a supplier of fruit and nut snacks. It employs approximately 220 staff.

6. The claimant commenced working for the respondent in January 2010 as a production operative, through an agency. She became an employee of the respondent on 8 November 2010. She is Latvian. She came to the UK shortly before working for the respondent. Although her first language is Latvian, she also considers Russian to be a native language.

7. In July 2015 the respondent introduced a language policy, which is sometimes referred to as an effective communication policy. English was to be spoken in the workplace. During rest and lunch breaks workers could use the language of their choice. All employees had to have a satisfactory level of English upon recruitment.

8. On 3 October 2016 Mr Ramsay issued a memo in respect of the language policy. It explained that a common language would promote effective workplace communication across the business. Management instructions, health and safety information, company policies would be delivered in English. It stated that a common language was important when avoiding misunderstandings in speaking, listening, reading and writing.

9. On 10 February 2017 a letter of concern was issued to the claimant and a colleague by a production supervisor. It followed a meeting at which they had discussed the language policy. She recorded that the claimant was asked to use English in the factory and asked for improvements. It stated that in the future, matters might be dealt with through disciplinary procedures. The claimant and her colleague, Ms Bandri, were concerned about the letter and the reference to disciplinary action in the future. They approached Mr Ramsay who reassured them. They expressed concern about losing their jobs and he said they need not worry about that and that the letter was not the beginning of disciplinary proceedings. Both the claimant and Mr Bandri remembered this discussion and, in his evidence, Mr Ramsay did not dispute that he had reassured them and said they should not worry.

10. In September 2018 the claimant had a period off work sick due to work-related stress. She attended two welfare meetings and explained she was having difficulty with her line leader, Ms Caulfield. Ms Cheney agreed to speak to Ms Caulfield about her manner.

11. On the 16 September 2019 the claimant requested leave to attend a dental appointment in Latvia. This was to be the last in a series of treatments of dental implants which she required. She had used up her holiday leave and was informed she could not take unpaid leave. At a meeting with Ms Cheney and Mr Thompson on 20 September 2019 to discuss her request, the claimant said that she could have

taken it off sick, but thought she was doing the right thing in asking for unpaid leave. She was informed that she could not take the day and it would be considered suspicious if she did not attend work on the day in question, 27 September 2019, but they would check with Mr Ramsay. They finally confirmed that the day could not be taken off on 25 September 2019. The claimant did not visit the dentist as she had hoped and cancelled the appointment on 26 September 2019.

12. The claimant did not attend work on 27 September 2019 and reported sick.

13. The claimant attended an investigation meeting in respect of that absence on 30 September 2019 with Mr Lewis Thompson. She said she had been sick with diarrhoea and reported it on the day in question. Mr Lewis said he considered it suspicious, because she had previously implied she would take the day off sick.

14. The claimant attended a disciplinary hearing on 10 October 2019 for unauthorised absence. She asked for a phone call to be made to the dentist and he confirmed that the appointment had been cancelled. She was found to have taken the day off as unauthorised leave and have dishonestly reported herself sick. She was given a first and final warning for 12 months and informed that further incidents of misconduct could result in further disciplinary action including dismissal.

15. The claimant submitted an appeal on 21 October 2019. She had obtained confirmation in writing of the telephone discussion which took place at the disciplinary hearing, to the effect that she had cancelled the dentist's appointment and did not attend. The appeal was rejected on 25 October 2019.

16. In November 2019 the claimant contacted Nicola Lamb, human resources adviser, in respect of further concerns with her line leader but she was redirected to raise issues with her supervisor. This concerned the claimant as she had been advised to contact Ms Lamb by her supervisor. This was probably a case of crossed wires.

17. On 3 June 2020 the claimant had a meeting with Ms Cheney and Mr Lewis Thompson concerning her health. She informed them she was having hot flushes because of the menopause. She said they could cause her to sweat and become dizzy. She had tried tablets but they did not work. She had opened the top button of her overall but been reprimanded by Mr Scott, the line leader. Ms Cheney said the claimant could stand near to a fan when possible, but they could not relax the rule about keeping the overall buttoned. Ms Cheney said she would obtain some more fans.

18. On 25 June 2020 the claimant raised a protection screen on her line to allow more air to circulate. Mr Scott, who was working on the adjacent line pulled the screen down causing it nearly to strike her face. There was a disagreement with words expressed during which the claimant said Mr Scott told her to fuck off. Ms Cheney approached the claimant and there was a further tense exchange.

19. The claimant submitted a grievance about these matters on 29 June 2020 and attended a meeting with Miss Sommerville on 7 July 2020. Ms Sommerville interviewed the claimant's colleague Jurgita, who said she had overheard Mr Scott

use the profanity alleged. She also interviewed Ms Cheney, Ms Caulfield and Mr Scott. Ms Caulfield said she had not overheard any foul language. She said she had gone over to get them back on their own lines and as she turned around she heard the claimant speaking to Jurgita in a foreign language. She then went to inform Ms Cheney about the argument concerning the screens. Mr Scott stated that the claimant had been aggressive after he had flicked the screen back. He gave a description of the events including how Ms Caulfield had approached and told him to get back to his line. Jurgita also told him to get on with his work and he then overheard a conversation of 5 or 10 seconds in a foreign language, spoken by the claimant but he did not know with whom.

20. On 17 July 2020 Miss Sommerville wrote to the claimant to inform her of her findings. They were that the screen which Mr Scott flicked had startled the claimant although it did not hit her, that although she and Jurgita had said Mr Scott used offensive language, she could not find on a balance of probability that had happened because Mr Scott and Ms Caulfield had said that was not true, that Mr Scott had treated other staff consistently in respect of PPE and ensuring the screens were kept down. She found that Ms Cheney's approach may have come across differently because she was frustrated in trying to help.

21. On 20 July 2020 the claimant was invited to an investigation by letter from Mr Derek Thompson, safety, health and environmental manager. He stated that during the grievance there had been further allegations of misconduct made against the claimant in respect the effective communications policy.

22. The claimant attended the meeting on 3 July 2020 and was accompanied by Ms Chmiel. She was then invited to a disciplinary meeting by letter of 27 July 2020 to address an allegation of a breach of the effective communication policy. It was stated that Ms Caulfield and Mr Scott had raised a particular breach and the claimant had not denied them.

23. On 27 July 2020 the claimant raised three grievances concerning the use of PPE whereby she became hot because of the overalls and should have been provided with her own fan. She also complained about Mr Scott's attitude and an issue relating to statutory sick pay.

24. The claimant attended a disciplinary hearing on 30 July 2020. A Russian interpreter was provided by telephone. Mrs Beharall dismissed the claimant on notice because she was subject to a final written warning and admitted breaches of the policy and disagreed with it.

25. The claimant attended a grievance hearing with Ms Keaton on 4 August 2020.

26. The claimant attended a disciplinary appeal hearing with Mr Ramsay on 7 August 2020. A Russian interpreter was provided by telephone. Mr Ramsay dismissed the appeal.

27. The grievance in respect of the complaint about PPE was dismissed on 11 August 2020. Ms Keaton found that there were a sufficient number of fans to keep

employees cool but it would be a health and safety risk to allow each employee to have a fan.

The Law

Unfair dismissal

28. By Section 98(1) of the Employment Rights Act (ERA 1996) it is for the employer to show the reason for the dismissal and that it falls within a category recognised in Section 98(1) or (2), one of which relates to conduct, see Section 98(2)(b).

29. Under Section 98(4) of ERA "*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.*

30. There is no burden of proof in respect of the analysis to be undertaken under Section 98(4) of the ERA. Material considerations in a case where the reason for the dismissal was conduct, will include whether the employer undertook a reasonable investigation and formed a reasonable and honest belief in the misconduct for which the employee was dismissed[1]. It is not for the Tribunal to substitute its own view, but rather to review the decision-making process against the statutory criteria and, if it fell within a reasonable band of responses, the decision will be regarded as fair[2]. The 'reasonable band of responses' consideration includes not only the determination of whether there was misconduct and the choice of sanction, but will include the investigation[3]. A fair investigation will involve an employer exploring avenues of enquiry which may establish the employee's innocence of the allegations as well as those which may establish his guilt. That is of particular significance in the event the dismissal will impact upon the employee's future career[4]. With regard to any procedural deficiencies the Tribunal must have regard to the fairness of the process overall. Early deficiencies may be corrected by a fair appeal[5].

31. By Section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992, in any proceedings before an Employment Tribunal, a Code of Practice issued by ACAS is admissible and any provision in the Code which appears to be relevant to any question arising in the proceedings should be taken into account in

[1] BHS v Burchell [1980] ICR 303.
[2] Iceland Frozen Foods v Jones [1983] ICR 17.
[3] J Sainsbury PLC v Hitt [2003] ICR 111.
[4] Salford Royal NHS Foundation Trust v Roldan [2010] ICR 1457.
[5] Taylor v OCS Group Ltd [2006] ICR 1602

determining that question. The ACAS Code of Practice on Discipline and Grievance Procedures 2015 is one such Code.

32. If a claim of unfair dismissal is established, the Tribunal shall make a basic and compensatory award, if no order for re-instatement or re-engagement is sought, see section 118 of the ERA. Formula for calculating awards is contained in Section 119 and Section 123 of the ERA.

33. Under section 122(2) of the ERA, 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, it shall reduce or further reduce that amount accordingly.

34. By Section 123(1) of the ERA, the amount of the compensatory award should be such amount as the Tribunal considers just and reasonable in all the circumstances having regard to the losses sustained by the complainant in consequence of the dismissal insofar as that loss is attributable to action taken by the employer. If the dismissal is unfair for procedural reasons, the Tribunal may reduce or extinguish any compensatory award, if the Tribunal concludes that the complainant would or might have been dismissed had the procedures been fair[6].

35. Under Section 123(6) of the ERA, 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 the finding.

Discrimination

36. By section 39(2) of the Equality Act 2010 (EqA):

An employer (A) must not discriminate against an employee of A's (B)—

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment.

37. By section 109(1) of the EqA, anything done in the course of a person's employment must be treated as done by the employer and by section 109(3) it does not matter whether the thing is done with the approval or knowledge of the employer.

38. Direct discrimination is defined in section 13 of the EqA:

A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourable than A treats or would treat others.

[6] Polkey v A E Dayton Services Ltd [1988] ICR 142.

39. Indirect discrimination is defined in section 19:

A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

40. By section 9 of the EqA, race includes nationality or national origin, by section 11 sex is a protected characteristic.

41. By section 23 of the EqA:

On a comparison of cases for the purpose of section 13, 19 there must be no material difference between the circumstances relating to each case.

Burden of proof

42. By section 136(1) of the EqA, if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred. Section 136(2) provides that does not apply if A shows that A did not contravene that provision.

43. The Court of Appeal has approved and revised guidance to the application of the burden of proof under previous legislation which remain applicable to the EqA[7].

44.1 In deciding whether the claimant has proved such facts [to discharge the burden] it is important to bear in mind that it is unusual to find direct evidence of discrimination. Few employers will be prepared to admit such discrimination even to themselves.

44.2 The outcome at this stage will usually depend on what inferences it is proper to draw from the primary facts found by the Tribunal. The Tribunal does not have to reach a definitive determination that such facts would lead to it concluding there was discrimination but that it could.

[7] Wong v Igen Ltd [2005] ICR 931, Barton v Investec Henderson [2003] ICR 1205, Ayodele v Citylink Ltd [2019 ICR 458

44.3 In considering what inferences or conclusions can be drawn from the primary facts the Tribunal must assume that there is no adequate explanation for those facts.

44.4 When the claimant has proved facts from which the inferences could be drawn, that the respondent has treated the claimant less favourably on a protected ground, the burden of proof moves to the respondent. It is then for the respondent to prove that he did not commit, or as the case may be is not to be treated as having committed that act.

44.5 To discharge that burden it is necessary for the respondent to prove on the balance of probabilities that his treatment was in no sense whatsoever on the protected ground.

44.6 That requires a tribunal to assess not merely whether the employer has proved an explanation for the facts proved by the claimant from which the inferences could be drawn, but that explanation must be adequate to prove on the balance of probabilities that the protected characteristic was no part of the reason for the treatment.

44.7 Since the respondent would generally be in possession of the facts necessary to provide an explanation the Tribunal would normally expect cogent evidence to discharge that burden.

44. In **Madarassy v Nomura International plc**, the Court of Appeal held that a difference in status, namely that of the protected characteristic alone, was not of itself sufficient to discharge the burden of proof. In **Glasgow City Council v Zafar** the House of Lords held that because an employer acted unreasonably did not mean that it had acted discriminatorily. If the employer treated those with and without the protected characteristic equally unreasonably there would be no discrimination.

45. Section 124 of the Equality Act 2010 sets out the remedies which a Tribunal may order in respect of a complaint of discrimination at work. By section 124(2) the Tribunal may—

(a) make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate;

(b) order the respondent to pay compensation to the complainant;

(c) make an appropriate recommendation.

46. By section 24(4), subsection (5) applies, namely the tribunal must not make the order under subsection (2)(b) unless it first considers whether to act under subsection (2)(a) or (c), if the tribunal–

(a) finds that a contravention is established by virtue of section 19, but

(b) is satisfied that the provision, criterion or practice was not applied with the intention of discriminating against the complainant.

These provisions were considered by the Court of Appeal in the recent case of **Wisbey v Commissioner of the Police for the Metropolis [2021] EWCA Civ 650** and it held that having first considered the remedies of a declaration and a recommendation, there is no restriction or prohibition in section 124(5) on a tribunal's power to make a compensation order where loss is sustained as a consequence of established unlawful but unintentional indirect discrimination. However, the loss must arise from the unlawful discrimination. In that case no injury to feelings were

attributable to the indirect discrimination and so the tribunal had properly made no award.

47. By section 124(6) the amount of compensation which may be awarded corresponds to the amount which could be awarded by the county court under section 119, which includes an award for injury to feelings under section 119(4).

48. Section 207A(2) of the Trade Union and Labour Relations Consolidation Act 1992 provides, "*If, in the case of proceedings to which this section applies, it appears to the Employment Tribunal that the claim to which the proceedings relate concerns a matter to which a relevant code of practice applies, the employer has failed to comply with that code in relation to that matter and that failure is unreasonable, the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%*".

49. In respect to an award for injury to feelings, guidance has been issued by the Presidents of Employment Tribunals of England Wales and Scotland. The guidance summarises the effect of the case law in which the higher courts have described the proper approach. There are three brackets: the top bracket is for the most serious cases and ranges between £27,000 and £45,000, the middle bracket ranges from £9,000 to £27,000 and the lower bracket is from £900 to £9,000. In the leading case of **Chief Constable of West Yorkshire Police -v- Vento [2003] ICR 318** the Court of Appeal stated the top bracket is for the most serious cases such as where there has been a lengthy complain of discriminatory treatment on the grounds of sex or race, the middle bracket is for serious cases which do not merit an award in the highest bracket and the lowest bracket is for less serious cases such as where the act of discrimination is isolated or one-off occurrences.

Time Limits

50. By section 123(1) of the EqA proceedings may not be brought after the end of the period of 3 months starting with the date of the act to which the complaint relates, or such other period as the employment tribunal thinks just and equitable.

51. By section 123(2) of the EqA conduct extending over a period is to be treated as done at the end of the period. In **Commissioner of Police for the Metropolis v Hendricks (2003) ICR 503**, the Court of Appeal held that an act extending over a period was distinct from the succession of unconnected isolated specific acts that could constitute a state of affairs and was not restricted to a rule, policy or practice as identified in the earlier case law.

52. The higher courts have provided guidance upon the principles to be taken into account in determining whether it is just and equitable to allow a claim to proceed, notwithstanding the primary period has expired. The court must take into account anything which is relevant, see **Hutchinson v Westwood Television Limited [1977] IRLR 69**, and this could include those factors which are considered in the exercise of the discretion of personal injury claims by virtue of section 33 of the Limitation Act 1980, see **British Coal Corporation v Keeble [1997] IRLR 336**.

53. In **Robertson v Bexley Community Centre [2003] IRLR 434**, the Court of Appeal stated that it was for the claimant to persuade the Tribunal that it was just and equitable to extent time, and that the exercise of the discretion was the exception rather than the rule. However, in **Chief Constable of Lincolnshire Police v Caston** the Court of Appeal expressed caution about those remarks and Sedley LJ said, "*There is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised*."

54. The Tribunal will always consider the prejudice to a party of a decision to extend time or to refuse the extension, see **Miller v Ministry of Justice [2015] UKEAT 0003/15**. Prejudice to a respondent will include the loss of the limitation defence and also forensic prejudice which may arise from having to meet a case which has been brought later than was expected so that the quality of evidence is corroded by faded memories or loss of documents.

Discussion, analysis and conclusions

Indirect sex discrimination

55. The respondent has a policy whereby employees on the production floor must wear overalls manufactured from a particular material and to keep them buttoned up. That is a provision, criterion or practice which applies to men and women alike.

56. In 2020 the claimant had the onset of menopause. This included the symptoms of hot flushes. That created particularly difficulties at work. The buttoned up overall exacerbated the problem. She sweated and became dizzy.

57. The grievance raised on 3 June 2020 was a direct consequence of such an episode. She had undone the top button of the overall. Mr Scott had challenged her about this as a breach of the company rule.

58. Ms Cheney was sympathetic. She said that the respondent could not relax the requirement to wear the overall buttoned up, but said she was happy for the claimant to stand closer to the fans when possible. She ordered some additional fans. In her evidence she said that 4 additional fans were obtained, 2 placed on each line - that meant there were 4 mobile fans on each line. In addition there was a ventilation system which circulated air from outside. The claimant said this would not reduce the temperature particularly in hot weather, because the external temperatures were high. There did not seem to be a dispute about this, hence the need for additional mobile fans.

59. In evidence, Ms Cheney said that the four fans would be taken on a first-come first-served basis, as people arrived on shift. Sometimes the men who were working at the other end of the line took them. She said that she had offered to provide a fan for the claimant on 25 June, following the confrontation with Mr Scott, but the claimant did not recall this. In the outcome to the grievance, Ms Sommerville acknowledged that Ms Cheney's tone on this occasion may have been different because she was frustrated that the claimant did not take up any options. We accept she was probably invited to move to a fan on another line and the claimant declined.

60. In cross-examination the claimant accepted that when she had raised her concerns on 3 June 2020 she had been told she could take breaks and step out of the factory floor. She did not wish to do that because the hot flushes could be frequent and it would involve her leaving the line many times and letting down her colleague.

61. Miss Del Priore submits that the claimant cannot establish there is a disproportionate disadvantageous effect on women, arising from the application of the PCP of wearing a particular garment and buttoning it up. She says that heat intolerances can be suffered by men and women and can arise from a number of conditions. In the absence of medical evidence, she submits, the tribunal has insufficient information upon which to make a finding.

62. We disagree. As an industrial jury we bring our life experiences to the evidence and findings. We are satisfied hot flushes are well recognised symptoms of the menopause, just as for example headaches, weakness and fatigue are symptoms of the flu. We do not think it necessary to have medical evidence to establish this. It is also the case that these physical manifestations of the menopause only apply to women.

63. We are satisfied from those facts that more women are likely to be affected by the wearing of such garments when fully buttoned than men. Albeit that will not be a substantial number of women, because it will only occur at a particular age and for a certain time during which those hormonal changes take effect, it is nevertheless sufficient to establish that women would be at a particular disadvantage in comparison to men. It is by no means insignificant. There is no evidence before the tribunal to suggest that there are other conditions which generate heat intolerances which are particular to men, which might offset that gender disadvantage.

64. We are satisfied that the claimant herself was subject to that disadvantage. It led her to raising the grievance in June 2020. She was suffering from hot flushes dizziness and discomfort at work on a frequent basis and undoing the top button was a way in which she could ventilate herself and reduce the body temperature. On 25 June 2020, by raising the curtain on her line, she sought to enhance the airflow to reduce the effect of any hot flushing. Had she not had to wear the overall or button it to the top she would not have been put at this disadvantage.

65. There is clearly a legitimate aim for the wearing of such overalls, which are manufactured to the appropriate standard. It is to avoid contamination of foods; buttons, bodily hair or other foreign bodies could contaminate the food product without such overalls and any loosening or unbuttoning of them would enhance the risk of such difficulties. The respondent has agreements with its clients that will ensure such safety standards are fully complied with.

66. The wearing of such overalls is appropriate to the aim as it minimises the risk of food contamination and adheres to food safety standards.

67. Was the application of the PCP a proportionate means of meeting the aim? What alternative measures could have been taken to avoid the PCP? The tribunal

must weigh the disadvantage to the claimant and to women generally against the disadvantage to the respondent of not applying the PCP. It was not practicable for the respondent to disapply the requirement to wear the overall fully buttoned and continue the process of packing the foodstuffs safely and to the standards required by their customers. That is plainly an important consideration in the balancing exercise.

68. The disadvantage to women and the claimant who suffer this particular problem is significant. It creates an uncomfortable working environment leading to dizziness and discomfort which interferes with the ability to do the job without frequent breaks.

69. In determining the question of proportionality, the respondent need not take every measure to avoid the disadvantage. It need do only that which is reasonably necessary.

70. We are satisfied that relatively modest additional steps would have reduced the disadvantage. We can see no reason why one of the four fans could have not been earmarked for the claimant whenever she was on shift. We recognise it was not possible to provide a fan for all, because of the difficulty with cabling, but there was no evidence any other of the staff had the same physical difficulties that the claimant had at this time. Had there been alternative competing demands, such as from people with disabilities, prioritising a fan for the claimant might have not been possible, but there was no evidence that was the case.

71. Furthermore, it appears Mr Scott was unaware of the particular difficulties the claimant was having. There was no good reason he should not have been informed of the claimant's entitlement to a fan as a priority. The unsatisfactory system of allocation on a first come first served basis left the claimant without one on 25 June 2020. Had these measures been put in place the unhappy confrontation which occurred that day, when she took other measures in an attempt to increase the ventilation to reduce her temperature, would have been avoided.

72. Miss Del Priore says that a fan was offered to the claimant on 25 June 2020 when Ms Cheney spoke to her. There is a dispute about that, but even if it were so, it was too late. The claimant had been enduring the problem for at least a fortnight after the 3 June meeting and when the additional fans were provided in the second week of June, one should have been identified for her use and all line managers and supervisors informed of that arrangement. We note that Mr Thompson was critical of the claimant for undoing her top button in the interview of the disciplinary matter concerning the language policy, as a means of emphasising her disrespect for the respondent's rules. When she explained why, he said the respondent had adequate fans and they could not have one per person because of it being a tripping hazard. It is regrettable that he was so dismissive. His suggestion that she could leave and have a drink of water belittled the concern.

73. However, none of this assists the claimant, because the PCP would still have been reasonably necessary. The alternative measures would not have avoided the imposition of the PCP. It might have been the case that an alternative PCP could

have been identified to argue an indirect sex discrimination claim, but it is not for the Tribunal to reopen this part of the case at this late stage. Our focus on the fans in this part of the analysis is because it was a matter both parties considered relevant.

Indirect race discrimination

The language policy on the factory floor

74. The language policy, to speak English in the workplace save when on breaks, was a provision applied by the respondent to all its staff.

75. The proportion of workers in the factory who did not speak English as a first language was about, or just short of, 50%. Ms Del Priore submits that the claimant cannot establish a disproportionate disadvantage, because a significant number of other workers would be similarly disadvantaged. We regard that submission as unsound.

76. The language policy would place those who did not speak English as a first language at a particular disadvantage to those who did. Although the respondent only recruited workers who could pass a test which demonstrated a certain level of understanding, that was of relatively basic skills and not at a level which was close to those who spoke English as their native tongue. Whilst some foreign workers may be able to understand and speak English perfectly, on the evidence we heard four witnesses of whom were from Eastern Europe, the majority would have greater difficulties in understanding and communicating in English in comparison to British workers. The fact the comparator group of the workforce who are British constituted 50%, does not defeat the necessary statutory test as Ms Del Priore suggested. The case law makes it clear that it is necessary to focus upon the hurdle that places the group with the protected characteristic at a particular disadvantage to answer who the comparator is. The troublesome task of assessing a pool for comparison is less problematic under the more recent language of section 19 of the EqA and the answer in this case is clear. The comparator group of native English speakers emerges from the obstacle of not being able to use one's native language to communicate.

77. We are satisfied that the claimant was placed at this disadvantage. Miss Del Priore submitted that the claimant had a good command of English and was not disadvantaged. She drew attention to the tests the claimant had passed both on recruitment and in training. She also relied upon the minutes of meetings at which the claimant was demonstrated to have answered the questions put to her.

78. We accepted the evidence of the claimant and some of the witnesses she called that she did not have the level of understanding of English that the respondent suggested. She undoubtedly had developed a working knowledge of the language such as to be able to get by at work. However the claimant relied upon her daughter to assist her in reading letters from work and in composing written documentation for grievances. A particular disadvantage which the claimant and her European colleagues shared was the inability to converse naturally, in one's native tongue and to share that enjoyment with others. Although the policy is designed in part to remove segregation, it excluded those who did not have a very good level of English from some discussions held by their British counterparts. In other words although it

sought to remove segregation it could create an unintended feeling of alienation for those whose native language was not the common one.

79. The written policy set out its purposes:

a. To ensure that everyone concerned understands what they must and must not do at work and to comply with health and safety standards;
b. For managers and supervisors to communicate effectively to staff and agency workers when giving work instructions and when communicating company policies and standards;
c. To avoid segregation of the workforce into non-UK nationalities; workers of other nationalities feeling excluded;
d. To avoid misunderstandings.

80. Those are legitimate aims. They are recognised in the Code of Practice of the Equality and Human Right Commission, para 17.47. The respondent had not applied a blanket policy, insofar as it did not extend to work breaks, reflecting the danger identified in the code at paragraph 17.48 of the perils posed by indirect discrimination.

81. In respect of the claimant's complaint that she was generally placed at a disadvantage by the policy, we recognise the partial dangers of alienation to non-native speakers, to which we have referred above, but consider a greater level of segregation could arise without a common language in the workplace. The arguments put forward by the claimant for a loosening of the policy faced difficulties in practice. She suggested when no English workers were in the vicinity, no real objection could be made to speaking other languages. The difficulty with this is that it would rely upon the workers to exercise judgement on each occasion. This would be fraught with difficulties. English workers could arrive on the scene when a conversation in a foreign language was being used. Without continued use of the same common language, the switching of one language to the other would run the risk of unintended lapses becoming commonplace.

82. We are satisfied that it was reasonably necessary for the respondent to impose the PCP on the factory floor to achieve the legitimate aims. The claimant has not advanced any convincing alternative measures which would satisfactorily obviate the disadvantage to her and the disadvantaged group whilst safeguarding the aim.

83. We do not accept that the dismissal of the claimant was indirectly discriminatory. An employer is entitled to utilise a variety of measures to ensure its policies are complied with. The way in which this respondent used its disciplinary policy to achieve this aim is one we have concerns about, as set out below in the complaint of unfair dismissal. However, that does not detract from the proportionality of applying the policy to meet the legitimate aim. In indirect discrimination complaints, the respondent must justify the application of the provision, criterion or practice, not the unfavourable treatment of the claimant which, by contrast, is necessary in some other discrimination claims such as direct age discrimination and discrimination arising from disability. That would be the effect of considering the dismissal as the particular disadvantage which the respondent needs to justify.

The language policy: speaking English in meetings

84. The written policy included a section heading, "*supportive meetings/hearings*". It stated that if support is required, particularly in disciplinary or grievance hearings, the line manager and/or HR should be informed and they may be able to arrange another colleague to support in translation.

85. The claimant was not offered the facility of an interpreter at any of the grievance or disciplinary interviews or meetings until 30 July 2020. Prior to that time the practice was to conduct the proceedings in English and only to allow a colleague to attend if requested.

86. On 30 September 2019, when the claimant was interviewed about a day's unauthorised absence, she requested to be accompanied by her daughter, who is fluent in Latvian, Russian and English to interpret for her. That was refused. The claimant did not repeat the request but on some occasions was accompanied by a work colleague. Their English was not of the standard which the claimant felt necessary.

87. We are satisfied that this practice placed those of Latvian nationality and/or those who did not speak English as a native language at a particular disadvantage. The significance of the outcome of any disciplinary investigation necessitated a full understanding of all that was said. Grievances required a level of communication which was full and comprehensive, so that the employer was able to appreciate the concerns raised and the employees had trust and faith in the outcome. Although the claimant could get by on the factory floor with the English she had picked up, that was not sufficiently sophisticated to manage discipline and grievance meetings. The disadvantaged group, as well as the claimant, would feel uncomfortable and insecure, for fear of not appreciating the full meaning and importance of all that was said, fear of not being able to participate adequately and completely in the discussions, and a fear of misunderstandings with potentially serious consequences.

88. We are not satisfied that the application of this practice to meetings was relevant, or appropriate, to the legitimate aims described. Whilst it was of importance that instructions and discussions on the factory floor were safeguarded from any risk of misunderstanding by the use of a common language as well as the avoidance of segregation, the same problems did not arise for meetings. No problem of misunderstanding could arise in a meeting with an interpreter present and there could be no concern about workplace segregation. The only misunderstanding might be that of the foreign national employee. As emphasised in **Homer v Chief Constable of West Yorkshire** to justify indirect discrimination the means to achieve the aim must be both appropriate to the aim as well as proportionate. It was not appropriate to the aim.

89. In any event we are not satisfied that it was reasonably necessary to achieve any alleged aim to require only the use of English in formal meetings. The disadvantage to the group with the protected characteristic is significant, for the reasons set out above. The cost to the respondent of facilitating an interpreter was

the only real disadvantage to the respondent. Interpreters can be arranged with access on the telephone as happened at the last disciplinary and appeal meetings.

90. The respondent has not justified the PCP of using only English at meetings. This disadvantaged the claimant at the disciplinary meetings on 30 September 2019, 10 October 2019, and 25 October 2019. We are unable to say that the claimant would not have received a final written warning or found to have misconducted herself, because she did not identify anything in the hearing before the tribunal which she would have said differently. That said, the outcome was surprising, that the claimant was found to have lied about an illness of diarrhoea when she had no obvious motive to be absent from work because the dental appointment had been cancelled. We are satisfied there was nevertheless a disadvantage by way of the insecurity and fear of misunderstanding which we have described. The claimant was similarly disadvantaged at the grievance meeting with Ms Sommerville 7 July 2020 and the disciplinary investigation meeting on the 23 July 2020.

91. In submissions Miss Del Priore said that the complaint would only arise if the claimant requested an interpreter and she had not done so until July when an interpreter was provided. This was not how the PCP was identified at the preliminary hearing. The claimant did not ask repeatedly for an interpreter because one had been refused in 2019 and so the claimant had the reasonable expectation that any request would be pointless.

92. The practice of holding meetings only in English was one which continued until the disciplinary hearing on 30 July 2020. We are satisfied that amounted to a state of affairs or policy of continuing conduct for the purpose of section 123 (3)(a) of the EqA. These were not separate events, but fell under the umbrella of the same policy. All such claims are in time because the last was within three months of the presentation of the claim.

93. Had that not been the case, we would have held that the complaints concerning the disciplinary allegations in October 2019 had been presented within a period which was just and equitable. The claimant had not brought proceedings by 21 January 2020 because she was still in employment and feared any repercussion of doing so. She was also suffering from stress for which she had had time off work. We are prepared to assume the claimant knew about her rights and time limits, but the pressure not to litigate was understandable. The length of the delay, which would have been 8.5 months, has not adversely affected the cogency of the evidence in any significant way, which is largely accepted, save for a challenge to the claimant's command of English, which arose as much to the events which were more recent in any event. The records of the meetings were before the tribunal. The respondent would have lost the windfall defence of a time limit, but we would have regarded it as just and equitable having regard to the comparative disadvantages and balance of hardship.

Dismissal – unfair and direct discrimination

Unfair dismissal

94. The reason for the dismissal related to conduct. Mrs Beharall was satisfied from the claimant's admissions that she had not complied with the language policy of the respondent by speaking in languages other than English in the workplace. On the appeal Mr Ramsay formed the same view.

95. The conclusion that there had been misconduct was reasonable on the admissions themselves, insofar as breach of a policy is a shortcoming with respect to a particular standard of behaviour; but the question for the Tribunal, under section 98(4), is whether the respondent acted reasonably or unreasonably in treating the misconduct as a sufficient reason, in all the circumstances of the case including having regard to its size and administrative resources, for dismissing the claimant. The sufficiency of the reason for dismissal necessitates an evaluation of the nature and quality of the misconduct. Even though the claimant had an extant final written warning, a reasonable employer would be unlikely to terminate the employment of an employee of ten years' service if the breach, or breaches, of a policy were trivial or not of particular significance, by which we mean had not given rise to any problem or concern. The hallowed principles in BHS v Burchell must be applied in that context.

96. We are not satisfied that there was a reasonable investigation. Mrs Beharall received the investigative interview conducted by Mr Thompson, but no other papers save for those in respect of the final written warning and letter of concern. She based her decision on what the claimant said to Mr Thompson in that interview and what she said in the disciplinary hearing. She summarised this at paragraph 12 of her witness statement: "*Albina had admitted that she occasionally speaks languages other than English on the factory floor. During the disciplinary hearing I did not feel that Albina had provided a satisfactory explanation for doing so. More specifically, Albina suggested that part of the reason for doing this was because she did not agree with the policy. Albina admitted she felt the policy should change during our meeting. Albina also admitted that she could not guarantee that she will not breach the policy in the future*". We would add that, although the claimant had said in both interviews the she disagreed with the policy, she sought to explain that this was due to a feeling of alienation and fear which had developed amongst those whose first language was not English, something she felt the respondent ought to be aware of. She did not say she would not comply with the policy, but rather she would try to comply with it.

97. From the notes of the disciplinary hearing, it is apparent that Mrs Beharall believed there had been multiple complaints about the claimant speaking in a foreign language. Apart from the letter of concern of 10 February 2017, there was no information that the claimant's behaviour in this regard had been an issue for her colleagues or supervisors. The letter of invitation to the investigatory meeting stated that "*further allegations of misconduct made against you*" had been made in respect of the effective communications policy. During that interview the claimant had asked to see the complaints of those who had reported her. Mr Thompson told her she would receive investigation notes if the matter went further.

98. The impression portrayed to the claimant and the disciplinary officer was that allegations had been made against the claimant about breaches of the effective communications policy which the human resources department had then investigated. That was not the case. The perception Mrs Beharall had of the gravity of the claimant's misconduct must, inevitably, have been influenced by her mistaken belief that her behaviour in the workplace had led a number of others to regard it as of sufficient concern to raise it as such.

99. The claimant had asked to see any complaints but not received them (not surprisingly, because they did not exist). Given the perilous situation the claimant faced, of losing her job after 10 years' service, we would have expected any reasonable disciplining officer to have required sight of the multiple reports of her transgressions of the effective communication policy and have disclosed those to the claimant. No less would be required by the ACAS Code of Practice. In the absence of such complaints, Mrs Beharall had a limited quantity of material upon which to assess the gravity of the misconduct. We would have expected her to make enquiries of the claimant's supervisors and others who worked with her to assess the extent of the breaches of policy and whether they were material and significant.

100. That is not to say the tribunal condones employees selecting which policies, are parts of policies, they should comply with. A reasonable employer could properly regard these matters as of concern because, short of a promise or guarantee, future failures to comply with company rules could jeopardise the working relationship. However, within the armoury of sanctions available short of dismissal, a reasonable employer would evaluate any deterrents against the significance of the misconduct. It is the failure to investigate the impact and gravity of the past transgressions which fell short, leaving Mrs Beharrel with an incomplete picture to address the proper sanction in the circumstances. She had taken the hearing on with only one day's notice because of the untimely death of the factory manager. She had no experience of conducting such hearings and the claimant had been keen to proceed. Nevertheless, a reasonable employer would have recognised that it was its responsibility to ensure the hearing was fair. The paperwork was insufficient and further information was required before any proper considerations could proceed.

101. Had Mrs Beharall made those enquiries she would have discovered there had not been multiple reports of the claimant having spoken in foreign languages. She would have discovered that others who had behaved similarly had not been disciplined. The claimant's admissions could reasonably have led Mrs Beharall to the view that the claimant had spoken to her European colleagues in other languages when they had not been overheard, save for on 25 June, but not that it had troubled her English colleagues in any way. All that was necessary to determine whether dismissal was the suitable sanction for the misconduct.

102. Why and how the claimant came to be disciplined is unclear. Mr Ramsay said in his evidence it was unusual and he thought it must have been initiated by the human resources department. The inference is that one of the human resources advisors made the decision to launch a disciplinary enquiry having read Ms Sommerville's grievance investigation. On 25 June 2020, after the animated exchange between the claimant and Mr Scott because he had pulled down the curtain on her line, Mr Scott and Ms Caulfield recounted events which included

overhearing a conversation which was not in English. Mr Scott said it lasted for 5 or 10 seconds. Ms Caulfield said she had overheard the claimant speaking to Jurgita, her colleague, in a foreign language when she went to the approach supervisor. Jurgita had said she and the claimant had spoken to each other in a language other than English from time to time when they were alone, although not then.

103. In her evidence, Ms Sommerville said that she did not think there was any proof the claimant had broken a rule or that anything came of it. Ms Sommerville was not aware that the claimant had been disciplined for it. She said that there was no complaint about the discussion which was not in English. She had not raised any concern about it. The grievance she had investigated was of the claimant's complaint that Mr Scott had pulled down her screen which had hit her, told her to 'fuck off' when she was explaining why it had been repositioned, was inconsistent in allowing other colleagues to raise their screens and that her supervisor, Kay Cheney, pulled her table aggressively and spoke to her in a high tone. A rather peculiar feature of Miss Sommerville's conclusion was that she had rejected the complaint about Mr Scott's profane remark because he and Ms Caulfield denied it happened. In the evidence before the tribunal it emerged that Mr Scott had not been asked about this, and so had not denied it in that investigation and Ms Caulfield said she had not heard any abusive language but she could not hear what was being said in the raised voices.

104. When the claimant became aware that Mr Scott had raised a grievance against her, she asked what had come of it. Mr Lewis Thompson, of the human resources department, stated that this had been investigated at the same time as the claimant's grievance, by Ms Sommerville. That was not correct. Ms Sommerville said she had only investigated the claimant's grievance. Mr Scott stated that he had raised a grievance, initially informally but subsequently in writing, because he had received no response to the informal complaint in early July. His grievance concerned the claimant having no respect for him and his having been met on two occasions with aggression. It did not relate to a breach of the effective communication policy. Mr Scott said he could not remember if he had received a response to this formal complaint. This was difficult to believe, given how pedantic Mr Scott was about the observance of policy and procedures.

105. This background raises more questions than answers as to what generated the disciplinary proceedings and at whose instigation. The claimant was misled about Mr Scott's complaint against her and how it had been addressed. She was misled into believing a number of allegations had been made by others about her in respect of a breach of effective communications policy. The respondent did not call either Mr Lewis Thompson or Mr Derek Thompson to clarify the mystery. In addition to the deficiencies in the investigation which we have addressed above, which fell outside that of a reasonable investigation, we consider these procedural defects tainted the fairness an employee could expect.

106. The claimant believes she had been singled out or penalised. She believed she was disliked by Mr Scott and Ms Caulfield and her witnesses supported her view of that to an extent. She had raised a number of concerns formally and informally about her line managers and supervisors, which took time to investigate and she suspected that had not made her popular.

107. We would not ordinarily expect a disciplinary investigation to spring from the investigation of a grievance, unless it was of a particularly serious nature such as concerning health and safety. Ironically, Mr Scott had disobeyed the allergen policy by entering the claimant's line, but action was only taken on this health and safety breach when the claimant drew attention to it and he received no formal disciplinary sanction.

108. Human resources advisers usually respond to complaints and advise upon them rather than initiate them. If the complaints were initiated by the human resources department, we would have expected the employee to be told of that and not led to believe the source of the concern had emanated from elsewhere.

109. The claimant had been informed by Mr Ramsay that she should not worry about losing her job following receipt of the letter of concern, shortly after it was issued in early 2017. The policy is couched in terms of encouraging employees to speak English and the memorandum requesting its observance makes no reference to disciplinary proceedings for disobeying it. Other employees had spoken in languages other than English but no disciplinary action had been initiated against them. Ms Cheney said the policy had been and continues to be breached. The claimant is the only who has been dismissed for a breach of the policy and there is no evidence of any formal disciplinary action has been taken against anyone else.

110. In the absence of any satisfactory explanation as to how the grievance was used as a platform to launch a disciplinary investigation and in the light of the above matters, we have drawn the inference that the claimant was unfairly singled out to be disciplined for the reason she explained.

111. It may be an unusual case in which an employee who has a final written warning and then is found to have breached a policy could successfully claim to have been unfairly dismissed. This case demonstrated a procedurally flawed use of disciplinary procedures and unfairly targeted an employee who had raised a grievance. We have not fallen into the trap of substituting our view. These actions fell outside any reasonable and acceptable range of responses. For these reasons we find the dismissal to have been unfair.

Direct race discrimination

112. Dismissal is a form of less favourable treatment than those who retain their employment. The question is whether the dismissal of the claimant was because of her race, namely her Latvian nationality.

113. The tribunal must determine why the respondent dismissed the claimant and whether it was consciously or subconsciously influenced by that protected characteristic. That involves an assessment of the mental processes of the decision makers, Mrs Beharall and Mr Ramsay.

114. We are satisfied that the reason for the dismissal was, to their minds, because the claimant had not complied with the policy and received a final written warning. That would not be a decision which related to the claimant's nationality. It is true that the claimant found herself in a position of having to speak in English, which was not

her first language, and that arose because she was Latvian. That is not sufficient. It is not the nationality, albeit something that is connected with it, that led to the dismissal. It is comparable to the case of **Onu v Akwiwu and Taiwo v Olaibge and another [2016] 1 WLR 2653**, in which the Supreme Court held that poor treatment of a worker because of her vulnerability arising from her immigration status was not sufficient to found a direct race discrimination claim.

115. The claimant suggested that Mr Scott was a comparator, as an English worker. He walked on to the line on which the claimant was working on 25 June 2020. There was a breach the health and safety standard because he had been working on an allergen line. He was advised of this breach and informed more serious action might be taken if it recurred. Whilst we have expressed concerns about why the grievance which disclosed this did not generate the same formal investigation to that initiated against the claimant, we do not find this to be a suitable comparison for the purposes of section 23 of EqA. Mr Scott was not on a final written warning and he had no other disciplinary warnings or letters of concern. There are no primary facts from which to infer that the decision to dismiss could have been because of the claimant's protected characteristic of race. The burden of proof under section 136 has not been discharged by the claimant.

Polkey

116. We are not satisfied that it is just and equitable to reduce the compensatory award on the grounds that, had there been no procedural errors, the claimant would or might have been dismissed in any event.

117. Firstly, because we have found the claimant was singled out for unfair disciplinary treatment. It follows that the respondent would have been unlikely to have responded by way of disciplinary proceedings to the references in the grievance, made in passing, to an occasion when the claimant spoke in a foreign language. We would have expected the respondent, as a reasonable employer, to address any concerns it had about shortcomings of behaviour this type with the workforce generally, for example by highlighting the need for compliance. Many policies are not complied with to the letter and oversights and occasional lapses accepted because they are not a real cause for concern. If it thought appropriate, the respondent could have adopted a zero tolerance policy, but fairness would demand that the workforce were informed that in advance. We agree with Mr Ramsay that someone would have to be first to be disciplined, but not in circumstances such as these and not before the staff are put on notice of the importance management place on complete adherence to the language rule.

118. Secondly, had Mrs Beharall undertaken further enquiries, it is likely she would have received the same answers to those given to the tribunal by Ms Sommerville, Mr Scott, Ms Caulfield and Ms Cheney. That would have revealed that they did not make any formal complaint about the events of 25 June 2020, in respect of the use of a foreign language. Mrs Beharall would have discovered the context within which that discussion took place, which was after a troublesome and emotional exchange with Mr Scott in circumstances in which, on our findings, greater consideration could have been given to assisting the claimant by provision of a fan and keeping Mr Scott abreast of the difficulties. The admissions about speaking in a foreign language

when no one else was present did not offend the purposes for which the policy was implemented. That and the claimant's attitude to the policy might have concerned the respondent, but we consider it unlikely that after a reasonable enquiry, the respondent would have reacted by dismissing the claimant.

Conduct

119. The admissions of the claimant that she had breached the policy and her expressions of disagreement with it did amount to conduct which contributed to the dismissal, albeit it was used disproportionately as is apparent from our findings. Nevertheless, it is just and equitable to recognise that by reduction in the compensatory award by 20%. A similar deduction in relation to the basic award in respect of the same conduct before the dismissal is just and equitable.

Remedy

Unfair dismissal

120. The claimant does not seek an order for re-engagement or re-instatement. The basic award is agreed at £3,531, that being 80% of £4,414.50 which comprises nine years' service being 9 weeks x gross pay of £327.50 x 1.5.

121. There is no issue in respect of mitigation of loss.

122. A pay slip has been produced which clarifies a lump sum payment which was made to the claimant on 13 August 2020 and that reflects 9 weeks of pay in lieu of notice. It follows that any losses of earnings commenced on 1 October 2020 after the expiration of that period. The claimant was out of work for six weeks, that would be 7 weeks losses of earnings between 1 October 2020 and 20 November 2020 at £284.61 which is £1,992.27. In addition, the claimant is awarded 39 weeks of pension loss which continued beyond her re-employment elsewhere at a differential rate of £7.92 per week which is therefore the additional sum of £308.88 and to that we add loss of statutory rights of £500. That is a sub total of £2,801.15.

123. The Tribunal has considered whether it is appropriate in this case to increase the compensatory award as a consequence of an unreasonable failure on the part of the respondent to comply with the ACAS code of practice pursuant to Section 207A of the Trade Union and Labour Relations Consolidation Act 1992.

124. Paragraph 5 of the ACAS code of practice on discipline and grievance procedures 2015 states: "*It is important to carry out necessary investigations of the potential disciplinary matters …. to establish the facts of the case*". On our findings the respondent failed to do that and this was part of the reason we found the dismissal to have been unfair. The respondent did comply with other aspects of the code which is essentially a procedural guide and that requires the holding of meetings, the right to accompaniment and the right to an appeal meeting. It can be seen therefore from our findings that the respondent complies with the code in many parts. Having regard to that, we consider it just and equitable to increase the compensatory award by 10% which is an additional £280.12 which would leave a

sub-total of £3,081.27 which we would then reduce by 20% because of the conduct, that is less £616.25, which means the compensatory award is £2,465.02.

125. The recoupment provisions apply because the claimant received Job Seekers Allowance. We calculate the prescribed element by deducting any sum which did not reflect losses of earnings, as adjusted, in the compensatory award which means deducting £440 which reflects the loss of statutory rights after adjusted for an increase in respect of the code and the deduction in respect of the claimant's conduct, which means the prescribed element is £2,025.02.

126. The total award for unfair dismissal of £5,996.02 exceeds the prescribed element by £3,971.00. The effect of that is that the respondent shall pay only the sum of £3,971.00 to the claimant, the balance of £2,025.02 shall be retained by the respondent pending any service of a certificate from the Secretary of State for recoupment of any state benefits. The respondent will then pay any balance to the claimant.

Discrimination

127. We have considered the declaration, which we have made, and the claimant does not seek a recommendation. Having considered those matters first, we now turn to the issue of compensation.

128. No financial losses have flowed from that unlawful act.

129. We are satisfied it is appropriate to award injury to feelings in this case and we have regard to Presidential Guidance. We accept the suggestion that the appropriate bracket will be that of 6 April 2020 albeit that some of the issues arose before then and some after. Those brackets are, lower bracket £900 to £9,000, middle bracket £9,000 to £27,000 and upper bracket £27,000 to £45,000. In the **Vento**, the Court of Appeal indicated that the lower bracket would be suitable for one off acts or less serious incidents, the upper bracket for continuing courses of conduct and very serious acts which had long standing consequences for the claimant and the middle bracket is to capture those cases which fall between the two.

130. A number of examples of indirect discriminated awards were referred to by Ms Del Priore and she suggested the appropriate award would be £5,000. Many of those awards are somewhat old, and those which are not often reflect a one-off event, but some cases are serious one-off events such as dismissal.

131. This is a case in which the claimant was significantly affected by the PCP of indirect discrimination in respect of speaking only English in meetings and she suffered in terms of her health after she lost her employment. She has produced a Fit to Work record. She was able to obtain employment by 20 November but has continued to suffer injured feelings which include a significant blow to her confidence. The proceedings have meant she has had to relive the experience. It is important to acknowledge the submission of Ms Del Priore that not all of those feelings of hurt can be attributed to the claim on which she has succeeded because as is apparent from her written address this morning she felt significantly alienated by the language policy on the shop floor, the indirect discrimination complaint on

which she has not succeeded, and we therefore have the difficult task of apportioning that part of her injury to the successful claim.

132. At meetings in 2019 and 2020 the claimant's confidence was knocked because she could not express herself through the medium of her native language in respect of the issue for which she received a final written warning and in respect of concerns about her work colleagues that she had expressed in grievances and, perhaps most significantly, in respect of the interview in the first part of the disciplinary process which led to her dismissal. These had a cumulative impact upon the claimant's confidence and wellbeing at work. We therefore consider that the award should be one which falls in the middle bracket, but to discount the injury to feelings to those claims which were not successful, the lower part of the bracket. It is not in the lowest bracket because this is not a one-off event or of comparable nature. The award we made is for £10,000. We must add interest at 8%. We consider it appropriate to take it from the 23 June 2021 which is one year so that will be a total sum of £10,800 for injury to feelings.

Deposit

133. In respect of the indirect discrimination claim concerning speaking English on the factory floor, a deposit order was made for substantially the same reasons we found in favour of the respondent. We order that the deposit of £100 be paid to the respondent.

Unanimous decision

116. All members of the tribunal agree on the above findings and conclusions.

Employment Judge D N Jones
Date: 23 July 2021

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