



EMPLOYMENT TRIBUNALS

Claimant: Ms D Eustace

Respondent: Nottingham Trent University

Heard : via Cloud Video Platform in the Midlands (East) region

On: 20, 21 and 22 September 2021

Before: Employment Judge Ayre (sitting alone)

Representatives:

Claimant: In person

Respondent: Mr M. McBride, solicitor

JUDGMENT

1. The claimant was unfairly dismissed by the respondent.
2. The claimant contributed to her dismissal through her conduct, and accordingly both the unfair dismissal and basic awards shall be reduced by 65% to reflect the claimant's contributory conduct.
3. The respondent is ordered to pay to the respondent a basic award of £176.40.
4. The respondent is also ordered to pay a compensatory award of £4,554.54.
5. The prescribed element of the award is: £3,286.16.
6. The prescribed period is the 14th May 2020 to the 14th October 2021.
7. The total amount of the award is: £4,730.94
8. The balance is £1,444.78.

REASONS

Background

1. The claimant was employed by the respondent as an Information Assistant working in its Boots' Library from 14 November 2017 until 14 May 2020 when she was dismissed with immediate effect.
2. On 27 July 2020, following a period of Early Conciliation which lasted from 26 June 2020 to 23 July 2020, the claimant brought a complaint of unfair dismissal. She alleges that the reason for her dismissal was a prohibited reason within either section 100(d) or 100(e) of the Employment Rights Act 1996 ("**the ERA**") and that the dismissal was unfair.
3. The respondent defends the claim. It says that the claimant was dismissed for a reason related to conduct, specifically her behaviour on 7 February 2020 towards students in the library, and that the dismissal was fair.
4. The case came before Employment Judge Rachel Broughton for a preliminary hearing on 20 October 2021 at which the issues in the claim were identified and case management orders were made.

The Proceedings

5. I heard evidence from the claimant and, on behalf of the respondent, from Ivan Hopkins, Head of Catering and Hospitality, who took the decision to dismiss the claimant, and David Eade, former Director of Employability, who heard the claimant's appeal.
6. There was an agreed bundle of documents running to 405 pages. At the start of the hearing the claimant suggested that there were additional relevant documents which had not been disclosed and which were not included in the bundle:-
 - a. CCTV footage of the incidents which the claimant believes is relevant but was not disclosed;
 - b. The claimant's original handwritten statement to the weekend supervisor in the library on 8th February 2020; and
 - c. The outcome of a separate investigation that had been carried out by the respondent into the behaviour of the students on the day in question, under its Student Code of Behaviour.
7. The respondent's position in relation to the documents referred to above, was that no other CCTV footage was available, the weekend supervisor had disposed of the original handwritten statement after she had written it up, and that the outcome of the investigation into the students' behaviour had been dealt with in a specific application for disclosure made by the claimant in February 2021.
8. I noted from the Tribunal file that Employment Judge Butler had considered the claimant's request for specific disclosure and decided to refuse it. I saw no reason to interfere with that decision. It remained open to the claimant to argue that the failure to disclose the student investigation report affected the fairness of her dismissal.

9. I was satisfied that a fair hearing was possible without the documents referred to by the claimant. In any event, I cannot order disclosure of documents which do not exist, and the respondent's solicitor assured me that they did not exist.
10. I was also, by agreement between the parties, played 5 clips of CCTV footage showing the incidents that took place on 7th February 2020. There was no sound on the CCTV footage. The CCTV footage was initially shown to me during the hearing by the respondent's representative turning his camera round. The size of the footage on the screen however meant that it was difficult to see the detail of what happened. By agreement therefore the respondent's representative sent the CCTV footage through after the end of the first day's hearing and I viewed it on a larger screen.
11. Mr McBride submitted written submissions on behalf of the respondent, for which I am grateful. There was no order for the preparation of written submissions, and the claimant gave her submissions orally.
12. During the hearing the claimant frequently became distressed. We took regular breaks to give her time to rest and recover.
13. I delivered judgment on the merits of the case after lunch on the third day of the hearing. The parties agreed that we should then go on to consider issues of remedy, and a remedy hearing took place on the afternoon of the third day. The claimant gave evidence under oath and was subject to cross-examination by Mr McBride. I considered the Schedule of Loss contained in the bundle together with accompanying documents [pp.31-41].

The Issues

14. The issues that fall to be decided at the hearing are as follows:-
 - a. What was the reason for the claimant's dismissal? The respondent says that the claimant was dismissed for a reason relating to her conduct, namely her behaviour towards students in the library on the afternoon of 7th February 2020. The claimant asserts that the real reason for her dismissal was that In circumstances of danger which she reasonably believed to be serious and imminent :-
 - i. and which she could not reasonably have been expected to avert, she left...or (while the danger persisted) refused to return to her place of work (section 100(d) of the Employment Rights Act 1996 ("**ERA**"); and / or
 - ii. she took (or proposed to take) appropriate steps to protect herself or other persons from the danger (section 100(e) ERA).
 - b. If conduct was the reason for dismissal, does the dismissal meet the tests set out in *British Home Stores v Burchell* [1978] IRLR 379, namely:-
 - i. Did the respondent genuinely believe that the claimant was guilty of misconduct?
 - ii. Did the respondent have reasonable grounds upon which to form that belief?

- iii. Did the respondent carry out as much investigation as was reasonable in the circumstances?
- c. Did the respondent follow a fair procedure in dismissing the claimant, taking into account the ACAS Code of Practice on Discipline and Grievances?
- d. Was the decision to dismiss within the range of reasonable responses?
- e. If the claimant was unfairly dismissed, what basic and compensatory awards should the respondent be ordered to pay, taking into account the claimant's mitigation and any Polkey reduction?
- f. Should the Tribunal reduce any compensatory and / or basic award to reflect the fact that the claimant caused or contributed to the dismissal?

Findings of Fact

15. The claimant was employed by the respondent as an Information Assistant. She worked in the Boots' Library on the respondent's City site, where her role involved providing support to students using the library facilities. The role was a customer facing one and the claimant was expected to provide a welcoming, supportive, customer focussed environment in line with the concept of 'gold standard customer service' [p.71].
16. The claimant's employment with the respondent started on 13 November 2017 [p.64].
17. On Friday 7th February 2020 the claimant was working in the library. Friday afternoon is a particularly busy time in the library, and the library was short staffed on the day in question. Between 5 pm and 6.30 pm there were three incidents that took place involving the claimant and students who were in the library.

Incident One

18. The claimant was working alone on the reception / information desk by the entrance to the library. A visitor to the library (**Student A**) approached the reception desk and asked to be allowed in. Student A was a student of the University of Nottingham, and was not one of the respondent's students. As part of an arrangement between the respondent and the University of Nottingham, University of Nottingham students were permitted to use the Boots Library. They were however required to provide photo ID as well as their library card when entering the library.
19. The claimant, quite rightly, asked Student A to show photo ID. Student A became angry and said that she had never previously been asked to show ID when entering the library. A statement that turned out to be untrue as Student A had visited the library two days' previously and shown photo ID.
20. There was then an altercation between Student A and the claimant during which both became upset and angry. Student A accused the claimant of

racism. She was on her mobile phone at the time and told the person on the end of the line to record the conversation and that she was going to make a complaint. She asked for the claimant's name, and the claimant showed her her identity card. Student A then attempted to take a photo of the card at which point the claimant grabbed the card back from Student A. Student A was rude, disrespectful and aggressive towards the claimant. The claimant felt threatened, but her actions did not help the situation.

21. The claimant tried to radio for help, as she was alone at the reception desk and her supervisor was not present. The radio did not work. Her colleague Halimah Ali arrived and tried to calm Student A down. Shortly afterwards another colleague, Lydia Harkus arrived. Lydia took the student away from the reception desk and told the claimant to leave the reception desk, which she did.
22. The whole incident lasted a few minutes. During the incident the claimant was also letting other students into and out of the library as she was the only member of staff behind the reception desk.
23. It was clear from the CCTV footage that the claimant was angry during the incident and that she did not deal with the situation as she should have done. At times she pointed at the student and at one point waved her finger in a circle by her forehead, indicating that she thought the student was 'missing a loop'. Her behaviour was not appropriate.

Incident Two

24. Shortly after 6pm on 7th February the claimant was in Room 005, the staff office on the ground floor of the library. One of the respondent's students (**Student B**) who was a friend of Student A, approached the door of the office. She asked for the claimant's name aggressively and the claimant felt threatened. After a short conversation the claimant left the room, walking past Student B. Student B shouted at the claimant words to the effect of 'she has hit me' and followed the claimant to the information desk on the opposite side of the library.
25. There was an altercation between the claimant and Student B in the library. At one point Student B went to walk away, and the claimant followed her and stood in front of her. Very quickly a number of other students surrounded the claimant, and it appears that Student B became very aggressive and confrontational towards the claimant, to the extent that Student B had to be restrained. The claimant's evidence, which I accept, was that she thought that Student B was going to hit her.
26. After a few seconds during which she was surrounded by students, the claimant walked away.

Incident Three

27. At approximately 6.21 pm the claimant left Room 005 and walked past a group of students, including Students A and B, who were sitting on sofas near the information desk. As she walked past the claimant briefly held up her mobile telephone and pointed it towards the students, as if she was filming or taking a photograph of them. In fact, she did not do so. One of

the students got up to follow the claimant and was restrained. The claimant then left the library and went home.

28. The claimant was clearly very distressed by the events of 7th February and had difficulty sleeping. She felt threatened by the students and this caused her considerable anxiety. At 2 am on the morning of the 8th February, she called the police to report the incident. She subsequently attended the police station on two occasions but chose not to press charges.
29. After incidents one and two the claimant wrote an email to her line manager, Amy Jackson, and others, setting out her version of events [pp.134-5]. She described Student A as being “*very rude and angry*”, raising her voice and wanting to make a complaint. She also said that she had felt herself becoming upset, asked the student to move away from the desk, and tried to call security on the radio. She described the situation as threatening and the student as ‘yelling’ at her. She said that she had left the desk and gone for a walk around the block whilst Halima covered reception.
30. She went on to say that as she was writing the email a friend of Student A, Student B, had come into the office and refused to leave, grabbed the claimant’s name tab and said she was going to file a complaint. The claimant also wrote that she had asked Student B to leave the office, which she had refused to do, and had instead started shouting at the claimant. The claimant said that she had left the office because she was being threatened, and that Student B had then called her a “*psycho*”.
31. Lydia Harkus also sent an email, on the evening of 7th February, describing what she had seen [pp.137-8]. She said that she had been told by Katherine that a student was shouting at the claimant, and that when she (Lydia) arrived at the reception desk Student A “*was very angry and shouting*” and the claimant was “*in a temper*”. She told the claimant to leave the reception desk so that she could diffuse the situation. As the claimant walked away she shouted ‘good’ when Student A said that she would be making a complaint.
32. Lydia then wrote that, later that evening she had seen the claimant walk past the students at they were sitting on the sofa, with her phone in her hand, looking like she was taking pictures. One of the students “*was made extremely angry for this, and got up to follow Deborah.*” Lydia stopped the student from following the claimant.
33. Layla Jones set out her observations in an email sent on the evening of 7th February [p.139]. She described the claimant as being “*clearly shaken*” and “*frightened that the students in question would be waiting outside for her*”. She also described a group of about 5 students as “*squaring up to Deborah and were shouting, threatening and surrounding her...not only were the students threatening to call the police on Deborah, they were also allowed to stay in the building. They then threatened and shouted at Deborah as she left, as she had to walk past them to get out but Security didn’t help until after it was pointed out to them that they were threatening a staff member again.*”
34. Layla also commented in her email that: “*Staff were clearly shaken by this incident, but having the people involved be allowed to stay in the building after they had threatened violence to a staff member didn’t make the*

evening staff feel better about the whole situation. Also, to ensure staff safety, Security should have escorted the staff member to her taxi, so she could avoid being abused as she left".

35. Halimah Ali sent an email with her version of events on the same evening [p.140-1]. She described hearing "*some commotion*" from the reception desk, and that the claimant showed her pass to Student A after Student A demanded to know the claimant's name. She said that both the claimant and Student A were shouting at her trying to explain what had happened, and that the situation was heated. She wrote that "*The student was being loud towards Deborah but at the same time I think Deborah's reaction to the situation may have aggravated the student.*"
36. Halimah sent a further email on 10th February [p.140] in which she stated that Student B had approached her and asked "*where is this staff member that was rude, I need to have a word with her*". Having reflected, Ali felt that Student B was seeking the claimant out.
37. On Saturday 8th February the claimant went back into the library and met with Helen Schoppler, who was the weekend supervisor in the library. She wrote a handwritten report of what had happened. That handwritten report was no longer available and was not produced in evidence at the Tribunal hearing. Ms Schoppler produced a typed email of her notes with her discussion with the claimant on 8th February. She sent that email on 8th February to several colleagues, but not to the claimant. It was not until 25th February that Ms Schoppler forwarded the email to the claimant [p.220] with an apology for not including her in the original email.
38. The claimant was signed off by her GP as unfit to work on Monday 10th February and did not return to work at any time prior to the termination of her employment.
39. The two students who were involved in the incident submitted written complaints about the claimant's behaviour on 7th February [pp.131 - 133]. They also reported the claimant to the police. There was no evidence before me of any charges being pressed against the claimant because of the students' complaints.
40. On 13th February Hannah Luetkemeier, Business Development Team Manager, was appointed as Investigation Officer and asked to carry out an investigation into the events of 7th February. She was asked to investigate three allegations against the claimant: -
 - a. Serious disorderly conduct and failure to conduct herself with integrity and professionalism, specifically, that at approximately 5pm on 7th February whilst on the Boots Library reception, she had an altercation with a visitor to the library during which she raised her voice and made offensive and inappropriate remarks and gestures; and that at approximately 6pm on the same day, she had an altercation with one of the respondent's students during which she was aggressive and confrontational.
 - b. Breach of the respondent's Equality, Diversity and Inclusion Policy in relation to the above incidents, which were perceived to be racially and religiously motivated.

- c. Serious breach of the respondent's Data Breach Policy by taking a photo or video of the student and / or the visitor to the library; and using library systems to access personal data of the students in order to pass these details to the police.
41. Lucy Steel provided HR support to Ms Luetkemeier during the investigation process.
42. As part of the investigation, Ms Luetkemeier considered 'eyewitness accounts' provided by 6 colleagues of the claimant who had been in the library on 7th February: Lydia Harkus, Layla Jones, Halimah Ali, Matt Keyworth, Katherine Rodriguez and Andrew Lawton-Collins. She also viewed the CCTV footage.
43. On 21 February Ms Luetkemeier wrote to the claimant outlining the allegations against her and inviting her to attend an investigation meeting on 28th February [pp. 251-252]. The meeting was subsequently postponed, at the claimant's request, to 6th March, due to the unavailability of the claimant's trade union representative.
44. The claimant attended an investigation meeting with Ms Luetkemeier on 6th March at 2pm. She was accompanied at that meeting by Stuart McAdam, a representation from Unison. [pp.152-170]. During the meeting, which lasted more than two hours, the claimant told Ms Luetkemeier her recollection of events, and mentioned that during incident one, Student A had suggested that the claimant was "*being racist*". She told Ms Luetkemeier that she was alone on reception when incident one had taken place and that the radio didn't work when she tried to call for help.
45. Ms Luetkemeier offered the claimant the opportunity to view the CCTV footage, but the claimant said she didn't want to see it. The claimant's trade union representative did however view the footage. The claimant did not watch the CCTV footage (other than in the police station) until 2nd June, when she viewed it with Lucy Steel from the respondent's HR department.
46. Ms Luetkemeier also interviewed three of the claimant's colleagues, Halimah Ali, Andrew Lawton-Collins and Lydia Harkus. She asked questions of Julie Partridge [pp.192-3]
47. On 19 March the claimant asked for the investigation process to be put on hold due to her ill health, and it was agreed that the investigation would be paused for 14 days.
48. After conducting her investigation Ms Luetkemeier issued her report. In summary, she found that there was significant evidence to support the first allegation against the claimant, but insufficient evidence to support the second and third allegations. She recommended that a disciplinary hearing should take place.
49. She also recommended that the respondent consider nominating an acting supervisor where the substantive supervisor is absent from work and providing guidance to staff on how to provide their names when asked for them by students and visitors.

50. A separate investigation into the students' behaviour on the day in question was carried out by Mike Berrington, Deputy University Librarian. There was no evidence before me as to what Mr Berrington's conclusions were. Both Mr Hopkins and Mr Eade told me that they were not involved in the investigation into the students' behaviour and did not know the findings or conclusions of that investigation.
51. Following the conclusion of the disciplinary investigation, Mr Hopkins was appointed as the disciplinary hearer. On 4 May he wrote to the claimant inviting her to a disciplinary hearing via Skype on 12th May. The letter that Mr Hopkins sent to the claimant [pp 276-277] stated that there were three allegations for consideration at the disciplinary hearing: -
- a. Serious disorderly conduct and failure to conduct herself with integrity and professionalism;
 - b. Breach of the university's Equality, Diversity and Inclusion policy regarding the "*malicious, unlawful or deliberate discrimination, harassment or bullying of a student and/or visitor to the University*"; and
 - c. Serious breach of the Data Breach Policy.
52. Even though the second and third allegations above had effectively been 'dropped' by the Investigating Officer, Ms Leutkemeier, they were still included in the disciplinary invite letter. In evidence, when asked why they had been included, Mr Hopkins accepted that they had already been dropped and could have been taken out. There was no good reason why they were included.
53. The disciplinary hearing took place on 12 May 2020 [pp.278 – 298] and lasted for over two hours. Mr Hopkins chaired the meeting and was accompanied by an HR advisor and a note taker. The claimant was accompanied by Stuart McAdam from Unison.
54. During the disciplinary hearing Mr Hopkins asked the claimant about the incidents. The notes of the hearing [p.284] suggest that he had already formed a view as to the claimant's conduct as he commented, relatively early in the meeting that "*it's clear that you demonstrate extremely negative, unprofessional behaviour*" and that the claimant's manner was "*exactly what*" Student A said.
55. Mr McAdam told Mr Hopkins that "*we all behave differently under stress, Deborah has had psychiatric trauma from this, this has triggered it and the way she behaved was different to normal circumstances or reactions*".
56. Mr Hopkins then put to the claimant some of the evidence given by her colleagues [p. 290]. It appears from the notes of the meeting that his focus, and the evidence put to the claimant, was evidence that was not favourable to her. He was selective in the extracts that he referred to and mentioned only those comments that referred to the claimant's behaviour, without referring to the behaviour of the students, which was an important part of the evidence.
57. He does not appear to have taken account of the behaviour of the students towards the claimant. When the claimant told Mr Hopkins that there were women pushing her and calling her "*a stupid bitch*", Mr Hopkin's response

was “*I understand it was a tense situation*” but that he was concerned about the claimant’s behaviour.

58. It appeared, from both the documentary evidence in the bundle and the oral evidence during the hearing, that Mr Hopkins did not truly appreciate the situation that the claimant found herself in. He did not demonstrate any empathy towards the claimant, nor did he take account of the behaviour of the students. When the claimant told him that she was in shock, that Student A was screaming at her, and that she felt threatened, Mr Hopkin’s response was “*the student behaviour is being dealt with separately. I am saying to you that the things you said don’t seem appropriate...*”
59. At the end of the disciplinary hearing Helen Russell from HR asked the claimant: “would you do anything differently?”. The claimant’s response was: “*Of course...I would have, now having been given the opportunity and asked why I didn’t remove myself...yeah if I had known that I could remove myself from the desk and leave it unattended, I would have got out of there like a shot, I would have ran...*”
60. After the disciplinary hearing Mr Hopkins decided to dismiss the claimant without notice or payment in lieu of notice. He wrote to her on 13 May informing her of his decision [pp.299-302]. In his letter he described the claimant as neglecting to conduct herself in a professional and calm manner and demonstrating “*negative behaviour and conduct from the outset*”. He referred to the claimant as “*antagonistic and inappropriate*” and “*deeply unprofessional*”.
61. Mr Hopkins also concluded, despite the comments of the claimant during the disciplinary hearing that ‘of course’ she would do things differently, that she had failed to express any indication of remorse.
62. Mr Hopkins concluded that the claimant’s behaviour was “*wholly unacceptable conduct*” and that there was no trust or confidence that the claimant would not demonstrate similar conduct in the future.
63. This was the first time during the course of her employment that the claimant had been subject to a formal disciplinary process, and there were no formal disciplinary warnings on her record.
64. The claimant appealed against the decision to dismiss her [pp 303-326]. In her very detailed grounds of appeal the claimant stated, amongst other things, that during the investigation she had referred to an apology she had given to a colleague, and to having expressed regret at not being able to cope with the situation. She wrote that she believed the ‘attack’ on her was racially and religiously motivated referred to the impact that the incidents had had on her.
65. David Eade, Director of Employability, was appointed as appeal hearer, and the appeal hearing was held on 19 June [pp.345-361]. The claimant was accompanied at the appeal hearing by her trade union representative Stuart McAdam. The appeal hearing was lengthy and detailed, lasting almost two hours. The claimant had the opportunity to put forward her case in some detail.

66. After the appeal hearing Mr Eade wrote to the claimant to inform her of his decision [pp.362-3]. He did not uphold the claimant's appeal, although he did comment in the appeal outcome letter that: *"This was clearly an emotionally charged series of events that continue to cause you considerable upset. I was concerned that you had been placed into a situation that you were not able to deal with due to a lack of experience or training...However, I am satisfied that this was not the case..."*
67. Mr Eade concluded that *"I can find no substantial errors in procedure, nor do I consider the penalty disproportionate and the decision made by the Disciplinary Manager was reasonable in the circumstances."*
68. The respondent's disciplinary procedure contains a non-exhaustive list of examples of unacceptable behaviour. [p.122]. Under the heading 'misconduct' some of the examples given are *"not treating colleagues, students and customers / clients of the University with dignity and respect"; 'improper conduct which may bring the University into disrepute' and "disruptive behaviour"*.
69. Gross misconduct includes *"Serious disorderly conduct – violent, abusive or indecent behaviour"*. Mr Eade, in his evidence to the Tribunal, when asked which of the categories of gross misconduct he considered the claimant's behaviour fell into, referred to serious disorderly conduct. The examples of serious disorderly conduct in the disciplinary procedure are violent, abusive and indecent behaviour. There was no suggestion in either the dismissal letter or the appeal outcome that the claimant's behaviour during the incidents was either violent, abusive or indecent.
70. The claimant's version of events was, at times, not supported by the CCTV footage. Having heard the claimant's evidence during the hearing I am satisfied that she was genuinely confused by events. The incidents of 7th February clearly caused the claimant a great deal of distress, to the extent that more than 18 months after they happened, the claimant broke down regularly when talking about them. I do not believe that the claimant was deliberately misleading during her evidence.

Evidence on remedy

71. At the time of her dismissal the claimant was aged 49 and had two complete years' service with the respondent.
72. Whilst employed by the respondent the claimant earned a gross salary of £8,755.70 pa. Her gross weekly earnings with the respondent were £168 and her net weekly earnings were £123. The respondent contributed 5.5% of her gross earnings into a pension, giving a weekly employer pension contribution of £9.24.
73. There were 71 weeks between the date of dismissal and the date of the hearing.
74. The claimant worked 20 hours a week for the respondent, and also worked for Leicester City Council as a teacher in an Adult Learning Centre. Whilst employed by the respondent she worked 23.5 hours a week for the Adult Learning Centre. She reduced her hours after her dismissal to 5 hours a week, and from September 2021 has increased them to 15 hours a week.

75. The claimant has been unwell since her dismissal and was advised by her GP and her counsellor to take some time off work. Despite this she has made attempts to find alternative employment by applying for other jobs. She undertook a training course between October and December 2020 and in May 2021 set up her own business.
76. She has not yet earned any income from her new business. She worked for five days for Express Recruitment Limited and earned £264.31 net in respect of that period of employment.
77. She has received universal credit totalling £2,934.51 since she was dismissed.

The Relevant Law

78. Section 98 of the Employment Rights Act 1996 (“the ERA”) provides that :-

“(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 as 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 with the employee held...

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

(b) relates to the conduct of the employee

(4) 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.”

79. In a case in which the respondent relies on conduct as the potentially fair reason for dismissal, the Tribunal must consider the tests set out in the leading case of *British Home Stores v Burchell* [1978] IRLR 379, namely:-
- i. Did the respondent genuinely believe that the claimant was guilty of misconduct?
 - ii. Did the respondent have reasonable grounds upon which to form that belief? and
 - iii. Did the respondent carry out as much investigation as was reasonable in the circumstances?

80. The Tribunal must also consider the procedure followed by the respondent, including whether it complies with the ACAS Code of Practice on Disciplinary and Grievance Procedures.
81. 61. Finally, the Tribunal should consider whether dismissal is within the range of reasonable responses, taking care not to substitute its view on the appropriateness of the disciplinary sanction applied for that of the employer (*Iceland Frozen Foods Ltd v Jones* [1982] IRLR 439). In deciding whether dismissal is within the range of reasonable responses, the Tribunal must focus on the employer's conduct rather than any injustice to the employee, although the interests of the employee can of course be taken into account.
82. The range of reasonable responses test applies to the investigation process, to the employer's belief in the employee's guilt of misconduct, and to the appropriateness of dismissal as a sanction (*Sainsbury's Supermarkets Ltd v Hitt* [2003] IRLR 23).
83. Section 100 of the ERA contains the following provisions:-
- (1) *An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed of the reason (or, if more than one, the principal reason) for the dismissal is that – ...*
- (d) *in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work, or*
- (e) *in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger."*
84. Where a Tribunal finds that a claimant has been unfairly dismissed, the respondent can be ordered to pay a basic award and a compensatory award to the claimant. Sections 119 to 122 of the ERA contain the rules governing the calculation of a basic award and include, at section 122(2) the power to reduce a basic award to take account of contributory conduct on the part of a claimant:-
- "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, the tribunal shall reduce or further reduce that amount accordingly. "*
85. The rules on compensatory awards are set out in sections 123 and 124 of the ERA and include, at section 123(6) the following:-
- "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."*

86. The leading case on contributory conduct is *Nelson v BBC (No.2) 1980 ICR 110* in which the Court of Appeal held that, for a Tribunal to make a finding of contributory conduct, three factors must be present:-
- a. There must be conduct which is culpable or blameworthy;
 - b. The conduct in question must have caused or contributed to the dismissal; and
 - c. It must be just and equitable to reduce the award by the proportion specified.
87. 'Culpable or blameworthy' conduct can include conduct which is 'perverse or foolish', 'bloody-minded' or merely 'unreasonable in all the circumstances' (*Nelson v BBC (No.2)*)
88. The Employment Protection (Recoupment of Benefits) Regulations 1996 SI 1996/2349 ("**the Recoupment Regulations**") apply to compensatory awards covering immediate loss in unfair dismissal claims and set out the duties of Employment Tribunals where they apply.

Conclusions

Reason for dismissal

89. I am satisfied that the reason for dismissal in this case was the conduct of the claimant, and specifically her behaviour in the library on 7th February. All of the evidence before me, including in particular the evidence of Mr Hopkins, who took the decision to dismiss, and Mr Eade, the appeal hearer, points to misconduct being the reason for dismissal. The respondent has discharged the burden of proving a potentially fair reason for dismissal.
90. I find that the claimant was not dismissed for a reason under section 100(d) of the ERA. She was not dismissed for leaving her place of work on 7th February. On the contrary, she was instructed by her colleague Lydia Harkus to leave the reception desk during the first incident, and a colleague subsequently called a taxi to take the claimant home. Not only that, but both Mr Hopkins and Mr Eade were clear in their evidence that they believed the claimant could and should have de-escalated the situation by walking away from the students or removing herself from the library. If anything she was dismissed for not walking away or leaving her place of work.
91. I also find that the claimant was not dismissed for a reason falling within section 100(e) of the ERA. By pretending to take a photo or film on her telephone as she walked past the students when leaving the library, the claimant was not, in my view, taking appropriate steps to protect herself or others from the perceived danger. Rather her actions served to antagonise the situation and, if anything, to increase the danger to the claimant's safety as evidenced by the fact that one of the students got up to follow the claimant after witnessing the claimant's behaviour and had to be restrained.

Burchell test

92. I am satisfied, on the evidence before me, that Mr Hopkins held a genuine belief that the claimant was guilty of misconduct. That was clear not just from the letter of dismissal and the minutes of the disciplinary meeting, but also from Mr Hopkins' evidence to the Tribunal. It was evident that Mr

Hopkins genuinely believed that the claimant's behaviour amounted to misconduct, and that was the reason why he dismissed her.

93. I also find, on balance, that Mr Hopkins had reasonable grounds for forming that belief. I was concerned that Mr Hopkins appeared to form a view very early on in the disciplinary hearing that the students' version of events was correct, rather than the claimant's, and also that he did not have any information about the investigation into the students' conduct. However, but he also had before him the CCTV evidence and the detailed investigation notes. His role as disciplinary hearer was to weigh up the evidence before him and the belief that he formed was one which he was, in my view, entitled to reach.
94. The investigation that was carried out by the respondent was, I believe, a reasonable one. Ms Luetkemeier took time and care in investigating the issues and in interviewing relevant witnesses including the claimant. The investigation could have been more thorough if Ms Luetkemeier had interviewed the students, but she did consider their written statements and gave the claimant the opportunity to put forward her version of events. She appeared to approach the investigation with an open mind, and was not just looking for evidence of the claimant's guilt – as evidenced by the fact that she concluded that there was insufficient evidence to proceed with two out of the three allegations against the claimant. At the end of the investigation she produced a detailed and well-reasoned investigation report, which was shared with the claimant.
95. The claimant made much of the fact that Ms Shappler had, in her view, changed the claimant's handwritten statement when she typed it up. Even if this were the case then that alone did not render the investigation process unfair. I have reminded myself that the 'range of reasonable responses' test applies to the investigation and find that the investigation carried out by the respondent was within that range. The claimant was provided with Ms Shappler's typed version of her statement and had the opportunity to comment on it and point out any perceived inaccuracies.

Procedure

96. I accept that the procedure followed by the respondent in dismissing the claimant was a fair one. The claimant was told of the allegations against her and had the opportunity to put forward her version of events during the investigation, and again during the disciplinary and appeal hearings.
97. She was provided with the right to representation, which she took up, and she was accompanied at the disciplinary and appeal hearings by her trade union representative, who appears to have played an active part in the meetings.
98. In advance of the disciplinary hearing she was warned that one of the potential outcomes of the disciplinary process may be that she was dismissed. She was also provided with the evidence against her and both she and her representative had the chance to review and consider it before the hearing.
99. Both the disciplinary and appeal hearings were lengthy meetings during which the claimant and her representative had the opportunity to state their

case fully. There was an appeal conducted by a different manager who was not involved in the investigation or the decision to dismiss.

100. The failure to suspend the claimant does not render the dismissal procedurally unfair, as it is not a requirement of a fair procedure that an employee be suspended. It is however relevant to the question of whether the claimant's behaviour really amounted to gross misconduct.

101. I do have some concerns that no one involved in the investigation, disciplinary or appeal processes (including the claimant) was provided with the outcome of the investigation into the behaviour of the students, but that failing does not of itself render the dismissal procedurally unfair.

Was dismissal within the range of reasonable responses?

102. In considering this issue I have reminded myself not to step into the shoes of the employer and substitute my view for that taken by Mr Hopkins and, to a lesser degree by Mr Eade. Instead, I have focussed on the question 'was dismissal within the range of reasonable responses?' and have considered that question by looking at the evidence available to the respondent at the time it made its decision to dismiss.

103. What is striking to me in this case is what appears to be a lack of understanding or empathy for the situation that the claimant found herself in, or of proper consideration of the provocation by the students which was a significant mitigating factor. This was clearly a situation which caused the claimant a great deal of distress, and that she did not deal well with. It did not appear to cross the mind of either Mr Hopkins or Mr Eade that the claimant was quite simply overwhelmed by the situation, was out of her depth and therefore did not deal with the situation as well as she could have. There was no evidence before me of either of them considering that this might be a performance issue rather than a conduct one.

104. The claimant referred repeatedly to the absence of her supervisor, to being on her own on the reception desk during the first incident, and to being frightened. She was also clearly upset at having been accused of racism. Very little, if any, weight appears to have been placed on those factors by the decision makers.

105. The claimant's trade union representative Mr McAdam referred, during the disciplinary hearing, to the claimant having suffered 'psychiatric trauma' and having behaved out of the ordinary due to the stress of the situation. Colleagues of the claimant, whose evidence was before both the disciplinary and the appeal hearer, described the claimant as having been 'clearly shaken', 'frightened', and that the students had been 'shouting at the claimant, threatening her and surrounding her'. On two occasions a student had to be physically restrained. Despite this the students were allowed to remain in the library.

106. The focus of the disciplinary and appeal hearings was understandably on the claimant's behaviour, but very little if any account was taken of the behaviour of the students, which was a key contributing and mitigating factor in the events of that evening. Mr Hopkins appeared to

dismiss the claimant's comments about the absence of her supervisor, and Mr Eade concluded that the claimant had not been put in a situation that she could not deal with.

107. It is clear from the evidence before the disciplinary and appeal hearers that the claimant was distressed on 7th February and subsequently, that she did not know what to do, and that she felt threatened. It did not seem to occur to either Mr Hopkins or Mr Eade that the claimant may have responded as she did because she felt threatened – the flight or fight response.
108. Nor did they appear to properly consider the provocation to which she was subject, evidence of which was before them at the time. For example, Lydia Harkus [p, 137] *"a student was shouting at Deborah" "Both the student and Deborah was shouting at each other, and it was very clear that Deborah was in a temper". "I stopped the student from following Deborah".* Layla Jones' evidence was that: *"A group of about 5 students starting squaring up to Deborah and were shouting, threatening and surrounding her" "not only were the students threatening to call the police on Deborah, they were also allowed to stay in the building. They then threatened and shouted at Deborah as she left, as she had to walk past them to get out". "Staff were clearly shaken by this incident, but having the people involve be allowed to stay in the building after they had threatened violence to a staff member didn't make the evening staff feel better about the whole situation... Security should have escorted the staff member to her taxi..."*
109. In addition, the claimant's behaviour did not fall clearly into one of the categories of gross misconduct set out in the respondent's disciplinary policy, although I accept that the list in the disciplinary policy is not exhaustive. Mr Eade's evidence was that the claimant's behaviour fell into the "serious disorderly conduct" category, but there was no suggestion in either the dismissal letter or the appeal outcome that the claimant's behaviour during the incidents was violent, abusive or indecent – the types of behaviour with the respondent's own policy says amounts to serious disorderly conduct.
110. The claimant had, during the disciplinary hearing, shown some recognition that she would behave differently if the situation was to occur again. The respondent had not considered it necessary to suspend the claimant following the incident, although I do accept that this could have been in part because she called in sick.
111. This was the first time during her employment that the claimant had been subject to a formal disciplinary process, and there were no formal disciplinary warnings on her record.
112. In these circumstances, I find that no reasonable employer would have dismissed the claimant, and that dismissal was therefore outside the range of reasonable responses. For that reason, and that reason alone, the dismissal was unfair.

Contributory conduct

113. The Claimant was in my view guilty of culpable behaviour which contributed to the dismissal. She did not deal well with the incidents in the library. She became angry and argued with Student A, argued with Student B, did not walk away as quickly as she could have done and pretended to film or take a photograph of the students as she walked past them on her way out of the library.
114. She should not have behaved in this way, and it was both unreasonable and inappropriate for her to do so.
115. It is clear from the evidence that it was this behaviour that caused the respondent to dismiss her. I therefore find that the claimant contributed to her dismissal and that it would be just and equitable to reduce both the basic and the compensatory awards to reflect this.
116. The claimant's behaviour was a significant factor in her dismissal. It would, in my view, be just and equitable to make a 65% reduction in both the basic and the compensatory awards as a result.

Polkey

117. In light of my conclusions that the dismissal of the claimant was procedurally fair, I do not make any Polkey deductions.

Remedy

118. The claimant was aged 49 when her employment ended and had two complete years of continuous employment. Her gross weekly earnings were £168 to which a multiplier of 3 should be applied. Her potential basic award is therefore 3 x £168, which is £504.
119. This sum should be reduced by 65% to reflect the contributory conduct of the claimant, giving a basic award of **£176.40**.
120. The claimant's net weekly pay with the respondent was £123. The respondent made 5.5% pension contributions based upon her gross salary, so weekly employer pension contributions were £9.24 (168 x 0.055).
121. There were 71 weeks between the date of dismissal and the date of the final hearing. The claimant's loss of earnings from the respondent during this period was (71 x £123) £8,733. Her pension loss during the same period was (71 x £9.24) £656.04. Her total loss to the date of the hearing therefore was £9,389.04. From that loss must be deducted the claimant's net earnings of £264.31, giving a net loss to the date of the hearing of £9,124.73.
122. I have also decided to award six months' future loss of earnings and pension contributions, totalling £3,438.24 (26 weeks x £123 + 26 weeks x £9.24). This gives a total loss of earnings and pension contributions of £12,562.97 (9,124.73 + 3438.24). I have awarded six months' future loss because I consider it just and equitable to do so. Although the claimant told me that she had set up a new business, she has not yet received any earnings from that business.

123. The claimant also told me that, since leaving the respondent, she has reduced the number of hours that she works for another employer. It would not, in my view, be just and equitable to order the respondent to pay for the reduction in the claimant's earnings from another employer.
124. In addition to £12,562.97 for loss to the date of hearing and future loss, I award the claimant the sum of £450 in respect of loss of statutory rights.
125. The total compensatory award therefore is £13,012.97. I have reduced this sum by 65% to reflect the claimant's contributory conduct, giving a compensatory award of **£4,554.54**.
126. The Recoupment Regulations apply to the award, as the claimant received job seekers' allowance. The prescribed element of the award is £3,286.16. This is the amount of the award that relates to the period to the final hearing (£9,389.04 reduced by 65%)>
127. The prescribed period is the 14th May 2020 to the 14th October 2021.
128. The total amount of the award is: £4,730.94 (the total of the basic and compensatory awards).
129. The balance (ie the difference between the total awards and the prescribed element) is £1,444.78.

Employment Judge Ayre

14 October 2021