



EMPLOYMENT TRIBUNALS

Claimant: Mr G Henshall

Respondent: Wm Morrison Supermarkets Plc

Heard at: Leeds Tribunal Centre

On: 14, 15, 16, 17, 24 and 29 June 2022

Before: EJ Anderson

Representation

Claimant: In person

Respondent: Mr N Singer (Counsel)

RESERVED JUDGMENT

1. The claim of unfair dismissal is not well founded and is dismissed.
2. The claim for holiday pay is dismissed on withdrawal by the claimant before me

REASONS

Introduction

1. This was a claim brought by the claimant, Mr Henshall, against his former employer, Wm Morrison Supermarkets Plc. The claimant appeared in person. The respondent was represented by Mr Singer of counsel.

2. The respondent is a national supermarket chain. The claimant had been employed by the respondent for 20 years and was in the role of Market Street Manager at the time of his dismissal.
3. The claim is one of unfair dismissal. At a case management hearing on 26 October 2021, a potential failure to pay holiday pay was discussed. However, following discussion on the second day of the hearing, the claimant confirmed that he wished to withdraw the claim for holiday pay, explaining that any amount would be negligible. I subsequently dismissed that claim on withdrawal by the claimant.
4. Early conciliation started on 6 July 2021 and ended on 20 July 2021. The claim was presented on 17 August 2021.

Evidence

5. There was an agreed bundle of documents ultimately running to 829 pages. I also had a 60-page witness statement from the claimant and statements from the respondent's three witnesses Mr Barker (investigation officer), Mr Waterhouse (disciplinary officer) and Ms Hamilton (appeal officer).
6. I heard evidence over the course of five days. I considered lengthy written submissions as well as oral submissions from both parties on the sixth day.

The Claims and Issues

7. The matter was considered at a case management hearing on 26 October 2021, at which time the issues were identified and recorded as follows:
 1. *What was the reason or principal reason for dismissal? The respondent says the reason was conduct. The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.*
 - 1.2 *If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:*
 - 1.2.1 *there were reasonable grounds for that belief;*
 - 1.2.2 *at the time the belief was formed the respondent had carried out a reasonable investigation;*
 - 1.2.3 *the respondent otherwise acted in a procedurally fair manner;*
 - 1.2.4 *dismissal was within the range of reasonable responses.*
 - 1.3 *The claimant has helpfully set out at paragraph 4 of his agenda for today's hearing, 15 points of contention of alleged unfairness. The claimant had also set out 4 points of contention in support of a disability discrimination complaint. That complaint has today been withdrawn but the claimant has confirmed that he will rely on these additional points in showing that his*

dismissal was unfair. In particular he refers to having been denied the right to audio record meetings on 7, 10, 18, 28 May and 5 July (which disadvantaged him due to his dyslexia), not being allowed 24 hours' notice to review new written evidence (which again disadvantaged him due to his dyslexia), insufficient or no regard being had for the fact that Ms Millington, People Manager, had not appropriately carried out her role of providing welfare support to the claimant, had not taken his difficulties at work seriously as illustrated by a quote that she remembered thinking about "dyslexics and how they cope with things" and the fact that the outcome letter read to the claimant at the disciplinary hearing on 5 July 2021 was different from what was set out in the written confirmation of outcome, the suggestion being that the claimant had not had an opportunity to address all of the points the decision maker was upholding against him.

8. There are no issues relating to employee status or time limits.

The Facts

9. The tribunal made the following findings of fact:

Context

10. The claimant commenced employment with the respondent on 16 June 2001. His employment ended on 5 July 2021, at which time his role was Market Street Manager. He had become an Operations Manager in May 2020.
11. The claimant moved to the 'MC' store on 16 June 2020. This move arose after a disagreement or issue between the claimant and the then regional manager.
12. The respondent operates a 'Respect in the Workplace' policy (the policy). Relevant provisions of the policy include the following:
- *We don't tolerate any form of discrimination, victimisation, bullying or harassment*
 - *All allegations of bullying and harassment are taken seriously and will be investigated*
 - *If any colleague is found to have breached this policy, corrective action will be taken either through re-training or, in more serious cases through disciplinary action which could result in dismissal.*
13. The policy defines the terms used as follows:

Bullying is offensive, intimidating, malicious or insulting behaviour that can make a person feel vulnerable upset humiliated undermined or threatened. This included mockery, ridicule, tricks, jokes and any form of "banter". An example might be include where a manager uses their personal strength and power to threaten someone into action through fear or intimidation.

Harassment is unwanted conduct that has the purpose of effect of violating a person's dignity, or creating an offensive, intimidating or hostile environment.

This can be physical, verbal, non-verbal or written and also covers unwanted sexual advances, including touching or standing too close.

14. Examples are given of bullying and harassment behaviours. The policy states that the list is not exhaustive. The list includes: *Shouting and aggressive behaviour towards a colleague in public or private.*

Canteen Incident

15. On 30 March 2021, Miss Sanderson (customer assistant) wrote a letter to Mr Barker (who was a 'Safe Hands' Manager at the time, essentially acting as the store manager) and Ms Millington (People Manager), in which she stated she would be handing in a letter of grievance against the claimant. Miss Sanderson set out that on 27 March 2021, the claimant had approached her in the canteen and *began to be very confrontational in regards to the canteen till being left the day before.* The letter goes on to say that she had spoken to another manager (Mr Green) at the time (i.e. 26 March 2021), who confirmed it was 'ok for her to go' and to leave the till in his possession. Miss Sanderson set out that on 27 March 2021, the claimant had told her she had a terrible attitude and was throwing Mr Green under the bus deliberately. Miss Sanderson's letter said she repeated that she had been told she could leave, to which the claimant *then told me to "fuck off"*. Miss Sanderson said of the claimant: *He's incredibly aggressive and from a senior manager I'm appalled by his behaviour.*
16. Miss Sanderson's letter goes on to describe that on 30 March 2021, the claimant had approached her again, asking if he could speak about the incident on 27 March 2021, to which she had said *No, in no way was that situation provoked and I'm not allowed to speak to him in regards to this.* Miss Sanderson confirmed in her letter that, as she had set out when initially reported on 27 March 2021: *an apology would not be accepted and (I) want this to be dealt through the correct procedure. If at any point I feel it isn't or hasn't been I will ask for an external investigation and be contacting the regional manager, regional personnel manager and if needs be David Potts (Chief Executive of Morrisons).*
17. Within her letter, Miss Sanderson provided a list of people who were present in the canteen at the time as: Mr Richmond, Mr Brayshaw, Mr Ward and Ms Mullins.

Mr Brogden Incidents

18. Mr Barker says he was approached by another colleague, Mr Brogden (customer assistant) on two separate occasions in April 2021, during which he raised complaints about the claimant. The first complaint was that the claimant had assaulted Mr Brogden on 7 April 2021 outside the staff area, snatching a device (a 'hht') from his hands. The second complaint was that on 12 April 2021, the claimant had approached Mr Brogden in the warehouse and asked if Mr Brogden had reported him in respect of the 7 April 2021 incident. Mr Brogden said that the claimant had gone on to make threats

to kill him and had pushed a 'milk tetra' (a large metal cage or crate on wheels) into him.

19. There is an undated letter from Mr Brogden in which he states that: *(the claimant) confronted me on why I had reported him for telling me not to give me any of my shit and get on the back of the van and trying to snatch the hht out of my hand. I explained to him why because he had crossed the mark. Then he went on to tell me that I was a dead man chanting I'm going to fucking kill you over and over shoving the heavy 6-pint milk tetra in too (sic) me.*
20. There was a later incident between the claimant and Mr Brogden, which took place in the car park of the MC store. This occurred during the disciplinary process and was 'added in' to those proceedings. The disciplinary officer made findings about this incident and it formed one of the grounds for the claimant's dismissal. However, on appeal, Ms Hamilton overturned this. I note here that Ms Hamilton also overturned the finding in respect of the 7 April 2021 incident. I shall not therefore refer in detail to those incidents.

Investigation

21. Mr Barker says he was asked to investigate Miss Sanderson's grievance by Human Resources (HR). Mr Barker's evidence was that he was familiar with how to carry out an investigation, having done this on over ten occasions, and he was familiar with the policy. Mr Barker said that before commencing his investigation, he reviewed Miss Sanderson's grievance letter and made notes of all the witnesses Miss Sanderson said had been in the canteen at the time. Mr Barker told the tribunal he did not retain those notes. I accepted this evidence.
22. Mr Barker said that it was the submission of the additional complaints by Mr Brogden that led to a delay in both Miss Sanderson and the claimant being interviewed, as he took the decision to investigate all matters together. Mr Barker initially interviewed Miss Sanderson on 9 April 2021, and again on 18 May 2021. He interviewed Mr Brogden on 6 May 2021. Mr Barker said that Mr Brogden had booked annual leave shortly after making the allegations and did not want to deal with the stress of an investigation right beforehand. Mr Barker explained this delayed the process because it was necessary for him to interview Mr Brogden as part of the investigation. Notwithstanding this explanation, it remains unclear to me why, particularly given that Mr Brogden's leave meant there would be a delay, the claimant wasn't notified and spoken to about the canteen incident earlier. Doing so would not have prevented the investigation later encompassing all the complaints. However, I do not find the delay was so significant as to render the process unreasonable.
23. The interviews carried out as part of the investigation were conducted by Mr Barker and Ms Millington. Ms Millington was the notetaker on all occasions. The notes of the interview with Miss Sanderson on 18 May 2021 record her reiterating that the claimant had told her to 'fuck off'. When asked what she wanted the outcome to be, Miss Sanderson's reply is recorded as: *Don't want him near me @ all, he's very aggressive. Don't want to be on my own with him.*

When asked about speaking with him, her reply is recorded as: *Don't want to deal with him.*

24. Mr Barker's evidence was that he had asked Mr Green to submit a witness statement, after Miss Sanderson explained that Mr Green had been present during the canteen incident. I note that Miss Sanderson had not named Mr Green in her letter of 30 March 2021. I note that Mr Barker had also spoken to Mr Ward and Mr Brayshaw and they had referred to Mr Green being in the canteen.

25. Mr Green's statement confirms that he did not hear any commotion (he had his earphones in at the time), but that when the claimant sat opposite him immediately afterwards, the claimant was slightly *red in the face but was acting normal with me*. Mr Green goes on to say that Miss Sanderson then approached him about the incident when the claimant went for a cigarette and Mr Green told her he had not heard what happened. Mr Green's statement sets out that he and Miss Sanderson *then spoke about the incident that happened which caused the whole scenario, I said it was my fault and told her not to worry*. This is understood to refer to the till incident the night before.

26. Two anonymous statements were submitted: one was dated 28 April 2021 and the other was provided in early May. The statement dated 28 April 2021 is on a 'standard' 'Colleague Witness Statement' template. The entire content of that statement is as follows:

Was just on dinner break at far side of canteen with other staff member. When heard a comotion (sic) from top of canteen sounded a bit heated but can't recall what was spoken as too far away

27. In Mr Barker's witness statement, he identifies the author of this anonymous statement as Mr Ward.

28. The second statement was made on a 'Colleague Witness Statement Anonymity Request' form. The requirements of this statement were not met, in that the form provides that the author is required to sign a declaration, which will not be released to the colleague under investigation, and stating the reasons for wishing to remain anonymous. There is no signature, and no signature from the investigating manager.

29. The content of this second statement is as follows:

I was in the canteen on my dinner, I was sat by myself on my phone on the far table. (Miss Sanderson) was sat there on her phone when (the claimant) walked in and started being aggressive towards her. I didn't hear everything (the claimant) was saying to (Miss Sanderson) but I did hear him tell (Miss Sanderson) to fuck off.

After this (the claimant) then went to go sit down + sat on the table with (Mr Green).

30. Mr Barker and Ms Millington carried out an investigation meeting with Mr Brogden on 6 May 2021. In that meeting, Mr Brogden described that he had been in the warehouse on 12 April 2021 and that the lift doors had opened; the claimant was in the lift. Mr Brogden described that the claimant looked at him and said that he had just spoken with another colleague, Mr Higdon, who said Mr Brogden had put in a complaint about the claimant, which Mr Brogden confirmed. Mr Brogden told the claimant he (the claimant) had overstepped the mark. Mr Brogden described that the claimant then 'flipped out'; his face went from white to red, he got six inches from Mr Brogden and repeatedly chanted that he (Mr Brogden) was a dead man. Mr Brogden said that the claimant had then 'come back at him' and 'rammed' the milk tetra into him.
31. On 19 April 2021, Ms Cocksedge (customer assistant) provided a witness statement. Ms Cocksedge had been present in the warehouse on 12 April 2021. Ms Cocksedge's account is that she was standing with Mr Brogden as he was waiting for the lift in the warehouse; when the lift arrived in the warehouse, the claimant came out of it and walked towards Mr Brogden and asked him why he had reported him. Ms Cocksedge says that Mr Brogden replied "*you know why*", then the claimant said "*no I don't that's why I'm asking you at this time*". Ms Cocksedge says she then turned away. Ms Cocksedge says Mr Brogden shouted over that the claimant had said he was going to kill him. Ms Cocksedge said she did not hear the claimant say this. Ms Cocksedge says the claimant then asked Mr Brogden again why he had reported him and not come to him first to sort it out. Ms Cocksedge describes that Mr Brogden started to walk with a milk tetra to the other lift. When Ms Cocksedge next turned around, she saw both men pushing and pulling the milk tetra, but said she did not know who had started it. Ms Cocksedge goes on to describe that the claimant then walked away and Mr Brogden came back out of the lift saying "*you think you're so f**king hard you don't you*", and the claimant then started walking back towards Mr Brogden; Ms Cocksedge then said "*come on guys leave it*". Mr Brogden told Ms Cocksedge that he was going to report the claimant for threatening him. Ms Cocksedge said that she did not hear the claimant threaten Mr Brogden.

Interviews with the claimant

32. Mr Barker and Ms Millington first met with the claimant on 7 May 2021. Ms Millington was the note taker. This was the first time that the claimant was made aware of the allegations against him.
33. The claimant said that he wanted to record the meeting. Although it is not expressly set out in the notes, the meeting was not recorded. Mr Barker told the claimant that he would be doing an investigation and it would be fair. The claimant said that he had notes at home about the incident. He noted that the meeting was taking place 45 days after the canteen incident and said he didn't feel he could 'give a fair account anymore'. Ultimately, the claimant asked for additional time, to allow him to give fair account, and the meeting was rearranged for 10 May 2021.

34. The interview notes of 10 May 2021 record the claimant saying that he had been sufficiently concerned at the time of the canteen incident to have made notes about it. The interview notes record the claimant explaining *Till was left on Friday, I'd been on late night (and) then back in at 6am, no excuse for not handling things properly, wasn't having my best day*. They go on to record the claimant saying he had questioned Miss Sanderson as to whether she was on a break and that he felt he needed to see her *regarding the sensitive issue anyway*. It records the claimant saying: *can't remember what I said, something like you're clearly not working (and) you left the till out last night*. The notes confirm an exchange about Mr Green and the claimant questioning why Miss Sanderson was 'throwing him under the bus'.
35. The notes record that, in relation to the canteen incident, the claimant said the following (amongst other things):
- *Went to sit down and tried to close the conversation. Think I told her to 'fuck off' or something*.
 - *When I swore, (Miss Sanderson) raised her voice and said who do you think you're talking to?*
 - *If you asked my guys, yes they know I'm hot headed, they know if they give me space, a couple of hrs I'll come back round, apologise*
 - *I say things with no filter*
 - *An area I need to work on. Something I need to work on, have said way more brutal things to other people before*
36. The claimant produced a 'Statement of Events' document, which detailed events between 26 March 2021 and 7 May 2021, as they related to Miss Sanderson. Within that document, he confirms:
- a) He was upset that no action had been taken about the till, as Miss Sanderson had been identified as a poor performing colleague and the claimant had been given instruction by Mr Barker and Ms Millington to capture any poor performance
 - b) He was irritable about the situation
 - c) On 27 March 2021, he had asked Miss Sanderson if she was on a break, noting (to her) that she had been chatting on his first entry to the canteen, and was now sitting chatting at a table. He said he asked her this *with an air of anxiety*.
 - d) He commented to Miss Sanderson that she was *throwing Mr Green under the bus* by blaming him for the till incident the night before
 - e) The claimant realised the conversation was getting heated and he ended the conversation saying "*I'm not interested I just want to eat my dinner*", which he says he said 'with conviction'.
 - f) Miss Sanderson shouted at him, accusing him of being disrespectful
 - g) After the incident, he reflected that it was not managed well and he need to resolve it. The claimant spoke to Mr Barker and explained he was unable to say anything about Miss Sanderson's poor service and *his hunger had led to the incident*.
 - h) On 30 March 2021: *I still felt anxious to communicate the shortfalls with the till procedure to (Miss Sanderson) and also wanted to explain why I*

had tried to speak to her on Saturday and apologise (sic) for upsetting her with a swear word. I approached (Miss Sanderson) on the shop floor at 7:08 and said "Hi (Miss Sanderson), can I apologise (sic) for upsetting you on Saturday and swearing and can we have a few minutes to discuss everything today"

- i) Miss Sanderson refused this approach and said she had reported the claimant.
- j) 7 May 2021 was the first time he was informed that Mr Barker and Ms Millington would be conducting a formal investigation relating to Miss Sanderson

37. When discussing the meeting on 10 May 2021 during the tribunal hearing, the claimant initially said that he had gone into the office on 7 May 2021 feeling *"quite frustrated and heated"*. He said a discussion began about Miss Sanderson and the claimant told Mr Barker that he had notes at home about it. He described that he *"was quite insistent about adjourning"*. The claimant went on to say that he wanted to start the 10 May 2021 meeting by apologising as he thought it was *"the right thing to have done"*. He said he had been insistent on postponing and felt an element of guilt about that. Later during cross examination, it was put to the claimant that the notes record him apologising 'for how he was' on 10 May 2021. The claimant responded that *"I don't stand over the notes as true and accurate. I do remember apologising, I just don't know if they're accurate."*

38. In his evidence, the claimant refused to accept that notes were correct when they referred to negative aspects, and he struggled to accept various propositions where they painted him in anything other than a positive light. He remained preoccupied with his own treatment and often framed his answers in this way. For example, when asked about the terms of the policy, he repeatedly gave responses where he referred to him being a victim or on the receiving end of poor practice, and complained about processes breaking down.

39. The notes of the 10 May 2021 meeting record in relation to the warehouse incident, the claimant said the following (amongst other things):

I went down (in the lift), doors opened and I said to (Mr Brogden) just the man I'm looking for...I said what's this I'm going to get sacked and that we'd had a fight

40. In the interview notes, the claimant says they did have a conversation, but he couldn't remember it. He referred to Mr Brogden making comments that the claimant was threatening to kill him.

41. On 18 May 2021, there was a further investigation meeting. The claimant was informed he had breached the policy and was told the respondent wanted to support him, and a referral to Medigold was recommended (Medigold provides occupational health services). The claimant is recorded as saying he felt he did need to talk to someone, that there was *"always a reason for me to be upset and then what comes out of my mouth can't justify what happened with (Miss Sanderson) all day long I can see how wrong way to do it."* The claimant was

informed a disciplinary meeting may be the next step and that he would be informed about this.

42. A further meeting was arranged for 21 May 2021. The claimant covertly audio-recorded this meeting. The transcript contains numerous gaps and inaudible sections. What is clear is that prior to the meeting starting in earnest, there were exchanges between those present, and seemingly others at times. The transcript records Ms Millington referring to an individual as “a right dumper”, uses the word ‘fucking’, refers to a “shit hole”, and states “what a knob”. She also refers to someone’s son having mental health issues. There is a lot of dialogue before the substance of the meeting is reached, which is itself relatively brief; Mr Barker reads a letter from Mr Warehouse, which invites the claimant to a disciplinary hearing. I do not find that the recordings of Ms Millington undermine the reasonableness of the procedures or process as they relate to the claimant, but feel bound to observe that the transcript suggests language that is far from the professional conduct one might expect in the circumstances.
43. The claimant complains that the letter read out at the meeting was, in fact, written by Mr Barker and not by Mr Waterhouse as claimed. The tribunal heard from Mr Waterhouse in evidence that he had received a ‘phone call from Ms Millington, with whom he discussed the content of the letter, before Ms Millington typed it up and issued it. Mr Waterhouse’s evidence is that he had input into this letter and changed some wording. I accepted this evidence and there was no cogent challenge to it.

The Notes

44. The claimant takes serious issue with the notes made by Ms Millington, in all three meetings that she was the note taker. He went so far as to describe them as ‘fraudulent’. Mr Barker was adamant in his oral evidence that the notes were an accurate record of the discussions and he explained they had signed them on the day.
45. Each set of meeting notes has a cover page, which contains a number of tables. This provides tick options for the type of meeting taking place, the date and times of the meeting, and the attendees. The bottom table is essentially a confirmation of contents. It states *I confirm that these are the notes taken at the meeting. I understand these notes are a summary of the discussion and reflect a true account of the points discussed.* Underneath that statement are two boxes, for the colleague and the manager to each sign and date.
46. The claimant told the tribunal that he did not realise this was what signing the cover sheet meant; he thought signing in this box merely confirmed he had attended the meeting. The claimant’s evidence was that he had conducted over 100 disciplinary meetings as a manager. When it was put to him that he must have known what signing this box meant, he maintained that he didn’t. He stated that he had never been the note taker and that it had never been explicitly stated in any of the 100 meetings he had attended that this was the purpose of

signing. I found that difficult evidence to accept, particularly given the claimant's clear attention to detail and his attitude towards following process.

47. When asked if he recalled Mr Barker and Ms Millington asking him to check the notes, the claimant replied that he didn't remember. When asked if it was possible they had, the claimant replied "*I would expect that to have happened*". The interview notes between Ms Hamilton and Mr Barker were discussed, in which Mr Barker confirmed to Ms Hamilton that he had asked the claimant if he disputed anything in the notes and the claimant had not. Mr Singer asked the claimant if he agreed with that; the claimant replied "*no, because I didn't get a copy of the notes on the day, so didn't have ample opportunity*". Mr Barker was not sure whether the claimant had been given a copy of the notes, but accepted he should have been. Given Mr Barker's lack of confidence on this point, I accepted it was more likely the claimant had not been given a copy, which contravened the disciplinary policy.
48. The claimant's evidence about the notes was confusing at times. He confirmed that he had signed every page of the notes taken during an investigation meeting into the car park incident and this was "*to confirm the content*". In addition, on 26 May 2021, the claimant signed the confirmation of contents box and underneath this added a handwritten note that: happy to sign each page – feel as though today process is fair – subject to notes been (sic) typed.
49. I found it odd that the claimant understood and had read the small print that indicated initialing each individual page confirmed the content, but he had not noted that the sentence above the signature box to confirm that the notes are a true reflection of the points discussed. I think it is more likely that he did know what signing the box signified.

Disciplinary

50. The letter inviting the claimant to a disciplinary meeting was dated 21 May 2021. It informed the claimant that he would be asked to respond to allegations of gross misconduct for severe breach of the Respect in the Workplace Policy by:
- a) Shouting and aggressive behaviour towards a colleague in public or private;
 - b) Unwanted conduct that has the effect of violating a person's dignity, or creating an offensive, intimidating, or hostile environment; and
 - c) Offensive, intimidating, malicious, or insulting behaviour that could make a person feel vulnerable, upset, humiliated, undermined or threatened.
51. The letter reminded the claimant of his right to be accompanied, and informed him that the allegations were serious, and that a potential outcome of the disciplinary meeting could be his dismissal for gross misconduct or a formal warning.
52. In advance of the disciplinary hearing with Mr Waterhouse, the claimant sent a statement in which he set out questions and concerns about the ongoing investigation and which he wanted *reviewed, investigated and answered fairly*

prior to any formal disciplinary meeting being held. Mr Waterhouse did not read this statement before he met with the claimant.

53. The disciplinary hearing began on 26 May 2021. Ms Maguire was the note taker. As above, the claimant signed the confirmation of contents box and underneath this added a handwritten note that: *happy to sign each page – feel as though today process is fair – subject to notes been (sic) typed.*
54. The claimant complains that there was bias throughout the disciplinary proceedings. The typed notes of the meeting on 26 May 2021 show that Mr Waterhouse stated as far as he was concerned, there was *no conflict of interest. Impartial.* And that the claimant responded *I agree.*
55. There was an adjournment of 23 minutes during the 26 May 2021 hearing, following which Mr Waterhouse said that further investigation was needed and they would *pick up with people that you have named. Serious allegation. No rash decision.* Handwritten 'adjournment notes' set out that *process needs fixing before next disc meeting.* They also listed the possible outcomes from 'no action' to 'dismissal', with some evidence of consideration of the appropriateness of these at this stage. Consideration of potential action prior to the conclusion of the enquiries can give an impression of a level of pre-determination.
56. The claimant complains that Mr Waterhouse should not have carried out any investigation, as the investigation and disciplinary stages should be different and points to the ACAS Code, which refers to the investigating officer and the disciplinary officer being different people. In the tribunal's experience, it is quite common for disciplinary hearings to be adjourned in order for further investigation or clarity to be sought. It is not unreasonable for this to be done by the disciplinary officer, as it is the disciplinary officer who has identified what information is missing. Mr Waterhouse obtaining the outstanding evidence does not in and of itself render the disciplinary process unreasonable.
57. During this additional investigation, a further incident took place between the claimant and Mr Brogden in the car park at the MC store, on 11 June 2021. The claimant requested an independent manager investigate this incident; a store manager from a different region was appointed to deal with this. This was an incident which Waterhouse relied upon as part of his decision to dismiss, but which Ms Hamilton overturned on appeal.
58. On 22 June 2021, the claimant was moved to another store.
59. On 23 June 2021, the claimant was suspended and advised the most recent incident involving him and Mr Brogden (on 11 June 2021) would be progressed to disciplinary and would be 'added' to the other allegations.
60. A disciplinary hearing was scheduled for 5 July 2021. Ahead of this hearing, the claimant sent emails including attachments to Mr Waterhouse and Ms Maguire, which he wanted to be considered as part of the disciplinary process. Mr Waterhouse did not read those documents. This was not reasonable. It also

became clear that Mr Waterhouse did not understand the true nature of mitigation and had only taken account of the claimant's long-service and lack of live warnings on file.

61. On 5 July 2021, the disciplinary hearing took place. At the conclusion of this hearing, the claimant was dismissed. Mr Waterhouse read out a document, which detailed that the claimant had "*bullied and harassed colleagues by shouting and swearing at that directly, used rude and inappropriate and offensive behaviour and comments towards colleagues*" and went on to refer to the incident involving Miss Sanderson and the claimant acting inappropriately with Mr Brogden "*on a number of occasions*". Mr Waterhouse refused to allow the claimant to ask any questions during and after the reading of the document, and said that a written outcome would be sent.

Appeal

62. On 13 July 2021, the claimant submitted a letter of appeal against the decision to dismiss him. He set out his grounds of appeal as follows:

- i. Unfair and biased investigation and process
- ii. Discrepancies in evidence/unreliable witnesses
- iii. Failure to consider evidence presented by yourself
- iv. Failure to provide reasonable adjustments and breach of Equality Act
- v. Unfair sanction

63. The claimant received his dismissal letter on 14 July 2021. He then sent a further email dated 19 July 2021, in which he confirmed that his initial letter was to stand as grounds for his appeal, but that he wanted the email to be considered as part of the appeal process. Within that letter, he made criticisms of documents. He confirmed he did not want to continue working for the respondent company, but wanted the respondent to recognise that the dismissal was unfair for a number of reasons, which included that:

- a) There is no evidence that demonstrates the allegations to be 100% true
- b) He contested any wrongdoing in relation to Mr Brogden, and wishes to mediate with Miss Sanderson
- c) The respondent had not followed process
- d) The respondent had failed to recognise reasonable adjustments

64. On 21 July 2021, the appeal hearing commenced, with Ms Hamilton and the claimant in attendance, along with Ms Gunter (People Manager). The notes of that hearing show that the claimant attended remotely and confirmed that he was happy to proceed alone (in the absence of representation). Ms Hamilton stated that if the claimant needed to adjourn the hearing, "*just say*". The claimant confirmed that he was happy to take questions from Ms Hamilton and was happy with the written submissions he had provided. Ms Hamilton therefore adjourned the hearing and began her consideration. She was unable to conclude the matter on that date and the appeal process continued throughout July and August.

65. In her oral evidence, Ms Hamilton said that despite being employed as a full-time store manager, she spent most of her time on the appeal. Her assistant who worked part time, worked full time during this period to assist her. I accepted that evidence and it was clear that a he amount of work had gone into the appeal process.
66. Ms Hamilton confirmed the decision to dismiss, though on two of the original four grounds, in a detailed letter dated 16 September 2021, which runs to 27 pages. That letter sets out the work carried out, including the documents read, the investigation meetings conducted, a visit to the MC store, and confirmation of the documents shared with the claimant. The list of actions undertaken runs to almost three pages of the letter.
67. Within the letter, Ms Hamilton produces a table, which details each allegation and in the next column, summarises the evidence related to that allegation. This includes the statements obtained from other employees, as well as the claimant's evidence, through his investigation meetings, and other documents submitted by him.
68. Ms Hamilton addressed each of the claimant's grounds of appeal in turn:

Unfair and biased investigation and process

69. Ms Hamilton acknowledged the delay in the investigation and describes that *it took longer than necessary for (Mr) Barker and (Ms) Millington to investigate the staff room and hht/warehouse incidents*. Ms Hamilton confirmed that she challenged Mr Barker about the delay and identified a lack of experience on Mr Barker's part when dealing with disciplinary matters. She did not find that there had been any deliberate intention by Mr Barker to 'cause issues' with the investigation and timescales.
70. Ms Hamilton confirmed that she had considered additional evidence, including WhatsApp messages as part of her review.
71. In relation to the claimant's allegation that Ms Millington had fabricated the minutes of the investigation meeting, Ms Hamilton confirmed that she had spoken to Mr Barker about the meeting and he had confirmed that the claimant had read each page, checked everything and did not dispute anything. She further notes that the claimant did not document anything on the notes to raise a dispute (which he had done on later notes). Ms Hamilton states *I do not find it plausible that (Ms Millington) has fabricated the details within your meetings*.
72. The claimant complained that Mr Waterhouse did not allow him 24 hours to consider the grievance submitted by Miss Sanderson and the notes of her interview on 9 April 2021 when he was presented with it for the first time at the hearing on 5 July 2021. As part of the appeal process, Ms Hamilton re-issued these documents (along with others, which she believed the claimant had not previously seen). Ms Hamilton also commented that the claimant's request for 24 hours was not unreasonable and she herself would have permitted this. Ms Hamilton confirmed her view that Mr Waterhouse should have ensured the

claimant had been provided with all relevant document in advance of the disciplinary hearing.

73. The claimant produced a number of documents throughout the process. These included emails, statements and WhatsApp messages. He sent an email to Mr Waterhouse prior to the hearing on 5 July 2021, which was not read by Mr Waterhouse before the hearing, nor did Mr Waterhouse reference them during the hearing. This was not reasonable. However, Ms Hamilton confirmed she had reviewed that document, as part of her review.
74. The claimant complains that the letter Mr Waterhouse read out at the conclusion of the disciplinary hearing was not in the same terms as the letter he then received. Ms Hamilton concluded that this was not unreasonable, and noted that the letter read out included the sanction, why no lesser sanction was appropriate, and the claimant's right of appeal; the letter that was sent included specific details as to how the decision had been reached. Notwithstanding Ms Hamilton's views on the reasonable of this, she recommended that in future, the disciplinary manager provide more specific detail as to how the decision has been reached on the day. I consider this was reasonable and note in particular there was no material difference, in the sense of contradiction between the letters.

Discrepancies in evidence/unreliable witnesses

75. Within this part of Ms Hamilton's letter, she lists each of the witnesses involved in the incidents, the claimant's issues with them/their evidence, and provides her response to the same. This includes the issues raised by the claimant of discrepancies over the versions of events, the lack of action taken against others, and various other matters.
76. The claimant had complained that Mr Waterhouse did not interview Mr Higdon adequately. I find this is a fair criticism. However, Ms Hamilton re-interviewed Mr Higdon as part of the appeal process, as well as others.
77. Ms Hamilton refers to the claimant's case that Mr Brogden has lied about the warehouse incident and she acknowledges that she cannot corroborate what was said between the two men. What she does conclude, based upon the evidence available, is that there was an exchange, which required Ms Cocksedge to tell the two men to 'leave it' and Mr Higdon to feel the need to 'keep an eye on it'. Ms Hamilton concluded that it was the claimant that instigated this exchange, as a result of him confronting Mr Brogden about him reporting the claimant over a previous issue.
78. In respect of the claimant's complaint that Ms Mullins was not interviewed, Ms Hamilton notes that just because Ms Mullins and the claimant reportedly have a good working relationship, this does not mean that she was not one of the anonymous witnesses. This is somewhat at odds with what appeared to be fairly clear acceptance by the other witnesses that the two anonymous witnesses had in fact been identified (and neither was Ms Mullins). I found the

decision not to interview Ms Mullins a rather odd stance, given that every other member of staff present during the canteen incident was spoken to.

79. Within this part of Ms Hamilton's letter, she addresses the claimant's credibility and points to the following:

- a) Although the claimant disputes the notes made by Ms Millington on 10 May 2021, they do record him admitting to telling Miss Sanderson to "fuck off or something".
- b) The claimant's own statement of events refers to him trying to apologise to Miss Sanderson *and apologise for upsetting with her with a swear word*
- c) That document also states that what he said to Miss Sanderson was: *Can I apologise for upsetting you on Saturday and swearing*
- d) The claimant's account of when he made the notes he relied on to draft his statement of events altered

80. Ms Hamilton confirmed in her oral evidence that based on the evidence, and having reviewed the claimant's own statement, she was confident that he did swear at Miss Sanderson.

81. In his oral evidence, the claimant sought to suggest that these apologies were 'if Miss Sanderson thought I had sworn', rather than being an actual admission to swearing. I found that simply not credible.

Failure to consider evidence presented by the claimant

82. The claimant complained that his statement of events regarding the canteen incident was not included within the 'disciplinary pack'. However, Ms Hamilton fully reviewed this statement, as well as all emails and attachments the claimant had sent, as part of the appeal process.

83. The claimant also complained that he had not been permitted to read out a statement at the disciplinary hearing on 5 July 2021. This was denied by Mr Waterhouse. In any event, Ms Hamilton considered this as part of the appeal.

84. Mr Waterhouse did not read, nor refer to the Medigold report as part of the disciplinary process, despite being asked to do so by the claimant. Ms Hamilton considered this as part of the appeal process and set out that Mr Waterhouse's reasoning for this as being the claimant had told him on 26 May 2021 that he has adamant he had no issues and there was nothing wrong with him. Given that it had been obtained during the overall disciplinary process and Mr Waterhouse had been asked to read it, one would expect that it would have been read. However, Ms Hamilton read and considered it as part of the appeal process.

85. The claimant referred to another employee who had acted in a way which he considered was gross misconduct, but which had not been 'followed through'. It was acknowledged by the respondent witnesses that there had been failings

in how that matter had been dealt with, and that training was now in place to ensure it didn't happen again. I do not find that a failure by the respondent in respect of another individual somehow undermines the reasonableness, in principle, of its decision re the claimant.

86. The claimant said that Ms Cocksedge's statement was not included in the evidence on 5 July 2021. Ms Hamilton accepted this (along with all original documents) should have been re-issued, or referred to as a minimum, in the invite letter. However, she considered that the omission did not preclude the claimant from referring to it. In any event, she considered it as part of the appeal process.

Failure to provide reasonable adjustments and breach of Equality Act

87. The claimant raised the issue of representation. He said that he had not declined representation as was suggested; he simply did not have representation and was not offered any representation bodies. The letter of 21 May 2021 explicitly states that:

I have also attached the current Disciplinary Policy and guide to representation policy which we encourage you to read in advance of the hearing,

You may bring someone with you to the meeting if you wish. This could be a work colleague or a union representative. It's your responsibility to make sure your chosen representative is able to attend, however if you need any support in arranging this, please let me know...

88. The notes of the meetings record that the claimant was reminded about his right to be represented/accompanied and that he was happy to proceed. I note that the claimant asked for an adjournment of the first investigation meeting and in his own words 'was insistent about this'. I am confident that had he wanted to adjourn for representation, or any other reason, he would have made such a request. I also find that as a manager who had conducted in excess of 100 disciplinary meetings himself, the claimant would have been well acquainted with the rights and roles involved in such proceedings.
89. The claimant complained that he was not permitted to record the meetings, or the hearing on 26 May 2021 and considered this would have been a reasonable adjustment, in the context of his dyslexia. Mr Waterhouse accepted in his interview with Ms Hamilton that there had been a discussion at the start of the meeting on 26 May 2021 about the claimant's dyslexia, before Ms Maguire began to take notes. This formed part of the discussion and it is good practice to ensure that such conversations are included within the records of any meeting.
90. It was Mr Waterhouse's position that it would have been more appropriate for the claimant to be accompanied, rather than to record the meeting. He also considered that two hours was 'more than enough' time to consider the evidence the claimant had not previously seen, rather than the 24 hours requested by the claimant. Mr Waterhouse noted that the claimant explained

he was dyslexic and required longer than this; Mr Waterhouse notes that he too is dyslexic and considered two hours was more than long enough. I reject the comments of Mr Waterhouse that because he too has dyslexia, he is able to determine what is suitable for other people with dyslexia. It is well established that people with dyslexia have different difficulties and there is no 'one size fits all' in terms of presentation, intervention or adjustments.

91. In cross-examination, the claimant confirmed that he had not raised any issues around his dyslexia and any need for reasonable adjustments during the Medigold process. He said that he asked to record the meetings because it would "*help and improve my development*".
92. The letter of 24 June 2021, inviting the claimant to the reconvened disciplinary hearing repeated the comments that the claimant may bring someone to the meeting if he wished (as set out in the second set of italics above).
93. Ms Hamilton took into account that Mr Waterhouse offered to read the notes of the disciplinary hearing back to the claimant, that the claimant did not request additional time during the hearing, or indicate he was having any difficulties, and that Ms Maguire offered to (and did) type her minutes after the claimant said this would assist him. Ms Hamilton herself ensured that all the notes taken part of the appeal were typed. She did not uphold the complaint that reasonable adjustments were not available.
94. In light of the adjustments and offers that were made and the claimant's reasoning for wanting to record the meeting, I do not find the refusal to allow recording was unreasonable.

Unfair Sanction

95. The claimant asserts that his behaviour did not amount to gross misconduct and he should not have been dismissed. Ms Hamilton notes the claimant's proposition that if the canteen incident had been treated as a grievance and mediation followed through, then he would have been able to take learnings from the incident. Mediation, by its very nature, requires both parties to agree to participate; Miss Sanderson did not give her agreement. Ms Hamilton formed the view that it was appropriate for the matter to be considered via the disciplinary route.

Additional complaints/failings

96. The claimant has raised a number of further, specific issues in respect of the process and decision. He complains that the complaints made by Miss Sanderson and Mr Brogden were malicious and that both had their own agenda. I asked the witnesses about this, as it had become clear as part of the disciplinary process and the evidence obtained that this was the case. Ms Hamilton confirmed that she considered this and the potential motivation, as part of her overall consideration of the case and the evidence.

97. The claimant points out that no action was taken against the other individuals named in this case, who he says, are culpable. I note that Miss Sanderson and Mr Brogden were both subordinates of the claimant and this was a key part of Ms Hamilton's rationale. Mr Barker had commented about the incidents being behaviour of a Level 3 employee towards a Level, 1 employee (which was the case in the incident under investigation). I also note that Mr Brogden was investigated as part of the car park incident. Mr Barker told the tribunal that a decision had been taken not to discipline Mr Green in respect of the till incident, and there had been significant mitigation, in relation to his health. I note that in relation to Mr Green, there was no allegation or suggestion that his behaviour had been *towards* another employee. I therefore do not find that there has been inconsistent treatment, which undermines the reasonableness of the respondent's actions towards the claimant.
98. In relation to procedural matters, the claimant complains that statements were not signed and dated and this undermines their credibility. Ms Hamilton noted that the interviews were generally conducted by video, but accepted that "*we should at least have read it out over the video call to check it was a fair representation*". When Ms Hamilton carried out her own investigation/review, she ensured the witnesses confirmed their accounts.

Legal Principles

99. Unfair dismissal is dealt with in the Employment Rights Act 1996 (ERA) as follows:
100. Section 94(1) of the Employment Rights Act 1996 provides that an employee has the right not to be unfairly dismissed by his employer.
101. Section 95 sets out that:
- (1) For the purposes of this Part an employee is dismissed by his employer if...
- ...
- (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.
102. Section 98 sets out 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 a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
- (2) A reason falls within this subsection if it—

...
 (b) relates to the conduct of the employee,
 ...

(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.

103. The case of **British Home Stores -v- Burchell [1978] IRLR 379** sets out the test when considering the assessment of reasonableness of an employer's actions when dismissing an employee for alleged misconduct to three questions:

1. Whether the employer reasonably believed that the employee was guilty of misconduct.
2. Whether the employer had reasonable grounds on which to base that belief.
3. Whether it had arrived at that decision after conducting a reasonable investigation.

The test does not require the employee to have actually been guilty of misconduct.

104. It is a well-established principle that when considering a misconduct dismissal, an employment tribunal must not substitute its own view of a claimant's alleged conduct, and must not substitute its own view of what should have happened; it is judging whether the actions of the employer were fair, not deciding what it would have done.

105. There are two principal 'strands' to a decision under s98(4): 'substance' and 'procedure', and both are subject to the reasonableness test. However, both strands feed into one overall assessment which falls to be made by the tribunal. The tribunal may answer the questions that were posed to it in two strands and then draw those strands together in one overall assessment when determining whether the case for unfair dismissal is made out (see USDAW v Burns EAT 0557/12).

106. Not every procedural defect will render a dismissal unfair. It is therefore important for tribunals to look at procedural flaws in context and to consider their implications for the overall reasonableness of the employer's decision to dismiss. In Sharkey v Lloyds Bank plc EATS 0005/15 Mr Justice Langstaff, then President of the EAT, observed that it will almost inevitably be the case that in any alleged unfair dismissal a claimant will be able to identify a flaw, small or large, in the employer's process, and that it is therefore for the tribunal

to evaluate whether that defect is so significant as to amount to unfairness.

107. In terms of general fairness, the courts have established that defects in the original disciplinary hearing and pre-dismissal procedures can be remedied on appeal. In Taylor v OCS Group Ltd 2006 ICR 1602, CA the court stressed that the tribunal's task under s98(4) is to assess the fairness of the disciplinary process as a whole. Where procedural deficiencies occur at an early stage, the tribunal should examine the subsequent appeal hearing, particularly its procedural fairness and thoroughness, and the open-mindedness of the decision-maker.

Application of the Law to the Facts

Did the Respondent genuinely believe the Claimant had committed misconduct?

108. I consider the respondent did hold a genuine belief that the claimant had committed misconduct, which was based on the evidence obtained throughout the investigation from a number of individuals, including direct complaints from those who said they had been on the receiving end of inappropriate conduct. There was also evidence of the claimant accepting some behaviour.

Did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant?

109. There were statements provided by various individuals that alleged poor behaviour/conduct by the claimant.
110. The claimant also made certain admissions (though some of these were later qualified/retracted). There was therefore evidence available which constituted reasonable grounds for the respondent's belief that the claimant had committed misconduct.
111. The investigation itself was flawed. The disciplinary process, in so far as it included further investigation and the manner in which the hearing was conducted, was also flawed.
112. The explanation for the initial delay in interviewing the claimant was unconvincing, though the delay was not so significant as to render the process unfair. There was inadequate investigation in the early stages, demonstrated by the need for Mr Waterhouse to make further enquiries. Mr Barker also omitted to provide copies of the interview notes. At the disciplinary stage, there were further failings. For example, Mr Waterhouse failed to consider all the relevant information, did not fully explore the issues in the interviews he undertook, did not confirm the contents of those interviews with the witnesses, and did not allow the claimant 24 hours to consider evidence he had not previously seen.
113. Ms Mullins was not interviewed by any of the officers involved, which is

an odd stance. However, I remind myself of the principles articulated in Taylor and Sharkey and assess the fairness of the disciplinary process as a *whole*, notwithstanding there may be some flaws. I do not find that the decision to not interview Ms Mullins is so significant as to render the process as a whole unfair. Ms Hamilton gave her rationale that there was sufficient evidence available and interviewing Ms Mullins would not change matters. It was not therefore an entirely arbitrary decision.

114. I have considered this case as a whole, examining the appeal process, and in particular its procedural fairness and thoroughness, and the open-mindedness of the decision-maker. Having done so, I do not find that the dismissal was unfair. The appeal process was thorough and sought to rectify the shortcomings. Ms Hamilton re-interviewed all the key individuals, save for Ms Mullins. Ms Hamilton provided an explanation as to why she did not interview Ms Mullins. Ms Hamilton compiled and considered all the relevant information and invited the claimant to take part in the process.

115. I accept that Ms Hamilton's own review rectified many of the deficiencies in the original investigation and disciplinary (which I make clear were present). I also accept that her own investigation contained flaws. However, what is absolutely clear is that Ms Hamilton reached her views based on a number of key facts, which included that the claimant had sworn at Miss Sanderson, and her analysis of the evidence around that, including the claimant's own documents that refer to him swearing. In addition, it had been the claimant who had approached Miss Sanderson and Mr Brogden in both of the incidents she upheld. The claimant did not dispute that he had approached Miss Sanderson. The claimant said that Mr Brogden was simply 'there' when the lift opened, but he chose to broach the issue at that time.

116. I note that Ms Hamilton did not uphold two of the grounds on which the original decision to dismiss had been made. Ms Hamilton was candid in her evidence, agreeing that elements of both the investigation and disciplinary processes were flawed. I am entirely satisfied that she kept an open mind, without any level of pre-determination (as evidenced by her ultimately not upholding two of the grounds found by Mr Waterhouse) and approached the task with care and attention, as she approached her evidence to the tribunal.

Was dismissal within the range of reasonable responses?

117. When considering this question, I remind myself that it is not for me to consider what action I might have taken in the circumstances being considered, and it is not for me to substitute my own judgment for that of the respondent. The question for me is whether dismissal was within the range of responses that a reasonable employer might take, albeit that some employers might have imposed a lesser sanction.

118. I have to consider the process as a whole, which includes whether the actions of Ms Hamilton rectified any defects that had previously occurred. I again remind myself of the principles articulated in the cases of Sharkey and

Taylor.

119. Ms Hamilton confirmed in her evidence that her belief was that the claimant had sworn at Miss Sanderson and told her to “*fuck off*”. She noted that swearing at a colleague is more serious than the use of swearing in conversation on a peer-to-peer level. She also clarified that it was not just that the claimant had sworn at Miss Sanderson; it was more that an altercation had taken place and Miss Sanderson felt aggrieved. Ms Hamilton commented that “*Swearing doesn’t help*”.
120. Ms Hamilton also set out that as a manager, the claimant was a custodian and that people need to be able to approach managers with concerns.
121. As regards the warehouse incident, Ms Hamilton found that the claimant had approached Mr Brogden, knowing a report had been made, and that the claimant had been involved in the pushing-and-pulling of the milk tetra. She accepted that she did not know who had started the latter, but it had happened, and it had been instigated by the claimant’s actions of approaching Mr Brogden about his report. She also noted that Mr Higdon had commented that he felt he needed to keep an eye on the situation. Ms Hamilton made the point that all colleagues should feel they can report matters without fear of retribution.
122. In all the circumstances as described above, I conclude that dismissal was within the range of reasonable responses.

Conclusion

123. For the reasons set out above, I do not find that the dismissal was unfair, and the claim is consequently dismissed.

Employment Judge Anderson

4 August 2022