EMPLOYMENT TRIBUNALS

Claimant: **Mrs R B Zakaszewska**

Respondent: v **Cranswick Convenience Foods Limited**

Heard at: Hull **On: 3, 4, 5, 6, 10 & 11 October 2022**

Before: Employment Judge Miller
Mr M Weller, JP
Mr K Lannaman

Appearance:

For the Claimant: **In Person**

For the Respondent: **Mr J Searle**

JUDGMENT having been sent to the parties on 17 October 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction and issues

1. The claimant was employed by the respondent as a factory operative. The respondent is a food manufacturer. The claimant was dismissed on 5 November 2020 for gross misconduct. She started early conciliation on 13 January 2021 and that finished the same day. On 10 February 2021, the claimant made c alim to the employment tribunal for unfair dismissal, wrongful dismissal and race discrimination. Claims of disability discrimination were also identified at the preliminary hearing.
2. There was a preliminary hearing on 27 April 2021 and the following specific claims were identified:
   2.1. Unfair dismissal
   2.2. Wrongful dismissal – notice pay
   2.3. Direct race discrimination
   2.4. Discrimination arising form disability (section 15 Equality Act 2010)
   2.5. Harassment related to race/disability
3. The detailed list of issues is set out in the appendix to this judgment.

The hearing

4. The hearing was heard over 6 days. It had originally been listed for 3 days in February 2022 but it there were problems with the documents so that there would not be enough time hear the evidence – particularly given the need for an interpreter. The case was therefore postponed until 3 October 2022 and listed for 6 days.

5. We were provided with two files of documents (bundles): one from the respondent which they said had been produced in accordance with the orders and one from the claimant including documents which the claimant said were important but, she said, not all of which had been included in the respondent's bundle.

6. The claimant had also attached documents to the witness statements of her and her witnesses.

7. The claimant produced a witness statement and attended and gave evidence. The claimant also produced witness statements from:

   7.1. Marcin Buczek

   7.2. Paula Buczek

   7.3. Magda Banka

8. All of the claimant's witnesses attended and gave evidence.

9. The respondent produced witness statements from

   9.1. Angela Moreira

   9.2. John Burkitt

   9.3. Nick Young

   9.4. Vicky Brown

   9.5. Vikki Daniel

   9.6. Andrew Sanders

10. Some of the witnesses produced supplementary statements in accordance with orders made at the February hearing to address additional documents.

11. We also had access to CCTV of the incident on 28 October 2020 which we viewed in the course of the claimant's oral evidence.

12. The claimant and her witnesses' first language is Polish and the Tribunal had the benefit of two interpreters. We are very grateful for their assistance over a long hearing.

13. We heard a lot of evidence about other breaches or alleged breaches of Covid rules and guidance and alleged breaches of health and safety at the respondent's premises. We have addressed that in our decision where relevant. However, while we understand the reason for the claimant producing this evidence and her arguments about unequal treatment, it would not be appropriate or proportionate to address all of that evidence in detail.

14. We also record that we heard detailed submissions from both parties. We have considered those submissions and taken them into account, along with relevant evidence, when making our decision.

Findings of fact

15. We have made such findings of fact as are necessary to decide the issues set out in the appendix. While we have considered all the evidence, we have not necessarily made explicit findings about everything we heard. Where any evidence was disputed, we have made our decision on the balance of probabilities.

16. The claimant started working directly for the respondent in its factory on Sutton Fields in Hull on 20 August 2018 after a period as an agency worker. There are two areas in the factory as far as is relevant for our purposes high risk where processed food is finished, so that the finished product will be consumed by end consumers; and low risk which is where the raw meat ingredients are processed.

17. In December 2019 the claimant was working in the high risk area, she says that was harassed and intimidated by the manager when working there. That is not part of the claimant's claim to this Tribunal but it is part of the background to the claimant's claim. The claimant also says that on 4 December 2019 she was assaulted in the yard at the respondent's factory and this, she says, was the start of her health problems. Communications about that grievance and the way it was dealt with were relevant to the question of whether the claimant was disabled within the meaning of section 6 of the Equality Act 2010 at the relevant time and whether the respondent knew about that. In submissions, Mr Searle conceded on behalf of the respondent that, for the purposes of this claim, by January 2020 the claimant was disabled by reason of depression and anxiety and the respondent had knowledge of that. We do not therefore need to make any further findings or decisions about except to note that the grievance was closed around the end of January 2020 and the respondent took no further action about the claimant's complaints at that time.

18. The claimant raised a further grievance on or around 11 June 2020. A meeting was arranged to discuss that but because of some communication difficulties the meeting did not go ahead. The parties tried to rearrange the meeting but the claimant was off sick from 7 July 2020 to 1 August 2020. A fit note dated 11 July 2020 indicated that the claimant was suffering with anxiety and stress at work. The fit note was for two weeks and followed by another dated 25 July 2020 for one week to 1 August 2020. There was correspondence from the claimant to the respondent about the claimant's health either directly or through her partner Mr Matuszewski relating to arranging the grievance meeting and on 20 August 2020 the claimant wrote to Ms Daniel.

19. The claimant said in that correspondence

"The second meeting did not take place because you know very well that I was on sick leave. And my illness is the result of the lack of help from the employer after the physical attack on me on December 4, 2019 by Anita Wojciechowska.

In a recent meeting into HR on August 7, you vehemently denied that you had not received any information about the cancellation of the meeting scheduled for July 21, 2020. You claimed that you knew nothing about my sick leave. You spoke untruths and as proof I am sending you e-mails sent by my husband Robert and your reply".

20. The email concluded the claimant would like to have an appointment with the Occupational Health Nurse, Rosemary.

21. In her witness statement the claimant said that she first asked Ms Daniel to arrange an Occupational Health appointment on 7 August 2020, but it did not happen until she requested it in writing. This was not challenged by the respondent and is broadly consistent with the emails about the appointment that we will come to. We therefore prefer the claimant's evidence that she did first request an Occupational Health appointment on 7 August 2020 when she first returned to work after her sickness absence.

22. An HR Officer, Hazel Pearce, who did not attend to give evidence to the Tribunal, responded on 21 August 2020 to the claimant's email of 20 August 2020. She said that the claimant's original grievance about the incident on 4 December 2019 had been investigated and concluded. Then Ms Pearce said, "*we will arrange an appointment for yourself with our Occupational Health Nurse, you will receive a letter confirming the date and time*".

23. The claimant replied on 7 August 2020 for leave from 7 September to 22 September 2020 but that was not actioned straight away. The claimant resubmitted that request on 17 August 2020 and that was sent to HR on the same day. The claimant received formal notification through the IT system on 22 August 2020 that that leave had been approved.

24. The claimant was then informed on 31 August 2020 that an Occupational Health appointment had been arranged for her at the factory on 15 September 2020 at 3:30pm. It says in the letter "*if you cannot attend this appointment please contact the HR Department as soon as possible".* The claimant received this after she had been made aware that her leave period that covered that date had been approved. The claimant did not inform the respondent that she could not attend the Occupational Health appointment until the day before the appointment, on 14 September 2020, at 4:50am before the start of the shift. The claimant's emailed Hazel Pearce and said "*because I am currently on vacation a meeting with Rosemary scheduled for 15 September is impossible please set a different date and I will be available for work".* Ms Pearce replied to say, *"one day notice is unacceptable you can come and see us when you are at work to rearrange".*

25. We set out the claimant's reply in full. She said:

"*Forgive me but vacation is my free time and at my disposal. So let me be its keeper. I'm busy, my vacation is scheduled for each day. It is unacceptable and unprofessional to schedule an appointment during your vacation. It is unacceptable that there is no communication between Production and HR, which results in your ignorance as I am on vacation until September 23. Therefore, please take the consequences towards the HR employee or manager, possibly the area leader of LOW RISK,* [which was where the claimant worked at this time]*, and not ME.*

In addition the notice clearly states "If you cannot attend this appointment please contact the HR Department as soon as possible". I did so by sending an email to HR. Thus I respected Rosemary's time and suggestion above to notify the HR Department. Therefore please also respect my free time. Your answer to me shows that respect for the employee and its free time is not respected. Sad.

Under the present circumstances I am asking you to schedule an appointment again when I am available for work".

26. In oral evidence, the claimant said that the reason for not notifying the respondent before the day before her appointment was because, effectively, she did not know if she would be well enough; she did not know what she would be doing while on her leave; it was difficult to be motivated when suffering depression and she could not get to the factory because it was too far and inaccessible for her while on leave.

27. Ms Pearce replied on the evening of 14 September 2020. She said,

"This was an appointment you requested. We have tried to accommodate this as you stated you were suffering with mental health issues that needed support and I believed this hadn't changed.

Unfortunately Rosemary's appointments are when she is available to attend site. Appointments are made to support employees and are usually focussed on individuals referred by managers and individuals who are suffering with long term health issues. However we have attempted to offer support as per your request.

As we are unable to arrange appointments around people's schedules you may be better seeing your GP who will be able to accommodate your availability.

If you still wish to see Rosemary please liaise with HR to arrange when she is on site. This may however not be for another month and may still not be around your required timescales as this is an external resource to support Occupational Health and not a replacement for your own Doctor.

For future reference it is not your manager's responsibility to arrange or rearrange these appointments. This is a resource that is paid for by the company and appointments are scarce. Not providing adequate notice you are unable to attend means another employee who may need this time could have used this appointment".

28. We find that it was reasonable for the respondent to expect the claimant to inform them if she would not be available for the Occupational Health appointment. The respondent says, and we accept, that Occupational Health is an external resource bought in and that they provide appointments once a month. It is not reasonable to expect HR, who organise the appointments, to know the leave arrangements of all the employees, there being many hundreds of people employed on the site, and it is reasonable to expect employees to communicate their availability.

29. It was the respondent's case that Occupational Health appointments are predominantly made as a result of referrals for long term sickness absences, and similar issues, from managers. This would mean that appropriate arrangements were made about leave or availability in the course of scheduling those appointments. Ms Pearce's response was to that extent reasonable, although we do not think that her tone was ideal. The claimant made the reasonable point that a number of people appeared to have just not shown up to the Occupational Health appointments and at least she gave them some notice. It might, we think, and as the claimant suggested, have been possible to give a last minute appointment to another person to avoid wasting it, but whether or not that was possible at least the claimant did, in fact, inform the respondent that she would not be attending.

30. The claimant's reasons, however, for the last minute notification were unclear. In oral evidence she said that it was in part because of her disability, she didn't know

whether she would be available to attend on a particular day, she said that it was difficult and expensive to get to the appointment at work when she wasn't travelling to work anyway.

31. We prefer the evidence of the contemporaneous record set out in the emails. It is clear that the claimant was upset or annoyed that the appointment was booked during her leave and she perceived the appointment as a work related activity. The claimant makes no mention of the impact of her disability or the practicality of travelling to the appointment in those emails. We find that the reason the claimant said she could not make the appointment on 15 September was because she was not available because she was on leave and for no other reason. Even if we are wrong that that was the claimant's actual reason, on the basis of the emails Ms Pearce could have had no reason to believe that the claimant was not attending for any other reason than that she was on leave.

32. It was the claimant's case that the email exchange required the claimant to make the appointment in person when at work. We accept that that is what the claimant genuinely believed, but we do not think that that is what the emails actually say. It does say that you can come and see us when you are at work to rearrange, but in our view it is stretching the meaning of those emails to say that HR will not accept communication about Occupational Health appointments other than in person.

33. We find that Ms Pearce was not deliberately trying to prevent the claimant from attending Occupational Health. The claimant requested an appointment, one was made, the claimant cancelled that and the respondent invited her to make another appointment when back at work. The claimant did request another appointment, eventually, some six weeks later on 28 October 2020. On 29 October Ms Daniel told the claimant that she would arrange an Occupational Health appointment on the next available visit. As we know, events overtook those arrangements. We do not know why the claimant delayed in making that request but we do know that the claimant knew appointments were only available irregularly from what has been set out in Ms Pearce's emails on 14 September.

34. We find therefore that the reason that the claimant did not see Occupational Health in September was because of her cancelling the first appointment and delaying in requesting the second one.

35. The next thing we refer to is the main incident on 28 October 2020. The claimant attended work shortly after 5am on that day. She travelled to work in a car with her partner, Mr Matuszewski, and some other people. This was, as a reminder, during the Covid-19 pandemic when various restrictions about face masks, social distancing and hand washing or hand sanitising were in place.

36. The claimant said in evidence that she sanitized her hands either before or just after she got out of the car. For our purposes, as far as the claim goes, it does not ultimately matter when or if the claimant sanitized her hands in the car or the car park. What is clear, and what we find, is that the claimant did not sanitize her hands at the turnstile on the way into the factory grounds; or the bottom of the stairs leading up to the entrance to the factory; or at the top of the stairs. We have seen CCTV of all of these places and that CCTV evidence is clear. We reject the claimant's assertion that the video of the yard is not a video of the same day as the other videos. It includes a video recording of the same people, in the same clothes, in the same order as - and is wholly consistent with - the footage you can see at the bottom of the stairs from the CCTV at the top of the stairs. It is just not

credible to suggest that the respondent would go to the trouble of falsifying this evidence.

37. On that day the claimant was walking up the stairs with Mr Matuszewski and they were both following Angela Moreira up the stairs. Angela Moreira was the further processing manager. She was senior to the claimant and the claimant said in evidence that she was aware of this at that time. At the top of the stairs there was a doorway with a sanitizer on each side of the doorway – one before you go though the door and one after you have passed through the door.

38. On the CCTV we can see that Ms Moreira turns to look at the claimant and Mr Matuszewski as they are walking up behind her. We prefer Ms Moreira's evidence that she did not say anything to the claimant at that point. Ms Moreira passed through the doors, sanitizing her hands on the way. The claimant and Mr Matuszewski went through without sanitizing their hands. We prefer Ms Moreira's evidence about what happened next. On noticing that the claimant and Mr Matuszewski had not sanitized their hands, and Ms Moreira realised this because she did not hear the sound of the sanitizer, Ms Moreira asked them to sanitize their hands. Mr Matuszewski did, twice in fact. and demonstrated this to Ms Moreira. The claimant refused to do so. Ms Moreira said that the claimant told her that she had not touched anything and her hands were in her pockets. We heard a great deal of evidence about whether the claimant said her hands were in her pockets or her arms were folded but we do not think in the final analysis it makes a great deal of difference The claimant was instructed by a manager to sanitize her hands and she refused to do so. That is not disputed. We note that Ms Moreira is Portuguese, the claimant is Polish and that both of them were communicating with each other in English. We recognise that the scope for misunderstanding about details of that conversation is significant but as it is not material we do not make any findings about whether the claimant said her hands were in her pockets or her arms were folded.

39. The claimant says that Ms Moreira was in her personal space, aggressive and said it would not end well for her. Ms Moreira said that she did tell the claimant she would report her to HR for not sanitizing her hands. We prefer Ms Moreira's evidence. It is consistent with what we have seen on the CCTV, the claimant was close to Ms Moreira coming up behind her, not the other way round.

40. It is the claimant's case that at this point there were a number of other people who were walking past them without sanitizing their hands. The claimant said that they were Romanian, predominately, and that Ms Moreira ignored them but chastised the claimant because the claimant is Polish. In our view, and we find, Ms Moreira was engaged in trying to resolve the issue with the claimant, albeit briefly, and she said in oral evidence that she did not see or hear if the other people passing her had sanitized their hands or not. We accept Ms Moreira's evidence that she had challenged other people about not sanitizing their hands on other occasions. Ms Moreira said that she was given an instruction by senior managers to challenge anyone she saw breaching the Covid rules and that is the reason she challenged the claimant and Mr Matuszewski. Everyone, she said, except the claimant but including her partner, complied with her request. We accept Ms Moreira's evidence about this – that the reason she challenged the claimant was because she had been given a general instruction to do so, and that everyone else she challenged had complied with her instructions.

41. Ms Moreira did report the claimant to HR as she said she would and she set out in a brief statement that we have seen what she said happened. This statement is consistent with the account we have set out above. Ms Moreira said, in that statement, that she recognised the claimant and Mr Matuszewski from the high risk area but did not know their names. The claimant said this was just not credible and that Ms Moreira had agreed that everyone knew her partner. We do not agree. In evidence Ms Moreira said that she knew both of their faces but not their names. This is consistent with what she said in her original statement. We prefer her evidence and find that Ms Moreira did not in fact know who the claimant and Mr Matuszewski were at that point. We also accept Ms Moreira's evidence, on the basis that all of the people involved were speaking English at that time, that she did not know the claimant's nationality at the time that she challenged her.

42. There was an investigation meeting the same day conducted by John Burkitt. The claimant agreed in the investigation meeting that she was aware of the Covid briefings produced by the respondent and the signs around the factory. The signs and the briefings make it clear that the Covid controls - to wash and sanitize hands, wear a mask and maintain distance - were in force. The Covid briefing on 1 October 2020 said, "if there is a sanitizing station please use it".

43. The claimant said that the reason she refused to sanitize her hands was that there were 3 sanitizing stations and that she had already used one of them. We have already found that this was not correct. Mr Burkitt said that if the claimant had used the sanitizer at the bottom of the stairs she would not have to use the one at the top. In that meeting Mr Burkitt asked the claimant if the CCTV would show that the claimant had sanitized her hands at the bottom of the stairs and the claimant asked in response if all the CCTV was working. The respondent asserted, and we find, that the claimant was referring back to the incident in December 2019 at that point. However, we think that rather than hoping the CCTV was not working that the claimant was making the point that CCTV had not been working in 2019 which was to her disadvantage whereas the respondent could find CCTV when it was to their advantage. In any event the claimant said that the CCTV *would* show that she had sanitized her hands at the bottom of the stairs.

44. The claimant raised issues in that meeting about other Covid and general Health and Safety breaches on the respondent's premises to which we will return briefly later. The claimant was suspended on full pay on the grounds that there was a serious breach of Health and Safety. Mr Burkitt then undertook an investigation. This comprised of him watching CCTV to see if the claimant had sanitized her hands and he concluded that it showed that she had not. He therefore referred the matter to the disciplinary hearing for potential gross misconduct.

45. The claimant was invited to a disciplinary hearing before Nick Young on 3 November 2020. That first invitation was for a hearing on the same day but that was quite properly put back to 5 November 2020. The claimant was, on advance of the hearing, provided with a copy of the disciplinary procedure, minutes from the meeting with Mr Burkitt, Ms Moreira's statement and Covid protocol slides. CCTV was available to watch at the hearing and the claimant and other people in the meeting did watch it at the start of the hearing. This CCTV footage did not include footage of the yard which showed the bottom of the stairs. That CCTV was found a bit later.

46. In the meeting, as far as is relevant, the claimant agreed that she had refused to sanitize her hands and maintained her position that she had done it previously at the sanitizer downstairs. The claimant raised the issue of other people breaching various Covid restrictions and other Health and Safety breaches. Mr Matuszewski also raised that there were regular numerous breaches and nothing was done. In the course of the hearing everyone visited the downstairs sanitizer to get a better understanding of what had happened.

47. At that hearing the claimant asked if the reason that she had been chastised by Ms Moreira was because she was Polish. This allegation was not substantially addressed by Mr Young or Ms Daniel from HR who was also in attendance, but it was not further pursued by the claimant or her partner at that time either.

48. In the course of the hearing Mr Matuszewski agreed that it was right for Ms Moreira to challenge them but it had gone too far. The claimant says that she did not agree with this and that Mr Matuszewski was not on that occasion speaking for her.

49. Mr Young decided to summarily dismiss the claimant at that meeting without notice or pay in lieu of notice. He said, at the meeting:

"*after consideration from what you have told me today, reviewing the CCTV I cannot see any hand sanitizer at the bottom and also at the top of the stairs when a manager has requested you to sanitize you have just carried on, in the current situation we are in this is a gross misconduct offence, summary dismissal, you have five working days to appeal".*

50. The decision was sent in writing in a letter dated 6 November 2020 and the three reasons for the claimant's dismissal given were: failing to sanitize hands; refusing to sanitize hands when given a reasonable management instruction to do so; and misleading the investigation by claiming to have sanitized in the knowledge that you in fact hadn't. We find that these *were* the reasons that Mr Young had in his mind when dismissing the claimant.

51. We refer at this point to the respondent's disciplinary policy. That sets out what the respondent considers to be either misconduct or gross misconduct. As far as we can see, having regard to that policy, each of the three allegations found against the claimant fall under misconduct rather than gross misconduct. Specifically, the relevant rules are

    51.1. insubordination and/or refusal to carry out a reasonable management instruction, and this applied to not doing as Ms Moreira requested;

    51.2. minor breaches of the company's staff hygiene rules, and this applies to the claimant's failure to sanitize her hands; and

    51.3. any conduct prejudicial to the maintenance of discipline within the company, and this applies to not being honest to the disciplinary investigation about the claimant's assertion that she sanitised her hands at the bottom of the stairs.

52. While all of these are undoubtedly misconduct, in our view they do not amount individually or collectively to a breach of the respondent's gross misconduct rules. Specifically, as far as we can see, two potentially relevant rules are;

    52.1. any conduct seriously prejudicial to the maintenance of discipline in the company, and we do not accept that this can apply to one person misleading

the investigation in their own disciplinary proceedings. It must be something wider than that; or

52.2. an act of gross insubordination, and again, in our judgment, the circumstances of the interaction on 28 October 2020 with Ms Moreira do not fall within that.

53. We also find that Mr Young considered the investigation findings, reviewed the CCTV and went to look at the site. There is nothing that we have seen or heard to connect Mr Young's decision to dismiss the claimant to the claimant's race in any way at all.

54. In this hearing the claimant took issue with the recording of that meeting, that the notes produced by the respondent were not consistent with her recordings. It is right that the respondent's notes are not a verbatim record. However, the extracts that the claimant has produced, and that we have looked at, do not change the fundamental matters that Mr Young took into account. He was entitled to take the view on the evidence he had that the claimant had not sanitized her hands at the bottom of the stairs and that this meant that she had lied to the investigator and to him. Even without having access to the yard's CCTV it is clear that you can see perfectly clearly from the CCTV at the top of the stairs that the claimant walked straight in without using the sanitizer at the bottom of the stairs and Mr Young was perfectly entitled to reach that conclusion.

55. The claimant appealed against her dismissal on 6 November 2020. She said in that appeal letter, as she had in the recording of the disciplinary meeting, that she had disinfected her hands at the car and had kept her hands in her pockets. She reiterated that she did use the sanitizer and we assume that she meant the one at the bottom of the stairs. She said that the reason that she refused Ms Moreira's request was because she had done it before. In that appeal the claimant compares her treatment to that of four Romanian people who did not sanitize their hands at all on 6 November 2020 between the turnstile and the cloakroom.

56. There was an appeal meeting before Victoria Brown on 16 November 2020. Again the claimant was accompanied by Mr Matuszewski and was provided with all relevant documents in advance. In the appeal, the claimant said that she sanitized her hands at the car and at the bottom of the stairs and confirmed that she understood the Covid rules and why they had to follow them.

57. Ms Brown tried to get to the bottom of why the claimant did not comply with Ms Moreira's request. The claimant said again she understood why she was asked but that she had already done it and that this time, at the appeal, she added that she was in a rush to get to work. Again, alleged breaches by other people were raised and the claimant said that maybe Ms Moreira didn't like her.

58. At the conclusion of that hearing Ms Brown said she would review the CCTV, reconstruct the scenario to see if it would be picked up by the CCTV at the top of the stairs and would get back to the claimant. Mr Matuszewski said at the meeting that it was a stupid mistake and the claimant would apologise, but at this hearing the claimant disassociated herself from that comment.

59. After the hearing Ms Brown reconstructed the alleged sanitizing by the claimant at the bottom of the stairs and at some point in the course of doing so discovered the CCTV from the yard. This was the CCTV that demonstrates conclusively that the claimant had not sanitized her hands at the bottom of the stairs.

60. The claimant's appeal was refused and the two allegations of not following Health and Safety standards in the pandemic and the refusal to comply with a reasonable management instruction were upheld. In our view Ms Brown conducted a fair and thorough appeal. The fact that she reconstructed the incident and discovered a further CCTV in our view demonstrates that she was open-minded. She said in evidence, and we accept, that had the evidence at that time showed that the claimant *had* sanitized her hands it would have been a different outcome.

61. We now address the allegations of other breaches of Covid restrictions and allegations of other health and safety failings of the respondent and, specifically, the allegation by the claimant that she was treated differently form other employees.

62. These are the allegations of other Health and Safety and Covid breaches that the claimant and her witnesses have referred to.

63. It is perfectly clear to us, and we think the respondent accepted, that the relevant standards were not universally adhered to in the respondent's factory. There are obvious breaches, even in the short segments of CCTV we saw, of Covid restrictions. We are also prepared to accept that the stills from various videos we saw demonstrate that people were breaching both Covid and Health and Safety guidelines and possibly rules. By way of a small example Mr Sanders candidly accepted that he was not wearing hi-vis clothing when he should have been. Further, although not directly relevant to the issues we have to decide, we have to say that we were particularly concerned to see the state of the toilets at the factory. Mr Young said it was a historical problem that had since been resolved but it is nonetheless worrying that it ever got to that stage.

64. Mr Matuszewski, and latterly Mr Buczek, were diligent in raising these issues with the respondent. The respondent has investigated them. The outcomes might not be to the claimant's liking but we accept the respondent's evidence that they are and were taking steps to address the Covid restrictions and breaches of them in challenging circumstances. The respondent clearly took additional steps as things changed introducing such things as Covid wardens; sanitizer controlled doors; regular instructions to managers and Covid briefings and posters. The respondent was far from perfect but it is not, as Mr Searle said, our job to conduct an enquiry into the way they managed the factory during the pandemic.

65. We comment particularly on the numerous allegations levelled against Carl Hopcraft. We find that the respondent did communicate to Mr Matuszewski that they would take formal disciplinary action about his alleged breaches and we have no reason to believe that they did not.

66. We were also provided with disciplinary outcomes for other employees who had breached Covid rules. Two of those disciplinary proceedings were conducted by Mr Sanders, one resulted in dismissal, the other in a final written warning. At first sight those cases looked similar to the claimant's case. However, without reciting the details now, we are satisfied that they were not the same. There were subtle, but important, factual differences. We found Mr Sanders to be a plausible and open witness and we prefer his evidence about these cases. We have also, on the last day of the hearing seen the investigation notes of those cases and they are consistent with his evidence.

67. Finally in terms of our findings of facts we prefer Mr Sanders' evidence that he did not make the discriminatory comments he was alleged to have made concerning Romanian and Polish workers. This was not actively pursued by the claimant in cross-examination of Mr Sanders and there was no direct evidence to support the claimant's allegations.

Law and Conclusions

Unfair dismissal

68. Under section 94 of the Employment Rights Act 1996 an employee has the right not to be unfairly dismissed by their employer. Section 98(1) of the Employment Rights Act 1996 says that it is for the respondent to show the reason for the dismissal and that, as far as is relevant in this case, it is for a reason falling in subsection 2 of Section 98. One of those reasons is that the dismissal related to the conduct of the employee. When deciding what the reason for the claimant's dismissal was, we have to think about the set of facts known by the respondent or believed by the respondent. (*Abernethy v Mott Hay &* Anderson [1974] IRLR 213. Underhill LJ, explained that: "*the essential point is that the 'reason' for a dismissal connotes the factor or factors operating on the mind of the decision-maker which cause them to take the decision – or, as it is sometimes put, what 'motivates' them to do so*" (*Beatt v Croydon Health Services NHS Trust* [2017] EWCA Civ 401). The question for the Tribunal is what was the genuine reason for the decision to dismiss, in the mind of the dismissing manager. Questions as the reasonableness of that belief are addressed in the second part of the test.

69. In this case we have found that Mr Young's reasons for dismissing the claimant did genuinely, in his view, relate to the conduct of the claimant.

70. Section 98(4) says that where the employer has fulfilled the requirements of section 98 (1), that is when they have demonstrated that the dismissal was for a potentially fair reason,

"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 that reason as a sufficient reason for dismissal of the employee; and

(b) shall be determined in accordance with equity and the substantial merits of the case".

71. In a conduct dismissal we have to decide whether Mr Young reached a reasonable belief based on a reasonable investigation. (*British Home Stores Ltd v Burchell* [1978] IRLR 379*).* In our view there was a reasonable investigation. Mr Young did, in our judgment, have a reasonable belief that the claimant had done what she was accused of, namely failing to sanitize her hands before entering the factory, failing to follow a reasonable management instruction and misleading the investigation. It is not our place to decide if we would have dismissed the claimant in these circumstances. We are not permitted to substitute our own decision, we can only consider if the decision to dismiss the claimant was within the band of reasonable responses which a reasonable employer might have adopted (*Iceland Frozen Foods v Jones* [1982] IRLR 439). Even if we consider

that the decision was on the harsh said and that we might have reached a different conclusion, it is not up to us to make that decision here.

72. We have considered carefully the evidence about the other people who were disciplined, the action taken, or not taken against managers' breaches or alleged breaches and other ongoing alleged breaches. We think that the decision might be seen to be on the harsh side and we understand the claimant's sense of grievance that she has been dismissed in the context of all the breaches she has brought to our attention. However, we agree with the respondent that, with respect to the claimant, this is to miss the point. It was not the claimant's initial failure to sanitize her hands that was the main problem. The additional and aggravating factor for the claimant, compared to all the other cases we saw, was her refusal to comply with Ms Moreira's request to sanitise her hands; and then maintaining the position that she had already sanitized her hands when she had obviously and demonstrably not done so.

73. What we have to decide is not whether we would have dismissed the claimant but whether the decision to dismiss the claimant by Mr Young was within the band of reasonable responses of a reasonable employer. In our view the misconduct of the claimant could reasonably have been dealt with by way of a final written warning or by way of a dismissal. This means that the decision to dismiss the claimant was within the band of reasonable responses of a reasonable employer.

74. The real issue in this case for unfair dismissal we think, is the equity and substantial merits of the case. The claimant's complaint is, and we think always has been, that she was treated more harshly than others. In circumstances where one employee is dismissed for something and another employee is subjected to a lower or no sanction for the same thing, that might be enough to make the dismissal unfair. However, the law is that the circumstances must be truly similar. (*Hadjioannou v Coral Casinos Ltd* [1981] IRLR 352).

75. In all the cases in this case that we reviewed there is a difference. The main factor in the claimant's case was her refusal to accept that she had done wrong combined with maintaining the demonstrably incorrect position that she had previously sanitized her hands. This conduct, or conduct similar to it, was not present in any of the other cases that we were referred to which means that the claimant's case is distinguishable and the dismissal was not unfair for that particular reason. This means that the claimant's claim of unfair dismissal was not well founded and is dismissed.

Wrongful dismissal

76. In terms of the wrongful dismissal claim we have a slightly different test. We have to decide if the claimant breached her contract of employment in such a way that the respondent was entitled to treat the claimant as completely rejecting her contract - a repudiatory breach of contract. (see *British Heart Foundation v Roy (Debarred)* UKEAT/0049/15/RN). This is, in the case of a conduct case, referred to as gross misconduct. We are not satisfied that the acts of the claimant amounted to gross misconduct.

77. We have referred to the respondent's rules about gross misconduct and misconduct in our findings. In our view it fell into misconduct rather than gross misconduct. This is supported by the decision in the case of Mr Simoes whose circumstances were most similar to the claimant's and who was dismissed on notice. We conclude that this demonstrates that the respondent did not genuinely

believe the claimant's circumstances, and circumstances like that amounted to a repudiatory breach of contract and we don't think so either.

78. In circumstances where a decision is *just* within the band of reasonable responses it is not clear to us how it can be consistent to find that this could also amount to a fundamental and repudiatory breach of contract. Where an employer could reasonable deal, as we have found, with the misconduct with a warning rather than a dismissal it cannot be the case that the claimant's conduct is so bad as to amount to a complete rejection of the contract.

79. The claimant was therefore dismissed in breach of contract.

80. In those circumstances the claimant is entitled to the greater of notice set out in the contract or statutory notice under section 86 of the Employment Rights Act 1996. A copy of the claimant's contract that we have seen provides that she is entitled to one month's notice on completion of her probationary period. The claimant is therefore entitled to one month's pay as damages for the respondent's breach of contract. We have heard no evidence about what a month's pay would amount to and that will be dealt with at a remedy hearing if necessary

Discrimination arising from disability. (Section 15 Equality Act 2010)

81. Section 15 of the Equality Act – discrimination arising from disability – says:

(1) A person (A) discriminates against a disabled person (B) if—

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

82. In this case the unfavourable treatment is said to be purposely frustrating the claimant in her efforts to attend an appointment with an Occupational Health Nurse in or around September 2020. The "thing arising in consequence of the claimant's disability" was said to be her need to see an Occupational Health Nurse which arose out of her mental ill health.

83. Simply put, we have found that the respondent did not frustrate the claimant's attempts to attend an appointment with an Occupational Health Nurse. The claimant was not, therefore, subjected to the unfavourable treatment recorded in the Case Management Order of Employment Judge Maidment.

84. It is not necessary for us to go further than that and the claimant's claim under section 15 Equality Act 2010 is dismissed.

Direct Race discrimination

85. Section 13 of the Equality Act 2010 says:

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

86. By virtue of section 9 of the Equality Act 2010, race is a protected characteristic.

87. Section 23 (1) says:

(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.

88. Section 136 says:

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

89. We refer to the case of *Igen Ltd v Wong* [2005] IRLR 258. That case says that the tribunal must consider all the evidence before us to determine whether the claimant has proved facts from which we could conclude that the respondent has committed the discriminatory acts complained of. We are entitled at that stage to take account of all the evidence but must initially disregard the respondent's explanation

90. The less favourable treatment in this case is the claimant's dismissal. The claimant was by any measure, treated unfavourably in being dismissed. We have found, however, that the reason for that treatment was because of Mr Young's genuine and reasonable belief in her culpability in respect of the incident on 28 October and the subsequent disciplinary meetings. We have heard no convincing evidence from which we could conclude that the reason for the claimant's dismissal was her race. The only basis, as far as we can tell for the claimant's assertion that the treatment was because of her race, was because she said that she saw some people she believed to be Romanian, or of other nationalities more generally, being treated more favourably than the claimant. Even if that is correct, it is not enough to show a difference in treatment and a difference in race. There must be *something* from which we could conclude that the claimant's nationality was a reason for the treatment (*Madarassy v Nomura International* [2007] IRLR 246).

91. However, but even if we had found some facts from which we were able to conclude that the reason for the claimant's dismissal was her race, the respondent has provided an explanation for the treatment (which we have accepted) which is its genuine belief and reasonable belief in her guilt that is unconnected with the claimant's race.

92. This means that the claimant's claim of direct discrimination also fails.

Harassment related to race and disability

93. The last claim the claimant is bringing is for harassment under section 26 of the Equality Act, this says

(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

94. Subsection 5 lists the relevant protected characteristics, and they include race and disability.

95. The first allegation of harassment related to race, and that is about Ms Moreira's actions on 28 October 2020. It is said that she stood close to the claimant, pointed at the hand sanitizer, was very rude to her and said it would not end well for the claimant. As we have already found this did not happen as the claimant alleged. We have no doubts that the treatment by Ms Moreira was unwanted by the claimant however, it was not in our judgement, for the reasons we have already explained, related in any way to the claimant's race. We found that Ms Moreira did not know what the claimant's race was at that time. Her decision was solely as a result of a management instruction to Ms Moreira. The requirement for conduct to be *related* to is a relatively low threshold of causation but Ms Moreira's acts do not meet that threshold. So for these reasons that claim fails and is dismissed.

96. The second allegation of harassment relates to the Occupational Health referral. It was said to be harassment related to disability. We have no doubt again, that Ms Pearce's actions were unwanted. We have commented on the tone of her emails. Hwever, in our view, those actions do not come close, even if there were a deliberate attempt to frustrate the claimant's access to Occupational Health amounting to a violation of the claimant's dignity and creation of an intimidating, hostile, degrading, humiliating or offensive environment. That is a high hurdle (*Thomas Sanderson Blinds Ltd v English* UKEAT/0316/10/JOJ, UKEAT/0317/10/JOJ) and the conduct, unwanted as it was, did not reach that hurdle.

97. For these reasons the claimant's case of harassment is unsuccessful and is dismissed.

Employment Judge Miller

3 November 2022

Appendix – List of issues

1. Unfair dismissal

1.1 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 says that there was inconsistency in the way she was treated when compared to others. When the incident of her being challenged over hand sanitation arose, she said that other staff had been allowed to pass by the manager , Angela Moreira, without sanitising their hands and without challenge. She says that her husband who also worked for the respondent, Mr Robert Matuszewski, raised with the respondent the case of 5 other individuals who had acted in breach of Covid rules both before and after the incident relating to the claimant and where the respondent took no action. The case of another individual, Mr Igor Prokofjev, is also relied on as having been reported by her – he is said to have entered the workplace without sanitising his hands. Again, the respondent is said to have taken no action.
1.4 Fundamentally, the claimant maintains that she had complied with the rules regarding hand sanitisation. She used her own sanitiser rather than that provided by the respondent which was an additional hygiene precaution. Ms Moreira is said to have broken safety rules by holding people in a crowded area when the claimant was challenged. Furthermore, prior to the incident she said that briefings had been

published saying that employees should try to wash their hands. After the incident a new one was issued shortly before her dismissal saying that if employees did not comply with sanitation requirements they could be disciplined.

2. Remedy for unfair dismissal

2.1 Does the claimant wish to be reinstated to their previous employment?
2.2 Does the claimant wish to be re-engaged to comparable employment or other suitable employment?
2.3 Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.
2.4 Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.
2.5 What should the terms of the re-engagement order be?
2.6 If there is a compensatory award, how much should it be? The Tribunal will decide:
2.6.1 What financial losses has the dismissal caused the claimant?
2.6.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
2.6.3 If not, for what period of loss should the claimant be compensated?
2.6.4 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
2.6.5 If so, should the claimant's compensation be reduced? By how much?
2.6.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
2.6.7 Did the respondent or the claimant unreasonably fail to comply with it by [specify alleged breach]?
2.6.8 If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?
2.6.9 If the claimant was unfairly dismissed, did s/he cause or

contribute to dismissal by blameworthy conduct?
2.6.10 If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?
2.6.11 Does the statutory cap of fifty-two weeks' pay apply?
2.7 What basic award is payable to the claimant, if any?
2.8 Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?
3. Wrongful dismissal / Notice pay
3.1 What was the claimant's notice period?
3.2 Was the claimant paid for that notice period?
3.3 If not, was the claimant guilty of gross misconduct? / did the claimant do something so serious that the respondent was entitled to dismiss without notice?

4. Disability

4.1 Did the claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? The Tribunal will decide:
4.1.1 Did s/he have a mental impairment: depression and anxiety?
4.1.2 Did it have a substantial adverse effect on her ability to carry out day-to-day activities?
4.1.3 If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?
4.1.4 Would the impairment have had a substantial adverse effect on her ability to carry out day-to-day activities without the treatment or other measures?
4.1.5 Were the effects of the impairment long-term? The Tribunal will decide:
4.1.5.1 did they last at least 12 months, or were they likely to last at least 12 months?
4.1.5.2 if not, were they likely to recur?

5. Direct race discrimination (Equality Act 2010 section 13)

5.1 The alleged less favourable treatment is the claimant's dismissal?
The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.
If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether s/he was treated worse than someone else would have been treated.
The claimant says s/he was treated worse than individuals allowed to pass before her without hand sanitation on 28 October 2020, the individuals raised by Mr Matuszewski with the respondent (Romanian, Baltic States, Portuguese and British) and Mr Igor Prokofjev (possibly Latvian). She refers to a manager, Mr Andy Sanders, allegedly saying that he would prefer Romanian workers over Polish workers because they were likely to complain.
5.2 If so, was it because of her nationality?

6. Discrimination arising from disability (Equality Act 2010 section 15)

6.1 Did the respondent treat the claimant unfavourably by purposefully frustrating her in her efforts to attend an appointment with an occupational health nurse following a sickness absence which ended on or around 1 August 2020.
6.2 Did the following things arise in consequence of the claimant's disability: the claimant's need to see an occupational health nurse arose out of her mental health impairment
6.3 Was the unfavourable treatment because of the claimant's need to see a nurse?
6.4 Was the treatment a proportionate means of achieving a legitimate aim? The respondent says that it sought to arrange appointments at times to suit the claimant.

7. Harassment related to race/disability (Equality Act 2010

section 26)
7.1 Did the respondent do the following things:
7.1.1 On 28 October 2020, Mrs Moreira stood close to the claimant, pointed at the hand sanitiser, was very rude to her and said that it would not end well for the claimant (race only)
7.1.2 following the claimant sickness absence which ended on or around 1 August 2020, the respondent purposely stopped her being able to attend an appointment with an occupational health nurse (disability only).
7.2 If so, was that unwanted conduct?
7.3 Did it relate to race/disability?
7.4 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?
7.5 If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

8. Remedy for discrimination or victimisation

8.1 Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?
8.2 What financial losses has the discrimination caused the claimant?
8.3 Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?
8.4 If not, for what period of loss should the claimant be compensated?
8.5 What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?
8.6 Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?
8.7 Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?
8.8 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
8.9 Did the respondent or the claimant unreasonably fail to comply with it?

8.10 If so is it just and equitable to increase or decrease any award payable to the claimant?

8.11 By what proportion, up to 25%?

8.12 Should interest be awarded? How much?