EMPLOYMENT TRIBUNALS

Claimant: Ms R Lino

Respondent: EG Group Limited

Heard at: Manchester (by CVP) **On:** 15 & 16 February and (in chambers) on 22 March 2024

Before: Employment Judge Phil Allen
Mr C Cunningham
Mrs SA Humphreys

REPRESENTATION:

Claimant: Mr N O'Brien, counsel
Respondent: Ms L Kaye, counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claimant was unfairly dismissed by the respondent. The complaint of unfair dismissal was well-founded.

2. It is just and equitable to reduce the basic award payable to the claimant by one hundred percent because of the claimant's conduct before the dismissal.

3. The claimant caused or contributed to the dismissal by blameworthy conduct and it is just and equitable to reduce the compensatory award payable to the claimant by one hundred percent.

4. There was a seventy-five percent chance that the claimant would have been fairly dismissed in any event (**Polkey**).

5. The complaint of direct race discrimination is not well-founded and is dismissed.

6. The complaint of harassment related to race is not well-founded and is dismissed.

REASONS

Introduction

1. The claimant was employed by the respondent from 9 December 2015 until she was dismissed on 2 April 2021. From 1 December 2019 she was a site manager. At the relevant time, she managed the Greggs store at Braywick. Following a food safety check undertaken on 30 December 2019, there was an investigatory process, followed by a disciplinary process. The claimant brought claims of race discrimination (direct discrimination and/or harassment) as a result of the conduct of a second investigatory meeting with her on 5 February 2021. She relied upon her Spanish nationality in bringing her claim. She also claimed unfair dismissal after she was dismissed on 2 April 2021. The respondent denied the claims and contended that the dismissal was fair by reason of conduct.

Claims and Issues

2. The case had a long procedural history which it is not necessary to reproduce in this Judgment. Preliminary hearings were conducted on 10 May 2022, 15 March 2023, 26 June 2023, and 2 January 2024. The issues were initially listed following the first preliminary hearing. At the start of this hearing, we were provided with an agreed list of issues and the parties confirmed that those issues remained the ones which needed to be determined. It was also agreed that we would initially determine the liability issues only, together with issues five and six. The other remedy issues were left to be determined later, only if the claimant succeeded in any of her claims. The issues which we needed to determine, as recorded in the agreed list of issues, are appended to this Judgment.

3. The claimant had previously brought claims for unauthorised deduction from wages and for annual leave, but those claims were struck out/dismissed at the hearing on 2 January 2024. The claimant had also previously applied to amend her claims, but the application to amend had been refused at the hearing on 26 June 2023.

Procedure

4. The claimant was represented by Mr O’Brien, counsel. Ms Kaye, counsel, represented the respondent.

5. The hearing was conducted by CVP remote video technology with both parties and all witnesses attending remotely. At the start of the hearing, we had a short discussion with the parties before taking some time for reading. The hearing was interpreted for the claimant by an interpreter provided by the Employment Tribunal service throughout the hearing. The claimant’s counsel also highlighted the need for us to be aware of the claimant’s health conditions during the hearing. We ensured that we took regular breaks during the hearing.

6. An agreed bundle of documents was prepared in advance of the hearing. The bundle ran to 442 pages. We read only the documents in the bundle to which we were referred (including in witness statements, or as directed by the parties). Where a number is referred to in brackets in this Judgment, that is reference to the page number in the bundle.

7. We were provided with the witness statements of three witnesses: the claimant; and two witnesses for the respondent. We read those witness statements on the morning of the first day. The respondent's witnesses were: Mr Balbino Alvarez, Area Manager (and the person who conducted the interview with the claimant on 5 February 2021); and Ms Lisa Holt, HR Business Partner (and the person who made the decision to dismiss the claimant).

8. We heard evidence from the claimant from midday on the first day until the end of the first day. She was cross examined by the respondent's representative, before we asked a question of her, and she was asked a few questions in re-examination. On the morning of the second day, we heard from the two witnesses for the respondent, each of whom were cross examined by the claimant's representative, we asked them questions, and they were re-examined.

9. After the evidence was heard, each of the parties was given the opportunity to make submissions. The claimant's counsel provided a written submission document and added to those written submissions verbally, the respondent's counsel made her submissions orally.

10. Judgment was reserved and accordingly the Tribunal provides the Judgment and reasons outlined below. An additional day was taken in chambers to reach this decision (the hearing having finished at the end of the two days allocated, leaving no time for a decision to be made).

11. The Tribunal was grateful to the representatives for the way in which the hearing was conducted, which was entirely appropriate.

Facts

12. The claimant worked for the respondent from 9 December 2015. She started out as a bakery assistant, then worked as a supervisor, and from 1 December 2019 she was a site manager. We were provided with a copy of her contract in her site manager role (181). The respondent has a disciplinary procedure (235).

13. The claimant alleged that she was treated less favourably on the grounds of her race and harassed related to her race. The list of issues referred to the claimant's Spanish nationality.

14. At the relevant time, the claimant was the site manager for a Greggs store located at Braywick near Maidenhead. The claimant accepted that she was an experienced site manager, and she emphasised the fact that she had received positive reviews prior to the issues which arose in this case.

15. We were shown some food safety documents which emphasised matters relating to food safety and the storage and use of food. The claimant accepted that she had been aware of those matters. One such document stated that any out-of-date stock must be removed and disposed of immediately (431).

16. In the bundle of documents, was a job description for the claimant's role (432). It was a generic Greggs' store manager job description and not one specific to the respondent (we were not provided with one specific to the respondent). That emphasised that compliance with food safety and health and safety policies and

procedures was something which was considered to be part of the role-holder's KPI's. There was some dispute about the job description and whether it applied to the claimant, arising (in part) from Ms Holt's reference to a job description in her disciplinary decision. The claimant had produced a job description or job descriptions in advance of the disciplinary hearing. Within the Greggs' supervisor job description, it stated that one of the key tasks and main duties was to "*Ensure that food is stored in designated containers with correct labelling to prevent spoilage*". That task was not listed in the store manager's job description.

17. In her evidence, the claimant contended that she had raised with her area manager on a regular basis throughout 2020 issues relating to the staff who worked in her store. We were not provided with any documents which evidenced that she had done so.

18. In her witness statement, the claimant recounted a conversation with another employee of the respondent, Mr Muthian, in September 2020, in which she said that he had told her to get another job before December. He left the respondent shortly thereafter. There was no reference made to that conversation in any documents, including those which recorded the claimant's grievance or the Tribunal proceedings.

19. As part of her claim, the claimant alleged that the reason for her dismissal was because the area manager wished to place another named employee in her role. In her witness statement, the claimant provided no evidence whatsoever about that person or their circumstances. The only evidence available to us about it was contained in the letter which provided an outcome to the claimant's grievance (331), in which it was said that the named individual had been a manager prior to maternity leave and Mr Diwas (the area manager) had asked her if she wished to return in the same position. We heard no other evidence about the other person's circumstances.

20. We were provided with the rotas for the relevant site on the week commencing 28 December 2020 (440). The claimant worked on Monday 28 December 2020 between 7am and 4pm. For the last two hours of the shift, she was the only person recorded as working at that site. On Tuesday 29 December she worked 6am to 1pm. On 30 December she did not work.

21. On 30 December 2020 a food safety check was undertaken at the site by a regional manager. It was Mr Alvarez's evidence that it was common practice for area managers and regional managers to do spot checks on stores unannounced and that he personally always checked for out-of-date goods when he did so. We were shown photographs of a number of things identified (194). Chicken was in a storage container without a label attached to show when it had been first used and what the use by date was. Two other containers had similar issues and appeared to contain chicken or tuna products. Both a chicken mayo container and a tuna crunch container with the statement on them "*do not exceed the use by date*" had use by dates which had been entirely blocked out using black marker pen. A lettuce package with a use by date of 28 December had the use by date blocked out with black marker pen (albeit the date was still visible). A sign was attached to racking which said "*All the ingredients are ready here!! Don't take from the fridge*" (with a down arrow). The claimant was not at work on the day of the check.

22. It was not in dispute that marking out-of-date food with a black marker was not part of the respondent's procedures. It was also not disputed by the claimant, when it was put to her, that the matters identified might have resulted in the store being closed if they had been identified by inspectors.

23. The claimant accepted during the hearing that she had drawn the black pen marks on the items, and she had written the sign. Her explanation for the use of the black pen was that it was her way of indicating to other employees (including the supervisors) that the items should be thrown away. When she was asked why she did not simply throw the items away herself, the claimant highlighted how busy she had been and her workload, and said that she could not do everything, and she expected others to throw away the things which she had marked. We could not understand why the claimant would take the time required to mark the products rather than dispose of them herself. We also did not understand why the mark for disposal would involve covering up the use by date. As a result, we found that the claimant's explanation lacked credibility and we did not accept that it was truthful.

24. On 3 January 2021 the claimant was interviewed by Diwas Shrestha (following the safety check) and we were provided with notes which recorded what had been said in the investigatory meeting (203). There were two signatures on each page of the notes. The claimant contested that it was her signature, but when challenged further, explained that what she indicated showed that she had looked at the page, but it was not her final signature as such. Her witness statement recorded that she had written "*R*" on some notes to indicate that they had been copied to her, but she had refused to sign them. The notes recorded questions and answers in English. The claimant confirmed that she did not raise in that meeting any issue with language, she emphasised that she thought it was an informal meeting (although we noted that a degree of formality must have existed where the meeting was noted, and the notes signed by the attendees). We did not hear evidence from Mr Shrestha.

25. The notes of 3 January meeting recorded the claimant as saying that she always put a black mark on the date to ensure that a product was not to be used. She emphasised that it was the supervisors' job to check to make sure that there were no out of date items. She said that maybe she forgot to throw away the lettuce (shown in the photograph) on 29 December when she had worked opening the store. She said that she normally checked dates but may have missed it. When asked to confirm that all the supervisors and team members were aware that a black mark meant that the items should be discarded that day, the claimant was recorded as replying that maybe the named supervisors didn't know, but the supervisors should have known to discard the product if they could not read the date. At the end of the interview, the claimant was recorded as saying that sometimes it could be a little difficult to control the staff.

26. We were provided with an email from Mr Shrestha of 12 January (208) in which it was recommended that disciplinary action should be taken against the claimant following the investigation.

27. On 22 January 2021, one of the supervisors at the site was given a letter of concern which was to remain on her personnel file for six months (417). That was stated to be due to the concern "*Breach of food safety; specifically failing to remove out of date food items and failing to correctly label items once open".* The letter also

said, *"Going forward, please ensure that food safety is adhered to at all times*". The letter was from Mr Shrestha, from whom we did not hear evidence and therefore we heard no evidence about why the supervisor was given that sanction, which was notably considerably less severe than the sanction ultimately given to the claimant.

28. The relevant subsequent decisions regarding the claimant at the time were made by Ms Turner, an employee relations advisor who is not now employed by the respondent and from whom we did not hear any evidence. The claimant, in her own evidence, also did not provide any explanation about what occurred during January 2021. It was clear from the evidence that the respondent made the decision to refresh the investigation (using the word used in submissions) rather than to proceed straight to a disciplinary hearing.

29. Within the documents provided was a letter of 26 January 2021 from the claimant to Ms Turner (267), which appeared to have been the reason, or part of the reason, for the respondent's decision to refresh the investigatory process. In that letter the claimant emphasised that she was not English and that her spoken language was Spanish. She said:

> "*my English is not good enough to ensure that my side of the story and my opinions are clearly communicated without bias or loss of detail, also I am not aware of all my rights. I fear that my right to have a translator present at the investigation meeting has already prejudiced my case…I was not informed that I would be able to have someone present to assist me in overcoming the language barrier with my employer, at the first investigation…I am therefore using the services of a professional interpreter. My interpreter is totally independent and understands my dialect of Spanish. They understand "FULLY" that as sensitive or legal issues may be discussed and information exchanged needs to be accurate and unbiased…I understand that it is unlawful to put me at a disadvantage when it is my right to have an interpreter present to assist me with the language barrier, I would kindly ask you to allow me this in order that the Disciplinary Hearing can progress without the need to start a grievance which would only delay matters"*

30. The claimant was sent a letter on 2 February 2021 inviting her to a further investigation meeting (274). The letter was from Mr Alvarez, area manager. It stated that the purpose of the meeting was to consider allegations of "*Serious breach of food safety; specifically, failing to remove out of date food items from sale*".

31. We heard evidence from Mr Alvarez. He is English but both of his parents are Spanish, he lived in Spain as a boy, and he is able to speak Spanish fluently. Accordingly, he is able to speak and understand both English and Spanish.

32. There was no dispute that Mr Alvarez arrived at the location for the meeting early. He did not know the claimant, so asked for her. He had a cigarette outside the building and was spoken to by Mr Judson while doing so. He denied that he told anyone about the reason for his visit or that he told anyone that he was there to conduct an investigation. The claimant asserted that he did. That assertion was not based upon anything the claimant had seen or heard directly, but rather was based upon being asked about the interview by a colleague. It was obvious that the attendance of an area manager at the site would have led to potential gossip

between employees, and, as he was there to meet the claimant, it obviously might have been connected to her. There was no evidence that that Mr Alvarez had spoken to others about the meeting or his reason for being at the store.

33. In attendance at the investigatory meeting Mr Alvarez conducted on 5 February 2021, was the claimant (who spoke Spanish), Mr Wayne Judson (her appointed translator, who spoke both Spanish and English), and Sachin Obhan who was a note taker who we understood spoke only English. We were provided with handwritten notes of the meeting taken by Mr Obhan in English (299). The claimant secretly recorded the meeting, and we were provided with a full transcript of what was said in the meeting (292). The transcript was prepared on the respondent's behalf, but the content of the transcript was not disputed by the claimant. Helpfully, the transcript recorded both what was said in the meeting in Spanish and what was said in English, with the colour of the text showing which language was used on which occasion (292).

34. The meeting took place in a small room on site. We were told that it was the only private meeting space available at the site. Mr Alvarez's evidence was that he had not previously visited the site and did not know about the size of the room available. It was also his evidence that somebody from the respondent's HR department had made the arrangements. He acknowledged that the room was not ideal. The meeting took place at a time when social distancing should have been observed. Mr Alvarez clearly had some concerns because he was recorded as saying at the start of the meeting that because of the pandemic, he was going to take a break every twenty minutes. The claimant was recorded as stating she was happy with that (after the question was translated for her). The transcript did not record the claimant as expressing concerns about the room or social distancing at any point during the meeting. Mr Judson did express concern part-way through the meeting in English about the fact that social-distancing was not being adhered to, to which Mr Alvarez said "*okay*" and Mr Judson replied, "*Just to let you know*". The exchange between Mr Judson and Mr Alvarez was not translated for the claimant.

35. The handwritten notes taken were somewhat briefer than the transcript. They were only three pages. They did not record any of the conversation in Spanish. In cross-examination Mr Alvarez agreed that they were an inadequate record of the meeting.

36. The transcript recorded a number of notable things about the meeting, including:

a. Mr Alvarez made clear from the start of the meeting that he wanted the replies to his questions from the claimant to be in English, something to which Mr Judson objected;

b. Mr Judson did not translate everything that was said. On at least one occasion, he expanded upon what the claimant said when informing Mr Alvarez of her answer;

c. After clarifying the number of people in the claimant's team, Mr Alvarez asked "*Can I just ask you a quick question, how many of your team speak fluent Spanish?*". The claimant said it was only one person;

d. Mr Judson advised the claimant whilst translating. He advised the claimant to say no comment to Mr Alvarez's question about the number of Spanish-speakers in the team and told the claimant that she didn't know. Mr Alvarez clearly understood this at the time and challenged Mr Judson and emphasised that his role was only to interpret;

e. When the claimant began to answer some questions in English, Mr Judson told her (in Spanish) only to answer in Spanish. Slightly later in the meeting, the claimant told Mr Judson in Spanish that she was going to say the answer to Mr Alvarez in English and asked Mr Judson whether that was ok, to which Mr Judson replied that she should only reply in Spanish because Mr Alvarez understood;

f. Mr Judson and Mr Alvarez clearly had a disagreement about how the claimant was to respond in the meeting. Mr Judson said, "*If she doesn't have the command of English how is she going to explain it to you?*", to which Mr Alvarez responded "*If she doesn't have the command of English how can she do her job*";

g. Mr Judson stated that he was going to phone human resources, to which Mr Alvarez agreed he could (and a break would be taken). Immediately afterwards, Mr Judson referred the claimant in Spanish to the question asked much earlier in the meeting about how many staff spoke Spanish and the claimant replied to Mr Judson in Spanish "*He is discriminating against people who speak Spanish*";

h. In a lengthy passage in Spanish, the claimant explained to her translator that she had asked for an interpreter because she was concerned she would be asked to incriminate herself and she also referred to not wanting to incriminate her friends who were pregnant or older;

i. Mr Judson asked the claimant whether she wanted to finish and make a complaint to human resources and "*we go to ACAS*", to which the claimant replied that no she wanted to finish the meeting;

j. After a further disagreement about Mr Judson's role, Mr Alvarez decided to end the meeting, he said due to the interpreter; and

k. At the end of the meeting the claimant said in Spanish (which was not translated to English) "*Another thing I want to say is because you haven't investigated anyone else…You know that he has to investigate the others, not just me. Very cunning …Like trying to intimidate me. I don't do the work of 7 people*". Mr Alvarez did not reply to the question about whether he had interviewed anyone else (but he accepted in his evidence to the Tribunal that he had understood it).

37. Mr Alvarez's evidence was that he felt that asking about how many Spanish speaking members there were in the claimant's team was a reasonable question, which he had asked because he was keen to understand how the claimant communicated with her team and, in particular, whether there were any

communication barriers. He felt that was relevant to the disciplinary investigation. From his answers to cross-examination it was clear that he was considering whether the issues identified might have arisen from, and been explained by, communication issues between the claimant and members of her team, which might have resulted in an approach other than disciplinary action. In his evidence, Mr Alvarez described himself as dual British/Spanish and emphasised that he did not have an adverse view of people who are Spanish as the claimant had suggested.

38. It was Mr Alvarez's evidence that he was only asked to investigate the claimant. He was not asked to investigate any other employees. He did not know about the outcome to the process followed for the supervisor. It was his evidence that he did not respond to the claimant's question at the end of the meeting about whether others had been investigated because he wasn't aware of what other enquiries had been carried out by local management, and his personal role was limited to the claimant. He also explained any difference in treatment between the claimant and the supervisor as being everything to do with the fact that the claimant was in charge of the shop and so ultimately responsible (albeit neither the sanctions imposed on the claimant, nor the supervisor, were Mr Alvarez's decision).

39. Mr Alvarez said that he accepted and appreciated that the meeting had not gone well. He acknowledged that he did at times raise his voice to overcome Mr Judson, but he denied acting in a harassing and intimidating manner. It was Mr Alvarez's evidence that Mr Judson was needlessly aggressive.

40. In his answers to questions in cross-examination, Mr Alvarez denied requiring the claimant to answer in English in the meeting. In submissions, the claimant's counsel submitted that Mr Alvarez's denial that he required the claimant to answer in English was approaching disingenuous. The transcript clearly showed that Mr Alvarez did endeavour to require the claimant to answer questions in English during the meeting, albeit that she did not do so.

41. In her witness statement, the claimant referred to Mr Alvarez as having been aggressive throughout the whole meeting in a harassing and intimidating manner, albeit she did not detail exactly why she said that. She said that the meeting seemed less like a disciplinary investigation meeting and more of a persecution. In cross-examination, the claimant accepted that Mr Judson had told her not to respond in English in the meeting, and that he had added things to her responses.

42. Mr Alvarez had no further involvement in the procedures about which we heard evidence after the meeting on 5 February (save for answering some questions as part of the grievance process). In her evidence, Ms Holt stated that a decision had been made that there was a disciplinary case to answer. However, when asked, it was clear that Ms Holt did not know who had made that decision or when.

43. On 11 February 2021 the claimant was invited to a disciplinary hearing by letter (312). In that letter the allegation was stated as being "*under the heading of gross misconduct*". The allegation from Mr Alvarez's letter of 2 February was reproduced: "*Serious breach of food safety; specifically, failing to remove out of date food items from sale*". That hearing did not go ahead. Ms Holt told us that the process was paused for the claimant's grievance.

44. The claimant raised a grievance (436). The respondent summarised the grievance (314). A grievance outcome was provided by Ms Humphries, an HR Advisor, in a letter of 10 March (328). We did not hear evidence from Ms Humphries. Of relevance that letter said, of the first investigatory meeting, that "*the investigation was undertaken* [without a translator] *as you were considered a strong English speaker with no prior issues in your career as a manager with Greggs in relation to your language abilities*". Of the second investigatory meeting, it was said "*your meeting on 5th February 2021 with Balbino Alvarez was conducted and concluded due to your interpreter interfering with the questions and answers*". The letter addressed the claimant's allegation about the manager on maternity leave as we have already recorded. Ms Humphries expressed concern about the language barriers mentioned by the claimant and a support meeting was offered to ensure that "*both employee and employer are able to communicate efficiently of what the roles, responsibilities and correct processes are*".

45. A letter of 19 March invited the claimant to a disciplinary hearing (336). The letter was sent by Ms Holt, Employee Relations Team Leader. In that letter the allegation was stated to be "*under the heading of gross misconduct*" but what was alleged differed from what had been said in Mr Alvarez's letter or the letter of 11 February. What was alleged was "*Serious breach of food safety – Specifically, failing to remove out of date food items from sale and amending dates fraudulently*". The claimant was informed that the respondent had allocated a Spanish speaking translator to attend the meeting. The claimant was told of her right to be accompanied and she was explicitly told about the range of potential sanctions including dismissal. It was also said that, if the claimant failed to attend, then the hearing would be held in her absence.

46. The claimant responded to the invitation on 19 March in an email to Ms Holt (339). She said she would not accept the invitation for reasons she explained. On 24 March, the claimant sent a further email to Ms Holt (341). That email was important as it was the statement upon which the claimant relied when she attended the disciplinary hearing. Amongst other things, she stated the following (being described as "*fact*"):

> "*Out of courtesy I helped* [the supervisor] *do her job due to her lack of willingness and incompetence.*
>
> *The job I did for her was to go through the food fridges and physically remove out of date products.*
>
> *I told her … to throw the out of date food that I had marked with a black pen away. All supervisors must follow the procedures. They had been trained and They had signed the workbooks accepting their capacity to do their tasks accurately.*
>
> *She was told it was out of date.*
>
> *My duties were long so I left her to do what she is paid to do…*
>
> *… I will point out that it is totally unreasonable for you to expect me to do the job of my supervisors and my own job ALL AT THE SAME TIME …*

That is all I have to say. There are no mitigating circumstances"

47. Within her email, the claimant also addressed translators and stated she would have her own translator with her. She also attached the job descriptions which we have already addressed earlier in the Judgment.

48. The claimant attended the disciplinary hearing on 29 March 2021 which took place by Zoom. The claimant was not accompanied. Another employee of the respondent who spoke Spanish attended as a translator, and a note-taker also attended. Ms Holt's evidence was that the claimant attended but refused to put her camera on. Ms Holt asked the claimant several questions. The evidence was that to each question asked, the claimant replied, "*no comment*", albeit it also appeared that she made reference to the statement she had provided. The claimant did not include anything about this meeting in her witness statement and when questioned about it she appeared to recall only that it lasted about five minutes, having been unsure which meeting was the disciplinary meeting and which were investigatory meetings. Ms Holt's evidence was that there were notes taken of the meeting and she said that she had those notes in front of her when she prepared her disciplinary decision. Those notes could not be found for the Tribunal hearing and were not provided to us. It was Ms Holt's evidence that she took the decision to abandon the meeting and provide an outcome in writing after asking the claimant if she was going to answer "*no comment*" to every question and receiving only that answer to the questions she asked. Ms Holt did emphasise that she took the claimant's statement into account when she made her decision and, amongst other things, noted that it did not provide any mitigation.

49. Ms Holt sent the claimant her disciplinary decision letter on 2 April 2021 (346). Under the heading "*Allegations*" the letter set out that the allegation was "*Serious breach of food safety - Specifically, failing to remove out of date food items from sale*". That was notably not the allegation included in the letter of 19 March inviting the claimant to the disciplinary hearing, but rather was the allegation as it had been described on 2 February. That section of the letter went on to say "*When I clarified the allegation you responded "no comment"*".

50. At the end of the first page, the disciplinary-decision letter explained that the only evidence that the claimant provided was her statement and her job description. The letter said that the claimant had provided the "*explanation that you felt it was not you that was responsible for the out of date products*". The letter then erroneously stated that the claimant's job description explained "*Ensure that food is stored in designated containers with correct labelling to prevent spoilage*". Ms Holt was unable to explain where that quote came from, but we accepted (as Ms Holt did in answer to one question asked, before she provided other answers) that the quotation was from the supervisor's job description (not being the job description for the claimant's role).

51. Ms Holt set out her conclusion in a paragraph towards the end of the letter (347). In that paragraph she said:

> "*You did not provide any evidence to support that expired food items where not located on site on the day in question. I believe that you crossed out the expiry dates to use the food items and reduce 'wastage' on site. This in return would have shown as the site not losing money due to food wastages. I*

believe this was done for personal gain to prevent your wastage figures from looking poor for the site. However, this could have potentially injured our customers severely and brought the company into disrepute."

52. During the cross-examination of Ms Holt, it was emphasised that what she concluded, and the allegation recorded at the start of the letter, were entirely different. Ms Holt accepted that what she addressed in the conclusion was not the allegation which had been investigated and was not the case which the claimant had faced. During her cross-examination, Ms Holt agreed that the allegation considered did not suggest that the failures had been done systematically, or deliberately, or with a view to personal gain. Ms Holt appeared unable to explain why she had made the decision based upon findings which were not in the allegation which she had stated was being considered. Ms Holt also confirmed that there had been no investigation about previous store audits/checks and what may have been identified during 2020. Ms Holt accepted that what she concluded in her letter was something which had never been put to the claimant at any stage in the process.

53. In her witness statement, Ms Holt said that the explanation that the claimant provided of marking the items and telling a member of staff to throw away the black marked items, did not make any sense to her, as why would the claimant take the time to mark the products when she could have just as quickly have disposed of them herself? Ms Holt also emphasised that having out of date products on site could have resulted in serious harm to a customer's health. In relation to the sanction given, Ms Holt referred to the fact that the claimant had not been sorry for what had happened and had sought to blame others.

54. The claimant appealed in an email of 3 April (349). A further email setting out her appeal was sent on 6 April (419). It appeared that two supporting statements were also provided for the appeal as they were referred to in the decision letter, but we were not referred to them. The claimant appeared to have asked for the appeal to be considered on the documents and she did not attend a hearing. A decision letter rejecting the appeal was sent by Ms Brennan, HR Support Manager, on 30 April 2021 (353). We did not hear evidence from Ms Brennan and the claimant did not give any evidence about the appeal process in her witness statement.

55. This Judgment does not seek to address every point about which the parties have disagreed. It only includes the points which we considered relevant to the issues which we needed to consider in order to decide if the claims succeeded or failed. If we have not mentioned a particular point, it does not mean that we have overlooked it, but rather we have not considered it relevant to the issues we needed to determine.

The Law

Unfair dismissal

56. An unfair dismissal claim is brought under Part X of the Employment Rights Act 1996. The respondent bears the burden of proving, on the balance of probabilities, that the dismissal was for misconduct. If the respondent fails to persuade us that it had a genuine belief in the claimant's misconduct and that it dismissed her for that reason, the dismissal will be unfair.

57. If the respondent does persuade us that it held the genuine belief and that it did dismiss the claimant for that reason, the dismissal is only potentially fair. We must then go on and consider the general reasonableness of the dismissal under section 98(4) Employment Rights Act 1996. That section provides that the determination of the question of whether a dismissal is fair or unfair depends upon whether in the circumstances (including the respondent's size and administrative resources) the respondent acted reasonably or unreasonably in treating the misconduct as a sufficient reason for dismissing the claimant. This is to be determined in accordance with equity and the substantial merits of the case. The burden of proof in this regard is neutral.

58. In conduct cases, when considering the question of reasonableness, we are required to have regard to the test outlined in **British Home Stores v Burchell** [1980] ICR 303. The three elements of the test are:

(1) Did the employer have a genuine belief that the employee was guilty of misconduct?

(2) Did the employer have reasonable grounds for that belief?

(3) Did the employer carry out a reasonable investigation in all the circumstances?

59. The additional question we need to determine is whether the decision to dismiss was one which was within the range of reasonable responses that a reasonable employer could reach.

60. As the respondent's representative emphasised, it is important that we do not substitute our own view for that of the respondent, **London Ambulance Service NHS Trust v Small** [2009] EWCA Civ 220 at paragraph 43 says:

> "*It is all too easy, even for an experienced ET, to slip into the substitution mindset. In conduct cases the claimant often comes to the ET with more evidence and with an understandable determination to clear his name and to prove to the ET that he is innocent of the charges made against him by his employer. He has lost his job in circumstances that may make it difficult for him to get another job. He may well gain the sympathy of the ET so that it is carried along the acquittal route and away from the real question- whether the employer acted fairly and reasonably in all the circumstances at the time of the dismissal*"

61. It is not for us to decide whether the claimant committed the misconduct alleged or whether the respondent has proved that she did so. We also must not decide whether we would have dismissed the claimant had we conducted the disciplinary hearing and considered the evidence which was in front of the decision-maker.

62. The appropriate standard of proof for those at the employer who reached the decision, was whether on the balance of probabilities they believed that the misconduct was committed by the claimant. They did not need to determine or establish that the misconduct was committed beyond all reasonable doubt.

63. In considering the investigation undertaken, the relevant question for us is whether it was an investigation that fell within the range of reasonable responses that a reasonable employer might have adopted. Where we are considering fairness, it is important that we take into account the process followed as a whole, including the appeal. We are also required to have regard to the ACAS code of practice on disciplinary and grievance procedures. The respondent's representative emphasised that we must not substitute our view of what we think should have happened.

64. Inconsistency of treatment for misconduct by an employer can lead to (or contribute to) a finding that a dismissal is unfair. In her submissions, the respondent's representative referred to **Hadjioannous v Coral Casinos** [1981] IRLR 351, a case about when inconsistent treatment might lead to a finding of unfair dismissal. That case emphasised that such an outcome might occur where there were truly parallel circumstances, but arguments based on disparity should be scrutinised carefully and would rarely be properly accepted.

Polkey

65. In **Polkey v AE Dayton Services Ltd** [1987] IRLR 503, the House of Lords held that the fact that the employer can show that the claimant would have been dismissed anyway (even if a fair procedure had been adopted) does not make fair an otherwise unfair dismissal. However, such evidence (if accepted by us) *may* be taken into account when assessing compensation and can have a severely limiting effect on the compensatory award. If the evidence shows that the employee *may* have been dismissed properly in any event, if a proper procedure had been carried out, we should normally make a percentage assessment of the likelihood and apply that when assessing the compensation. In applying a **Polkey** reduction, we may have to speculate on uncertainties to a significant degree. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence. The issue is what the respondent would have done and not what a hypothetical reasonable employer would have done in the circumstances. The onus is on the respondent to adduce evidence to show that the dismissal would (or might) have occurred in any event. However, we must have regard to all the evidence when making that assessment, including any evidence from the claimant.

Contributory fault

66. Section 122(2) of the Employment Rights Act 1996 provides that the basic award shall be reduced where the conduct of the employee before dismissal was such that it would be just and equitable to do so. It is important to note that a key part of the test is determining if it is just and equitable to do so.

67. Section 123(6) of the Employment Rights Act 1996 provides that if we find that the claimant has, by any action, to any extent caused or contributed to her dismissal, we shall reduce the amount of the compensatory award by such amount as we consider just and equitable having regard to that finding. This test differs from the test which applies to the basic award. The deduction for contributory fault can be made only in respect of conduct that persisted during the employment and which caused or contributed to the employer's decision to dismiss.

68. There are three factors required to be satisfied for us to find contributory conduct: the conduct must be culpable or blameworthy; it must have caused or contributed to the dismissal; and it must be just and equitable to reduce the award by the proportion specified.

Direct discrimination

69. A direct discrimination claim relies on section 13 of the Equality Act 2010 which provides that:

> *"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."*

70. Section 39(2) of the Equality Act 2010 provides that an employer must not discriminate against an employee. It sets out various ways in which discrimination can occur and these include any other detriment. The characteristics protected by these provisions include race.

71. Under Section 23(1) of the Equality Act 2010, when a comparison is made, there must be no material difference between the circumstances relating to each case. The requirement is that all relevant circumstances between the claimant and the comparator must be the same and not materially different, although it is not required that the situations have to be precisely the same. We must consider a hypothetical comparator.

72. Section 136 of the Equality Act 2010 sets out the manner in which the burden of proof operates in a discrimination case and provides as follows:

> *"(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 sub-section (2) does not apply if A shows that A did not contravene the provision".*

73. At the first stage, we must consider whether the claimant has proved facts on a balance of probabilities from which we could conclude, in the absence of an adequate explanation from the respondent, that the respondent committed an act of unlawful discrimination. This is sometimes known as the prima facie case. It is not enough for the claimant to show merely that she has been treated less favourably than her comparator and there was a difference of race between them. In general terms "*something more*" than that would be required before the respondent is required to provide a non-discriminatory explanation. At this stage we do not have to reach a definitive determination that such facts would lead us to the conclusion that there was an act of unlawful discrimination, the question is whether we could do so.

74. If the first stage has resulted in the prima facie case being made, there is also a second stage. There is a reversal of the burden of proof as it shifts to the respondent. We must uphold the claim unless the respondent proves that it did not commit (or is not to be treated as having committed) the alleged discriminatory act.

To discharge the burden of proof, there must be cogent evidence that the treatment was in no sense whatsoever on the grounds of the protected characteristic.

75. In practice Tribunals normally consider, first, whether the claimant received less favourable treatment than the appropriate comparator and then, second, whether the less favourable treatment was on the ground of race. However, a Tribunal is not always required to do so, as sometimes these two issues are intertwined, particularly where the identity of the relevant comparator is a matter of dispute. Sometimes we may appropriately concentrate on deciding why the treatment was afforded, that is was it on the ground of the protected characteristic or for some other reason? In most cases there is a need to consider the mental processes, whether conscious or unconscious, which led the alleged discriminator to do the act. Determining this can sometimes not be an easy enquiry, but we must draw appropriate inferences from the conduct of the alleged discriminator and the surrounding circumstances (with the assistance where necessary of the burden of proof provisions). The subject of the enquiry is the ground of, or the reason for, the alleged discriminator's action, not his or her motive. In many cases, the crucial question can be summarised as being, why was the claimant treated in the manner complained of?

76. We need to be mindful of the fact that direct evidence of discrimination is rare, and that Tribunals frequently have to infer discrimination from all the material facts. Race does not have to be the only reason for the conduct, provided that it is an effective cause or a significant influence for the treatment. The explanation for any less favourable treatment does not have to be a reasonable one. Unfair or unreasonable treatment by an employer does not of itself establish discriminatory treatment. It cannot be inferred from the fact that one employee has been treated unreasonably that an employee of a different race would have been treated reasonably.

77. The way in which the burden of proof should be considered has been explained in many authorities, including three which were referred to by the respondent's counsel: **Igen Limited v Wong** [2005] ICR 931; **Madarassy v Nomura International PLC** [2007] ICR 867; and **Royal Mail v Efobi** [2021] UKSC 33.

Harassment

78. Section 26 of the Equality Act 2010 says:

> *"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."*
>
> *"In deciding whether conduct has the purpose or 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."*

79. The Employment Appeal Tribunal in **Richmond Pharmacology v Dhaliwal** [2009] IRLR 336, stated that harassment is defined in a way that focuses on three

elements: (a) unwanted conduct; (b) having the purpose or effect of either: (i) violating the claimant's dignity; or (ii) creating an adverse environment for her; (c) on the prohibited grounds. Although many cases will involve considerable overlap between the three elements, the EAT held that it would normally be a 'healthy discipline' for us to address each factor separately and ensure that factual findings are made on each of them.

80. A respondent can be liable for effects, even if they were not its purpose (and vice versa). It is important that we consider purpose and effect and explain that we are doing so. Even if the conduct has had the proscribed effect, it must also be reasonable that it did so. The test in this regard has both subjective and objective elements. The assessment requires us to consider the effect of the conduct from the claimant's point of view; the subjective element. We must also ask, however, whether it was reasonable of the claimant to consider that conduct had that requisite effect; the objective element.

81. The burden of proof provisions explained for direct discrimination, also apply to harassment. We also must consider whether the conduct related to race. When considering whether facts have been proved from which we could conclude that harassment was related to race, it is relevant, at the first stage, to take into account the context of the conduct which is alleged to have been perpetrated on that ground.

82. At the end of the hearing, we raised with the claimant's counsel the proposition that we could not find both harassment and direct discrimination on the same circumstances. During the hearing nobody could identify the precise legal basis for that proposition. The claimant's counsel left it with us. We have subsequently identified that section 212(1) excludes conduct which amounts to harassment from the definition of detriment. As a result, we could not find that the respondent both directly discriminated on grounds of race and subjected the claimant to unlawful harassment related to race for the same conduct, albeit we could of course consider both complaints when initially determining our decision.

83. In their submissions, both counsel focussed primarily upon the facts of the case, rather than legal argument.

Conclusions – applying the Law to the Facts

Unfair dismissal

84. The first issue we needed to determine was what was the reason why the claimant was dismissed? The respondent contended that the reason was misconduct. The claimant gave an alternative reason, she said it was because the respondent wanted to replace the claimant with the regional manager's friend and was therefore looking to exit her from the business.

85. We found that the reason for the dismissal was conduct as the respondent contended. We accepted that Ms Holt made the decision to dismiss the claimant for the reasons which she gave. We found that, clearly, misconduct was the issue which led to her decision. There was no evidence before us to support the claimant's contrary asserted reason, save only for the claimant's own assertion, and we

therefore did not find that the claimant was dismissed for the reason asserted at issue 1(a).

86. The matters set out at issue two in the list of issues, reflected the things which we needed to consider applying the **Burchell** test. We found that the Respondent did form a genuine belief that the Claimant was guilty of misconduct, namely a serious breach of food safety, by failing to remove out of date items from the store. That was the reason which Ms Holt evidenced for her decision, and we found that was why she did so. We also found that the Respondent did have reasonable grounds for that belief (albeit we have addressed procedural flaws and the disconnect between the allegations and the findings below). Similarly, we have addressed below the shortcomings in the process when comparing what was investigated with what was found, but a broadly reasonable investigation and process was undertaken.

87. As we have set out in the legal section above, we were then required to determine whether the dismissal was fair or unfair in the circumstances (including the respondent's size and administrative resources) and whether the respondent acted reasonably or unreasonably in treating the misconduct as a sufficient reason for dismissing the claimant in accordance with equity and the substantial merits of the case, applying section 98(4) of the Employment Rights Act 1996.

88. The respondent's counsel submitted that the claimant had accepted that she had put the black marks over the use by dates in circumstances when the products should have immediately been thrown away and accepted that this was a process which she knew was in place. She emphasised that was a serious breach of food safety. Instead of putting black marks on the products, the claimant should have removed the out-of-date items and disposed of them. She highlighted that the claimant, in her statement submitted as part of the internal process (341), had accepted that she had been helping the supervisor in going into the fridge and throwing away food, had admitted marking out-of-date food with the black pen, and had not said that it was a one-off incident.

89. The claimant's counsel emphasised that he was not meaning in any way to minimise the importance of public health issues or the importance of the respondent's desire to protect the reputation and profitability of its business. However, he submitted that there was nevertheless a very wide gulf between the relatively straightforward allegations which the claimant faced of non-compliance in relation to food safety on the one hand, and the systematic, preconceived, cynical and deliberate practice of retaining out of date food past its sell by date in order to reduce food waste and for personal gain (that is the thing determined by the decision-maker), on the other. He submitted that if the respondent had wanted to put that allegation to the claimant, it would have needed to have told the claimant and to have undertaken a proper look at the inspection history in that store. It was the claimant's case that the outcome found was to blame the claimant for something far more significant than the straightforward and less serious allegation investigated and upon which the disciplinary decision should have been based. In his written submissions, the claimant's counsel described this as a failure to put serious concerns to the claimant and a reliance upon serious concerns which had not been canvassed or reasonably investigated.

90. We found that, applying the test set out in section 98(4), the respondent did not act reasonably in treating the misconduct found as sufficient reason for dismissing the claimant in accordance with equity and the substantial merits of the case, as a result of the flawed procedure undertaken in respect of the evidence, investigation, and the decision which was in fact reached by Ms Holt. Ms Holt reached the decision that the claimant should be dismissed based upon a finding (or series of findings – as set out in the conclusion of her letter (347)) which was not the allegation which she herself stated had been the purpose of the disciplinary meeting and which was not the allegation investigated or explained to the claimant as being under investigation. The allegation investigated was failing to remove out of date food items from sale (being a serious breach of food safety). The finding was that the claimant had crossed out dates to reduce wastage on site for personal gain and to prevent the claimant's wastage figures from looking poor. That finding was not what had been investigated, nor was it what the claimant had attended the hearing understanding was the misconduct alleged. The claimant's decision to offer no comment in the disciplinary meeting and the resultant absence of dialogue in the disciplinary hearing, was partly in response to the allegation faced (which was not the allegation determined). We found that the claimant's counsel was correct in his submission that the outcome found was to blame the claimant for something far more significant than the straightforward and less serious allegation investigated and upon which the disciplinary decision should have been based. That finding, into something which differed from the allegation which had been investigated and which Ms Holt set out in her own letter as being the allegation determination of which had been the purpose of the meeting, meant that we found that the dismissal was unfair applying section 98(4) of the Employment Rights Act 1996. Being dismissed for something other than the misconduct investigated; we found resulted in the procedure followed and the decision made being fundamentally flawed and rendered the dismissal unfair.

91. Having found that the dismissal was unfair for the reasons explained, we did not necessarily need to also determine all of the questions regarding unfair dismissal asked in the list of issues. Nonetheless we did in fact go on to do so.

92. Issue 3(a) said that the Claimant alleged she was a scapegoat, and was treated more harshly than others who had actually breached food safety regulations but against whom no action was taken, and that in any event she did not commit the alleged misconduct by virtue of the fact that she was not working on 30 December. We did not find that this argument supported the claimant's claim. The claimant was the store manager. She was treated differently to the supervisors, but that was (at least in part) because the roles were different. The differences in outcome between the claimant and the supervisor would not have resulted in us finding that the claimant's dismissal was unfair, based upon the evidence available, as they were not in truly parallel or comparable circumstances. In any event, the claimant admitted that she had blocked out the use-by-dates on the products. She had failed to throw away the out-of-date lettuce. She also accepted in the first investigation that the supervisors may not have known that the black marks meant the items should be discarded that day (206). The claimant did not appear to have understood that as site manager it was her responsibility to ensure that food safety was adhered to. The claimant chose to use black marks to block out use-by-dates, outside of the respondent's procedures, and accepted that others may not have known why she did so. There was clearly a difference between the claimant and the supervisors in the

misconduct being considered as well as in the level of responsibility. Whilst it was correct that the claimant was not present on the day of the inspection, she acknowledged that the black marks and blocked out use-by-dates was something she had done.

93. In issue 3 we were also asked to consider whether dismissal was in the band or reasonable responses available to the respondent? The flaws in the process which we have described meant that the dismissal was unfair because the dismissal decision was taken based upon findings that should not fairly have been made. That meant that the sanction was also flawed for the same reason. We have addressed in more detail below the gravity of the conduct which occurred and whether the claimant could or would have been fairly dismissed had a fair procedure been followed.

94. In issue 4(a) it was stated that the claimant alleged the respondent breached confidentiality. We did not find that there was any evidence that the respondent had done so. We accepted Mr Alvarez's evidence that he did not have a conversation with any of the staff about the reason for his meeting when he attended to undertake the investigatory meeting. We did not find that the respondent breached confidentiality.

95. In issue 4(b) it was alleged that the respondent failed to take an accurate note of the investigatory meeting on 5 February 2021. There was a note (299). As recorded, Mr Alvarez agreed that it was an inadequate record of the meeting. We did not find that the note of an investigatory meeting, or any inadequacies in it, rendered the dismissal unfair.

96. In issue 4(c) the claimant alleged she was not able to properly communicate through her interpreter. The issues arising from the meeting on 5 February 2021 are addressed in more detail below when considering the allegations of direct discrimination and harassment. We did not find that the claimant was not able to properly communicate through her interpreter as alleged and any issues arising from the conduct of the meeting on 5 February did not result in the dismissal being found to be unfair.

Contributory fault

97. As we did find that the claimant was unfairly dismissed, we needed to go on and consider issues five and six. Those were issues which are remedy issues (that is, they do not alter the finding that the dismissal was unfair), but it had been agreed that we could consider them alongside the liability issues.

98. Issue five raised the issue of contributory fault. In the section on the law set out above, we have described the issues as they needed to be determined for the basic award and the compensatory award as the tests to be applied are different. We did apply each of those tests. However, as the two tests raised materially the same issues, we did consider them both together.

99. There was no dispute that the claimant had used a black marker pen to cross out the use-by-dates on products and that, in some cases, that had resulted in the dates no longer being visible. The claimant had not disposed of out-of-date products.

As we have explained, we did not accept the claimant's evidence about why she crossed out the dates as having been truthful. We did not need to decide why she did it. Crossing out use-by-dates was not the respondent's policy. By marking the items and obscuring the dates the claimant was acting in breach of procedures. Her actions created a risk that products would be used after the use-by-dates had expired. That created a safety risk for the respondent and its customers. Adherence with basic standards of food hygiene is of the utmost importance in a food preparation environment. The claimant not only marked the items, but completed concealed the use-by-dates on some of them. As a result, we found that the claimant's conduct was culpable and blameworthy, occurred prior to the dismissal, caused or contributed to the dismissal, and it was just and equitable to reduce both the basic and compensatory award by one hundred percent.

Polkey

100. Issue six is the issue commonly known as *Polkey*. The list of issues asked if the respondent failed to follow a fair procedure, can the respondent show that following a fair procedure would have made no difference to the decision to dismiss? If so, by what proportion would it be just an equitable to reduce the compensatory award? As a result of the decision which we reached on contributory fault, the decision made on *Polkey*/issue six did not have any material impact upon the outcome. Nonetheless we considered the issue.

101. The claimant's counsel submitted that the whole process was completely flawed and there was no basis for properly determining a *Polkey* reduction. We did not agree with that submission. For the reasons already explained in relation to contributory fault and which we will not repeat in this part of the Judgment, the claimant was at fault and her actions had created a food-safety risk for the respondent and its customers. As we have explained in the section on law above, in considering *Polkey* we do have to speculate on uncertainties to a significant degree and the mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence. We needed to consider what the respondent would have done. We did find that the failings in the process followed meant that it could not be said that the claimant would certainly have been dismissed had a fair procedure been followed. However, as a result of what the claimant did, her position, and the risks which resulted, we found that there was a very strong probability that the claimant would have been dismissed in any event had a fair procedure been followed. That probability would have meant that we would have reduced any compensatory award by seventy-five percent. As we have already applied a reduction of one hundred percent for contributory fault, that reduction makes no difference to a nil award.

Direct race discrimination and harassment

102. The allegations of direct race discrimination and harassment related to race, relied upon the same six matters set out as issues 9.1-9.6 in the list of issues. As a result, when considering the allegations, we considered each of the matters alleged in turn. When doing so, we applied all of the questions asked at 10-12 (for direct race discrimination) and 13-17 (for harassment) to each of the allegations 9.1-9.6 in turn.

Allegation 9.1 – breach of confidentiality

103. The first allegation upon which reliance was placed was set out at 9.1 as follows: Mr Alvarez arrived early for the investigation meeting on 5 February 2021 and breached the confidential nature of the investigation by making other employees aware of the details and creating a hostile environment for the claimant, who the other employees were led to believe had wronged. It was said that this formed part of the campaign of harassment, as it made it an extremely difficult environment for the claimant to continue working in.

104. We found as a fact that Mr Alvarez did not breach the confidential nature of the investigation by making other employees aware of the details. We accepted Mr Alvarez's evidence that he did not do so. We found him to be a truthful and genuine witness. There was no evidence that he had spoken to other staff about the purpose of the meeting, save for the fact that he needed to ask for the claimant and save for the claimant's assertion that he did (albeit she was not herself a party to, or a witness to, any such conversation). As a result of that finding, we did not find that the claimant was subjected to direct race discrimination or harassment related to race in the way alleged. We also did not find that there was any campaign of harassment as alleged. The way in which the respondent addressed the investigation and issues was not co-ordinated or a campaign, each step was left to the relevant investigator or decision-maker.

Allegation 9.2 – the room

105. Allegation 9.2 was that there was a breach of Covid Regulations during the investigation meeting on 5 February 2021 which took place in a small room with no ventilation. It was alleged that the claimant was extremely uncomfortable and anxious and did not want to be there, but felt she had no choice otherwise it would be held against her if she did not attend. She alleged she was put in a position where she had to risk her personal health, and this the claimant believed was part of the campaign of harassment.

106. The meeting of 5 February 2021 did take place in a small room with limited ventilation. Mr Alvarez (who did not know anything about the room in which the meeting was arranged in advance) acknowledged that the room was not ideal, and he expressed some concern at the start when he said that, because of the pandemic, he was going to take a break every twenty minutes (292). At the start of the meeting the claimant confirmed that she was ok with what was proposed and at no point in the meeting did she express any concerns about the room either to Mr Alvarez or to Mr Judson. Mr Judson did raise a concern of his own volition (294) when he said that he was just letting Mr Alvarez know and he said he was not doing things by governmental rules and regulations. That part of the meeting was not translated for the claimant by Mr Judson.

107. We did not find that the claimant was less favourably treated in the way described at allegation 9.2. We did not find that the claimant herself felt uncomfortable or anxious in having the meeting in the small room. She was given the opportunity to say if she was not comfortable with the arrangements at the start of the meeting and she did not do so. She did not express any concerns about the meeting room at any point during the meeting (but did feel able to express her

concerns about other matters). There was no evidence that a non-Spanish speaker or someone of a different race to the claimant would have been treated differently. The was no evidence of the something more required to reverse the burden of proof. Irrespective of the race of the attendee, we found that the participant would have been asked to attend the meeting in the same room.

108. There was no evidence that holding the meeting in the particular room was unwanted conduct for the claimant. In any event, we found that it was not related to the Claimant's Spanish nationality. The purpose of holding the meeting in the room was not those required for unlawful harassment, the purpose was for the meeting to take place on site and the particular room was chosen by someone in HR not Mr Alvarez. We did not find that the room chosen had the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant, but even had it done so we would not have found it reasonable for the choice of room to have had that effect.

Allegation 9.3 – communicating through an interpreter

109. Allegation 9.3 was that Mr Alvarez did not allow the Claimant to properly communicate through her interpreter, thus using her language barrier as a means of inhibiting her ability to properly represent herself. In his submissions, the claimant's counsel said that it was fair to say that Mr Alvarez and the claimant's interpreter did not get on and he agreed that it would perhaps be possible to point to failings on both sides. Mr Alvarez said that he accepted and appreciated that the meeting had not gone well. We had the benefit of the full transcript of the meeting which recorded exactly what had been said by Mr Alvarez, Mr Judson, and the claimant, in both English and Spanish (all of which Mr Alvarez understood) (292). Based upon what was recorded in that transcript, we did not find that Mr Alvarez did not allow the claimant to properly communicate through her interpreter and we did not find that he used the language barrier as a means of inhibiting the claimant's ability to properly represent herself.

110. We have already explained what we found in paragraph 40 about Mr Alvarez's denial during cross-examination that he required the claimant to answer in English in the meeting and the claimant's counsel's submission that the denial was approaching disingenuous. The transcript clearly showed that Mr Alvarez did endeavour to require the claimant to answer questions in English during the meeting, albeit that she did not do so. We did not find that his answers meant that his evidence was otherwise unreliable, albeit they were not correct on this issue. What was clear from the transcript was that Mr Alvarez did in fact let the claimant answer the questions asked in Spanish with translation. We did not find Mr Alvarez to have been responsible for the meeting not being successful. What Mr Alvarez refused to tolerate was Mr Judson's interruptions and refusal to translate the questions and answers accurately and fully.

111. In considering the less favourable treatment alleged it was necessary for us to identify the appropriate comparator. We raised this with the parties in submissions. When asked about the appropriate comparator, the respondent's counsel proposed that the appropriate comparator in materially the same circumstances would be a store manager facing a disciplinary investigation for food safety breaches who was arguing that language had been a barrier in their initial investigation meeting

because English was not their first language. She submitted that the comparator would not be a native English speaker. The claimant's counsel disagreed when he made his submissions. He submitted that the comparator would be a someone who was a natural English speaker but who, for some other reason, required assistance in conducting the interview. We agreed with the respondent's counsel and not the claimant's counsel on this issue. We found that a hypothetical comparator in materially the same circumstances of a different race, would have been someone who had an interpreter because English was not their first language but who was of a different race to the claimant. Indeed, for this allegation, it would have been somebody of a different race who had an interpreter who behaved in the meeting in the same way as Mr Judson did.

112. As a result, we did not find that the claimant was treated less favourably than a hypothetical comparator in not materially different circumstances of a different race would have been. The claimant did not demonstrate the something more required to shift the burden of proof and show that a hypothetical comparator of a different race would have been treated differently in the meeting. There was no less favourable treatment. Any adverse treatment was not because of the claimant's Spanish nationality.

113. The issue of whether there was unwanted conduct depended to an extent upon what was being considered. We have not found that the claimant was subjected to what she alleged in allegation 9.3 at all. Had she been, it would have been unwanted and, in the broadest sense, not allowing the claimant and her interpreter to have acted in the meeting as they wished to, was unwanted for the claimant. However, Mr Alvarez's purpose in the way he conducted the meeting and his approach to Mr Judson was not that required for unlawful harassment (his purpose was to try to make progress with the investigatory meeting and to try to hear what the claimant had to say). We also did not find that it was reasonable for the way in which the meeting was actually conducted to have had the requisite effect. As we did not find what the claimant alleged, we could not determine whether the conduct had the requisite effect.

Allegation 9.4 – Mr Alvarez's question

114. Allegation 9.4 was that Mr Alvarez asked questions during the meeting which were of a discriminatory nature, such as quizzing the claimant as to how many Spanish speaking members there are within her team and making the claimant feel, with this line of questioning, that she was not good enough. This was described in the allegation as having occurred despite the claimant having worked for the respondent for about six years and her limited knowledge of English having never posed any problems.

115. This allegation needed to be considered in the context of the second investigatory meeting and the reason for it. The meeting had been arranged as a refresh of the investigation, even though an investigation meeting had already been undertaken by Mr Shrestha on 3 January. The reason for the meeting was because the claimant had expressed concerns about the first investigation meeting because (267) she was not English, and she felt that her English was not good enough to ensure that her side of the story and her opinions were clearly communicated. The

claimant had described the need to have a meeting with someone present to assist her in overcoming the language barrier.

116. What exactly was asked was clearly recorded in the transcript (293) "*Can I just ask you a very quick question, how many of your team speak fluent Spanish?*". We accepted that was what was asked. The claimant was not quizzed and there were not multiple questions asked, as the allegation suggested.

117. We did not find that the question asked was less favourable treatment of the claimant at all. We found the question to have been a perfectly reasonable one for Mr Alvarez to have asked in the context of a meeting which had been arranged with an interpreter as a result of the claimant's concerns about the language barrier, and where Mr Alvarez was endeavouring to establish whether the claimant's communication with colleagues had been a factor in the matters being investigated (indeed, which may have provided an explanation for what had occurred).

118. We have already addressed our finding on comparators when addressing allegation 9.3. The appropriate hypothetical comparator in materially the same circumstances would have been someone who had an interpreter because English was not their first language but who was of a different race to the claimant. In the context of this allegation, the comparator would have been somebody attending a refreshed investigation meeting because they had expressed concern about overcoming the language barrier. We found that the claimant had not shown the something more which would shift the burden of proof, in showing that Mr Alvarez would not have asked the same question to a hypothetical comparator of a different race and/or that the reason for the question was the claimant's race. As we have already recorded, Mr Alvarez accepted that the meeting had not gone well. We agreed. However, there was no evidence that the question asked was because of the claimant's race.

119. In terms of harassment and allegation 9.4, we did find that the question being asked was unwanted conduct from the claimant's point of view as she did not like the fact that the question had been asked (at least it was clear that she had not at some point in the meeting, after speaking to Mr Judson about it). We also found that the conduct related to the claimant's race in the broad sense that a question about her language and the language used by her colleagues is broadly race-related. However, we did not find that Mr Alvarez's purpose in asking the question was that required, we accepted his evidence about why it was he asked the question which was to better understand the claimant's communication with others at the site. We also did not find that it was reasonable for the question asked to have had the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. We found, focussing on exactly what was asked as recorded in the transcript and the context in which the question was asked, that it was not reasonable for such a benign question to have had the requisite effect (taking account of the words used in the definition). We also did not find that the question asked did in fact have the requisite effect on the claimant, focussing on the language used in the question, what the claimant said when answering it, and the evidence we heard (that is any effect it had was not sufficient to satisfy the statutory test).

Allegation 9.5 – Mr Alvarez's conduct in the meeting

120. Allegation 9.5 was that throughout the entire meeting, Mr Alvarez acted aggressively in a harassing and intimidating manner, making it seem less of a disciplinary investigation meeting, but rather a persecution. We did not find that Mr Alvarez did act in the meeting in the way alleged. We have carefully considered the transcript that recorded exactly what occurred in the meeting. We did not find that Mr Alvarez acted in an aggressive and intimidating manner. We did not find that the meeting was more like a persecution than an investigatory meeting. We found Mr Alvarez to be a genuine and truthful witness and we also accepted his evidence about the meeting (save in the one respect which we have already addressed). We found that if it was the case that anybody acted inappropriately in the meeting, it was the claimant's interpreter. As we did not find that what was alleged occurred, we did not find that the claimant was treated less favourably on grounds of race as alleged. We did not find that the claimant was harassed related to race as alleged.

Allegation 9.6 – the claimant's question and Mr Alvarez's lack of response

121. Allegation 9.6 was that when the claimant asked why steps were not being taken against the persons that were actually on duty on the day of the incident and thus responsible for the incident, as opposed to the claimant, who was not even working that day, the meeting was ended with her question left unanswered. It was said within the list of issues that this showed the claimant that the investigation was just a farce and being used to oust her because she is of a different nationality.

122. At the end of the meeting (298) the claimant said, "*Another thing I want to say is because you haven't investigated anyone else*". That was said in Spanish and not translated, but Mr Alvarez accepted that he had understood what was said. Mr Alvarez did not respond to what was said, even to explain that he knew nothing about the investigation of others. Mr Alvarez's evidence was that he had only been asked to undertake the investigation for the claimant and not any of the others in the store and he did not know about the outcome to the process followed for the supervisor. It was his evidence that he did not respond to the claimant's question because he wasn't aware of what other enquiries had been carried out by local management, and his personal role was limited to the claimant. We have based our findings upon what we found was asked, which was not answered, rather than the more detailed question which it appeared to have been alleged was asked from the allegation in the list of issues.

123. We did not find that the claimant had shown the something more required to reverse the burden of proof. Therefore, we did not find that the claimant had been treated less favourably than a hypothetical comparator in materially the same circumstances of a different race would have been. The claimant had not shifted the burden of proof in showing that the reason why Mr Alvarez did not respond to the question was because of her race.

124. In terms of harassment, the absence of an answer to the question from Mr Alvarez was unwanted conduct for the claimant. However, there was no evidence that the conduct related to the claimant's nationality and, as with the direct discrimination claim, we did not find that the claimant had shifted the burden of proof as she had not shown the something more to do so. We also did not find that the

effect on the claimant of the absence of an answer to what she actually said at the end of the meeting had the effect on the claimant of violating her dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her, nor did we find that it would have been reasonable for the absence of an answer to the question to have had the requisite effect.

Summary

125. For the reasons explained above, we found that the claimant was unfairly dismissed by the respondent. The claimant was not successful in any of her claims for direct race discrimination or harassment related to race. We found that it was just and equitable to reduce both the claimant's basic and compensatory awards by one hundred percent as a result of her conduct/contributory fault. We also found that there was a seventy-five chance that the claimant would have been fairly dismissed in any event if a fair procedure had been followed. As a result of those findings and even though the claimant was found to have been unfairly dismissed, there is no need to arrange a remedy hearing as the claimant will not recover any other remedy (over and above the declaration) as a result of our findings.

Employment Judge Phil Allen

22 March 2024

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

2 April 2024

FOR THE TRIBUNAL OFFICE

AGREED LIST OF ISSUES

Unfair dismissal

1 Was the Claimant dismissed for a potentially fair reason pursuant to s.98(2)[(b)] of the Employment Rights Act 1996 (**ERA**), namely misconduct?

(a) The Claimant asserts the Respondent wanted to replace the Claimant with the Regional Manager's friend and was therefore looking for a reason to exit her from the business.

2 Did the Respondent act reasonably in treating the Claimant's conduct as a sufficient reason for dismissing the Claimant, in that:

(a) did the Respondent form a genuine belief that the Claimant was guilty of misconduct namely a serious breach of food safety by failing to remove out of date items from the store?

(b) did the Respondent have reasonable grounds for that belief?

(c) did the Respondent form that belief based on a reasonable investigation in all the circumstances?

3 Was the dismissal of the Claimant fair in all the circumstances? In particular, was the dismissal within the band of reasonable responses available to the Respondent?

(a) The Claimant alleges she was a scapegoat, and treated more harshly than others who had actually breached food safety regulations but against whom no action was taken, and that in any event she did not commit the alleged misconduct by virtue of the fact that she was not working on 30 December.

4 Did the Respondent follow a fair procedure when dismissing the Claimant?

(a) The Claimant alleges the Respondent breached confidentiality;

(b) The Claimant alleges the Respondent failed to take an accurate note of the investigatory meeting on 5th February 2021;

(c) The Claimant alleges she was not able to properly communicate through her interpreter.

Remedy for unfair dismissal

5 If the Claimant's dismissal is found to be unfair, which is denied by the Respondent, did the Claimant's conduct cause or substantially contribute to her dismissal? If so, by what proportion would it be just and equitable to reduce the compensatory award?

6 If the Respondent failed to follow a fair procedure, can the Respondent show that following a fair procedure would have made no difference to the decision

to dismiss? If so, by what proportion would it be just an equitable to reduce the compensatory award?

7 n/a

8 n/a

Direct Race discrimination / race related harassment

9 Did the following events actually in fact occur as alleged, specifically that:

9.1 Mr Alvarez arrived early for the investigation meeting on 5th February 2021 and breached the confidential nature of the investigation by making other employees aware of the details and creating a hostile environment for the Claimant, who the other employees were led to believe had wronged. This formed part of the campaign of harassment, as it made it an extremely difficult environment for the claimant to continue working in.

9.2 Breach of Covid Regulations during investigation meeting on 5th February 2021 which took place in a small room with no ventilation. The Claimant was extremely uncomfortable and anxious and did not want to be there, but felt she had no choice otherwise it would be held against her if she did not attend. She was put in a position where she had to risk her personal health, and this the Claimant believes was part of the campaign of harassment.

9.3 Mr Alvarez did not allow the Claimant to properly communicate through her interpreter, thus using her language barrier as a means of inhibiting her ability to properly represent herself

9.4 Mr Alvarez asked questions during the meeting which were of a discriminatory nature, such as quizzing the Claimant as to how many Spanish speaking members there are within her team and making the Claimant feel, with this line of questioning that she was not good enough. Despite the Claimant having worked for the Respondent for about 6 years and her limited knowledge of English having never posed any problems.

9.5 Throughout the entire meeting, Mr Alvarez acted aggressively in a harassing and intimidating manner, making it seem less of a disciplinary investigation meeting, but rather a persecution

9.6 When the Claimant asked why steps were not being taken against the persons that were actually on duty on the day of the incident and thus responsible for the incident, as opposed to the Claimant, who was not even working that day, the meeting was ended with her question left unanswered. This showed the Claimant that the investigation was just a farce and being used to oust her because she is of a different nationality.

10 Did the aforesaid acts amount to less favourable treatment?

11 If so, was the Claimant treated less favourably than a non-Spanish hypothetical comparator in not materially different circumstances?

12 If so, was the less favourable treatment because of the Claimant's Spanish nationality, or for another reason?

Harassment

13 If found proven, do the acts set out at paragraph 9.1 – 9.6 amount to unwanted conduct?

14 If so, was the unwanted conduct related to the Claimant's Spanish nationality?

15 If so, did the conduct have the purpose of violating C's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for C?

16 If not, did the conduct have the effect of violating C's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for C?

17 Was it reasonable for the conduct to have that effect?

Remedy for discrimination

18 n/a