EMPLOYMENT TRIBUNALS

Claimant: Ms R Azevd

Respondent: Greggs Plc

Heard at: **Watford (CVP)** **On:** **09 & 10 February 2023**

Before: Employment Judge M Hussain

Representation
Claimant: Litigant in person
Respondent: Miss R Thomas (Counsel)

JUDGMENT having been sent to the parties on 17 March 2023 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

1. The claimant, Ms Rosa Azevedo, was employed by the respondent, Greggs Plc, as a Warehouse Operative at the respondent's Enfield site. The claimant was employed by the respondent from 04 March 2019 until 17 January 2022, when she was dismissed on grounds of serious misconduct.

2. The claimant claims that her dismissal was unfair within section 98 of the Employment Rights Act 1996. She also claims that the respondent failed to pay holiday pay and that she was entitled to notice pay.

3. The respondent contests the claim for unfair dismissal. It says that the claimant was fairly dismissed for serious misconduct for breaching food safety procedures by failing to adequately wash her hands, and it was entitled to terminate her employment without notice because of her misconduct. The respondent also contends that the claimant has been paid for any holiday entitlement outstanding at the date of termination.

4. The claimant was not represented and gave sworn evidence. The respondent was represented by Miss R Thomas, counsel, who called witnesses Mr A Elferink, a Logistics Manager and Ms Firmager a Payroll Manager. I considered the documents from an agreed bundle consisting of 385 PDF pages, which the parties introduced in evidence.

Preliminary matters

5. At the beginning of the hearing, before I heard any evidence, I dealt with an application to amend the claim.

Application to amend the claim

6. The claimant, by way of an email dated 24 January 2023, made an application to amend her claim to include complaints of harassment on grounds of sex and victimsation. Due to the proximity of this hearing, the application was not dealt with earlier.

7. The claimant submitted that the reason she did not include details of her harassment complaints was because she did not realise that she could pursue the allegations of harassment through a claim of discrimination and so did not tick the relevant box on the claim form. She only became aware of the law when conducting further research as she completed her witness statement. The claimant explained that she did not receive legal advice and only became aware that she had to apply to amend her claim upon the respondent flagging this up to her.

8. The claimant also stated that she did not realise that she had been subject to victimisation until after she had received the disclosure of documents, when she came to learn that Mr Elferink had a meeting with Mr Duodu, 3 days before her dismissal.

9. The harassment allegations relate to a Mr Duodu, a team leader, who had been making comments that made the claimant feel uncomfortable. The nature of the comments has been described in her witness statement but details regarding the dates and times of these incidents have not been noted. A grievance was raised and dealt with in May 2021. The claimant now states that she was dismissed for making complaints of harassment and wishes to claim compensation for injury to feelings.

10. The respondent submitted that the claimant had multiple opportunities to bring her claim sooner than 24 January 2023. This was the first time she made reference to harassment on grounds of sex and victimisation.

11. The claim form was lodged in May 2022 and no reference was made to harassment on the grounds of sex or victimisation as the relevant boxes were not ticked.

12. The schedule of loss made reference to discrimination, and the claimant was put on notice by the respondent that this claim had not been pleaded back in October 2022.

13. The respondent argues that the claims for sex discrimination and victimisation have not been fully particularised, and it is unclear whether the claims are out of time. The respondent further contends that there is a lack of clarity about the dates and times of the complaints but notes that a grievance was made in March 2021. If the allegations which formed the

basis of her grievance are the complaints she wishes to advance, then on the face of it they are out of time.

14. The respondent also submitted that by allowing the amendment there will be a delay leading to further expenses being incurred by the respondent and the Tribunal.

15. I considered Selkent and Abercrombie v Aga Rangemaster Limited [2014] ICR 209. I considered all the circumstances of the case and the balance of hardship and concluded that the amendment should not be allowed as the amendment was likely to involve a substantially different enquiry from the existing claims, there would be a delay in concluding the matter would result in hardship to the respondent and the claims are substantially out of time.

16. First, I considered the nature and extent of the amendment. I noted that reference had been made to harassment in the summary of complaints attached to the claim form and the claimant named Mr Doudu as the person harassing her. The claimant noted that on one occasion he had made an unreasonable request for her to take a Covid test and on other occasions, he had asked her to keep him company or share food together. This appears to be referenced as background information to put the facts of the dismissal into context rather than separate allegations. At the same time, she also mentions, being paid less than others in the same circumstances, and has not made any separate claims in relation to difference in pay [18]. The claimant goes on to describe why she did not like Mr Duodu and why she did not want to be around him and gave this as one of the reasons for not initially washing her hands and also why she rushed away. The summary of complaints did not refer to a protected characteristic and ends with a statement that she was unfairly dismissed and wishes to claim notice pay, holiday pay and other payments [25].

17. The claim of unfair dismissal has been pleaded on the basis that the decision to dismiss was unreasonable and harsh and that the process adopted by the respondent with respect to the investigation and the disciplinary hearing was unfair. In her particulars of claim she states that she did wash her hands and dried them with blue paper towels.

18. The harassment and victimisation complaints have not been sufficiently particularised even at this late stage in proceedings. In her witness statement, the claimant refers to harassment in paragraphs 55-65 but has not provided details of the dates, times or places of specific incidents. The claimant states that she had made a complaint of harassment in March 2021 [287-289], however, having considered the complaint, although she does not mention harassment, she does mention being made to feel uncomfortable by Mr Duodu. At a meeting on 06 April 2021, the claimant was asked to outline her main points of grievance and it was recorded that she believed she was not paid correctly, she should have been paid when she refused to take a Covid test, and she believed that Charles Duodu was a liar and that he wanted to get her into trouble [290]. She did not say that she was being harassed because of her sex. Because there was no mention of a protected characteristic and there was a lack of clarity around the nature of the complaints being made, the investigation focused on whether Mr Duodo had lied to her and behaved in a way that made her feel

uncomfortable in front of 2 colleagues. In view of this, I consider that amendments go beyond adding new facts to existing claims of unfair dismissal, wrongful dismissal, and failure to pay holiday pay or adding labels to facts already pleaded. The facts presented in the witness statement served on 24 January 2023 are new facts seeking to introduce wholly new causes of actions, namely, harassment on grounds of sex and victimsation.

19. If the claim was amended to include 2 new heads of claim the hearing will need to be postponed to allow the respondent a fair opportunity to respond to the new allegations. This will involve preparing a new case by investigating the allegations, gathering evidence, preparing witness statements, and calling new witnesses to attend a hearing. This will also mean that there will be a delay in concluding the matter. Furthermore, there will be no opportunity for early conciliation. The respondent is likely to suffer significant prejudice should the amendment be granted.

20. I considered the time limit issues and the reasons for the delay.

21. In respect of the victimisation claim where the detriment is dismissal, this should have been presented at the same time as her claim which was presented in May 2022.

22. It is not clear when the harassment allegations took place. It appears that some of the allegations were the subject of a grievance which was dealt with in May 2021. Even if there was a course of continuous conduct between that date and the request to wash her hands or the alleged celebration, the final act of alleged harassment, would have been in December 2021. Again, there is a 3-month time limit to present the claim. The claimant knew of the outcome of the grievance in May 2021 and if she was of the view that raising the complaint was the reason for the dismissal, she had an opportunity to include it within her claim.

23. I consider whether it would be just and equitable to extend the time limit. In doing so I take in to account the balance of hardship and injustice.

24. The claimant states that she became aware of the law at a late stage, however, I note that the schedule of loss, which had been served by October 2023, referred to discrimination [308]. She became aware of the law and her rights at that stage. Furthermore, the correspondence from the respondent also put the claimant on notice that the Tribunal would not be considering matters not already pleaded in her claim form [308]. I find that this was an opportunity at which the claimant could have applied to amend her claim. No explanation has been given as to why there was a delay in making the application to amend from October 2022 till 24 January 2023.

25. If the amendment is not allowed, it will mean that the claimant will not be able to litigate the discrimination and victimisation claims in their own right and will not be able to claim compensation for injury to feelings. However, the claimant can still pursue the claim for unfair dismissal on grounds already pleaded and provide background information to put her claims into context. If the amendment is allowed, the hearing will need to be delayed enabling the respondent to gather evidence and prepare its case, putting the respondent at significant cost. It will also mean asking witnesses to give

evidence on matters that are of some age. I note that the claimant's colleagues and Mr Duodu, when questioned, could not recall the incidents the claimant had referred to in her grievance [291].

26. In balancing the injustice and hardship, I find that it would not be just and equitable to allow an amendment to be made out of time. The application is refused.

Issues for Tribunal to decide

27. Having dealt with these preliminary matters, I agreed with the parties the issues for me to decide. Although the Polkey and contributory conduct issues concerned remedy and would only arise if the claimant's complaint of unfair dismissal succeeded, I agreed with the parties that I would consider them at this stage and invited them to deal with them in evidence and submissions. The issues for the Tribunal to decide include:

Unfair dismissal

27.1 What was the principal reason for the claimant's dismissal and was it a potentially fair reason under sections 98(1) and (2) of the Employment Rights Act 1996? The respondent asserted that it was a reason relating to the claimant's conduct.

27.2 If so, was the dismissal fair or unfair within section 98(4), and, in particular, did the respondent in all respects act within the band of reasonable responses. The claimant stated that the dismissal was unfair because the respondent followed an unfair process; namely that Mr Elferink acted as an investigator and conducted the disciplinary hearing, there are in accuracies in the records, a witness was permitted to take a witness statement from another witness, the claimant did not have access to the statements and CCTV footage before the disciplinary hearing and Mr Elferink's decision was pre-determined and harsh.

27.3 If the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would still have been dismissed had a fair and reasonable procedure been followed, in accordance with the principles in Polkey v AE Dayton Services Ltd [1987] UKHL 8; Software 2000 Ltd v Andrews [2007] ICR 825; W Devis & Sons Ltd v Atkins [1977] 3 All ER 40; and Crédit Agricole Corporate and Investment Bank v Wardle [2011] IRLR 604. The respondent said that the claimant would have been dismissed in any event, therefore any award should be reduced by 100%. The claimant contended that she would not have been dismissed.

27.4 Would it be just and equitable to reduce the amount of the claimant's basic award because of any blameworthy or culpable conduct before the dismissal, as set out in section 122(2) of the 1996 Act, and if so to what extent? The respondent said that if I decided that the claimant was unfairly dismissed, the award should be reduced by 100%.

Breach of contract

27.5 Did the claimant, by her blameworthy or culpable conduct, cause or contribute to her dismissal to any extent, and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award under section 123(6)? The respondent said that the compensation should be reduced by 100%.

27.6 How much notice was the claimant entitled to receive? This was not in dispute: it was 2 weeks' notice.

27.7 Did the claimant fundamentally breach her contract of employment by committing an act of gross misconduct? This required the respondent to prove that the claimant committed an act of gross misconduct.

27.8 For the claimant's claim of unfair dismissal, the focus under section 98(4) was on the reasonableness of management's decisions, and it was immaterial what decision I would myself have made about the claimant's conduct. But for the breach of contract claim, I had to decide for myself whether the claimant was guilty of conduct serious enough to entitle the respondent to terminate the employment without notice.

Holiday pay

27.9 What was the claimant's leave year?

27.10 How much of the leave year had passed when the claimant's employment ended?

27.11 How much leave had accrued for the year by that date?

27.12 How much paid leave had the claimant taken in the year?

27.13 Were any days carried over from previous holiday years?

27.14 How many days remain unpaid?

27.15 What is the relevant daily rate of pay?

Findings of fact

28. The relevant facts are as follows. Where I have had to resolve any conflict of evidence, I indicate how I have done so at the material point. References to page numbers are to the agreed bundle of documents.

29. The claimant, Ms Azevedo, was employed by the respondent, Greggs Plc, as a Warehouse Operative. The claimant was employed by the respondent from 04 March 2019 until 17 January 2022 when she was dismissed on grounds of gross misconduct.

30. The claimant had a clean disciplinary record.

31. On 05 March 2019 the claimant completed induction training, the content of which covered hand washing [78].

32. The 2-day induction also included hand washing training and a site tour including handwashing training and observation [48].

33. The hand washing training delivered during the induction included a step-by-step guide on washing hands, which also contained a warning stating failure to wash hands could lead to disciplinary action and dismissal.

34. Upon completion, the claimant signed a declaration confirming that she understood her responsibility to comply with procedures and that failure to do so may lead to disciplinary action and dismissal [48].

35. The hand washing procedure in place during the claimant's period of employment noted that hands must be washed thoroughly throughout the day and each time upon entering any food production or food handling area.

36. On 27 August 2019 a 5-minute training session was delivered on the hand washing procedure [84] to the claimant.

37. During COVID, and upon return from furlough, enhanced social distancing and personal hygiene measures were put in place.

38. The claimant was aware that she was required to wash her hands for 20 seconds and more frequently than normal [87].

39. The claimant was aware of the Food Safety and Quality Policy Document in the washing area [95].

40. On 29 March 2021 the claimant made a complaint about Mr Duodu stating that he made comments and behaved in a way that that made her feel uncomfortable, namely that he would ask her to do things that wasted her time, make comments asking whether they are friends or asking to share her food, trying to time his break so that it was at the same time as hers and calling her over under the pretext that it was for work related purposes but then say he just wanted company [287].

41. On 23 April 2021 a response to the complaint was sent by Stores Manager Vince Fox. Mr Fox explained that he had investigated the complaint by speaking to Mr Duodu and 2 others who were mentioned in the complaint as witnessing some of the incidents and nobody could recall the incidents mentioned, though Mr Duodu did accept that he had once asked the claimant to share her nuts [290].

42. On 29 April 2021 the claimant complained again providing further detail about some of the complaints, including an incident where he told her "get closer" to him [292].

43. On 05 May 2021 a Stage 2 Grievance meeting was held to discuss the complaints further [294].

44. In the outcome letter dated 11 May 2021 Mr Elferink confirmed that Mr Duodu stated that his intentions when speaking about non-work-related matters were to make the claimant feel like she was part of the team. He

offered to apologise and agreed to only speak to the claimant about work related matters going forward. The grievance was not upheld [294].

45. On 14 December 2021 the claimant arrived at work and had forgotten to bring the key to her locker. She decided to go to the manager's office to inform him.

46. The claimant walked through the hand washing station towards the office when she was called back by Mr Duodu. She was instructed to wash her hands.

47. The claimant returned to the hand washing station and was seen by Mr Duodu to dispense soap on to her hands [137].

48. The CCTV appeared to show that the claimant wet her hands [Witness statement of Mr Elferink para 28e].

49. The CCTV did not show the claimant at the drying area where hand dryers and blue roll is located [Witness statement of Mr Elferink para 28e].

50. The CCTV showed that the claimant was at the sink for less than 5 seconds.

51. The claimant left the sink area and made her way to the manager's office.

52. Mr Duodu followed shortly and made a complaint to the manager, Mr Czwornog that the claimant had not washed her hands.

53. Mr Czwornog ask the claimant if she had washed her hands to which she replied yes. Mr Czwornog took the claimant to report the matter to line manager Vince Fox.

54. Mr Fox carried out an investigation whereby statements were obtained from Mr Duodu [113], Luke Anderson [114] and Mr Czwornog [115].

55. On 22 December 2021 the claimant was invited to attend an investigation meeting on 24 December 2021 [116].

56. On 24 December 2021 at the investigation meeting the claimant explained that she forgot to wash her hands but when she was asked to wash her hands she did so [121]. She further explained that she did use soap and water and dried her hands with paper. The claimant also stated that she does not like that team leader and when she sees him, she feels like she has to get away from him quickly [124]. The claimant also apologised for her actions [127].

57. On 06 January 2022 the claimant was invited to attend a disciplinary hearing and was sent a copy of all relevant investigation notes evidence or witness statements [129].

58. On 14 January 2022 Mr Elferink took a further statement from Mr Duodu [137].

59. On 17 January 2022 a disciplinary hearing took place where the claimant explained that she did not receive the witness statements [139].

60. The claimant was provided with the statements of Mr Duodu and Mr Anderson and was given an opportunity to view the CCTV footage before being questioned about the disciplinary matter [139].

61. The claimant maintained that she had washed her hands when requested to do so and dried them with a blue paper towel.

62. When questioned about being at the hand wash station for 4 seconds, the claimant responded by stating that she has observed other people wash their hands or a lesser amount of time [140].

63. The claimant also explained that she didn't initially wash her hands because she wasn't going to work, she was going to the office to tell the manager about her key [140].

64. The claimant stated that even though she didn't wash her hands for long she still washed them, and she felt that the team leader reported her because he wanted to get her into trouble [140].

65. The claimant understood the reasons for and the importance of washing hands when entering the warehouse [140].

66. After a short adjournment at the end of the disciplinary hearing a decision was made to dismiss the claimant breaching food safety procedure by not washing her hands [141].

67. The claimant was notified of the outcome in writing on 20 January 2022 [144].

68. The claimant did not appeal the decision.

69. The claimant was fairly dismissed for misconduct.

70. The claimant is not entitled to notice pay.

71. Payment for holiday accrued at the date of termination of the claimant's employment, has been paid in full.

Relevant law and conclusions – unfair dismissal

72. Section 94 of the Employment Rights Act 1996 (ERA) confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under section 111 ERA. The employee must show that she was dismissed by the respondent under section 95 ERA, but in this case the respondent admits that it dismissed the claimant (within section 95(1)(a) of the 1996 Act) on 17 January 2022.

73. Section 98 of the 1996 Act deals with the fairness of dismissals. There are two stages within section 98. First, the employer must show that it had a potentially fair reason for the dismissal within section 98(2). Second, if the

respondent shows that it had a potentially fair reason for the dismissal, the Tribunal must consider, without there being any burden of proof on either party, whether the respondent acted fairly or unfairly in dismissing for that reason.

74. Every employee has right not to be dismissed unfairly. The respondent must first show that the claimant was dismissed, and that the claimant was dismissed for a potentially fair reason.

75. In this case it is not in dispute that the respondent dismissed the claimant, and that the claimant was dismissed for misconduct.

76. Misconduct is a potentially fair reason for dismissal under section 98(2) ERA. The respondent has satisfied the requirements of section 98(2) ERA.

77. In misconduct dismissals, there is well-established guidance for Tribunals on fairness within section 98(4) in the decisions in Burchell 1978 IRLR 379 and Post Office v Foley 2000 IRLR 827. The Tribunal must decide whether the employer had a genuine belief in the employee's guilt. Then the Tribunal must decide whether the employer held such genuine belief on reasonable grounds and after carrying out a reasonable investigation. In all aspects of the case, including the investigation, the grounds for belief, the penalty imposed, and the procedure followed, in deciding whether the employer acted reasonably or unreasonably within section 98(4), the Tribunal must decide whether the employer acted within the band or range of reasonable responses open to an employer in the circumstances. It is immaterial how the Tribunal would have handled the events or what decision it would have made, and the Tribunal must not substitute its view for that of the reasonable employer (per Iceland Frozen Foods Limited v Jones 1982 IRLR 439, Sainsbury's Supermarkets Limited v Hitt 2003 IRLR 23, and London Ambulance Service NHS Trust v Small 2009 IRLR 563).

78. First, I considered whether the respondent held a genuine belief that the claimant was guilty of misconduct and whether that belief was held on reasonable grounds.

79. Mr Elferink gave clear evidence as to why the investigation commenced, namely because Mr Duodu made a complaint that the claimant had not followed procedures in relation to hand washing. This is not disputed by the claimant. The respondent investigated the matter by obtaining statements from 3 witnesses, viewing CCTV footage and interviewing the claimant. This was also not challenged by the claimant. The account given by the claimant included an admission she washed her hands quickly [140]. Mr Elferink's evidence is clear about why he dismissed the claimant, and the dismissal letter was unequivocal [144].

80. Taking this evidence together, I find that at the time of dismissal, the respondent held a genuine belief that the claimant was guilty of gross misconduct and that belief was held on reasonable grounds. The evidence is compelling as the documents support the evidence given by witnesses and is not disputed by the claimant.

81. The claimant contended that the respondent did not carry out a reasonable investigation. She firstly stated that because Mr Elferink took a statement from Mr Duodu he acted as an investigator and conducted the disciplinary hearing in breach of ACAS Codes of Practice.

82. The ACAS Codes of Practice state that in misconduct cases, where practicable, different people should carry out the investigation and the disciplinary hearing. Mr Elferink gave evidence that he conducted the disciplinary hearing, and the investigation was carried out by Mr Fox. The investigation records demonstrate that Mr Duodu drafted his own statement, Mr Anderson's statement was taken by Mr Czwornog and Mr Czwornog drafted his own statement.

83. These statements were considered by Mr. Fox and the claimant was invited to an investigation meeting conducted by Mr. Fox. Mr Elferink also explained in his evidence that he was provided with an investigation pack from Mr. Fox which he reviewed in preparation for the disciplinary hearing. Mr Elferink gave evidence that Mr Fox conducted a good investigation and his only reason for meeting with Mr Duodu was to clarify matters relating to his statement. Mr Elferink contended that he did not have any discussion with Mr Duodu about what would happen in the disciplinary hearing, he simply wanted to clarify a couple of points which included whether the claimant dried her hands. Mr Elferink explained that the evidence from Mr Duodu was not the sole key piece of evidence, and it was considered alongside other statements and the CCTV footage.

84. The ACAS guidance states that when preparing for a meeting the respondents should ensure all of the relevant facts are available such as relevant documents, and where appropriate written statements from witnesses. Based on the evidence of Mr Elferink I am satisfied that the investigation was completed by Mr. Fox and that Mr Elferink, by obtaining a further witness statement from Mr Duodu to clarify matters, was not conducting a further investigation but complying with his duty to ensure that all the relevant facts were available prior to the hearing. I further find that this was reasonable in the circumstances as it potentially prevented the claimant from being questioned twice. I find that the respondent did not breach the ACAS Codes of Practice when Mr Elferink spoke to Mr Duodo.

85. The claimant complains that there were inaccuracies in the records relied upon by the respondents.

86. Nicola Worrall is recorded as being present at the investigation meeting on 24 December 2021 [121], however, the claimant asserts that she was not in attendance. The meeting notes have not been signed. Mr Elferink could not explain why the meeting notes had not been signed but stated that Nicola Worrall’s attendance had been recorded correctly to the best of his knowledge. The claimant, when questioned about the contents of the meeting notes, confirmed that she had made the comments with regards to washing hands as stated. Specifically, she agreed that she made the comment “I washed my hands after and took the time to do it”. The comment inviting Mr Fox to view the CCTV and the comment apologising for her actions, she confirmed, were also recorded accurately. In view of this, I find

that even if the record of attendance is inaccurate, it does not impact the integrity of the notes as the notes reflect the evidence given by the claimant.

87. The claimant contended that the contract of employment disclosed to her is not her contract of employment as she had signed her copy and there is no signature on the contract in the bundle. In her evidence, she confirmed that the contract in the bundle reflected her terms of employment. I find that this does not have any impact of the fairness of the investigation or on any of the issues I must consider today as the claimant is not asserting that different terms applied to her employment.

88. The claimant also asserted that allowing a witness to take a statement from another witness renders the investigation unfair.

89. I note that Mr Anderson's statement was taken by Mr Czwornog. Mr Elferink gave evidence that an investigator has flexibility to request others to take statements from witnesses on their behalf. The ACAS Codes of Practice guidance on the conduct of investigations is general and allows the employer discretion on how the facts are established and the evidence gathered.

90. I take in to account that Mr Czwarnog was not a direct witness to the incident and was informed about it after the fact. This is reflected in his own statement. Mr Anderson's statement is very brief and gives an account of the initial part of the incident, which corroborates the evidence of the claimant. The claimant did not seek to dispute the contents of the statement. For this reason, I find that the reliability of Mr Anderson's evidence has not been impacted by the decision of Mr Czwornog to take the statement.

91. The claimant also complained that she did not have access to witness statements or the CCTV footage before the disciplinary hearing on 17 January 2022.

92. The ACAS guide suggests that an employer should allow the employee time to prepare his or her case by making available copies of any witness statements or relevant papers. The respondent did comply with its duty and sent the documents on 06 January 2022. I accept that the claimant did not receive them but also find that she did not attempt to obtain them prior to the meeting. Mr Elferink's evidence demonstrates that this fact only came to light on the day of the hearing, and he made efforts to remedy the situation immediately.

93. The documents were provided, and the claimant was also given time to read the documents. The CCTV footage was also shown before Mr Elferink commenced his questioning. The disciplinary hearing did not raise any new matters for the claimant to answer and she was aware of the misconduct that was being investigated as it had been raised with her on 14 December 2021. The matters were also raised with her at the investigation meeting on 24 December 2021. Furthermore, she would have been aware of her actions and would have known what the CCTV was likely to have shown. I also note that no request was made by the claimant to reschedule the disciplinary hearing [139-142]. For these reasons, I find that the claimant did have sufficient notice of the misconduct that she would be questioned

about and did have an opportunity to consider the evidence before she was asked any questions, making the procedure fair.

94. The claimant contended that Mr Elferink's decision was pre-determined and that a decision to dismiss was made 3 days prior to the dismissal, when Mr Elferink spoke to Mr Duodu about his statement.

95. Mr Elferink has given evidence that he spoke to Mr Duodu to clarify matters to ascertain how much time the claimant spent at the sink and whether she had dried her hands. He denied colluding with Mr Duodu and reiterated that he did not make the decision to dismiss at that stage. Mr Elferink further gives evidence that he made his decision on 17 January 2022. I find Mr Elferink's evidence reliable and compelling, and I'm satisfied that the meeting with Mr Duodu was for the reasons stated. The claimant has not relied on any evidence to support her claim that Mr Elferink and Mr Duodu colluded together, other than the fact a meeting took place. This is not enough to establish the assertion that Mr Elferink and Mr Duodu colluded together and made a decision to dismiss the claimant at that point. Further, the disciplinary hearing notes demonstrate that Mr Elferink wanted to ascertain the claimant's understanding of her obligations to follow the hand washing procedures. In addition to this Mr Elferink investigated the claimant's allegation that Mr Duodu was celebrating and waving his arms when he saw that the claimant was in trouble. The CCTV evidence did not support this although the claimant did state that she could not recall the exact time of the incident. This demonstrates that he considered what the claimant had to say and acted upon it to establish the facts. For these reasons, I am satisfied that Mr Elferink's decision to dismiss was not predetermined.

96. I have considered the size of the respondent's undertaking. This is a large employer, with a HR department and well-drafted written policies. A formal disciplinary process was followed, after a thorough investigation which made findings that the claimant accepts, namely that she did not wash her hands adequately. I find that the investigation process was fair.

97. In considering, whether the decision to dismiss was within the range of reasonable responses and whether the respondent acted reasonably or unreasonably in treating the reason for the dismissal as a sufficient reason for dismissing the claimant, I assessed the evidence to determine which factors the respondent took into account when making the decision to dismiss.

98. When making the decision to dismiss the respondent was aware that the claimant had a clean disciplinary record. The respondent was also aware of that she was not on shift at the time. In his witness statement, Mr Elferink confirms that these matters were properly taken into account when making the decision to dismiss. He explains that whether the claimant was working at the time was immaterial as the risk of contamination remained, and that is the risk the procedures sought to eliminate.

99. The respondent took into account their policies and procedures. The Disciplinary Policy clearly states that a breach or negligence of duties and responsibilities regarding food or health and safety regulations or

procedures or personal and general hygiene, amount to a gross breach of procedure. The claimants training records which include a signed declaration, also warn that failure to follow hand washing procedures can lead to dismissal. In his evidence to the tribunal, Mr Elferink has confirmed that failure to follow hand washing procedures is a redline for the respondent because it presents a serious risk to customers and to the reputation of the business. Furthermore, at the time of the incident there were heightened concerns due to the prevalence of a new COVID variant. I accept that this was a risk that had to be carefully managed.

100. The respondent was also aware that the claimant had previously made a complaint against Mr Duodu and that she felt uncomfortable in his presence. The claimant has explained that she wanted to leave the hand washing station as quickly as possible due to her past experience with Mr Duodu. The claimant made the respondent aware of this at the investigation meeting [124]. I note from the outcome of the grievance the respondent communicated to the claimant that as Team Leader, Mr Duodu was entitled to make reasonable requests about work related matters [295]. Even though this was not raised as a reason for failing to comply in the disciplinary hearing, Mr Elferink did take into account the circumstances surrounding the interactions between the claimant and Mr Duodu and in his statement he explained that he would have expected any team leader to report a breach as important as this and if he had failed to do so he would have been neglecting his own duties. I am satisfied that the respondent had due regard to this matter. Mr Duodu did not act unreasonably in these circumstances and acted in accordance with his role and responsibilities.

101. The respondent also took in to account the claimants account where she accepted that she had not washed her hands for long.

102. In deciding whether the decision to dismiss was within the range of reasonable responses, I cannot substitute my own views for that of the respondent, but I must consider according to the standards of a reasonable employer whether dismissal accorded with the equity and the substantial merits of the case. I find that the respondent was entitled to take into account these considerations. As a manufacturer and supplier of food to the public, the respondent put in place clear hygiene standards, provided regular training to staff and a disciplinary policy enforcing those standards, to manage the risk of contaminating food. I also accept the respondent's evidence that it was operating at time where the risk of contamination was greater due to the outbreak of a new Covid variant at the time, which required policies to be strictly enforced. Further, Mr Duodu was acting within the remit of his role as a Team Leader when instructing the claimant to wash her hands. For these reasons, I find that the respondent acted reasonably in treating the misconduct as a sufficient reason to dismiss.

103. I find, therefore, that the claimant was fairly dismissed by the respondent within section 98 of the Employment Rights Act 1996. The complaint of unfair dismissal is not well founded and is dismissed.

Relevant law and conclusions – breach of contract

104. As a result of Johnson v Unisys Ltd [2001] UKHL 13, an employee is not allowed to bring a wrongful dismissal claim relying on the implied term of trust and confidence to recover damages for loss arising from the unfair manner of his or her dismissal. This is covered by the statutory right to claim unfair dismissal, which has various restrictions on how a claimant is eligible to claim, time-limits, the amount that can be awarded and so on. An employee is not allowed to circumvent the statutory rules by seeking compensation for the unfairness via a wrongful dismissal claim.

105. The Supreme Court in Edwards v Chesterfield Royal Hospital NHS Trust [2012] IRLR 129 said this principle does not only apply to wrongful dismissal claims based on a breach of the implied term of trust and confidence in the manner of dismissal. It also applies where compensation is claimed for breach of an express contractual disciplinary procedure.

106. The claimant was fairly dismissed for misconduct and is not entitled to notice pay

107. For these reasons, the claim for wrongful dismissal is dismissed.

Relevant law and conclusions – holiday pay

108. Under Regulations 13 & 13A Working Time Regulations 1998 (WTR) workers are entitled to take paid holidays and to be paid holiday pay. The right under Regulation 13 is 4 weeks; the right under Regulation 13A is 1.6 weeks, meaning that a worker has a right to 5.6 weeks paid holiday.

109. Under Regulation 14 WTR 1998, an employee is to be entitled to be paid, at termination of employment, the proportion of holiday that she is entitled to in proportion to the holiday year expired but which has not been taken by the employee during that time.

110. By Regulation 13(3) ERA 1996 a worker's leave year begins on the date provided for in the contract of employment, or if there is no relevant agreement, on the date when the employment begins and each anniversary of that date.

111. Regulation 14(3) provides for calculation of the amount of holiday pay due in these circumstances as follows: (A x B) less C, where A is the period of leave to which the worker is entitled, B is the proportion of the leave year expired and C is the period of leave taken.

112. By Regulation 30 WTR 1998, a worker can bring a claim in the Employment Tribunal in respect of unpaid holiday pay under Regulation 14. Any holiday pay is paid gross.

113. The claimant makes a claim for holiday pay and asserts that she had accrued 29 days holiday within the leave year and had only taken 18 days holiday. Therefore, she claims holiday pay for 11 days to be paid at a day rate of £112.96 totalling £1242.56.

114. In her evidence, and when questioned the claimant was unable to set out her claims in any further detail because the payments that had been made by the respondent had been calculated in hours rather than days. In her

evidence the claimant stated that she could not confirm if she had been paid more than what she was entitled to.

115. I have considered the evidence of Ms Firmager, who has explained in detail how the payments have been calculated and when the payments were issued.

116. The claimant's holiday year runs from the 01 April to the 31 March, and she is entitled to 21 days of holiday plus eight bank holidays, which would be calculated on a pro rata basis for part time employees. Bank holidays are treated differently from holidays and there is an additional floating day which is an extra day of holiday given to all employees outside of Scotland.

117. The respondent calculated the claimant's holiday entitlement for the year 2021/2022 and it amounted to 18 days in total. This was then adjusted after the claimant had been dismissed to take into account the termination of her employment before the end of the holiday year. This meant that the claimant was entitled to 16 days holiday during the leave year 2021/2022, not including bank holidays or the "floating day". This has not been challenged by the claimant. In her schedule of loss, the claimant asserts that her holiday entitlement for the year amounted to 15 days, including the "floating day" [204].

118. Records have been produced to demonstrate that the claimant has taken 15 days of holiday [Witness statement of Mrs Firmager para 12]. In her schedule of loss, the claimant noted that she had taken 18 days of holiday [204]. Evidence was provided of when these payments were made to the claimant [192]. I find the evidence of the respondent compelling as Miss Firmager's evidence was supported by documentation in the bundle which demonstrated when holiday was taken, and the amounts paid. The claimant was unable to detail when holiday was taken and could not confirm that the dates were correct. For these reasons, I find that 15 days holiday had been taken and the claimant had accrued and had outstanding, 1 floating day and 1 days' holiday at the date the employment was terminated. I also find that the respondent paid the claimant for these 2 days on 20 January 2022 [187] and 10 February [190].

119. With regards to the bank holidays and time in lieu, the claimant and respondent agree that seven bank holidays were worked. The respondent's records demonstrate that the claimant elected to be paid single time plus two days in lieu, for all of the holidays except one, where she elected to be paid double time plus one day in lieu [195]. Mr Firmager's evidence clearly sets out how the time in lieu was calculated and the hourly basic rate of pay that was used to determine the amount owed to the claimant. The hourly rate of £10.123 was multiplied by 79.5 hours of untaken time in lieu [Witness statement of Mrs Firmager paras 24-27] and the claimant was paid the outstanding amount of £804.78, on 10 February 2022 [190]. The claimant was unable to confirm or challenge this evidence as the pay had been calculated in hours rather than a day rate but accepted that she was paid for 79.5 hours of time in lieu that had been accrued.

120. I am satisfied that Ms Firmager's evidence establishes that two additional days of holiday pay were paid to the claimant over and above what she was

entitled to and account for any underpayment made when time in lieu hours were calculated. Again, the respondent's evidence is clear and is supported by documents in the bundle and the claimant was unable to confirm whether an overpayment had been made, stating that she would need to check her record.

121. The claim for holiday pay is not well founded and is dismissed.

Application for an anonymity order- Rule 50

122. Before the conclusion of the hearing, the claimant made an application under rule 50 of the Employment Tribunal Rules of Procedure 2013 and Article 8 of the Human Rights Act 1998, for an anonymity order, for her name to be anonymised in the judgment. The claimant argued that if her name was disclosed, it would damage her prospects of obtaining employment, particularly as she was already struggling to gain employment. She submitted that non-disclosure of her name would not affect the principles of open justice.

123. The respondent submitted that the principles of open justice apply, and the reasons set out for the application by the claimant do not justify an order. The respondent further submits that a claim for harassment were not litigated in these proceedings and Article 8 rights have not been engaged.

124. Rule 50 gives the tribunal the power to make an order with a view to preventing or restricting the public disclosure of any aspects of those proceedings as far as it considers necessary in the interests of justice or in order to protect the convention rights of any persons. Such an order includes an order that the identities of specific parties should not be disclosed to the public whether in the course of any hearing, in its listing or any documents entered on the register or otherwise forming part of the public record.

125. In deciding whether to exercise this power I took into account the principle of open justice, which is a fundamental principle of the justice system. Derogating from the general principle can only be justified in exceptional circumstances that make an order necessary to secure the proper administration of justice to achieve its purpose.

126. The claimant argues that by leaving her full name on record, it will lead to her right to a private life would be infringed. The claimant claims that she is currently looking for work and that the publication of her name will damage her prospects of obtaining employment in the future. The claimant does not rely on any evidence to support her position that she will suffer prejudice and that her job prospects would be affected. She has also not set out how the publication of her name will damage her job prospects, namely whether it will prevent her from applying for jobs or whether it will prevent her from securing a job, what impact this will have on her, how this will be detrimental to her and why she believes this would be a direct result from the publication of her name in a judgment.

127. Exceptions to the principle of open justice can only be applied where it is proportionate to do so. There is no general exception to open justice where

privacy or confidentiality is in issue. The hearing of a case in public and subsequent publication of any judgment may be, and often is, painful, humiliating, or upsetting, but this is tolerated, because it is, the best security for the impartial and efficient administration of justice and a means whereby confidence in the courts by the public can be maintained (per Scott v Scott [1913] AC 417).

128. In the absence of any evidence supporting the claimant's assertions, I find that it is not in the interests of justice or proportionate to make an anonymity order and the application is refused.

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Employment Judge Hussain

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Date 29 March 2024

REASONS SENT TO THE PARTIES ON
2 April 2024
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FOR THE TRIBUNAL OFFICE