EMPLOYMENT TRIBUNALS

Claimant: **Ms M Jones**

Respondent: **Vale Curtains and Blinds**

Heard at: **Reading** **On: 6 June 2024**

Before: **Employment Judge Reindorf KC**

Representation:

Claimant: in person
Respondent: Mr J McKeown (counsel)

RESERVED JUDGMENT

(1) The Claimant was unfairly dismissed by the Respondent.

(2) The Respondent is ordered to pay to the Claimant forthwith the sum of **£5,484.74** calculated as follows:

a. a basic award of £521.54; and

b. a compensatory award of £4,963.20.

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INTRODUCTION

1. After a period of ACAS Early Conciliation from 17 August 2023 until 28 September 2023, the Claimant presented her ET1 on 13 October 2023. She complained of unfair dismissal.

2. The Respondent denied the claims in its ET3 of 2 February 2024.

THE EVIDENCE AND HEARING

3. The case came before me for final hearing. I had an agreed bundle of 173 pages. Mr McKeown produced a skeleton argument containing a suggested List of Issues. I did not consider this to be necessary in a relatively straightforward unfair dismissal case, and in any event the draft List contained substantially more by way of summary of the Respondent's case than was appropriate.

4. The Claimant gave evidence on her own behalf and the Respondent called Mrs Jacqueline Smith (formerly Operations Manager) and Mr Karl Gibbons (Installations Manager). All witnesses produced written witness statements and were cross-examined.

5. At the outset of the hearing the Mr McKeown pursued an application to amend the Respondent's ET3. The application had originally been made on 14 May

2024 but the Tribunal had not dealt with it. The proposed amendment added factual assertions and did not change the substance of the ET3 in any material way. The application was not opposed by the Claimant and I did not perceive any prejudice to her in permitting the amended ET3 to be relied upon. Accordingly I allowed the application.

FINDINGS ON CREDIBILITY

6. I found the Claimant to be a truthful and credible witness. In her evidence there was one issue on which I am satisfied that she was mistaken rather than dishonest: it was her recollection that the incident in respect of which she was dismissed occurred on Monday 12 June 2023 and not on the Wednesday of the same week, as contended by the Respondent. The Claimant was certain that the incident had taken place on the Monday, and had cause to remember that date because it was the birthday of her daughter who had passed away some years previously. However the email which precipitated the dismissal was clearly dated 14 June 2023. I am satisfied that the incident took place on 14 June and that the Claimant mentally conflated the two significant and proximate dates.

7. By contrast I found the Respondent witnesses to be unsatisfactory in their evidence. By way of example, both Mrs Smith and Mr Gibbons asserted that Mr Gibbons had conducted an investigation into the allegation of misconduct against the Claimant. This was patently untrue. The bulk of Mrs Smith's evidence was similarly misleading, as she attempted to paint a picture of a proper disciplinary process, which had simply not taken place. Furthermore she did not mention until re-examination by the Respondent's counsel that she had had a discussion with Mr Johnson during a break in the disciplinary hearing. This was a highly relevant and significant fact, and it reflects poorly on the credibility of the Respondent's evidence as a whole that it was not admitted to previously.

FINDINGS OF FACT

8. The Claimant was employed by the Respondent as a part-time Administrator from 6 May 2021 until her dismissal on 19 June 2023. The reason given for her dismissal was gross misconduct. At the time of her dismissal her wages were £1,079 net per month (£1,130 gross).

9. The Respondent was a small family company with around eight employees. it had a staff handbook which contained examples of gross misconduct. Amongst these was "incompetence or failure to apply sound professional judgement".

10. The Claimant's supervisor was Mrs Smith, who was also responsible for HR matters such as disciplinary and grievance processes. The owner and Managing Director of the company was Mr Dave Rist. The previous owner and

Managing Director was Mr Phil Johnson, who was still working in the business during his handover to Mr Rist. The Claimant worked in an office alongside Mr Gibbons, although he was not always present because he did fitting jobs. The Claimant was on friendly terms with Mrs Smith and was good personal friends with Mr Gibbons.

11. The Claimant had a clean disciplinary record prior to her dismissal. Mrs Smith said in her witness statement that "notes" had been placed on the Claimant's file about alleged incidents, but she gave no detail of these and no notes were produced in the bundle. I find that these alleged incidents did not take place and notes were not placed on the Claimant's file.

12. The Claimant arrived at work just after 8am on Wednesday 14 June 2023. Mr Gibbons was in the office. At 8:24am the Claimant received an email from a customer who had made repeated complaints about his order and had tried to get a full refund of the cost of his curtains. The Claimant felt that the customer had previously been rude to her on the phone. The email said that the customer wanted to change the time of his upcoming appointment. The Claimant intended to forward the email to Mr Gibbons with a comment, which said "Hi Karl – Can you change this… he's a twat so it doesn't matter if you can't". By mistake, instead of clicking "forward" she had clicked "reply", so the email was sent to the customer instead of Mr Gibbons.

13. Shortly afterwards the phone rang and the Claimant answered it. A woman – who was the wife of the customer to whom the Claimant had sent the email by mistake – asked who was speaking, and the Claimant stated her name. The customer's wife said "Is there any reason why you called my husband a twat?". The Claimant was shocked and upset to realise her mistake. She signalled to Mr Gibbons to come over to the phone, and put the call on speakerphone. She said to the customer's wife that the line was not clear and asked her to repeat what she had said, which she did.

14. The Claimant apologised profusely to the customer's wife. The customer's wife asked to speak to the manager. The Claimant told her that Mrs Smith would be in the office at 10am and would call her back immediately. The customer's wife accepted this and the call was ended.

15. The Claimant phoned Mrs Smith straight away and told her what had happened. Mrs Smith said that it was all right and that she would deal with it when she arrived.

16. Mrs Smith arrived at 10am. In the presence of the Claimant and Mr Gibbons she phoned the customer's wife and apologised for what the Claimant had done. She said that the Claimant would be reprimanded. The customer's wife asked how she was going to be compensated, and Mrs Smith said "Oh so now we're back on to you getting your curtains for free? I'm sorry I can't do that". The customer's wife threatened to go to the press and social media. Mrs Smith said that she would investigate the matter and get back to her.

17. After the call the Claimant said to Mrs Smith that she would offer to pay the customer £500 out of her own pocket as a gesture of goodwill. Mrs Smith said that she would suggest that option to the customer.

18. Nothing further was said about the incident for the rest of the day. The Claimant was on annual leave on Thursday 15 June 2023.

19. In her witness statement and oral evidence Mrs Smith stated that an "investigation" took place on an unspecified date, consisting of Mr Gibbons looking at the email that the Claimant had sent the customer and deciding that based on the seriousness of the behaviour and the risk of a serious detriment to the company a disciplinary hearing had to take place. Mr Gibbons gave a similar account in his witness statement. Neither the Claimant nor the customer was interviewed. No notes were produced by Mrs Smith and no written account of the decision was made. Mrs Smith also said in her evidence that she then told Mr Rist and Mr Johnson of this decision.

20. I am satisfied that what in fact happened was that the customer contacted Mr Rist directly and made further threats about publicising the incident, in particular by and leaving a poor review on Trustpilot. When Mr Johnson learnt of this he told Mrs Smith that she should "get rid of" the Claimant. I find that this constituted the decision to dismiss the Claimant. The reason for the decision was that the customer had threatened to publicise the incident and to leave a poor review on Trustpilot.

21. On the morning of Friday 16 June 2023 the Claimant arrived at work at 8am. She noticed that Mrs Smith was crying. She asked her what the matter was and gave her a hug. Mrs Smith handed the Claimant an envelope containing a letter inviting her to a disciplinary hearing on Monday 19 June. Contrary to her evidence, Mrs Smith did not give the Claimant a copy of the Respondent's disciplinary procedure with the letter.

22. The Claimant asked Mrs Smith how the matter had escalated to such an extent. Mrs Smith told her "Because Phil said to just get rid of you when I told him what happened and the customer personally contacted Dave".

23. The Claimant was very upset and angry but continued to work. Mrs Smith asked her whether she would be prepared to write a letter of apology. She said words to the effect of "Fuck that, what's the point in writing an apology letter when it feels as though I've lost my job already judging by you crying and Phil saying to just get rid of me".

24. Shortly afterwards the Claimant sent two text messages to her partner. The first said: "Think they're sacking me because of the email. I've got a disciplinary on Monday. Customer wants to know what action has been taken and judging from Jacqui (her getting emotional) I know what the outcome will be". The second text message said: "I've been given a written letter today. Phil said to Jacqui "just get rid of her" but they can't they have to give me a letter first then Monday I'm being told to leave [six sad face emojis]".

25. During the morning the Claimant asked Mr Gibbons if he would accompany her to the disciplinary hearing. He and the Claimant consulted his diary and saw that he could not because he had an appointment on the Monday morning.

26. The Claimant's disciplinary hearing took place at 10am on Monday 19 June 2023. The hearing manager was Mrs Smith, who also took handwritten notes. The Claimant said that she would have liked to be accompanied but Mr Gibbons had not been available and she did not have time to find anybody else. Mrs Smith did not ask the Claimant if she was happy to proceed without a companion. Mr Gibbons was in fact on the premises throughout the meeting.

27. In the hearing the Claimant stated that the incident had taken place on the birthday of her daughter who had passed away several years previously, and that as a result her mind was not properly on the job. Mrs Smith asked her to describe what had happened, which she did in some detail. She said that the email was not meant for the customer but for Mr Gibbons. She said that she completely accepted that what she had done was wrong, but that she did not think it should have gone this far. Mrs Smith asked if she understood the detriment that the incident could cause to the company if the customer decided to follow through on the threats made. The Claimant accepted this point, but said that her mental health should be taken into account and that she felt that the decision was predetermined because of what Mr Johnson had said to Mrs Smith and because of Mrs Smith's emotions on the previous Friday.

28. Mrs Smith gave evidence, which I accept, that she herself had not consulted the staff handbook at any time prior to the hearing. I also find that she did not, as stated in her witness statement, hand the Claimant the staff handbook at the outset of the hearing. During the hearing the Claimant asked for a copy of the "code of conduct" so that she could see what rule she had breached, and Mrs Smith said that the company did not have one. Mrs Smith may have said this because she was confused about the difference between the staff handbook and a code of conduct. However the relevance of the issue is that the Claimant would not have asked to see a code of conduct if she had already been shown the staff handbook.

29. At 10:41am the meeting was adjourned. The Claimant went outside for a cigarette and spoke to Mr Gibbons. He told her that he did not think that Mrs Smith would dismiss her.

30. During the adjournment Mrs Smith also left the room and went outside, where she had a conversation with Mr Rist in which they discussed the disciplinary hearing, the allegation against the Claimant and the Claimant's imminent dismissal.

31. At 10:48am Mrs Smith called the Claimant back into the meeting and informed her that she was dismissed with immediate effect. She did not tell the Claimant that she had a right to appeal. The Claimant left the premises.

32. At 2:23pm that afternoon the Claimant emailed Mrs Smith asking how long the appeal window was, how to appeal and which sections of the code of conduct she was said to have breached. She received a reply from Mrs Smith shortly thereafter stating that the appeal window was five working days and her case fell into the gross misconduct category of “incompetence or failure to apply sound professional judgement”. She attached the relevant section of the staff handbook to the email. The Claimant emailed back pointing out that the staff handbook gave a ten day window for appeals. Mrs Smith accepted this, saying that she had replied before looking at the staff handbook.

33. On 20 June 2023 Mrs Smith emailed the customer’s wife and informed her that the Claimant had been dismissed “following the disgraceful email that was sent to your husband in error”. She did this in order to try to persuade the customer not to publicise the incident further.

34. The Claimant appealed against her dismissal by email on 23 June 2023 to Mr Rist. She set out fourteen grounds of appeal, as follows:

    34.1. She had not been given a copy of the company policy before the disciplinary hearing.

    34.2. She had not been told what part of the policy she had breached until after hearing.

    34.3. The sanction was unduly harsh.

    34.4. Her request for representation had been denied.

    34.5. There had been no preliminary hearing.

    34.6. The investigator (who the Claimant believed to have been Mrs Smith) had also conducted the disciplinary hearing and taken the notes.

    34.7. She had not been given any information about the investigation.

    34.8. She had not been invited to an investigation hearing.

    34.9. The findings of the investigation had not been presented to her and no decision had been made to proceed to a disciplinary hearing.

    34.10. She had not been sent a letter informing her that the matter was proceeding to a disciplinary hearing.

    34.11. No facts had been presented.

    34.12. Customer complaints and call-back were matters of minor misconduct according to the staff handbook.

    34.13. She had been given incorrect information about the timescale for appealing.

35. The Claimant also stated in her appeal letter that, in breach of the staff handbook, the possibility of counselling had not been considered and she had not been suspended.

36. Also on 23 June 2023 Mrs Smith emailed the Claimant asking her to return her keys.

37. Mr Rist forwarded the Claimant's appeal letter to Mrs Smith, without comment, on 26 June 2023. Fifteen minutes later Mrs Smith replied to Mr Rist saying:

    Wow, just wow, she is clutching at straws and does not have all of her facts straight at all, not sure who is mis informing her.

    You don't suspend unless a risk to the company

    Offer of £500 was said in jest by Meliesha and she point blank refused to write an email of apology.

    Request for representation was not denied, she never asked me or mentioned she had asked Karl. Karl told her he would not represent her because of his position. (found out after)

    Investigation hearing not necessary and it was Karl who done that not me (I wasn't here) Took my own notes but that is allowed.

    No 10 and 11 not true, no 12, not relevant as called customer a "twat"

    In my 30 years of staff management, never offered counselling.

    Please tell me she will not get anywhere.

38. An hour later Mrs Smith sent Mr Rist an email setting out detailed responses to each of the Claimant's fourteen grounds of appeal under an introductory paragraph stating "Please see below points to go back to Meliesha on and refuse appeal". The response to point 1 was "No solid reason for an appeal, appeal denied".

39. On 27 June 2023 the Claimant replied to Mrs Smith's email of 23 June saying that she still had not received a letter of dismissal and stating that somebody could collect the keys from her on Thursday 29 June. Mrs Smith forwarded this email to Mr Rist, asking him if he intended to go to see the Claimant. Mr Rist responded to Mrs Smith that he would go to see the Claimant "to find out what her next move is". In response Mrs Smith suggested to Mr Rist that he should reply to the appeal and then "sort it out".

40. On 28 June 2023 Mrs Smith sent the Claimant her final payslip and her P45. The Claimant responded asking for her letter of dismissal.

41. On 29 June 2023 Mrs Smith emailed the Claimant asking if she was still available for Mr Rist to collect the keys. The Claimant responded the following

day explaining that she had not had access to her email the previous day and that she did not realise that anybody was coming to collect the keys. She said that she had understood that Mr Rist would take the keys when he “reached out” to her about her appeal.

42. Later that morning Mrs Smith emailed the Claimant saying, in full:

    I have had a discussion with Dave and he feels there is no grounds for an appeal and subsequently the right to appeal has been denied.

    I will do you an official letter shortly outlining your dismissal.

    We would appreciate an opportunity again please to either collect the office keys or if you could get them dropped off during working hours, that would be appreciated.

43. On 4 July Mrs Smith emailed the Claimant attaching a letter of dismissal. In the email she had cut and pasted the fourteen points of response to the appeal that she had sent to Mr Rist on 26 June. The letter stated that the reason for the Claimant’s dismissal was “Formal company email to a customer using derogatory terminology”. It further stated: “This is a particularly serious issue for our business because we are a small company and largely rely on word of mouth for repeat business. Bad publicity could ruin the company if the customer decides to take the matter further”.

44. On 13 November 2023 the Claimant started a new job working for the Co-op. She worked there until 21 January 2024, when she resigned because she did not feel that retail was for her, it had taken a toll on her mental health and she was not happy in the job. Her net earnings at the Co-op were £2,586.68 in total, which equate to £258.67 per week or £1,120.90 per month.

THE LAW

Liability for unfair dismissal

45. By section 94 of the Employment Rights Act 1996 (“ERA”) an employee has the right not to be unfairly dismissed.

46. In a claim for unfair dismissal, the employer must show the reason (or, if more than one, the principal reason) for the dismissal, and that it is a potentially fair reason (s.98(1) ERA). Potentially fair reasons include:

    46.1. reasons relating to the conduct of the employee (s.98(2)(b) ERA); and

    46.2. some other substantial reason (“SOSR”) of a kind such as to justify the dismissal of an employee holding the position which the employee held (s.98(1)(b) ERA).

47. If the employer has shown (or the Tribunal finds) that the dismissal was for a potentially fair reason, the Tribunal must determine whether the employer acted reasonably or unreasonably in treating that reason as sufficient reason to dismiss the employee. In determining this question the Tribunal must have regard to the circumstances of the case, including the size and administrative resources of the employer's undertaking and equity and the substantial merits of the case (s.98(4) ERA).

48. In a misconduct dismissal the Tribunal should consider

    48.1. whether the respondent carried out an investigation into the matter that was reasonable in the circumstances of the case; and

    48.2. whether the respondent believed that that employee was guilty of the misconduct complained of; and

    48.3. whether the employer had reasonable grounds for that belief.

    (*British Home Stores Ltd v Burchell* [1980] ICR 303; *Graham v Secretary of State for Work and Pensions (Jobcentre Plus)* [2012] IRLR 759 CA at §§35-36).

49. The Tribunal should then decide on the reasonableness of the employer's response. In conducting this enquiry the Tribunal should keep in mind that the "range of reasonable responses" test applies to all aspects of the dismissal (*Burchell*; *Graham v Secretary of State for Work and Pensions (Jobcentre Plus)* [2012] IRLR 759 CA). The Tribunal should not substitute its own view of what is an adequate procedure for that which could be expected of a reasonable employer. The question is not whether there was something else which the employer ought to have done, but whether what it did was reasonable (*Sainsbury's Supermarkets v Hitt* [2003] IRLR 23 CA).

50. A reasonable investigation is an essential safeguard, as has been restated in a multitude of cases. See for example *Weddel & Co Ltd v Tepper* [1980] IRLR 96 at 101:

    ... [employers] do not have regard to equity or the substantial merits of the case if they jump to conclusions which it would have been reasonable to postpone in all the circumstances until they had, in the words of the [employment] tribunal in this case, "gathered further evidence" or, in the words of Arnold J in the Burchell case, "carried out as much investigation into the matter as was reasonable in all the circumstances of the case". That means that they must act reasonably in all the circumstances, and must make reasonable inquiries appropriate to the circumstances. If they form their belief hastily and act hastily upon it, without making the appropriate inquiries or giving the employee a fair opportunity to explain himself, their belief is not based on reasonable grounds and they are certainly not acting reasonably.

51. The investigation must take place before the decision to dismiss is taken: *Robert Whiting Designs Ltd v Lamb* [1978] ICR 89 EAT.

52. If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It is normally appropriate to provide copies of any written evidence, which may include any witness statements, with the notification (ACAS Code §9).

53. At the disciplinary hearing the employer should explain the complaint against the employee and go through the evidence that has been gathered. The employee should be allowed to set out their case and answer any allegations that have been made. The employee should also be given a reasonable opportunity to ask questions, present evidence and call relevant witnesses. They should also be given an opportunity to raise points about any information provided by witnesses. Where an employer or employee intends to call relevant witnesses they should give advance notice that they intend to do this (ACAS Code §12).

54. The employer's HR function should not interfere with the disciplinary officer's decision making, and should limit its involvement to advising on matters of law and procedure: *Ramphal v Department of Transport* UKEAT/0352/14 (4 September 2015, unreported) EAT at 55.

55. Appeals should be dealt with impartially (ACAS Code §27). Procedural defects in a disciplinary hearing may be remedied on appeal provided that in all the circumstances the later stages of a procedure are sufficient to cure any earlier unfairness: *Taylor v OCS Group Ltd* [2006] IRLR 613 CA.

56. In considering whether the employer acted fairly in dismissing the employee rather than applying some lesser sanction such as demotion, the Tribunal must be particularly astute to observe the range of reasonable responses test.

Remedy for unfair dismissal

57. By s.119 of the Employment Rights Act 1996 ("ERA") the basic award for unfair dismissal is calculated as follows:

    57.1. half a week's gross pay (subject to the statutory cap) for each year of continuous employment when the employee was below the age of 22;

    57.2. one week's gross pay (subject to the statutory cap) for each year of continuous employment when the employee was below the age of 41 but not below the age of 22; and

    57.3. one and half weeks' gross pay (subject to the statutory cap) for each year of continuous employment when the employee was not below the age of 41.

58. Where the effective date of termination of the employment took place between 6 April 2023 and 5 April 2024 the statutory weekly cap was £643.

59. The basic award may not be increased or reduced for failure to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures.

60. In addition to the basic award, by s.123(1) ERA the Tribunal must make a compensatory award in such amount as it considers just and equitable in all the circumstances having regard to the loss sustained by the Claimant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

61. The Tribunal should first determine the amount of the loss actually suffered by the Claimant in consequence of the dismissal which is attributable to action taken by the Respondent. The Tribunal should determine what the Claimant would have earned had the employment continued and how long it would have continued for. A sum for loss of statutory rights may be included. Credit should be given for:

    61.1. sums paid to the Claimant by the Respondent as compensation for the dismissal, including any pay in lieu of notice (*Heggie v Uniroyal Ltd* [1999] IRLR 802);

    61.2. sums earned by way of mitigation of loss; and

    61.3. deductions to be made for any failure to mitigate the loss.

62. Next, a reduction may be made on the basis that the employee would have been dismissed even if a fair procedure had been followed (*Polkey v A E Dayton Services Ltd* [1988] ICR 142 HL, *Hill v Governing Body of Great Tey Primary School* [2013] IRLR 274 EAT). This reduction may be made on a percentage basis to reflect the chance that the Claimant would have been dismissed in any event. The question is whether if there had been a fair procedure the result would still have been a dismissal (*Whitehead v The Robertson Partnership* UKEAT/0378/03, [2004] All ER (D) 97 (Aug) (17 August 2004, unreported). The assessment must made by reference to how the particular employer in question would have acted and not by the standards of a hypothetical reasonable employer. The burden is on the Respondent to show that the employment would have ended in any event (*Britool Ltd v Roberts* [1993] IRLR 481).

63. The next adjustment which may be made is an increase or reduction in compensation for failure to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures (s.207A of the Trade Union and Labour Relations Act 1992).

64. The Tribunal may make a reduction to the compensatory award for contributory fault in such amount as it considers just and equitable if it finds that the claimant has, by any action, caused or contributed to her dismissal

(s.123 ERA). This reduction should be made only if the Claimant was "guilty of improper conduct which gave rise to a situation in which he was dismissed and that conduct was blameworthy" (*Gibson v British Transport Docks Board* [1982] IRLR 228). The Tribunal should take "a broad, commonsense view of the situation" in deciding both whether to make a reduction and if so in what amount (*Maris v Rotherham Corpn* [1974] IRLR 147 NIRC).

65. If the total award exceeds £30,000 it will need to be grossed up for tax purposes.

66. Finally, the statutory cap for compensation for unfair dismissal should be applied.

CONCLUSIONS ON LIABILITY

The reason for the dismissal

67. I am satisfied that the decision to dismiss the Claimant was taken by Mr Johnson and communicated to Mrs Smith at some time between Wednesday 14 June and Friday 16 June 2023. Mrs Smith merely put the decision into effect. She did not exercise any decision-making powers herself.

68. The Respondent did not call Mr Johnson to give evidence. I conclude from the evidence before me that the principal reason for his decision was that the customer and his wife had made threats to publicise the Claimant's email in the press, social media and/or Trustpilot. I reach this conclusion for the following reasons:

    68.1. The disciplinary action was only launched after the customer made the threats directly to Mr Rist.

    68.2. It was as a direct result of the threats that Mr Johnson told Mrs Smith to "just get rid" of the Claimant.

    68.3. The threats and their potential impact on the business were mentioned by Mrs Smith both during the disciplinary hearing and in the dismissal letter.

    68.4. The day after the disciplinary hearing the Respondent emailed the customer's wife to tell her that the Claimant had been dismissed, in an attempt to head off the bad publicity that had been threatened.

69. I therefore conclude that the principal reason for the Claimant's dismissal was not a reason related to conduct. However, it was a reason which was capable of amounting to some other substantial reason such as to justify the dismissal of a person in the Claimant's job (an "SOSR reason"). As such, it was a potentially fair reason within s.98 ERA.

Fairness in the circumstances

70. Whether the true principal reason for the Claimant's dismissal was a reason related to conduct or some other substantial reason, the Respondent did not act fairly in the circumstances of the case in treating it as sufficient reason to dismiss her. Its actions fell well outside the range of responses open to a reasonable employer, even one of the small size and limited administrative resources of the Respondent. The disciplinary process and the dismissal were a sham designed to placate the customer. This is clear from the fact that Mrs Smith immediately informed the customer that the Claimant had been dismissed (notably, without any apparent regard for the Claimant's data protection rights). The Respondent decided to sacrifice the Claimant's employment for the sake of appeasing the customer and heading off bad reviews, and wholly unreasonably failed to consider other more proportionate ways of achieving the same outcome. In particular:

    70.1. The Respondent did not carry out an adequate investigation into the allegation against the Claimant:

        a. To the extent that any investigation was carried out, it was done not by Mr Gibbons but by Mrs Smith, who then went on to hear the disciplinary. The evidence given by the Respondent's witnesses that Mr Gibbons had conducted the investigation was not true, and they knew it not to be true when giving that evidence. It was concocted for the purposes of this Tribunal because the Respondent recognised that it was not fair or reasonable that Mrs Smith was both the investigator and the disciplinary officer.

        b. Mrs Smith's investigation amounted to nothing more than asking Mr Gibbons what had happened on the morning of 14 June 2023 because he had been a witness to the incident.

        c. Mrs Smith did not obtain an account from the Claimant, the customer or his wife. She did not examine the background to the incident, the context within which it occurred or any mitigation. She did not reach any preliminary view as to whether the Claimant's action was a genuine mistake or not.

        d. Mrs Smith did not consult the disciplinary policy or consider how or why the incident might amount to misconduct. She did not keep any notes or make a written record of the investigation. She did not inform the Claimant that an investigation had been carried out nor what its conclusions were.

        e. The reason why the Respondent did not carry out an adequate or indeed any investigation is that a summary decision had already been taken to "just get rid" of the Claimant. This decision was outside the range of reasonable responses, especially in circumstances where no other options for resolving the matter with

the customer were explored despite the fact that the Claimant had herself made a serious offer to make financial recompense to the customer.

70.2. The Respondent did not follow a fair procedure in dismissing the Claimant:

a. Mrs Smith acted as investigator, disciplinary officer and appeal decision maker.

b. The Claimant was not given adequate notice of the disciplinary hearing, during which time she would have had a chance to look for a companion to accompany her. Again at the outset of the hearing the Claimant was not given a proper opportunity to be accompanied or to postpone the hearing until she had had time to find a companion.

c. During the adjournment in the disciplinary hearing, and immediately before dismissing the Claimant, Mrs Smith discussed the case in detail with Mr Rist despite the fact that he would hear any appeal.

d. The Claimant was not shown the disciplinary procedure at any time before her dismissal. She was not told which part of it she had breached, so she did not have a proper opportunity to explain why she did not consider herself to have contravened it.

e. The Claimant was not given any detail as to the reasons for the dismissal until after time had expired for her to lodge her appeal and she had done so. This meant that it was difficult for her to know how to frame her appeal.

f. The Claimant was denied a right of appeal. Her grounds of appeal were dismissed preremptorily by Mrs Smith. Mrs Smith's decision not to allow the Claimant to appeal was then dressed up as though it had been taken by Mr Rist and communicated to the Claimant on that false basis.

70.3. The Respondent did not have reasonable grounds to believe that the Claimant was guilty of misconduct. No consideration was given to the extent of her culpability. The decision was a foregone conclusion based entirely on the threats made by the customer.

70.4. For the same reasons no thought was given to the extent of the Claimant's contrition, mitigation or the possibility of a lesser sanction.

71. In all the circumstances, including equity and the substantial merits of the case, I find that the Respondent acted unreasonably. The Claimant's dismissal was unfair.

CONCLUSIONS ON REMEDY

Polkey

72. I am satisfied that if a fair procedure had been followed, there is no chance that the Claimant would have been dismissed.

73. It is clear that on the day of the incident Mrs Smith thought that the Claimant's mistake was regrettable but not a disciplinary matter. Had she considered it a potential disciplinary matter, she would have taken steps that day to commence a proper investigation and she would have at least considered suspending the Claimant. Instead, no action of any kind was taken until the customer and his wife repeated their threats to the Managing Director. Mrs Smith was well aware that the customer had been angling for a reason to get a full or partial refund and had been persistently complaining. That is why she responded as she did to the customer's wife on the telephone, saying "Oh so now we're back on to you getting your curtains for free? I'm sorry I can't do that".

74. I am satisfied that Mrs Smith recognised that the Claimant's language was inappropriate but that she had made a genuine mistake in replying to the customer's email rather than forwarding it to Mr Gibbons. Whilst it would be within the range of actions open to a reasonable employer to commence a disciplinary investigation and potentially to impose a disciplinary sanction on an employee in similar circumstances, this particular employer did not take the view that disciplinary action was warranted in the context and would not have pursued it if it were not for the customer's persistence.

Contributory fault

75. I consider that by sending the offensive email to the customer on 14 June 2023 the Claimant contributed to her dismissal by 10%. I find that the sending of the email was improper and blameworthy to the extent that the Claimant should not have used the language that she did in the circumstances and it was careless of her to reply rather than forwarding the message. However I am satisfied that the language used was not out of the ordinary in the particular workplace, and that that fact mitigates the extent to which the Claimant's use of it on this occasion can be described as culpable conduct. The mistaken addressee was a genuine error, and one which is often made.

76. I do not consider that the Claimant's comment refusing to apologise to the customer on Friday 16 June 2023 amounts to contributory fault. Although the Claimant used bad language, this was not out of place in the workplace. Furthermore the Claimant was entitled to feel angry that the decision had been made to dismiss her and that the Respondent was going through a sham disciplinary process, given that Mrs Smith had already reported to her Mr Johnson's order to "get rid" of her. Against that background I do not consider

the Claimant's response to have amounted to improper, blameworthy or culpable conduct.

Basic award

77. At the time of her dismissal on 19 June 2023 the Claimant was 29 years old. (her date of birth being 24 August 1993). Her gross pay with the Respondent was £260.77 per week. She had two years' continuous service. Her basic award is therefore two weeks' gross pay, which amounts to **£521.54**.

Compensatory award

78. The Respondent neither argued nor sought to prove that the Claimant failed to take reasonable steps to mitigate her loss between her dismissal on 19 June 2023 and her obtaining employment at the Co-op on 13 November 2023. Therefore the Respondent has not discharged the burden of proving a failure to mitigate. I conclude that the Claimant is entitled to her loss of earnings for that period, which amounts to £5,214.67.

79. The Claimant's weekly earnings whilst working at the Co-op were almost exactly equivalent to her weekly earnings whilst employed by the Respondent. Accordingly I make no award in respect of that period.

80. I make no award for loss of earnings for the period following the Claimant's resignation from the Co-op. I am satisfied that her decision to resign from that job amounted to a failure to take reasonable steps to mitigate her loss. The principal reason for which she resigned from the Co-op was that she did not feel that retail was for her. This was not an adequate reason on the basis of which the Respondent should be required to continue to compensate her. Although she argued that another reason for her resignation from the Co-op was that she was suffering from ongoing mental ill health due to the Respondent's treatment of her, I did not see sufficient medical or other evidence to substantiate this, or to distinguish the Claimant's health problems at that time from pre-existing difficulties.

81. I award the Claimant £300 for the loss of her statutory rights, in light of the short length of her employment. This brings the total of the compensatory award before reductions, deductions and uplifts to £5,514.67.

82. I make no reduction to the compensatory award on the *Polkey* basis, for the reasons stated above.

83. I order no uplift to the compensatory award in respect of a failure to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures. Although the Respondent clearly failed to comply with the Code, I have found that the reason for the dismissal was an SOSR reason, which does not fall within the Code.

84. I make a 10% reduction to the compensatory award for contributory fault, for the reasons given above. This brings the total compensatory award to **£4,963.20**. The total figure of the basic and compensatory awards combined is **£5,484.74**.

Employment Judge Reindorf KC
Date 3 September 2024

Sent to the parties on:

4 September 2024

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For the Tribunal:

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