EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8002132/2024

Held at Glasgow on 25 February, 4 March, 9 & 15 May 2025

Employment Judge Doherty

G Smogorzewska	**Claimant** **In Person**
Lidl Great Britain Limited	**Respondent** **Represented by,** **Mr Milne,** **Counsel**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the claim is dismissed.

REASONS

1. The claimant presented a claim of unfair dismissal on the 2 December 2024. The claim was resisted and a final hearing was fixed. Unfortunately, due to technical difficulties the hearing on the original hearing date fixed 24th of February had to be adjourned and the hearing continued to dates in March and May. The claimant represented herself, and the respondents were represented by Mr Milne advocate.

The Issues

2. The respondents accept that the claimant was dismissed. There is an issue as to the reason for dismissal. The claimant challenges the fairness of dismissal under Section 98(4) of the Employment Rights Act 1996 (the "ERA"). The dismissal is said to be unfair as a result of the procedure adopted by the respondents and delay. It is also said that dismissal was too harsh a penalty.

3. The issues are whether at the point when they dismissed the claimant the respondents had carried out a reasonable investigation; whether they had reasonable grounds upon which to conclude that the claimant was guilty of the conduct for which she was dismissed; and whether dismissal fell outwith the band of reasonable responses.

4. In the event the claimant succeeds the Tribunal will deal with Remedy. The Remedy sought was originally reinstatement, however by the conclusion of the hearing the claimant no longer sought reinstatement or re-engagement. The issue is therefore confined to the assessment of compensation.

The Hearing

5. For the respondent's evidence was given by;
   - Mr Waddell, Regional Sales Team Manager, the dismissing officer who also dealt with the claimant's grievance;
   - Mr Fellows, Regional Head of Logistics, who dealt with the appeal, and the claimant's appeal against the grievance outcome;

   The claimant gave evidence on her own behalf.
   A joint bundle of documents was produced.

Findings in Fact

6. The respondents are a large company operating supermarkets.

7. The respondents enjoy HR support and have a number of policies and procedures in place for the management of their staff, which are updated from time to time. All of the policy and procedure documents are available for staff electronically via what is called a Mat terminal. Staff can also access their personal information, such as training records, via the Mat terminal.

8. Each member of staff is allocated an individual Global ID number which appears on documents such as payslips and training records.

9. Employees are allocated a different ID number when they entered onto what the respondents call their Success Factors platform.

The Respondents policies/procedures

10. The policies which the respondents had in place at the point when the claimant was dismissed include;

- Disciplinary Policy- July 2022 version;
- Disciplinary-HR Management Procedure - July 2024 version;
- Grievance HR Policy, - October 2023 version;
- Grievance HR Procedure – August 24 Version;
- Anti-Harassment and Bullying Policy (the Anti-Harassment Policy) - July 2022 Version.

The Disciplinary Policy (the Policy) contains provisions on investigation, suspension, disciplinary and appeal hearings.

11. The Policy provides that the company can suspend an employee on full pay pending further investigation or disciplinary action if they consider it appropriate. The Policy provides the suspended employee can contact the investigatory or disciplinary officer it they need to contact a colleague at work.

12. The Policy provides for summary dismissal in the event of gross misconduct. A non-exhaustive list of examples of gross misconduct includes;

"*(a) gross negligence or gross misconduct in the performance of duties;*
(f) any breach and or material failure to comply with the company's policies and procedures from time to time in force….
(m) actual or threated violence or physical assault of any person, bullying, unlawful discrimination or harassment."

13. The Policy provides that the aim is that disciplinary matters will be dealt with confidentially and sensitively.

14. The respondent's Anti-Harassment Policy contains the following definition as part of the definition of bullying;

"*Bullying is offensive, intimidating, malicious or insulting behaviour involving the misuse of power through means that can make a person feel upset, humiliated, undermined or threatened.*"

15. A non-exhaustive list of examples of conduct which could be regarded as bullying is provided and contain; "*physical or psychological threats* and *shouting at employees.*"

16. The Anti-Harassment policy contains a definition of harassment which includes "*physical or verbal unwanted conduct*"; it provides that the perception of the recipient will be relevant. It provides a non-exhaustive list of examples of conduct which may be regarded as harassment, providing that each case would be considered on its own circumstances. Examples include;

- *Unwanted physical contact including touching, pinching, pushing, and grabbing;*
- *mocking, mimicking or belittling a person.*

17. The Grievance Policy provides a mechanism to deal with grievances on an informal and a formal basis. The person making the complaint can chose whether to pursue a formal or informal grievance. The policy does not contain

a specific timeline within which grievances must be dealt with, although an earlier version of the policy made provision for a time line of 14 days.

Training

18. The respondents provide staff training via e-learning, and classroom attendance. Employees have a training record recording the training they have attended. Where an employee has completed an e-learning model the record notes that the training has been "*completed*". If the training is provided in a classroom setting when it is complete the record records "*participated*"*;* where training has been arranged but has not been undertaken the record states "*no show*"*.*

The Claimant

19. The claimant, whose date of birth is 18/11/1983, was employed by the respondents from 25/09/17 until 13/9/24.

20. The claimant was initially employed as a Warehouse Operative. She progressed to become an Assistant Team Manager (ATM) in 12/4/21 at the respondent's Northfleet operation. At the point of her dismissal the claimant held the post of Warehouse Department Manager at the respondent's Regional Distribution Centre in Motherwell. She was appointed to that post on 1 July 2024. As she was suspended at that point in practice she never undertook this role.

21. The claimant underwent various types of training during her employment.

22. The claimant was regarded as a good worker by the respondents.

23. The claimant's income from that employment was £884.62 gross and £676.46 per week.

Events Leading to Dismissal

First Investigation - grievance from Tony Hartley

24. On 1 April 2004 the respondents received an email form a Mr Tony Hartley (TH). He alleged that at the shift handover on 28 March 2024 the claimant appeared uninterested in the handover, swore at him saying: "*there are no fucking labels printed out for me, not even one*". He said that she became increasingly hostile towards him. TH stated he explained that the shift the previous night had been demanding, and he apologised for the fact that labels had not been printed. TH stated that the claimant then entered his personal space in a threatening and intimidating manner lifting her hands towards his neck and putting them round his throat applying pressure. He said he was shocked and did not know how to react. TH said that he felt absolutely mortified and humiliated that a senior member of staff had put him in this predicament in front of colleagues. He said he could not come into work for his following shift, as he had not slept due to the embarrassment and disgust that he felt, and he did not feel fit to see the claimant the following day as he still felt threatened by her.

25. TH was absent the following day.

26. TH was not line managed by the claimant, but was more junior to her in terms of grade.

27. Richard Hay, the then Logistics Manager attempted to resolve the grievance informally. He met with the claimant and discussed the situation arising from TH's complaint with her. The claimant indicated a willingness to Mr Hay to apologise to TH. She planned to do so on the 22 April, however TH did not want to proceed down this route and the grievance was passed to HR dealt with as a formal grievance. A Mr Jason Sandie was appointed to deal with it at the beginning of May 2024.

28. In the course of Mr Sandie's investigation he interviewed a number of witnesses.

29. Witnesses interviewed in this type of formal process are told that the meeting was confidential and should not be discussed.

30. Mr Sandie interviewed TH on 21/5/24. He reiterated the content of his grievance email in his statement to Mr Sandie. He was asked if there had been any issues with the claimant prior to this incident. He said no, and that he had not seen her very often. He was then asked: "*Would you say you got on with her OK? Has she spoken to you about it since in any way?*" He responded – "*No. No issues prior, didn't speak much.*"

31. Kevin McKendrick (KM) an ATM who witnessed the incident was interviewed on the 30/5/25.

32. KM's statement was to the effect that when he saw the claimant at the start of the shift she started ranting at him shouting: "*put your fucking cups in the bin*." He said he felt a bit intimidated, and crossed to the other side off the floor. He said he then turned round and saw the claimant put her hands round TH's neck. He said that he went over, but he was so shocked he did not know what to do. He said the claimant's demeanour was very intimidating, angry and aggressive and he confirmed that he could definitely see the claimant's hands round TH's neck. He could not say for exactly how long, but if he had to put a number on it, it was 5 to 10 seconds. He said the incident could not be construed as joking or playful.

33. KM was asked if he could verify what was said to TH. He replied: "*I can't verify exactly what was being said. I just heard a lot of ranting and swearing from Gabby about labels*."

34. He was also asked what happened after the incident and replied that: "*At this point I can't really remember. I just remember walking out with Tony and asked if he was OK and seen Gabby driving away. Tony was embarrassed and humiliated and we both said did that actually just happen?*".

35. KM was asked whether as an ATM he should have intervened. He said that he felt he did not have the chance. He then spoke to TH who felt humiliated by what had happened.

36. KM said he texted the claimant when he got home after work, telling her there was no need to use offensive language that he thought she should apologise to TH. The text which KM sent to the claimant did not make any reference to her physically touching TH.

37. KM's interview was conducted on the telephone as he was on sick leave. This meant that the minutes of the meeting were not signed, but the minutes were sent to him by email and approved by him.

38. The claimant responded to KM's text to the effect that she did not consider that she had done anything wrong.

39. The claimant was suspended on 30/05/24 on full pay as a result of the allegation of physical violence.

40. The claimant was interviewed by Mr Sandie on 10/6/24. She said she asked about labels. She denied saying "*put your fucking cups in the bin*"; she said they left empty cups and she may have said "*it looks shit*". She denied swearing about labels.

41. The claimant also denied putting her hands on TH's neck. She said that she put her hands on his shoulders shaking him saying "*hello wake up*". She said "*it was a joke and if you know someone you can interact differently*."

42. Mr Sandie interviewed 3 other members of staff, including the claimant's Line Manager, Douglas Baxter.

43. At the conclusion of the investigation Mr Sandie compiled an investigation report in which he set out the allegations and his findings. The witness statements which he took were attached to the report. In his report Mr Sandie

made a recommendation that the matter proceed to a disciplinary procedure on the basis of an allegation of harassment, as a result of the allegation that the claimant put her hands around TH's neck and aggressive and inappropriate conduct to a more junior member of staff as a result of the claimant's alleged use of language.

44. The report was completed on 22/6/24.

Second investigation – grievance from Chris Khalil

45. On 21 May the respondents received a grievance from a Chris Khalil (CK) about an incident which he said took place on the 17th of March where the claimant behaved aggressively towards him. CK said that he had felt for some time that the claimant had behaved aggressively toward him, calling him an idiot, stupid, and telling him to fuck off and that on one occasion she had lunged towards him trying to remove his headphones. He said on the 17th of March when he came to work an incident occurred where the claimant behaved aggressively towards him, saying he must be blind because he could not find a truck.

46. Matters were passed to Clare Murray of HR on 29/05/24 to investigate. She interviewed CK on 29/05/24, during which he made a number of allegations about the claimant's behaviour.

47. The claimant was interviewed on 4/06/24. The allegations CK had made were put to her and she responded to them. Five other witnesses were interviewed as part of Ms Murray's investigation. At the conclusion of her investigation she prepared a report which comprised: the allegations, her findings, the interviews and a recommendation. She made a recommendation to take 6 disciplinary allegations to a disciplinary procedure.

48. These included;

- An allegation that the claimant had used aggressive language, and not acted as a role model towards CK, telling him his pallets where “shit”.
- Failure to follow the company disciplinary policy by issuing DOG2 (disciplinary action) to CK on the 10/6/24 on the work floor and breach of the requirement for matters to be dealt with sensitively and with respect for the confidentiality of the individual involved, in breach of Section 2.2 and 4.4 of the Disciplinary procedure.

Disciplinary/ Grievance procedure

49. On 17 July Mr Waddell was asked by Mr McLeod, Regional Head of HR, to conduct the disciplinary procedure recommended by both the investigations.

50. He was provided with Mr Sandie and Ms Murray’s investigation reports with their accompanying witness statements. On 6/8/24 Mr Waddell wrote to the claimant setting out 8 disciplinary allegations which had arisen from the combination of the two investigations.

51. The 8 charges included the following 4:

“

1. *Unwanted physical conduct including touching and grabbing, in breach of Lidl's Anti-Harassment and Bullying policy, namely, on 28 March 2024, placing her hands around a colleague's throat and applying pressure to his neck against his will;*
2. *Using aggressive and abusive language, including swearing, in breach of Lidl's Anti-Harassment and Bullying policy, namely, on 28 March 2024, telling a colleague to "fuckoff";*
3. *Using aggressive and abusive language, including swearing, in breach of Lidl's Anti-Harassment and Bullying policy, namely, on 6 March 2024, allegedly telling CK that his pallet was "shit" and to "do what you want, I don’t give a fuck"; and*
4. *Allegation of breach/and or material failure to comply with the company’s policies and procedures from time to time in place in force i.e. not following*

the company's Disciplinary HR Management Procedure-Informal Disciplinary and Disciplinary – The Disciplinary Process 2.2. Confidentiality namely by conducting an ad hoc investigation with CK in the warehouse on 6 March 2024 at approx. 12.30pm."

52. The claimant was advised that each of these allegations was considered as potential gross misconduct and that dismissal was a potential outcome. She was advised of her right to be accompanied at the hearing.

53. The claimant was asked to attend a disciplinary meeting on 9/8; this was ultimately rescheduled to 16/8 as there was insufficient time between the investigation documents being sent out and the disciplinary hearing.

54. The claimant attended the respondent's premises on 12/8 to view the CCTV footage which Mr Sandie and Mr Waddell had seen.

55. The claimant lodged a grievance on 13/8/28 raising a number of matters, some of which were unconnected to the disciplinary proceedings, but some of which related to those proceedings.

56. Given the overlap between the disciplinary and the grievance, Mr Waddell decided to deal with them at the same time, although treating them as separate matters. He split the grievance into 2 sections. One section dealt with points relating to the disciplinary procedure, and a separate section dealt with points unconnected to the disciplinary procedure.

57. The claimant attended a disciplinary hearing on 16/8. The grievance meeting took place at the same time.

58. During the disciplinary meeting the claimant denied having placed her hands around TH's neck. She said that she shook him on the shoulders and told him to wake up and that it was a joke. She said that she felt guilty as she knew that she should not have touched him but she did not choke him. Mr

Waddell asked why TH would say such a thing. The claimant said she did not know. She also said the night shift did not like her because she points things out. The claimant also told Mr Waddell that TH and KM were friends.

59. The claimant said that in Poland (her country of origin) it was normal to shake hands and to grab things. The claimant said that when she arrived on her shift things were a mess with cups left in the trolley and she did say words to the effect "*why did you leave dirty shit and things the trolleys*". The claimant said that she said to TH why were no labels printed out but she denied swearing. She said she did not know you could not use the word shit as everyone else was using it. English is the claimant's second language.

60. In relation to allegation 2 the claimant denied saying fuck off; and said to TH that the trolleys were shit.

61. In relation to allegation 3 the claimant accepted that she said to CK his pallets were shit; she denied using the word fuck. She said if she had known shit was not a good word she would not have used it.

62. In relation to allegation 4 the claimant accepted that she had carried out a DGO2 with CK on the work floor. She advised that she had not received training in the policy. She said she had attended training in Northfleet, but had had to leave.

63. After that meeting an investigation was undertaken by Mr Waddell into the points raised by the claimant during the disciplinary hearing and her grievance. In the course of this he interviewed Mr Sandie, Mr Baxter, Mr Taylor and Mr Blaikie.

64. The claimant had queried why KM's statement was not signed. Mr Waddel ascertained from Mr Sandie that KM had been off work sick and had given his statement over the telephone. Mr Waddell obtained an email trail between Mr Sandie and KM from 30 May which showed that his statement had been sent to KM and that he approved it.

65. The claimant raised that she had not been sent the CCTV footage. Mr Waddell asked Mr Sandie about this. He said that he was only conducting the grievance investigation at the time. The claimant accepted that she touched TH. The CCTV footage was inconclusive and not relied upon and he did not think that she needed to see it. The only thing it showed was that KM was there.

66. The claimant had complained about the length of her suspension. Mr Sandie said that the event took place in March but he only became involved in it in late May. He did not know why it took so long for that to happen. He said there was annual leave for himself, TH, the claimant and KM was off sick.

67. Mr Waddell thought looking at what was said that the delay had been caused by Mr Hay trying to resolve matters informally.

68. Mr Waddell also asked Mr Sandie about the claimant's training on HR policies, but he was unable to confirm what training the claimant had.

69. Mr Waddell also asked what kind of character CK was as the claimant had indicated he was difficult to manage. Mr Sandie gave the view that CK was a troubled character.

70. Mr Waddell also asked Mr Baxter about CK. Mr Baxter expressed the view that he was difficult to manage.

71. Mr Baxter was asked about the claimant's training. He was unable to say whether the claimant had had DG (Discipline and Grievance) training since she came to Motherwell but he said that he thought she would be aware that a DGO2 should not be carried out in an open space and should be carried out in a confidential environment and he explained that a private room was available.

72. Mr Waddel asked Mr Blaikie about the claimant's training but he was unable to provide any information about this.

73. Mr Waddell requested the claimant's training records. These recorded that she had attended 22 training sessions on various matters including having attended training in HR Essentials on 21/7/21 and an HR training rollout on 15/9/22, both in a classroom environment. Both of these were marked that she attended. There was nothing in the records to suggest she had left the training before it was completed.

74. Mr Waddell wrote to the claimant on the 30/8 and 6/9 advising that due to his investigations delivery of the outcome of the disciplinary and grievance was going to take longer than the expected date of 30/8.

Outcome of Disciplinary/ Grievance

75. Mr Waddell considered all of the 8 disciplinary charges and all of the claimant's grievance points both connected and unconnected to the disciplinary proceeding.

76. Mr Waddell wrote to the claimant with his outcome on 13 September. He did not uphold 4 of the disciplinary charges, but upheld the charges 1 to 4 noted above.

Allegation 1

77. In relation to allegation 1 Mr Waddell concluded that on the balance of probabilities the claimant had placed her hands round TH's neck. He considered the claimant's position that this did not happen, and that she had only placed her hands on TH's shoulder and shook him saying wake up Tony, and that TH and KM were concocting the story. In reaching his conclusion Mr Waddell took into account that TH's version of what happened was corroborated by KM, and that the claimant admitted that she had placed her hands on TH. He took this into account. On balance he considered it unlikely that they were concocting the story. In reaching this conclusion he took into account that the claimant had not previously worked closely with TH or KM

and despite the claimant saying the night shift did not like her, that there was no history of them having fallen out. He thought it likely on balance that they had a good working relationship as the claimant said that when she arrived at work she would joke with them. He did not see what either individual would gain from making up the story. He also took into account the fact that a text message was sent by KM, who was also an ATM, after the shift to the claimant about her behaviour. He took into account the claimant's position that KM should have reported the behaviour in terms of the respondent's policy, however he took the view that it was likely that KM was trying to point out to the claimant directly that her behaviour was inappropriate with a view to preventing further escalation, and that he was taking the path of at least resistance in doing so. He did not conclude the fact that KM had not reported it meant that it did not happen.

78. Mr Waddell took account of the claimant's position that there was an overreaction to her behaviour. He took into account that when individuals are friends boundaries can change and he asked the claimant if she had interacted like this with him before but she confirmed that was not the case and that KM and TH are usually leaving when she arrives. Mr Waddell took into account what the claimant said about there being no intent to cause harm, and her lack of appreciation of what is acceptable in the UK work culture, but concluded that these factors did not excuse what was perceived as aggressive and unwanted conduct.

79. Mr Waddell took into account the terms of the respondent's anti-harassment policy and concluded the conduct amounted to bullying and harassing behaviour. Mr Waddell concluded that this conduct was gross misconduct warranting dismissal.

Allegation 2

80. With regard to allegation 2 Mr Waddell accepted that the claimant did not use the word fuck, but concluded that she said shit and that the use of expletives

in the workplace especially in front of those you line manage is not acceptable. He accepted that the claimant may not have been fully aware of the effect of the word, but he took the view that it was incumbent on the claimant to acquaint herself with the company's rules. He considered that she had used the word aggressively and that a distinction could be drawn between swearing generally and swearing at someone. Mr Waddell concluded that this conduct was general misconduct which merited a 1st warning.

81. With regard to allegation 3 Mr Waddell concluded he accepted that the claimant had not used fuck but had said shit to CK. He took into account the same considerations as he had in allegation 2, but also took into account that the claimant line managed CK, and that CK was difficult to manage. Mr Waddell concluded that this conduct was general misconduct which merited a 1st warning.

82. With regard to allegation 4 Mr Waddell concluded that the claimant had conducted a DOG on the warehouse floor with CK, as she admitted to doing so. He also took into account that the claimant's training records recorded that she had attended training in HR Essentials on 21/7/21, the main learning objectives of which were to know where to locate HR policies, understand your responsibilities as a line manager, and understand how and when to use the HR policies. He also took into account that in this training there was a specific section on DOG2 completion.

83. Mr Waddell considered the claimant's position that she had had to leave training early, but found that Northfleet could not verify this and the training record indicated that she had attended and completed the training. He also took into account that when he interviewed Mr Baxter he indicated that he believed the claimant was aware of the fact that private offices were used for such actions, and on the balance of probabilities, Mr Waddell did not accept that the claimant thought it was acceptable to conduct her DOG2 in a non-

private space. He concluded this behaviour amounted to gross misconduct, meriting a final warning.

84. Mr Waddel concluded that the appropriate sanction was summary dismissal. He considered whether to impose a sanction less than dismissal. He took into account that the claimant was doing a good job and that she had seven years' service with no disciplinary record, but he considered that her position as a line manager and the nature of the behaviour found was such that it was not tenable to return the claimant to another position in the warehouse.

Grievance Outcome

85. Mr Waddell wrote separately to the claimant with the grievance outcome on the 13th of September, separating points relating to the disciplinary proceedings from points out with those proceedings.

86. The claimant raised five points in her grievances relating to the disciplinary proceedings. These were;

- that she was suspended without evidence;
- the time taken to resolve the disciplinary action was too long;
- she was not informed of the respondent's progress, and they were not interested in how she felt;
- the respondents were selective in the evidence supplied. There was no statement from a witness, DB and she had not received the CCTV footage;
- matters were not kept confidential, people were talking about the incident. She said a driver, Tony, had mentioned to her that she grabbed someone by the neck.

87. Mr Waddell did not uphold point 1. He concluded that the there was a reason for suspension and that the procedure adopted was that which the respondents would normally follow.

88. Mr Waddell did uphold point 2. He found that the claimant was suspended on the 31st of May, and her first investigation meeting was on the 6th of June five days later. He found she was invited for a second suspension meeting on the 11th of June. CM, the investigating officer was on holiday from the 7th until the 16th of June and was then off ill until the 23rd of June. Mr Waddell received the investigation pack on the 17th of July and had four incidences of annual leave in July/August, as well as other work commitments which limited his ability to allocate time enough to investigate adequately. He noted the claimant then had two weeks holiday in July. Mr Waddell noted that although there was no formal length of time to conduct disciplinary proceeding, and there were some mitigating factors explaining why it took longer to conclude, he considered that matters should have been dealt with as promptly as possible to minimise stress to all parties involved, and he believed that it had taken too long to get to an outcome to the claimant who remained suspended from 30 May to 5th of September. He concluded that while there had been a range of factors from parties being on sick or on holiday or having work commitments, this did not excuse the delay. Mr Waddell upheld this part of the grievance and proposed that all the parties involved were retrained on the DOG policy with particular focus and time frames with the aim of preventing a repeated occurrence in the future.

89. With regard to the third part of the grievance, Mr Waddell partially upheld this noting there was a 1.5 week period from 11th to 21st of June when no contact was made to the claimant. He recommended training.

90. Mr Waddell did not uphold point 4. With regard to the DB interview, he advised that DB's interview was removed from the pack as it was not relevant. DB was off on long term sick and the statement was simply to the effect that he could add nothing. He advised that DB's name remained on the list of evidence to show nothing had been altered from the original. Mr Waddell found that CCTV had been removed by HR from the information sent to the claimant due to GDPR concerns, however the claimant was given an

opportunity of viewing the footage prior to the disciplinary hearing. Further, the footage was not used in any part of the disciplinary due to the nature and quality of the CCTV footage.

91. Mr Waddell did not uphold point 5 as the incident referred to by the claimant took place before she was suspended and therefore before the formal instruction for that matters should not be discussed was issued. He found that all of the witnesses were given the same information about confidentiality. He advised the claimant that if she had any evidence to bring this forward.

Appeal

92. The claimant appealed the outcome of the disciplinary and grievance procedure and her appeal was passed to Mr Fellows to deal with.

93. Mr Fellows wrote to the claimant on 25 September inviting her to a meeting on 7 October to deal with her appeal against both the disciplinary and grievance outcomes.

94. At the meeting the claimant raised the fact that she was surprised that matters took so long and if it was serious she thought she would be suspended immediately. She also suggested that the reason she was not suspended earlier was because she was needed in the warehouse.

95. Mr Fellows did not accept the latter point. He did however consider that matters had not been dealt with timeously and that there should not have been any attempt to resolve TH's grievance informally.

96. He also thought that the delay potentially caused rumours to circulate, as there is no confidentiality until there is a formal process. Mr Fellows understood from what the claimant had said to Mr Waddell during her investigation that Mr Hay had tried to resolve matters informally. He did

not investigate this with Mr Hay who was off on long term sick and understood could not be contacted.

97. Further to his meeting with the claimant Mr Fellows interviewed three members of staff. He wrote to the claimant on the 14 October with his outcome.

98. Mr Fellows upheld Mr Waddell's decision on the disciplinary allegations and the sanction of dismissal. He considered that the evidence of TH and the witness should be accepted and that the claimant's conduct towards TH in allegation 1 was unacceptable.

99. He indicated that the claimant's request for all training records of all workshops/exercises she had completed with the respondents would be forwarded to the Data Protection team in head office, who would liaise with her directly. The claimant's training records were not sent to her and she did not see them until they were included in the Hearing documents.

100. Mr Fellows was satisfied that Mr Waddell had been correct to uphold the part of the claimant's grievance that the disciplinary took too long to resolve, but not the remaining parts of her appeal against the grievance outcome.

Post Termination

101. The claimant applied for a number of jobs after her dismissal but found she was unsuccessful in her applications, as she was deemed to be over qualified for the posts she applied for. It was imperative for the claimant's financial circumstances that she obtained employment, and therefore she obtained a job as a warehouse operative, commencing on the 20th of October 2024. It was agreed that the claimant's income from that employment is £571.53. net per week. It was agreed she had been earning £676.46 net per week with the respondents (£884.62 gross).

Note on Evidence

102. In the main the Tribunal found all of the witnesses to be credible and reliable in their evidence as to their involvement in the disciplinary/grievance procedure. While there was considerable argument as to the fairness of the process and how matters should have been interpreted or deal with, there was not a great deal which was in dispute between the claimant and respondent's witnesses' evidence as to what occurred during that process as a matter of fact.

103. The claimant suggested in her submissions that Mr Waddell had, regardless of his conclusions, decided to dismiss her. She suggested this was maybe because she was the only woman in the warehouse. The Tribunal did not conclude that there was any basis to that suggestion. The fact that Mr Waddell carried out further investigations in an attempt to deal with the points the claimant raised; that he accepted she did not swear; he did not uphold all of the charges brought against the claimant; and he upheld part of the grievance did not suggest that he had determined the claimant would be dismissed regardless of the conclusions he reached.

104. The claimant also suggested that the respondent had fabricated her training records. This was on the basis that the Global ID number did not appear on the training records, but rather a different number. The tribunal did find it plausible that the respondents had deliberately fabricated the records. Such a conclusion would be likely to involve Mr Waddell and Mr Fellows in a considerable conspiracy, which in the tribunal's view was implausible. Neither individual knew the claimant or appeared to have any agenda against her. The respondents did introduce documents to explain the appearance of a different number after the claimant had flagged the different number on her training record in question to Mr Waddell. Mr Waddell accepted candidly he could not explain this, and the tribunal dd not consider that too much could be read into the fact that the respondents then sought to produce documents which explained the position.

Submissions

105. Both parties presented written submissions which they supplemented orally. In the interests of brevity these are not rehearsed here but are dealt with below where relevant.

Consideration

106. Section 94 of the ERA creates the right not to be unfairly dismissed.

107. Section 98 deals with the fairness of a dismissal and provides;

"*1)In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—*

(a)the reason (or, if more than one, the principal reason) for the dismissal, and

(b)that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2)A reason falls within this subsection if it—

……,

(b)relates to the conduct of the employee,

(4) where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a)depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

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

108. Under Section 98 the burden of proof rests with the respondent to establish the reason for dismissal. If they do so, the tribunal moves on to consider the fairness of the dismissal under Section 98(4), where in burden of proof is neutral. The tribunal reminded itself that an objective test of reasonableness judged by the standards of a reasonable employer is to be applied to the

question of the procedure and the sanction of dismissal and that there is a range of reasonable responses open to a reasonable employer.

Reason for Dismissal

109. There is no dispute that the claimant was dismissed as a result of the respondents upholding the 4 allegations set out above, and that these comprised the reason for dismissal, albeit it was found that allegation 1 amounted to gross misconduct warranting dismissal.

110. A 'reason for dismissal' has been described as a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee. The burden of proof on employers at this stage is not a heavy one. The respondent does not have to prove that the reason actually did justify the dismissal because that is a matter for the tribunal to assess when considering the question of reasonableness.

111. The Tribunal was satisfied that Mr Waddell had found that the claimant had physically put her hands round TH's throat and she had on two separate occasions used the word shit aggressively to TH and CK and that she had conducted a DOG 2 with CK on the warehouse floor.

112. There was no dispute about the second two instances of conduct to the extent the claimant accepted saying shit. She accepted that she had conducted a DOG 2 with CK on the warehouse floor. There was a factual issue as to whether the claimant had put her hands round TH's throat. Albeit Mr Waddell's letter of dismissal is not as clear as it might have been on his conclusion on this point the Tribunal was satisfied that he concluded that she had done so, explaining that in reaching this conclusion he took into account that he had corroboration from KM, whom he considered had no reason to lie, and that the claimant accepted physically touching TH.

113. The tribunal was therefore satisfied that it was these matters which were operating in Mr Waddell's mind at the point when he took the decision to dismiss the claimant and that the respondent had established the reason for dismissal and that it was a potentially fair one under Section 98(2)(b) of the ERA.

Fairness of Dismissal under Section 98(4) of the ERA

114. As this is a conduct dismissal the tribunal began by considering the application of the well-known case of ***British Home Stores Ltd v Burchell*** 1980 ICR 303, EAT, which sets out a threefold test; firstly, the employer must show that it believed the employee guilty of misconduct; secondly that it had in mind reasonable grounds upon which to sustain that belief; and thirdly at the stage at which that belief was formed on those grounds, it had carried out as much investigation into the matter as was reasonable in the circumstances.

115. The Tribunal began by considering the first limb of the test. The Tribunal was satisfied that Mr Waddell believed on the basis of information he had at the disciplinary hearing, including what he was told by the claimant, that she had on one occasion physically put her hand round TH's throat, and that she had used the word shit in an aggressive manner to TH and CK which was unacceptable language and that she had carried out a DOG 2 with CK on the warehouse floor.

116. The Tribunal then considered the second limb of the test, which is whether Mr Waddell had reasonable grounds on which to form those beliefs.

117. In relation to allegation 1 there was a conflict in the evidence which Mr Waddell was presented with. The claimant denied putting her hands round TH's throat. TH and KM both said that she did this.

118. An employer acting reasonably is entitled to accept the evidence of one employee over the other. It was not unreasonable for Mr Waddell, as he did, to attach significant weight to the fact that TH's version of what happened was supported by KM's statement. The claimant submitted that the fact that KM's text did not allude to her having done this should have demonstrated that it did not happen. However, it was not unreasonable for Mr Waddell to attach less weight to the fact that the physical contact was not mentioned in the text, than to KM's statement about what occurred in reaching his conclusion. He was entitled to attach weight to the fact that KM had sent a text to the claimant about her behaviour, which did suggest that an incident had occurred.

119. The claimant submitted that KM should have reported his concerns in line with the respondent's policy. However, it was not unreasonable for Mr Waddell not to attach particular weight to this in light of the text and statement he had from KH, and to form the view that the fact that KM dealt with it in this manner rather than through the policy in an attempt to follow the path of least resistance.

120. The claimant submitted that KM's statement was taken well after the events occurred, (the incident was on 28 March and he was interviewed on 30 May). It was apparent that his memory was at this point unclear. She pointed to the fact that he used language such as "*I can't verify*" and "at *this point I can't really remember, I just remember walking out with Tony*."

121. KH's statement however was definitive as to having seen the claimant's hands round TH's neck and that this was not done in the manner of a joke. This did not suggest that KH was unable to recall the significant events which Mr Wadell was reasonably entitled to take into account. KH's failures of memory were on the face of it related to peripheral matters.

122. The claimant also suggested that Mr Waddell should have considered and taken into account that TH and KH were friends and were concocting a story. She also relied in this submission on the fact that TH told Mr Sandie that he

did not get on with the claimant in the course of the investigation, but Mr Sandie did not follow this up. She believed she was not liked because she had reported that the night shift did not complete their tasks and did not do a good job. She pointed to the fact that when asked if he got on well with her by Mr Sandie, TH said 'no'.

123. As indicated above an employer is entitled to accept the word of one employee over another, and in this instance albeit the claimant believed that TH and KM were concocting a story, because she was not liked for reporting them, Mr Waddell was reasonably entitled to reject the notion that the story was made up on the basis that the parties had not worked closely together and there were no previous falls outs between them, and that TH and KM had nothing to gain by making it up. It was not unreasonable for Mr Waddell not to make further enquiry of TH's statement about his working relationship with the claimant to Mr Sandie. This statement was made after the incident of which TH was complaining, and sat alongside his confirmation that they did not work closely together. Mr Waddell was entitled to take into account that the two did not work or interact closely and there had been no issues. It was not unreasonable for him to form the view that there was a good working relationship to the extent that they did interact, on the basis of the claimant's statement that she would wave and joke with them when she arrived in the morning as they were leaving.

124. He was also entitled to take into account that and attach considerable weight to the fact that he had a witness who supported TH's version of events, even if he was a friend of TH, and that he had contacted the claimant about the incident very soon after it suggesting she apologise, and that TH had been off sick as he said after the incident, in accepting their version of what occurred.

125. The Tribunal therefore concluded that at the point when he reached his conclusion on allegation 1 Mr Waddell had reasonable grounds on which to do so.

126. In relation to allegations 2 and 3 the claimant denied saying fuck but admitted saying shit to TH and CK. Mr Waddell accepted her denial of saying fuck and that she was unaware of the severity of the word shit. It was not unreasonable for him to draw a distinction between swearing at someone and swearing generally and that the language had been used aggressively. He had reasonable grounds on which to conclude that the conduct had occurred.

127. The claimant accepted that she carried out a DOG2 with CK on the warehouse floor and therefore Mr Waddell had reasonable grounds upon which to conclude this conduct had occurred.

128. The Tribunal then considered whether at the point when they reached the decision to dismiss the respondents had carried out as much investigation into the circumstances as was reasonable.

129. The first matter which the Tribunal considered was the claimant's submission that she had not received a copy of the grievance from TH or CK. She also relied on the fact that these had not been submitted as grievances using the correct procedures.

130. The tribunal is concerned with the test of a reasonableness judged against the standards of a reasonable employer. Against that test, it cannot be said that every failure in procedure necessarily render a dismissal unfair. The fact that the individuals lodging grievances did not do so on the correct form in terms of the respondent's policy could not reasonably be said to result in the respondents not having to consider the grievances and deal with them.

131. The claimant did not see the grievance emails, however by the time of the disciplinary hearing, she had been made aware of the contents of the grievances in the course of her investigation meetings with Mr Sandie and Ms Murray, and further she had copies of the statements from the individuals who lodged the grievances. She was therefore aware of what was being said against her, and had the opportunity of responding to that.

132. The claimant made a number of submissions as to the delay in dealing with the grievances initially, and then, dealing with the disciplinary procedure. She firstly submitted that the respondents had a responsibility in terms of their policy to deal with grievances within 14 days, and this had not been done.

133. The policy which the claimant relied upon was not the policy which was in force at the time of the incident. The policy in operation at the relevant time did not contain a provision with reference to a timeline of 14 days. There was a delay between TH's grievance e-mail, and the claimant being suspended, however the tribunal was satisfied that this was occasioned due to the efforts of Mr Hay to try to resolve matters informally. The claimant's evidence supported the fact that he had attempted to do so, in that she said he had a discussion with her, and she indicated a willingness to apologise to TH. The fact that TH was not prepared to accept this, further supported the conclusion that these attempts were unsuccessful, and the respondents then had to embark on a formal procedure. While the delay was unfortunate, it could not be said that there was no reason for it and that it amounted to an unreasonable delay.

134. Thereafter there was a delay in the procedure itself. The claimant remained suspended from the 30th of May until the 13 September. This overall delay in concluding matters is not insignificant, however there was an explanation for it, in terms of absences, annual leave as explained by Mr Waddell in his grievance outcome and set out in the Findings in Fact. The period between suspension on the 31st of May, and the first investigation meeting was on the 6th of June, was five days. The claimant was invited for a second suspension meeting on the 11th of June. CM, was on holiday from the 7th until the 16th of June and was then off ill until the 23rd of June. Mr Waddell received the investigation pack on the 17th of July and had four incidences of annual leave in July/August, as well as other work commitments which limited his ability to allocate time enough to investigate adequately. The claimant also had two weeks holiday in July. The initial disciplinary hearing was rescheduled from 9/8 to 16/8, with a grievance being lodged on 13/8. That is not to criticise the claimant for lodging a grievance. It was not however unreasonable for the

respondents to take the view that the two disciplinary matters should be dealt with together, given the proximity in terms of time scales. Nor was it unreasonable for them to decide that the disciplinary and grievance procedures should be dealt with at the same time, in circumstances where a significant part of the grievance dealt with matters directly arising from the disciplinary process.

135. The investigations which Mr Waddell undertook on the back of the points made by the claimant at the disciplinary and grievance meeting took time to complete, and he contacted the claimant about this on the 30th of August and on the 9th of September. It was not unreasonable for Mr Waddell to undertake inquiry, on the basis of the points made by the claimant which explained this delay.

136. The claimant submitted that there was prejudice as a result of the delay, in that KM could not recall details as noted in his statement. This is a matter which is dealt with above, and the tribunal did not consider that anything turned on this submission in that KM's statement was clear as to the essentials of what was alleged and relied upon. The tribunal did not conclude that there was any prejudice to the claimant as a result of the delay. The witness statements set out the essential evidence upon which the respondents were relying, and there was no suggestion that the claimant's recollection of events had faded with the passage of time.

137. In considering the issue of delay the Tribunal took into account Mr Milne's submission and his reference to ***RSPCA v Cruden*** ICR 205 (EAT)*;* ***A v B*** 2003 IRLR and ***Christou v London Borough of Harringay*** (2012) IRLR. As submitted by Mr Milne, each case turns on its own facts and circumstances, and delay will cause unfairness where it is considerable and unjustifiable, and where it occasions prejudice to the claimant. Looking at matters in the round here, while there was delay, it was not unjustifiable as there were reasons for it. Further there was no prejudice caused to the claimant in being advised of the case against her or in responding to it, as a

result of it. In these circumstances it could not be said that delay rendered the dismissal unfair. That is the case, notwithstanding that the respondents upheld this element of the claimant's grievance and that matters may not have been dealt with as quickly as the policies envisaged or the respondents would have liked. What the tribunal is concerned with is not whether the respondents thought the delay was unreasonable, but whether the delay was unreasonably judged by the objective test of a reasonable employer in all the circumstances of the case.

138. The claimant also submitted that not all of the relevant evidence was included in the disciplinary pack. In this regard she referred to the respondent's failure to produce CCTV footage. The claimant however was given the opportunity to view the CCTV footage prior to the disability hearing, and it was not in any event relied upon and therefore there was nothing unreasonable in the respondent's failure to include this in the information sent to her. The same considerations pertain to the claimant's position as to the failure to include a witness statement from an employee who was absent from work at the time, and whose statement was not relied upon.

139. The claimant relied on the fact that KM's statement was not signed, however it was not unreasonable for the respondents to take KM's statement from him over the telephone in circumstances when he was absent from work on sick leave, and to subsequently confirm the accuracy of this by e-mail. It could not reasonably be said that his failure to sign the witness statement impacted on the reasonableness of the investigation carried out with him in these circumstances.

140. The tribunal also considered whether as much investigation as was reasonable was caried out in relation to allegation 4 (carrying out the DOG).

141. This again has to be judged by the standards of the reasonable employer. The claimant's position at the disciplinary hearing was that she had had to leave the HR training, had not been trained, and therefore was unaware of

obligations in terms of the policy to conduct the DOG in a confidential space. On the basis of this Mr Waddell undertook further inquiry, and obtained her training records. It was not unreasonable for him to conclude that the training records indicated that the claimant had attended this training notwithstanding her position that it was otherwise. There was no dispute that the claimant had not been trained since she moved to Livingston there was no further inquiry that was required into this. It was not unreasonable for Mr Wadell to investigate matters with the claimant's line manager, Mr Baxter and to take into account that he believed she would have known the procedure.

142. The claimant made submissions to the effect that her training records produced at the tribunal did not contain her global ID number, and were not her records. For the reasons given above, the tribunal did not consider it likely that the respondents had manufactured the records. As submitted by Mr Milne it is not necessary for the respondent to leave every stone unturned, and the scope of their investigation is that it requires to be reasonable. Having been told by the claimant that she had had to leave the HR training, Mr Wardell made reasonable inquiry, and it was not unreasonable on the basis of the information which he obtained in her training records to conclude that she had in fact attended HR essential training, and would have been aware of the requirements under the policy. The same applies to the consideration on appeal. The fact that the claimant's training records were not forwarded to the claimant as Mr Fellows had said they would be was unexplained, however there was no basis upon which to conclude that this was a deliberate act on the part of Mr Fellows. As indicated in his appeal outcome letter it was left to the data protection team to deal with this.

143. The tribunal was therefore satisfied that at the point when they reached their conclusions on the conduct for which the claimant was dismissed the respondents had carried out as much investigation as was reasonable in the circumstances, and that the third limb of the test in the ***Burchill*** test had been satisfied.

Reasonableness of sanction of dismissal

144. The tribunal then went on to consider the reasonableness of the sanction of dismissal. In doing so the tribunal reminded itself of the guidance given in the case of ***Iceland Frozen Foods Ltd v Jones*** 1983 ICR 17, EAT. What was said in that case was that;

> "*We consider that the authorities establish that in law the correct approach for the… tribunal to adopt in answering the question posed by [S.98(4)] is as follows:*
> - *(1)the starting point should always be the words of [S.98(4)] themselves;*
> - *(2)in applying the section [a] tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the… tribunal) consider the dismissal to be fair;*
> - *(3)in judging the reasonableness of the employer's conduct [a] tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;*
> - *(4)in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;*
> - *(5)the function of the… tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair."*

145. Applying that test it would not have been reasonable for the respondent to have dismissed the claimant if they had found only charges 2 and 3 against her, or had only found charge 4 against her. That however was not the case. They had also found charge 1 against her. It could not be said that in circumstances where the respondents had found the claimant, who held a managerial position guilty of misconduct which included putting her hands round the throat of a more junior employee, that the decision to dismiss for that reason fell out with the band of reasonable responses open to a reasonable employer in the circumstances.

146. The effect of that conclusion is that the claim fails and is dismissed.

Date sent to parties 27 May 2025