



EMPLOYMENT TRIBUNALS

Claimant: Mr K Davies

Respondent: Oscar Mayer Ltd.

HELD AT: Mold **on:** 4th – 5th August 2025

BEFORE: Employment Judge T. Vincent Ryan

REPRESENTATION:

Claimant: Mr T Rushton, Counsel

Respondent: Ms G Nicholls, Counsel

JUDGMENT having been sent to the parties on 11 August 2025 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. This is a claim involving a dismissal for racial harassment, based on an allegation of Irish stereotyping. In part, the Respondent contended that the phrase “Top the morning to ya”, said in a mock Irish accent, should be treated as seriously as any other unwanted words with stereotypical racial overtones that may more usually be understood as harassment; it was not more acceptable.
2. At the outset I declared my interest, enjoying joint Welsh/Irish nationality. I went further in saying that being mocked by people using that greeting with a “put on” accent, irritated me. I agreed the Respondent’s premise stated above. Neither side took exception to my continued involvement. I saw no need to recuse myself in the interests of justice. In fact, the Claimant did not argue that leniency was due on that basis; he too accepted the Respondent’s premise.
3. I made the point in giving judgment that I would disapprove superficial reporting or understanding of this case along the lines, depending on the outcome, that it was or was not permissible at work to mock people with red hair or in affected accents,

or that racism towards the Irish was more or was less permissible. Such reporting would be to miss the point of this case. The Respondent has a duty to maintain standards in accordance with its Dignity at Work Policy, whose stated aim is laudable. The Claimant was accused of using an employment ending, reputation damaging, loss-inducing, racially motivated slur, a slur which could have created an intimidating, hostile, degrading, humiliating or offensive working environment; these are serious matters. On the facts peculiar to this case, I found that the dismissal was unfair, which does not mean that I approve the use of the greeting in question or the use of mock accents.

4. The Claimant succeeded with this claim of Unfair Dismissal in accordance with established legal principles, the application of the Employment Rights Act 1996 and case law. It is not an indication of “wokeness” or “anti-wokeness”. The judgment does not set a precedent; its application is specific to the facts of this case, where the Respondent was found to have acted unfairly and unreasonably in its application of its Disciplinary Policy.

The Claims & Issues:

5. The Claimant claims Unfair Dismissal.
6. At the outset of the hearing, we agreed that the liability issues in the case were as follows:
 - 6.1. Did the Respondent have a reasonable and genuine belief in the Claimant’s misconduct?
 - 6.2. Was that belief based on a reasonable investigation?
 - 6.3. Did dismissal fall within the range of reasonable responses of a reasonable employer?

Witnesses:

7. The Tribunal heard evidence from:
 - 7.1. Mr Kris Major, Head of operations at the Respondent’s Wrexham site and the disciplining officer.
 - 7.2. Ms Amanda Wright, The Respondent’s group procurement director, based at the Wrexham site, and the appeals officer.
 - 7.3. The Claimant (C).

Documents:

8. Hearing bundle – I was provided with a hearing bundle comprising 120 pages and I also had sight of a CCTV recording, both prior to commencement of witness evidence and after submissions but before deliberations.

The Hearing:

9. Both parties were professionally represented throughout the hearing, and I thanked the representatives for their professionalism and courtesy throughout.
10. I was grateful to both representatives for the time that they took attempting to agree issues of remedy once the liability judgment had been issued. They were able to agree quantum subject to deductions, but were unable to reconcile their competing views on the applicability of any deductions to reflect contributory fault or the "Polkey Principle".

The Facts - I made the following findings of fact:

11. The Respondent (R) manufactures chilled ready meals and prepared food. It is a large employer, employing approximately 2,500 employees (this is taken from the ET3's Grounds of Resistance unchallenged) with a professional HR facility and access to legal advice. It relies on written policies and procedures including a Disciplinary Policy and written procedures (pages 52 – 57 of the hearing bundle to which all pages in this judgment refer unless otherwise stated), and a Dignity at Work Policy at pages 58 to 63. R has a site at Wrexham.
12. C commenced his employment with R on 8 September 1997 and was employed by R continuously until his summary dismissal on 4 September 2024, four days short of his twenty-seventh anniversary as an employee. At the date of his dismissal, he was employed as Engineering Storeman at the Wrexham site and was aged 57 years. C had a clean disciplinary record until his dismissal; R had no recorded or reported issues with C's performance, attendance, punctuality, attitude or conduct prior to the event leading to his dismissal.
13. In 2024 R embarked on a redundancy exercise and in June 2024 C was identified in a pool of two employees in the Store at Wrexham, one of whom would be made redundant. The relevant Manager in charge of the procedure affecting C was Mr M St John (MSJ). In consultation meetings held in June and July 2024 C and his Trade Union Representative objected to what they considered to be unsubstantiated, subjective, opinions expressed by MSJ and a colleague, Mr Shaw, about C, that were used to justify his selection for redundancy. Following the second such meeting C produced his written job description to justify an increase in his score against the redundancy criteria and while his score was increased, he was nevertheless selected for redundancy; C was given notice and was notified of the redundancy package and effective date of termination.
14. C was to be made redundant in September 2024, along with approximately 100 employees at the Wrexham site.
15. C, supported by his Union, considered that R had not fairly applied its own policy. He presented a grievance on 15 July 2024 (which was not addressed with him by R prior to his dismissal in the September following). The grievance is at pages 64 - 65. C grieved, among other things, that whilst the procedure laid down formed the basis for objective and fair measurement, this did not occur in his case, that MSJ's opinions "were subjective" and unsupported by evidence and were unjustified; C said he felt "let down, betrayed, and devalued"; he said he felt "targeted and singled out, with a predetermined outcome already decided (sic)". C grieved that given that

R's redundancy procedure allowed for a fair assessment of its employees, its implementation (by MSJ) was "a sham". Any fair reading of C's grievance would understand that C was complaining that MSJ targeted him, singled him out, and had predetermined his selection, rather than MSJ applying the fair and objective mechanism for selection laid down in the policy and procedure.

16. In evidence C said that MSJ put pressure on Mr Shaw during the process but there was no other evidence before me corroborating that opinion, and I make no finding in relation to Mr Shaw or MSJ's dealings with him; I did not hear evidence from either of them. His grievance concentrated on MSJ's conduct towards him and was explicit.
17. The "incident" giving rise to R's allegations of gross misconduct against C occurred on 13 August 2024, a matter of a few weeks before termination of C's employment by way of redundancy. I note in respect of the CCTV footage of the incident shown to me:
 - 17.1. There is no audio recording; it is completely silent;
 - 17.2. C is not visible throughout; it is accepted that he was sitting in a booth or cabin office just inside the door of the stores;
 - 17.3. C's stores colleague, Mr Ward, is visible in the cabin through a hatch; C was sitting at the other end of the cabin furthest from the external door leading to a yard through which others would be seen entering the store;
 - 17.4. Although the following entered the store none of them looked through the hatch in C's direction, namely:
 - 17.4.1. an external auditor, "the Auditor"
 - 17.4.2. Paul Smith
 - 17.4.3. Stuart Foster
 - 17.4.4. Scott Millward
 - 17.5. Mr Millward entered before the others; he is seen speaking to Mr Ward without any obvious notice being taken of C. He left and returned in tow with the others in the above order;
 - 17.6. As the Auditor entered the store he was scanning the entrance way, not the cabin, mostly looking down at the floor and around the walls apparently inspecting the working area (excluding the cabin); he processed ahead of Messrs Smith and Foster into the store and off camera. The Auditor was later described as being "red-headed" (I describe his hair as being dark, auburn); he had his hair, presumably long, tied back in a bun; he had a full beard;
 - 17.7. None of the four people listed gave any obvious or clear indication that they had seen or heard C; none looked his way. The Auditor briefly glanced in the direction of the cabin (not into it) but in no different a manner or for any longer than he glanced around generally;

- 17.8. On balance, it is likely that C was aware of the said procession into the store; he was aware of Mr Millward's presence;
- 17.9. When the Auditor, and Messrs Smith and Foster were beyond the camera and in the store, and before they processed out, Mr Millward waited for them in sight at the door. I was directed to what might have been a shake of his head as he stood waiting; I accept that there was a reaction from him by a head movement and a possible sighing shrug, but without sound or any further visible cue I can go no further than that. I accept that R believed Mr Millward was reacting to something said by C in the booth; I accept that he did so react.
- 17.10. The Auditor and entourage then walked back to the entrance, on camera, and left the building with Mr Millward, the Auditor still looking around but not obviously at anything in particular and apparently carrying out a general visual inspection. They all left the store to the outside yard. Again, neither the Auditor nor any others can be seen to notice C or react to anything said or done by C or Mr Ward from the cabin.
- 17.11. Had I not been told otherwise, I would have characterised the whole episode, lasting from 14:39:09 – 14:43:29, as being unremarkable, and I would not have known of C's presence; I would not have known any of those mentioned above were aware of it either.
18. When Mr Millward first entered the store, ahead of the others, he spoke to Mr Ward only. C was listening to recorded music of his choosing, an Irish ballad called "Grace", being sung by the Dubliners. He greeted Mr Millward in a mock Irish accent saying, "Top of the morning to ya!" Mr Millward ignored him. C took exception both to being ignored and the way Mr Millward spoke to Mr Ward (or perhaps that he only spoke to Mr Ward). During the total time that Mr Millward was in the store and outside the cabin, before, during, and after the arrival of the others named above, C repeated the phrase "top of the morning to ya" in a mock Irish accent. I accept C's evidence that he was effectively channelling the musical vibe (although that is my description of what he was doing). He was goading Mr Millward; being repetitive to draw attention, and to make a point that Mr Millward had not acknowledged him; he was trying to get under Mr Millward's skin by what may be considered annoying repetition of something that clearly did not amuse Mr Millward, not least, and I find so on balance, because he was on duty escorting a third party auditor and others; C was potentially causing embarrassment to Mr Millward by frivolous, goading, conduct as he persistently repeated the said phrase in a mock accent, and I find on balance that this was likely to have been his aim. He was being insubordinate to a manager. Ms Grace submitted that C felt he was beyond reproach as he was shortly to leave his employment, and I find on balance that there was an element of C being "demob" happy.
19. Mr Millward reported the incident to R and R then launched an investigation, conducted by MSJ (against whom C had an unresolved grievance) into whether C had racially harassed the Auditor by using the expression "top of the morning to ya!" in a mock Irish accent. It was assumed by R that the Auditor had stereotypical characteristics of an Irish person and that C thought so, and that C was mocking him, or at least R proceeded on that basis whether in good conscience or

opportunistically I do not know as I did not hear evidence from Mr Milwadr, MSJ or anyone in HR.

20. C did not know the Auditor. I accept C's evidence that he did not see the Auditor enter the store. He was seated and in the corner of the cabin and not at the hatch. On balance he knew that men had walked in but, and as one of them said during the investigation C did not hear his greeting, I accept that C did not see the Auditor specifically. He was working seated at his desk and not standing at the hatch.
21. The Auditor is not known, or believed by R, to be Irish. He was never asked by R about his nationality or ethnic origin. R's disciplinary case is based on its perception of what C might have perceived, namely that the Auditor was Irish or looked typically Irish. I have already found that C did not see the Auditor pass by the cabin's hatch; in any event C did not share R's perception that his appearance (as described, and latterly seen on CCTV) was stereo-typically Irish, and I accept this not least because C said credibly in evidence words to the effect that he did not think being red-headed was anymore an Irish characteristic than a Welsh one; obviously many of R's employees at Wrexham are likely to be Welsh.
22. Mr Millward reported the incident to senior management, TF, (the head of HR under the title Head of People & Development); TF appointed MSJ as investigating officer. MSJ interviewed C at 15:25 on the same day and put to C the allegation that he had "shouted inappropriate comment It is alleged you shouted, "top of the morning to the auditor", and MSJ asked whether this was because the Auditor had red hair, because that could be "construed as racism". C denied seeing the Auditor. He was not shown the CCTV footage.
23. MSJ suspended C on that afternoon pending investigation into "alleged misconductdue to the potential severity of the incident" (p68).
24. In interview Mr Millward described the Auditor walking away from the office [which I have referred to as a "cabin"] and "as he walked further" (which I assume was when he walked away from the entrance and off CCTV coverage), C "started reparative (sic) chanting/shouting out. I'm pretty sure it was "top o' the morning to ya" in an Irish sounding accent.... He continued to do it whilst the auditor was inside.... [I assume he means further into the store and away from the cabin/entrance to the store] it went on for a few minutes. I walked outside and he seemed to stop then". When MSJ asked why C would have done that Mr Millward expressed his opinion that it was "the fact that a ginger person" walked in; there was "no conversation". MSJ stated "for clarity auditor had bright red hair and beard". I do not so describe the Auditor's hair colour as seen on CCTV; I describe it as dark, or muted and auburn, red-headed but not reasonably considered "ginger" or "bright red".
25. Mr Smith, who followed immediately behind the Auditor, was interviewed by MSJ, p72. He heard C shout the greeting in an Irish accent not "once or twice but continuously"; he did not put "2 and 2 together"; he estimated C shouted it 6 times "but the auditor never said anything"; he told MSJ that he did not think anything prompted C to say it, and "he did not even talk to the auditor".
26. Mr Foster had walked into the store after Mr Smith. He was interviewed by MSJ p71. He says that C did not hear him say hello. He described how, when walking

around the workshop, he heard C repeat the said phrase imitating an Irish accent repeatedly, several times, and loudly. He thought it was derogatory and aimed at the Auditor, described as having “ginger hair and quite long beard”. He says that as the entourage left the building C was playing an ACDC song loudly, which he thought inappropriate.

27. MSJ interviewed Mr Ward, who was in the cabin with C and with whom C was not on speaking terms at the time (I believe because he was the other person in the redundancy pool, and he had survived the exercise). MSJ asked him whether he heard C say “top o’ the morning to ya” at any point. He said he did not. He said music was playing but implies it was not loud; he did not specify the song.
28. MSJ interviewed the Auditor (p74). He recalled that a phrase was “said over and over again” in an “intentional accent... could be a natural accent as I don’t know”. MSJ stated: “the phrase used was “top o’ the morning to ya”, whereupon The Auditor said that sounded right; it seemed odd. MSJ then asked the Auditor “Do you think it was aimed at you?” and the Auditor confirmed that his head was down and he “didn’t think much of it”. That was the end of the interview that lasted 5 minutes. MSJ provided the Auditor with the wording used (which C admits using), which the Auditor had not recalled; MSJ asked whether it was aimed at him, even though the Auditor had not suggested that, when asked to describe the circumstances, and did not seem to have thought it did.
29. MSJ’s investigation report commences at p75. At p.76 he describes the process of Mr Millward reporting the matter, the use of the said phrase and he states “the Irish inference, based on the fact that the Auditor had red/ginger hair and beard. There appeared to be no other logical reason for the outburst”. That stated conclusion is supposed to set the scene for the investigation. At p78 under a heading “Facts established”, MSJ states that the reason for the use of the said greeting “has not been established”; in recommending disciplinary action in his conclusion at p.79 he refers, amongst other things, to “the potential impact [the repeated phrase] could have had and the possible ramifications had the Auditor decided to bring a grievance” against R. The Auditor did not complain about the incident.
30. By letter dated 26 August (p81) R notified C of a disciplinary hearing for him to face an allegation of a breach of the Dignity at Work Policy “specifically racial harassment”, an allegation that C made “repeated inappropriate comments in the presence of an external auditor, in reference to that auditor”. He was advised:
 - 30.1. The allegations, “if proven, constitute gross misconduct”;
 - 30.2. He could produce evidence;
 - 30.3. He could make a written statement;
 - 30.4. He would be given the opportunity to explain and ask questions at a hearing;
 - 30.5. The possible outcomes, including summary dismissal were set out;
 - 30.6. The name of the Discipling Officer, Mr Major, was confirmed;

- 30.7. The Disciplinary Policy would be followed and
- 30.8. He could be accompanied.
31. The various accounts given by each of the eyewitnesses were not put to him prior to the hearing by way of further investigation (given that they were not in the same terms and there were notable differences as detailed above). The Investigation report including the witness statements was given to C before the hearing.
32. The hearing was held on 29 August 2024, and the notes commence at p83. C was not shown, and at this stage was unaware of, the CCTV footage. He denied seeing the Auditor. He admitted using the greeting “maybe twice, not 4 times” to Mr Millward, to which Mr Major stated: “This is a breach of the dignity of (sic) work policy”. C confirmed again that he did not know there was an external visitor on site, that he did not think his words were “offensive”, that he had a clean disciplinary record “all these years”, and he apologised. The point was made in defence that MSJ was the Investigating Officer despite the outstanding grievance and that he had asked leading questions of witnesses.
33. Mr Major was aware of the outstanding grievance from TF (Head of People & Development); at the time of the hearing, he did not know and had not enquired about the details of the grievance and had not seen it. TF had not told him that it concerned MSJ’s conduct of the two redundancy consultation meetings. TF told him, and he accepted at face value, that the Grievance was “about process and was not personal”. He was satisfied with that assurance, and on advice considered that the two matters, (grievance and disciplinary) were entirely separate and he did not need to inform himself of the nature of the grievance. In evidence Mr Major held to his belief, having by then seen the grievance, that it was about process, that MSJ was not conflicted, he was a suitable Investigator in this instance and that MSJ “did a good job” as Investigating Officer.
34. Mr Major confirmed under cross-examination that MSJ stated the words used by C to The Auditor, who did not know them. He considered that MSJ’s question as to whether The Auditor felt the phrase was aimed at him, was not a leading question but a direct one, asking how he felt at the time. In fact, MSJ did not just ask how or what the Auditor felt at the time before suggesting he was the object of the mock greeting. Mr Major knew that Mr Ward heard nothing, and Mr Smith did not associate the phrase with the Auditor (did not “put 2 and 2 together”). Furthermore, he was aware that MSJ did not put the statements of the other witnesses to C as part of the investigation; he accepts that there was no suggestion C had been shown the CCTV, and he did not require that it be shown at the hearing. Mr Major did not watch it, but relied on the description given to him by MSJ (although he refers to it in his later dismissal letter at p87 saying “Looking at the size of the office on CCTV...”). The dismissal letter was written by TF, and I infer from the evidence before me that TF did view the CCTV footage.
35. Mr Major made his decision to dismiss C accepting at face value the information and opinions given by MSJ in his report, and the advice of TF; he did not believe C, and he chose not to investigate further matters, such as whether C did know of the Auditor’s presence, and what music he was listening to at the time (which C says influenced the words and accent he used). He concluded “If C did not see him [the Auditor] he would not have made the comments; there is no way he did not

see the Auditor”, that the comment was derogatory and a “racial slur”, which is automatically [my finding of what he believed] gross misconduct which automatically [my finding of what he believed] must lead to summary dismissal.

36. By letter dated 4 September 2024 Mr Major confirmed his decision to dismiss C (commencing p87). He says at p88 the phrase used in a mock accent amounted to harassment, the use of “a racially stereotypical phrase”, that “it is reasonable to take the view that this would violate the dignity of a visitor to our site and humiliate him, whether or not this was your purpose, and that is wholly unacceptable”. He also says the comments were “about someone in relation to a particular nationality”. He referred to the outstanding grievance which he noted “is about [R’s] redundancy process and the scoring matrix, and not [MSJ] personally”, such that it was not unfair or unreasonable for MSJ to carry out the investigation. Without any reference to length of employment, record of performance or clean disciplinary record in the letter, Mr Major concluded that “there was no mitigation”.
37. C was summarily dismissed on 4 September 2024. The dismissal letter at p87 confirmed the disciplinary allegation for which he was dismissed was “you had committed a breach of the Company Dignity at Work Policy; specifically racial harassment. This is related to an incident on 13 August 2024 at 2:39pm within the Engineers Workshop where it is alleged you made repeated inappropriate comments in the presence of an external auditor, in reference to that auditor”. The letter confirms that Mr Major believed C “guilty of the allegations”.
38. Despite his evidence to the contrary under cross-examination, I find that Mr Major did not take into account the length and quality (or otherwise) of C’s employment nor his clean disciplinary record. He did not consider exculpatory evidence, weigh up MSJ’s report, consider any innocent explanations or mitigating circumstances, nor did he consider any alternatives to dismissal, including whether any action was required at all.
39. I find that Mr Major’s engagement in the process was superficial in that he did not consider the standard of the evidence before him and was not interested in a forensic approach to the matter, and followed what he seems to have felt was a set path from allegation to dismissal because that was what he was advised to do. Mr Major confirmed in evidence that TF advised him that “the seriousness [of the matter] outweighed” any mitigation. He confirmed to TF that he was dismissing C, and she drafted the letter of dismissal.
40. C appealed that decision, setting out 7 grounds of appeal (commencing at p90). The appeal was conducted by Ms Wright. R invited C to an appeal hearing (p92) and the letter again explained the procedure, the applicable policy, and the right to accompaniment. It was rescheduled. It took place on 2 October 2024, and the notes commence at p96.
41. Having listed the grounds of appeal and heard C immediately raising the matter of the outstanding grievance and MSJ’s involvement, Ms Wright stated that the grievance “was about process not MSJ”. Other than saying that she would speak to TF about Mr Millward complaining straight to MSJ, Ms Wright has not to date waived in her stance that the grievance was about process and was not about MSJ’s handling of the process. She maintains that it was about process; it was not; the grievance was explicitly about MSJ’s conduct of the process, a process C said

was a fair one if properly applied, but he felt it was not. Ms Wright had read the grievance, and her mind was made up, and remains so, without any due consideration of C's case on appeal.

42. Ms Wright also believed and remains of the belief that MSJ did not lead any witness but asked for clarification of matters, save where he suggested to the Auditor that the phrase in question was aimed at him. She focussed however on the phrase used, and that Mr Millward's complaint was that the phrase was racial. While she accepted an interpretation that C used it first to Mr Millward before the Auditor entered the store at all (and she accepted this to be the case in cross-examination), she focussed on its repeated use (many times) when a man with red hair had walked into the store; Ms Wright concluded that C would not have repeated it otherwise, which meant the intention was "racial" and, after its first usage, it was not then being said to Mr Millward. Bearing in mind C's insistence that he did not see the Auditor, Ms Wright did not consider whether it was possible, that having first addressed the greeting to Mr Millward, and Mr Millward conceding in interview that C stopped when he left the doorway, C was only ever addressing Mr Millward.
43. Ms Wright ensured that C had an opportunity to view the CCTV footage.
44. Ms Wright dismissed the appeal, and her outcome of 11 October 2024 commences at p101.
45. I find that Ms Wright did not approach this appeal with an open mind but was following a process that was leading inexorably to dismissal and confirmation of that at appeal. She did not consider the grievance properly and misconstrued it. She made assumptions that were based on opinion and advice and not evidence. In acting in this way, she did not address the grounds of the appeal conscientiously and thoroughly. Ms Wright may have been misinformed at some stage that the Auditor had made a complaint about the incident, but there is no evidence that she placed any weight on that; I am satisfied that she did not place reliance on it consciously, and I can go no further than that.

The Law

46. Section 94 Employment Rights Act 1996 (ERA) states that an employee has the right not to be unfairly dismissed, while s.98 ERA sets out what is meant by fairness in this context in general. Section 98(2) ERA lists the potentially fair reasons for an employee's dismissal, and these reasons include reasons related to the conduct of the employee (s.98(2)(b) ERA). Section 98(4) provides that once an employer has fulfilled the requirement to show that the dismissal was for a potentially fair reason the Tribunal must determine whether in all the circumstances the employer acted reasonably in treating that reason as sufficient reason for dismissal (determined in accordance with equity and the substantial merits of the case).
47. Case law has provided guidance but is not a substitute for the statutory provisions which are to be applied. Case law provides that the essential terms of enquiry for the Employment Tribunal are whether, in all the circumstances, the employer carried out a reasonable investigation and, at the time of dismissal, genuinely believed on reasonable grounds that the employee was guilty of misconduct. If satisfied of the employer's fair conduct of the dismissal in those respects, the

Employment Tribunal then has to decide whether the dismissal of the employee was a reasonable response to the misconduct. The Tribunal must determine whether, in all of the circumstances, the decision to dismiss fell within the band of reasonable responses of a reasonable employer; if it falls within the band the dismissal is fair but if it does not then the dismissal is unfair.

48. Whilst it used to be the case that emphasis was placed on the rationale and actions of the decision-maker it is now established that the investigator is also key to the question of fairness. If an investigator is acting in an official capacity for an employer that carries authority, and that person misleads the decision-maker or applies undue influence, that may render a dismissal unfair regardless of the good-intent, diligence, and impartiality of the decision-maker.
49. Questions of procedural fairness and reasonableness of the sanction (dismissal) are to be determined by reference to the range of reasonable responses test also (**Sainsbury's Supermarkets Ltd v Hitt [2002] EWCA Civ 1588** and **Iceland Frozen Foods Ltd v Jones [1983] ICR 17**).
50. The Tribunal must not substitute its judgment for that of the employer, finding in effect what it would have done, what its preferred sanction would have been if it, the Tribunal, had been the employer; that is not a consideration. The test is one of objectively assessed reasonableness. In **Secretary of State for Justice v Lown [2016] IRLR 22**, amongst many others, it was emphasised how a Tribunal can err in law by adopting a "substitution mindset"; the point was made in **Lown** that the band of reasonable responses is not limited to that which a reasonable employer might have done. The question was whether what this employer did fell within the range of reasonable responses. Tribunals must assess the band of reasonable responses open to an employer and decide whether a Respondent's actions fell inside or outside that band, but they must not attempt to lay down what they consider to be the only permissible standard of a reasonable employer.
51. Under the **Polkey** principle it may be appropriate to reduce an award by applying a percentage reduction to the Compensatory Award to reflect the risk facing a Claimant of being fairly dismissed or to limit the period of any award of losses to reflect this risk, estimating how long a Claimant would have been employed had he not been unfairly dismissed, in circumstances where the Respondent would or might have dismissed the Claimant. I must consider all relevant evidence, and in assessing compensation I appreciate that there is bound to be a degree of uncertainty and speculation and should not be put off the exercise because of its speculative nature.
52. Where a Tribunal finds that a complainant's conduct before dismissal was such that it would be just and equitable to reduce a Basic Award it may do so (s.122 ERA). Where a Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant it shall reduce any compensatory award by such amount as it considers just and equitable having regard to that finding (s.123 ERA). In doing so a Tribunal must address four questions (**Steen v ASP Packaging Ltd [2014] ICR 56 EAT**):

48.1 What was the conduct giving rise to the possible reduction?

48.2 Was that conduct blameworthy?

48.3 Did the blameworthy conduct cause or contribute to the dismissal?

48.4 To what extent should the award be reduced?

Submissions

53. Both representatives made oral submissions, without either taking exception to the other's on any aspect of the Law. They were based on factual matters.

54. The Respondent submitted, amongst other things:

54.1. There is such a difference between what C says happened and what the witnesses to the event say, that either C is lying, or all the others are and that deciding that matter is "binary";

54.2. C only admits saying the phrase twice but everyone else is consistent in saying he was very repetitive, which is what makes the use of the phrase so wrong;

54.3. The fact that the Auditor was present clearly posed a reputational risk, and both Mr Major and Ms Wright believed that C had conducted himself in the way alleged; there is no evidence that they were influenced by the impending redundancy or any attempt to deprive C of a termination package;

54.4. There is no evidence of any problem between C and MSJ, other of course than the extant grievance;

54.5. Even if there were flaws in the investigation, they would not render the dismissal unfair;

54.6. Rather than R being involved in a conspiracy it was more plausible to suggest that C felt "untouchable" and beyond reproach, even making an "ill-advised" comment stereotyping someone;

54.7. That the CCTV shows the Auditor looking up in the direction of the cabin and C must have seen him too;

54.8. C was "the maker of his own downfall" and the investigation was thorough; even if there was a procedural failure in MSJ's appointment to investigate, the outcome of the investigation was always going to be the same, establishing C's misconduct;

54.9. The repeated phrase was derogatory and therefore not a minor matter as it was no longer a greeting;

54.10. Mr Millward was the person who was racially harassed (this in answer to my question as to who was affected);

54.11. Ms Wright may have been told that the Auditor had complained (of which there is no evidence) but there is no evidence that she placed any weight on that.

55. The Claimant submitted, amongst other things:

- 55.1. The allegation does not reach the threshold for Harassment;
- 55.2. Mitigation was not considered – 27 years unblemished employment; this is not mentioned in the rationale for dismissal in the outcome letter;
- 55.3. C admitted use of the phrase from the outset and apologised; this is not mentioned in the rationale for dismissal in the outcome letter;
- 55.4. There were no reasonable grounds for a genuine belief in gross misconduct, but R “latched on to an opportunity” to dismiss C;
- 55.5. Dismissal was “way outside a reasonable response and was far too heavy handed”;
- 55.6. At worst this was a minor incident and one not meriting a deduction or any significant deduction from an award.

Application of Law to Facts - Judgment:

56. C had grieved about MSJ prior to the incident in question and made serious personal complaints that undermined his credibility as an impartial investigating officer. Absent any investigation into that grievance, and there is no evidence of any, R cannot reasonably have had confidence in MSJ as a suitable investigator. In all the circumstances C cannot have had any confidence that there would be a fair and impartial investigation by MSJ, and that he would receive justice in relation to Mr Millward's disciplinary allegation. MSJ was not a suitable appointee as investigating officer. If there was any substance to the grievance then he was clearly unsuitable, and whether or not there was substance to it, as it had not been concluded either way, he was conflicted.
57. C's grievance can only reasonably be read as a grievance against MSJ and one accusing him of targeting and singling out C for dismissal with a predetermined outcome of the redundancy selection. This is not only significant in that I have concluded MSJ was not an appropriate investigator, but the fact that neither Mr Major nor Ms Wright recognised the problem indicates a failing in their continued duty to investigate the matter at their respective hearings. Their stated views about the grievance show a lack of fair and conscientious application to their respective roles in the disciplinary process.
58. MSJ compounded C's reasonable suspicion about the lack of impartiality by the manner in which he conducted the investigation. He did not ask the Auditor what he heard (but what happened) and did not ask him how he felt or what he thought C was referring to when he repeated whatever phrase it was. He told the Auditor the words that were used and put forward the proposition that he may have been referring to him (“Did you think it was aimed at you?”). He was leading the Auditor. This is important because the basis of R's case is that the allegation for which C was dismissed was one of racial harassment, directed at the Auditor. Despite Counsel's submission that the person who was racially harassed was Mr Millward

(who did not give evidence to the tribunal, or any to that effect to R) and who said in investigation that the comments were made to the Auditor (“no reason other than the fact that there was a ginger person walked (sic), that’s my opinion”), R’s case is clearly that the person it says was racially harassed was the Auditor. The dismissal letter states specifically that the repeated inappropriate comments were said in the presence of an external auditor, in reference to that auditor. That conclusion was reached without the Auditor being able to recollect the words used or having thought that they were addressed to him or referenced him, despite C saying he did not see HIM, one witness hearing nothing, and another saying he did not connect what C said to the Auditor.

59. Despite the inconsistencies or gaps in the various statements given by eye witnesses, or the Auditor, such as the number of times the phrase was repeated or references to what, if any, music was being played and whether or not connections were made between the conversation, none of those matters were further investigated with C before the disciplinary hearing.
60. C was not shown the CCTV in advance of the disciplinary hearing and did not know of it, such that he was deprived of the opportunity to prepare properly with the evidence available to R. This was rectified on appeal but the appeal was not a full re-hearing and C was effectively on the back foot. With regard to the CCTV, Mr Major does not seem to have investigated the matter any further during the course of the disciplinary procedure by viewing it. In this regard, and apparently in others too, he was heavily reliant on what he was told by TF, rather than his own forensic analysis of evidence.
61. The investigation conducted by MSJ, and insofar as it was carried on during the disciplinary process by Mr Major and Ms Wright, was largely based on assumptions. It was assumed that C saw the Auditor, and that he stereotyped him, and thought that the stereotyping was of an Irish characteristic, and furthermore that even though the phrase was first used to Mr Millward it was then for some reason carried on in reference to the Auditor. R has assumed that the Auditor’s appearance was stereotypically Irish, which is in itself stereotyping, and highly questionable. Including C, there were six people in and around the storeroom at the time of the alleged incident. Only two of them, Mr Millward (describing The Auditor as “a ginger person”) and Mr Foster (saying “the gentleman has ginger hair and quite long beard”), categorically associated the use of the phrase by C as being racial and relevant to the Auditor. The fact that C and the others put forward alternative scenarios should have been reflected in the Investigation Report and been weighed against its conclusion by Mr Major and Ms Wright; it was not.
62. C’s explanation for the use of the phrase was in the context of the music he was listening to at the time. There was no investigation into this. In the investigation report interview notes, there is reference to other music played at a later stage of the events. C’s version of events was not put to the witnesses nor vice versa. It was the reason given by C for using the greeting as he did, to Mr Millward.
63. Early in the investigation report and when MSJ describes his appointment as investigator following the report by Mr Millward to TF, he sets out “the Irish inference” based on the auditor’s hair colouring, stating at that stage and prior to detailing the investigation “there appeared to be no other logical reason for the outburst”. The investigation report reads as if the outcome was predetermined. The

invitation to the disciplinary hearing stated as an outcome that if the allegation was proved it would be tantamount to gross misconduct with no leeway or room for discretion. This all appears to me indicative of predetermination or at least a failure to engage with the need for the use of discernment, discretion and judgment. C cannot have gone into the disciplinary hearing with any confidence of justice and that is unfair.

64. I did not hear evidence from MSJ, but I infer from the investigatory process that he predetermined the outcome. This is based on his conduct of interviews and the way he has set out his investigation report.
65. The consistent advice and involvement of TF, relied upon heavily particularly by Mr Major but also Ms Wright, is suggestive of a continuous course of treatment whereby C was pre-judged as being guilty and that as he was guilty of the allegation it would necessarily amount to gross misconduct and he would necessarily be dismissed. There was no evidence before me of impartiality on the part of MSJ or the use of discretion by Mr Major or Ms Wright. Mr Major and Ms Wright appear to have believed that their hands were effectively tied, and it was a straightforward matter of proving C had made the comment while somebody with auburn hair was in his vicinity, and that this would necessarily lead to dismissal. They did not engage with the issue as to what amounts to harassment.
66. Neither Mr Major nor Ms Wright give appropriate, fair, and reasonable consideration not only to C's defence, but to his mitigating circumstances, including length of service, clean disciplinary record, and the fact that his employment was due to end imminently. He admitted use of the greeting using an accent (albeit only twice and not more repetitiously). Dismissal is the ultimate sanction. In this case summary dismissal in C's circumstances would necessarily lead to his loss of redundancy benefits. There is no evidence before me of a conspiracy to effect this. But the fact of 27 years good behaviour coupled with imminent termination of employment meant that the problem, if there was one, was not likely to reoccur and taking no action or imposing a lesser sanction may have been appropriate, but these were matters that were not taken into account.
67. It follows from the above that I find the investigation was not fair and reasonable. The disciplinary and appeals officers had an unreasonable belief, even if misguided and genuine, in C's guilt. The outcome was not based on a reasonable investigation but upon advice which seems to have set dismissal in train from the moment of the complaint by Mr Millward.
68. R did not act fairly and reasonably in all the circumstances of the case.
69. Dismissal did not fall within the band of reasonable responses of a reasonable employer, because there was no proper investigation but also no consideration of any exculpatory matters or mitigating circumstances, and there were plenty to take into account.
70. The dismissal was unfair. That said, C's conduct towards Mr Millward was blameworthy. Adopting mock accents in a mocking way is reprehensible. C goaded Mr Millward by repeating a phrase, in a manner that Mr Millward was bound to find irritating and embarrassing as he was in company. I find on balance that he was trying to get on Mr Millward's nerves or to get under his skin to get a reaction from

him and to cause him embarrassment. That conduct was not specifically racial in connection with Mr Millward or anyone else. I find that the purpose was not to racially harass Mr Millward, and there is no evidence before me that it had the effect either, on anyone. It was nevertheless blameworthy as C was subordinate to Mr Millward. It gave rise to the disciplinary proceedings and therefore contributed to the eventual sanction.

71. Albeit I consider the dismissal unfair, I assess C's contributory fault to be 15%. R mischaracterised the conduct, but it was blameworthy conduct and C put himself at risk by insubordination. R did not and need not tolerate insubordination; it exaggerated the disciplinary charge to racial harassment but nevertheless there was misconduct. I assess that C's Basic and Compensatory awards should be reduced by 15%, as such would be just and equitable (Basic Award) and reflects C's contributory fault (Compensatory Award). Had C not behaved as he did, he would not have been disciplined. I also take account that contrary to all other evidence C maintained he only repeated the phrase twice, which is inconsistent with all other evidence, and I believe C knew he was dishonestly minimising his reprehensible conduct.
72. I do not consider that for his insubordination as found C was likely to be fairly dismissed; he was not properly at risk. I do not consider that a Polkey reduction is appropriate.

Approved by Employment Judge T V Ryan

Date: 16.09.25

JUDGMENT SENT TO THE PARTIES ON

02 October 2025

Kacey O'Brien

FOR THE TRIBUNAL OFFICE