EMPLOYMENT TRIBUNALS

Claimant: Mrs R Adegbulugbe

Respondent: Food Standards Agency

Heard at: Leeds **On:** 10 December 2019
6 January 2020 (reserved decision in chambers)

Before: Employment Judge Cox

Representation:
Claimant: In person
Respondent: Mr A Serr, counsel

RESERVED JUDGMENT

1. This claim of unfair dismissal fails and is dismissed.

2. The Hearing provisionally listed for 15 April 2020 to decide on remedy is cancelled.

REASONS

1. The Claimant presented a claim alleging that the Respondent ("the Agency") had unfairly dismissed her from her job as a meat hygiene inspector. The parties agreed that she was employed from 11 July 2005 until her dismissal on 14 December 2018. The Agency maintained that the reason for her dismissal was her conduct during a telephone call on 1 August 2018 with a representative of

Redfern, a company that makes on-line travel and accommodation bookings for the Agency's staff ("the call").

2. The Claimant was unrepresented by the time of the Hearing. The Employment Judge spent some time at the beginning of the Hearing clarifying with her why she alleged her dismissal was unfair, to ensure that her case could be put to the Respondent's witnesses. The Judge identified 13 points of alleged unfairness in the claim form and the document attached to it (which was her union's statement of case for her appeal against dismissal). The Claimant confirmed that the points identified by the Judge accurately reflected the issues she took with her dismissal.

Application to amend

3. Shortly after the Hearing began, the Claimant applied to amend her claim to allege disability and race discrimination. The terms of the amendments she wanted to make were not entirely clear but it appeared that she wanted to allege that her dismissal related in some way to two disabilities she said she had: calcified tendonitis of her right shoulder and a speech impairment that involves speaking too loudly and too fast to be able to communicate effectively. She said that the Agency had concluded that she had spoken aggressively during the call whereas the manner of her speech was in fact due to her speech impairment. She also said that she had received a final written warning in March 2018, which was taken into account in the decision to dismiss her, because the area manager resented her having been transferred to light duties because of her shoulder condition. She appeared, therefore, to be arguing that the decision to dismiss her was direct disability discrimination or unfavourable treatment because of something arising in consequence of one or both of her disabilities. She also wanted to make a claim of failure to meet the duty to make reasonable adjustments for her shoulder injury. In addition, she wanted to say that her dismissal was in some way, either directly or indirectly, connected with her race. She is a black Nigerian and she says that, because of her race, she naturally speaks loudly.

4. In considering the Claimant's application to amend, the Tribunal applied the guidance of the Employment Appeal Tribunal in Selkent Bus Co Ltd v Moore (1996) ICR 836. The amendments the Claimant wanted to make involved adding entirely new causes of action. Whilst the claims of direct and disability-related discrimination and race discrimination related to the decision to dismiss, which was already in issue in her unfair dismissal claim, the claim of failure to make reasonable adjustments involved a whole different area of enquiry. Any allegation of disability discrimination would involve an enquiry into whether the Claimant was in fact disabled as a result of either of the impairments she mentioned. All the proposed allegations of discrimination had been raised outside the three-

month time limit for a discrimination claim. The application had not been made until the morning of the Hearing on 10 December 2019, a year after her dismissal and around 9 months out of time. The Claimant was legally represented until shortly before the Hearing and she had ample opportunity to make an application to amend her claim in good time before the Hearing but had not done so. The Tribunal could identify no basis on which it could conclude that the application to amend had been made within a just and equitable period (Section 123(1)(b) of the Equality Act 2010).

5. The Tribunal was satisfied that the prejudice to the Respondent if the application were to be granted clearly outweighed the prejudice to the Claimant if the application were to be refused. If the application were granted, the Respondent would be faced with defending discrimination claims that had been raised out of time and would require the claim to be re-listed for at least three further Hearing days. If the application were refused, the Claimant would still have a claim of unfair dismissal that was ready to be heard.

6. The Claimant's application to amend her claim was therefore refused.

Issues and evidence in the unfair dismissal claim

7. In a claim of unfair dismissal, it is for the employer to establish the reason for its decision to dismiss and that it fell within one of the categories of reasons set out in Section 98(1)(b) or (2) of the Employment Rights Act 1996 (the ERA). One of those is a reason relating to the conduct of the employee (Section 98(2)(b) ERA). If the employer establishes that the reason for the Claimant's dismissal fell within one of these categories, the fairness of the dismissal turns on whether in all the circumstances (including the employer's size and administrative resources) the employer acted reasonably or unreasonably in treating that conduct as a sufficient reason for dismissal. That question must be decided by the Tribunal in accordance with equity and the substantial merits of the case (Section 98(4) ERA).

8. In cases of misconduct, the Tribunal will need to satisfy itself that the employer has followed a fair disciplinary procedure, complying with the ACAS Code of Practice on disciplinary procedures (Section 207(2) of the Trade Union and Labour Relations (Consolidation) Act 1992). The Tribunal will then want to establish whether the employer genuinely believed that the employee was guilty of the misconduct at issue and based that belief on reasonable grounds after a reasonable investigation (British Home Stores Ltd v Burchell (1980) ICR 303). The Tribunal will also need to be satisfied that the decision to dismiss, rather than to impose some lesser disciplinary sanction, was within the range of possible reasonable responses to the misconduct ((Iceland Frozen Foods Ltd v Jones (1983) ICR 17). The fact that an employee is already subject to a final

written warning may mean that a decision to dismiss is reasonable, even if the misconduct currently at issue would not justify a dismissal taken on its own. It will rarely be appropriate for the Tribunal to query whether it was reasonable for the employer to take into account a current final written warning in this way, unless there is evidence that the warning was issued in bad faith or was obviously inappropriate (Davies v Sandwell Metropolitan Borough Council (2013) IRLR 374).

9. At the Hearing, the Tribunal heard oral evidence from the Claimant. On the part of the Agency, it heard oral evidence from Mr Daniel Smith, Approvals and Registration Leader, who chaired the disciplinary hearing and made the decision to dismiss the Claimant, and Dr Annie Adkin, Head of Risk Assessment, who dealt with the Claimant's appeal against dismissal. In order to ensure that the Claimant's allegations of unfairness were put to the Respondent's witnesses, the Employment Judge put those points to the witnesses on the Claimant's behalf and with her consent. The Claimant was then given the opportunity to put any further questions to the Respondent's witnesses that she felt still needed to be answered.

10. On the basis of the oral evidence it heard and the documents to which the witnesses referred it, the Tribunal made the following findings of fact.

Reason for dismissal

11. The Tribunal accepts Mr Smith's evidence, which was clear and credible, that the reason the Claimant was dismissed related to the way in which she conducted the call. That was a reason relating to her conduct.

Reasonableness: procedure

12. The disciplinary process was prompted by an email from the Redfern employee who had been the call handler on the call to complain about the Claimant's conduct during the call. The email included these words:

> From the moment she came on the call it was constant shouting and screaming at me, this made me feel very emotionally drained out as I was struggling to understand what she wanted and I felt that it was very unprofessional especially from a Government client. I tried my best to keep calm in this situation and to understand and listen to what she needed but she made me feel uneasy."

13. The Claimant had made the call to Redfern from home. At the time, she was on a six-month temporary secondment to the Approvals and Registrations team from her usual operational role as a meat hygiene inspector.

14. Ms Sarah Pendleton was appointed as the investigating officer to look into the Claimant's conduct on the call and also concerns that Mr Phil Deaton, the Claimant's line manager, had raised about the Claimant's failure to fill in her flexitime sheets. These were internal records of working hours that employees were required to keep in order for the flexitime system to be administered properly.

15. On 24 August 2018 Ms Pendleton took part in a telephone call with Ms Jessica Morrison, a Human Resources advisor, Mr Deaton and Mr Smith. During that call, Ms Morrison explained that Ms Pendleton had been appointed as investigating officer and that Mr Smith would be conducting the disciplinary hearing and deciding on the outcome. As neither had fulfilled those roles before, she set out the procedure that should be followed. She summarised the issues to be investigated, which were the Claimant's conduct during the call and her failure to complete flexisheets.

16. Ms Pendleton listened to a recording of the call, which Redfern had sent to the Agency. She was unable to identify a mutually convenient time to meet the Claimant within a reasonable timeframe and so sent the Claimant the questions she wanted to ask her in writing. The Claimant provided her answers in writing. Ms Pendleton also interviewed Mr Deaton.

17. Ms Pendleton sent her investigation report to Mr Smith on 23 October and Mr Smith sent Mr Price, the Claimant's trade union representative, a copy of the report on 25 October.

18. At around this time, Mr Deaton confirmed to Mr Smith that he believed he had resolved the matter of the flexitime sheets with the Claimant, having dealt with it as an issue of performance. Mr Smith decided he would not be taking that allegation forward in the disciplinary process.

19. Mr Smith listened to the recording of the call three times. In the letter notifying the Claimant that her conduct was to be investigated, the allegation had been that she had acted in an abusive manner during the call. Mr Smith did not think from listening to the call that the Claimant intended to be abusive to the Redfern employee. He was, however, concerned that she appeared to have acted unprofessionally at several times during the call. On numerous occasions she spoke aggressively. Early in the call, she said she wanted to complain but did not make clear what she wanted to complain about. Whilst the Redfern employee was trying to resolve the issues she was raising, the Claimant continued to ask him questions about different departure times and prices for the journey. She was talking loudly. Mr Smith's own experience of working with the Claimant was

that she sometimes talked loudly when she was agitated. She did not appear to have any awareness of the impact she was having on the call handler. On occasions, the Claimant went further and shouted at the call handler. Mr Smith was satisfied that she was doing this consciously, to convey her dissatisfaction with the service being provided, but in an unprofessional way. At one point, the Claimant repeated that she wanted to complain and said that Redfern could lose its contract with the Agency. Mr Smith considered this threat inappropriate. At times, the Claimant spoke in a condescending manner, at one point asking the call handler if he had been trained and at another repeating "super off peak" slowly and loudly and in an exaggerated manner. Half-way through the call the volume of the television in the Claimant's home was increased, the news headlines were audible and the Claimant appeared distracted.

20. Mr Smith wrote to the Claimant on 30 October inviting her to a disciplinary hearing on 23 November to answer an allegation which was now phrased as being that her conduct during the call had fallen short of the standards expected of her. The Civil Service Code provides that civil servants "must always act in a way which is professional and that deserves and retains the confidence of all those with whom" they have dealings.

21. Mr Price emailed Mr Smith to ask whether the Redfern employee would be attending the disciplinary hearing. Mr Smith replied that he would not. Mr Smith took the view that it was inappropriate to invite someone to attend who did not work for the Agency, especially as a recording of the call was available.

22. The disciplinary hearing eventually took place on 14 December. Mr Price accompanied the Claimant. Mr Smith told the Claimant that he had decided not to pursue the flexi-sheet allegation as the basis of a possible disciplinary penalty as he was satisfied that it had now been dealt with satisfactorily as a performance issue.

23. In relation to the call, Mr Price objected to the Agency relying on the recording of the call, on the basis that it would involve a breach of the data protection legislation. Mr Smith did not agree. If there had been a breach, then it had been by Redfern. The recording was the best available evidence of the call and it was necessary for the Agency to listen to it to decide on the appropriate outcome.

24. The Claimant explained that she had made a call to Redfern on 31 July, the day before the call in question, during which she had been unable to complete a booking and she had carried her frustration with that call onto the next day. She queried whether the call handler was experienced enough to do his job competently. There was nothing in the recording that indicated to Mr Smith that the call handler was not competent.

25. When Mr Smith put to her the extract of the Civil Service Code cited above, the Claimant became agitated and insisted that she had a naturally loud West

African accent which she considered a disability. At various points during the hearing the Claimant claimed that the volume of the call had been enhanced on the recording or that the recording made her sound louder than she had been or that the quality of the phone line was poor so she had had to speak loudly. Mr Smith disagreed that having a loud voice was a disability or that the Claimant always spoke loudly. From his six months' experience of working in the same office environment as the Claimant, he knew that at times she was so softly spoken it was difficult to hear her. He concluded that she had the ability to control the volume at which she spoke.

26. The Claimant complained that Ms Pendleton was not present at the hearing so that she could question her, but neither she nor Mr Price raised any specific questions they wanted to raise about the report. The Claimant said that Ms Pendleton had left out of her report various emails she had sent her. She had brought these with her to the hearing and read two or three of them out to Mr Smith. They were emails from colleagues thanking her for work she had done and he did not consider them relevant to the issue he was considering, which was her conduct during the call.

27. Having heard the recording and the Claimant's explanations for and comments on it at the disciplinary hearing, Mr Smith's overall conclusion was that during the call the Claimant had spoken loudly at times on purpose, to intimidate the call handler and express her dissatisfaction with the service she was receiving. She had made an inappropriate threat to the call handler that the Agency's contract would be removed from Redfern, which was not within her power to decide. She had also shown lack of professionalism by conducting the call whilst her television was at a volume that could be heard and that appeared to have distracted her.

28. Mr Smith's concern was that at no point during the disciplinary hearing did the Claimant acknowledge that there had been anything inappropriate in her behaviour or that she had done anything wrong. Mr Smith was accompanied at the hearing by Ms Debra Coates, Human Resources Case Manager. When Ms Coates asked the Claimant whether she would do anything differently if she was in the same situation again, she said only that she would make the call from a different room or use a different phone or explain to the call handler that she needed to speak loudly. Mr Smith was not satisfied that the Claimant would alter her behaviour if she faced a similar situation in the future.

29. Although Mr Smith did not consider the Claimant's behaviour during the call to have been serious enough to justify dismissal in and of itself, she was already subject to a final written warning for failing to complete timesheets on time, which was not due to expire until 21 March 2019. Timesheets are used as the basis for generating and justifying the invoicing of food business operators for meat inspectors' time. In the letter confirming the warning, the Agency had explained to the Claimant that:

> Should you commit another act of misconduct within this time, you are likely to be dismissed . . . It is therefore very important that you improve your standard of conduct and behaviour to that expected of all staff and act professionally at all times.

30. In all the circumstances, Mr Smith decided that the Claimant should be dismissed. He told her of his decision at the conclusion of the disciplinary hearing and wrote to her confirming that decision and the reasons for it on 19 December, in these terms:

> I have carefully considered all the circumstances and information available to me including the investigation report, the record of the telephone call and your mitigation and representations at the hearing. I have listened to the recording several times and found that your behaviour was not necessarily abusive however it was unacceptably unprofessional, condescending and intimidating. I did not agree that you had a disability in relation to your speech and was not satisfied that you understood or had taken responsibility for your actions on that day. Additionally, you gave me insufficient assurance that you were aware of how your behaviour can affect others or how you would conduct yourself differently in the future.
>
> After considering all the relevant factors including your existing final written warning I have decided that you would be dismissed from the FSA and your last day of service would be 14 December 2018. You are entitled to 13 weeks' notice and you would be paid in lieu of notice.

31. The Claimant was dismissed with immediate effect but was paid 13 weeks' pay in lieu of notice.

32. On 26 December the Claimant sent the Agency an email appealing against her dismissal. In brief summary, the basis of her appeal was that the investigation report was incomplete and biased and had only looked for evidence to support the allegation. Ms Pendleton had not attended the disciplinary hearing so the Claimant had not been able to question her. Mr Smith had decided to dismiss her in advance of the hearing. The Redfern employee had not attended the hearing so she had not been able to question him either. She had been interrogated by the HR Case Manager at the hearing. She should not have been dismissed because she had a shoulder injury.

33. Dr Adkin dealt with the appeal. Before the appeal hearing, she read the appeal email, the investigation report, the notes of the disciplinary hearing and the letter of dismissal as well as various other documents including the Agency's disciplinary policy and procedure.

34. The appeal hearing was held on 14 March. The Claimant was accompanied by Ms Deborah Soer, her trade union representative. Dr Adkin gave the Claimant and her representative a full opportunity to raise all the points they wanted to make and discussed them with them. The appeal hearing lasted three-and-a-half hours.

35. Having made further enquiries of Ms Pendleton about the way in which she conducted the investigation, on 19 March Dr Adkin wrote the Claimant a careful and detailed letter explaining why her appeal had been unsuccessful. In short, Dr Adkin had identified no reason to query the soundness of Mr Smith's decision.

36. From these facts, the Tribunal concludes that the Agency adopted a fair procedure in dealing with the Claimant's disciplinary process, which fully complied with the requirements of the ACAS Code of Practice. There was a reasonable investigation, a disciplinary hearing that was fairly and thoroughly conducted and an appeal that was also thorough and fair. The Claimant had a fair opportunity to put her side of the case and raise the points she wanted to raise.

Reasonableness: decision to dismiss

37. From Mr Smith's clear and credible evidence and the recording of the call itself, which the Tribunal also heard, the Tribunal is satisfied that Mr Smith genuinely believed that the Claimant's conduct during the call was unprofessional, condescending and intimidating and that he had reasonable grounds for that belief. (Indeed, having heard the call, the Tribunal found it remarkable how calm and professional the Redfern employee remained in the face of the Claimant's conduct.) The recording alone gave him reasonable grounds for his conclusion, whether or not Ms Pendleton's investigation, which covered both of the original charges, had been reasonable, but the Tribunal in any event accepts that the investigation was reasonable.

38. The Tribunal also accepts that the decision to dismiss the Claimant, rather than to impose some lesser disciplinary sanction, was reasonable in all the circumstances.

39. The Claimant was already subject to a final written warning for not completing timesheets on time. The Agency had considered a final written warning to be appropriate because inspectors' timesheets are used to generate and justify charges to food business operators for inspectors' time. This meant that a failure to complete them had serious repercussions. The Claimant was very experienced and completing timesheets was a basic requirement of her role. She herself accepted that she had not completed her timesheets on time. Although she appealed against the warning, the appeal was dismissed. Having read the

notes of the disciplinary hearing that led to the warning and the clear and detailed letter confirming the decision to dismiss the Claimant's appeal against it, the Tribunal saw no evidence to indicate that the warning was in any way inappropriate or that it had been issued in bad faith.

40. In relation to the misconduct at issue in these more recent disciplinary proceedings, whilst the Agency did not believe that it amounted to gross misconduct, the Tribunal accepts that it had reasonable grounds for believing that it amounted to significant misconduct, especially since the Claimant had not acknowledged that she was at fault in any way or given any indication that she would act differently in the future.

41. In summary, the Tribunal considers that Mr Smith's decision to dismiss the Claimant was well within the range of possible reasonable responses to the circumstances of the Claimant's case.

The Claimant's points

42. The Tribunal makes the following findings in relation to the arguments the Claimant made as to why her dismissal was unfair:

42.1 **Ms Pendleton was biased against the Claimant and omitted evidence the Claimant had given her from her investigation report.** The Tribunal heard no evidence to support the Claimant's allegation that Ms Pendleton conducted her investigation in a biased manner. The Claimant had the opportunity to raise with Mr Smith at the disciplinary hearing that she had sent Ms Pendleton emails that had not been included in her report. Mr Smith listened to two of those emails, which the Claimant read out to him, but he did not consider them relevant to the Claimant's conduct during the call. The Tribunal considers his assessment reasonable.

42.2 **Redfern's recording of the call was used without the Claimant's consent, in breach of data protection law.** The Tribunal is not in a position to make a finding on whether Redfern's release of the recording to the Agency involved a breach of data protection law as it had no direct evidence on several matters that would be relevant to that issue. Dr Adkin records in her letter dismissing the appeal that callers to Redfern are informed that "calls are recorded for training and monitoring purposes". She had asked the manager responsible for privacy at Redfern whether this would cover the use of the recording in disciplinary proceedings and he replied that it would, as "one of the common purposes of monitoring on a business phone line is to capture and evidence unprofessional or abusive behaviour on the part of callers and operators". Whether or not this is an accurate statement of the legal position in relation to the use of the recording by Redfern, it does not directly address

whether the Agency was breaching its own data protection obligations in using Redfern's recording. But even if Redfern and/or the Agency did breach data protection law in using the recording, the Tribunal does not consider that this made the decision to dismiss the Claimant by reference to it unreasonable. As Mr Smith said, once the Agency had been sent the recording, it could not ignore it: this was authoritative and relevant evidence of how the Claimant had conducted herself during the call and listening to it enabled him to deal fairly with the allegation arising from the call handler's complaint.

42.3 **Ms Pendleton did not attend the disciplinary hearing, so the Claimant could not question her about the flaws and inaccuracies in her report.** The Agency's disciplinary procedure does not require the investigating officer to be present at the disciplinary hearing. There was in existence a set of guidance notes for managers that stated that the investigating officer should attend, but Mr Smith had not seen these at the time. The Tribunal does not accept that the non-attendance of Ms Pendleton at the disciplinary hearing made the decision to dismiss the Claimant unreasonable. Mr Smith had direct access to all the most relevant evidence, having himself listened to the recording of the call and discussed it with the Claimant, and it is difficult to know what relevant questions could have been put to Ms Pendleton, even if she had attended. In any event, if the Claimant had wanted to put questions to Ms Pendleton about flaws and inaccuracies in her report, she had a full opportunity to give Mr Smith details of those questions but she did not do so. Given the careful way in which Mr Smith approached his role, the Tribunal finds that he would have put the Claimant's questions to Ms Pendleton, had she raised any questions that were relevant and had asked him to do so.

42.4 **Mr Smith relied on an unsatisfactory investigation report.** The Tribunal does not accept that the investigation report was unsatisfactory, the Claimant never having clearly and fully particularised what she considered was wrong with it. In any event, Mr Smith had a reasonable basis for reaching the conclusions he did just from listening to the recording and speaking to the Claimant.

42.5 **New allegations against the Claimant were substituted at the decision stage, without the Claimant being given an opportunity to respond to them.** The Tribunal accepts that in the letter dated 24 August in which the Claimant was originally informed that there was to be investigation, she was told that the allegation was that she had been "abusive" to staff at Redfern whilst attempting to book travel arrangements on 1 August 2018. By the time she was invited to the disciplinary hearing, however, by the letter of 30 October, Mr Smith had decided that her conduct had not been abusive and she was therefore told that the hearing would consider an allegation that her conduct "fell short of expected behaviour" during the call. The Tribunal considers that this change in the formulation of the disciplinary charge did not prevent the Claimant having a reasonable opportunity to respond to the allegation against her: she was aware

at all times that the allegation was that she had not behaved appropriately during the call.

42.6 **Mr Smith was involved in the procedure from the outset and so was not impartial.** The Tribunal accepts that Mr Smith was party to the telephone call with Ms Morrison, Ms Pendleton and Mr Deaton on 24 August. This call did not discuss the merits of the allegation, however, but was effectively a means by which Ms Morrison could give two inexperienced managers an outline of their roles in the disciplinary process and the way in which the process worked. There was no evidence that anyone tried to influence the ultimate outcome of the process during that call.

42.7 **Mr Deaton, the Claimant's line manager, was also party to that telephone call, even though he was the initiator of the allegations, and so he also was not impartial.** As stated above, the Tribunal does not consider that the telephone call on 24 August did anything more than discuss the process to be followed. There was no evidence that Mr Deaton tried to influence the outcome of the process. In any event, the allegation with which Mr Deaton was personally involved, about non-completion of flexisheets, was not part of the reason for the Claimant's dismissal.

42.8 **The Claimant had not been allowed to submit documents at the disciplinary hearing.** The Tribunal accepts that the Claimant attempted to give Mr Smith several documents at the disciplinary hearing. The Tribunal also accepts Mr Smith's evidence that some of these documents were already in the appendices of the investigation report and others related to emails from colleagues thanking the Claimant for her assistance or contribution. He listened to two that the Claimant read out, but he did not consider them relevant to the issue before him, which was her conduct during the call. The Tribunal heard no evidence to establish that Mr Smith excluded from his consideration any relevant documents.

42.9 **The Agency had not confirmed the decision to dismiss within 5 working days, in breach of its procedure.** The Agency's disciplinary procedure provides that the decision manager should make a decision within five working days of the hearing and immediately communicate this in writing to the employee. The decision was in fact made at the hearing itself on 14 December. The letter confirming the decision was sent within five working days on 19 December. The fact that the Claimant did not receive the letter was because she had gone to Nigeria on 17 December and so was not at home to receive it. This did not prevent her appealing the decision. The Tribunal could identify nothing in these circumstances that made the decision to dismiss the Claimant unreasonable.

42.10 **The final written warning had been unjustified and should not have been taken into account, particularly since the timesheet allegation was not**

pursued in these more recent proceedings. As explained above, the Tribunal could identify no reason to query the reasonableness of Mr Smith's decision to take the final written warning into account in reaching his decision. The final written warning related to the late completion of time sheets, which are used to invoice organisations for inspectors' time. In these proceedings, the issue was the non-completion of timesheets for internal, working-time recording purposes only. The fact that Mr Smith did not consider it appropriate to pursue the disciplinary charge relating to flexitime sheets in no way casts doubt on the validity of the earlier warning relating to the completion of a different and more significant set of time-recording records.

42.11 **No reasonable account was taken of the mitigating factors in relation to the Claimant's conduct.** The Tribunal is satisfied that Mr Smith took full account of the fact that the Claimant had had a call with a Redfern employee the previous day that had left her feeling frustrated, but he reasonably concluded that that did not justify or excuse her behaviour on the following day, during a call with a different call handler about a different booking. He also considered her argument that her loud voice during the call was due to her race and amounted to a disability, but he believed, on reasonable grounds, that she was in fact able to control the volume at which she spoke but had consciously decided to raise her voice. The Tribunal accepts the Claimant's evidence that she told Mr Smith that she had asked a Redfern employee to pass on her apologies to the call handler. Mr Smith was concerned, however, that in her hearing with him she did not acknowledge that her behaviour had been inappropriate in any way nor did she confirm that she would act differently in future.

42.12 **Ms Coates stepped beyond her role in questioning the Claimant at the disciplinary hearing.** The Tribunal accepts that Ms Coates's primary role at the disciplinary hearing was to support Mr Smith in his role. It does not accept, however, that Ms Coates's question to the Claimant, which was about whether she would do anything differently in the future, made the conduct of the hearing in any way unfair. If anything, she was giving the Claimant an opportunity to acknowledge that she had been fault and make clear she would act differently in the future. If the Claimant had taken that opportunity, she might not have been dismissed.

42.13 **The decision to dismiss the Claimant was to penalise her for being put on light duties because of her shoulder condition.** There was no evidence before the Tribunal that any alteration to the Claimant's duties due to her shoulder condition or any other physical impairment affected the final written warning she was given or the decision to dismiss her in any way. The Tribunal accepts Mr Smith's clear and unequivocal evidence that he was not even aware of any difficulties the Claimant had had with performing her substantive role or whether and how she was incapacitated as he had had no communication with her area manager on these matters.

Conclusion

43. As the Tribunal is satisfied that the Agency had a potentially fair reason to dismiss the Claimant relating to her conduct and acted reasonably in all the circumstances in treating that as a sufficient reason for dismissing her, her claim of unfair dismissal fails and is dismissed.

Employment Judge Cox
Date: 9 January 2020