EMPLOYMENT TRIBUNALS

Claimant: Mrs A Pemberton

Respondent: TG Holdcroft (Motors) Ltd

Heard at: Birmingham (by CVP) **On:** 25-26 March and 30 April 2021

Before: Employment Judge Edmonds

Representation
Claimant: Mr A McGrath, Counsel
Respondent: Mr R Wayman, Counsel

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was V (CVP). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

JUDGMENT

1. The claimant's claims for holiday pay and wages are dismissed upon withdrawal by the claimant.

2. The claimant was not unfairly dismissed by the respondent.

REASONS

Introduction

1. The claimant was a credit control supervisor employed by the respondent, a motor vehicle dealership, from 21 November 1995 to 24 January 2020, at which time she was dismissed for gross misconduct. The claimant was dismissed following a complaint raised by one of her team, Ms Najma Bibi, about the way

that she had been treated by the claimant. The claimant alleges that her dismissal was unfair.

2. Following a period of early conciliation from 3 March 2020 to 3 April 2020, the claimant brought claims for unfair dismissal, holiday pay and other payments by claim form dated 27 April 2020. The respondent submitted its ET3 on 17 July 2020.

Claims and Issues

3. The claimant brought claims for unfair dismissal, holiday pay and other payments. However, prior to evidence commencing at the hearing, it was confirmed that the claimant no longer wished to pursue claims for holiday pay or wages, and these claims were withdrawn. The Tribunal was only then tasked with consideration of the claimant's unfair dismissal claim.

4. The issues to be considered were:

   a) Was the claimant dismissed (it was accepted that she was)?

   b) What was the reason or principal reason for dismissal? The respondent says the reason was conduct.

   c) Did the respondent genuinely believe the claimant had committed misconduct?

   d) Did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant, including in particular whether:

      i) there were reasonable grounds for that belief;

      ii) at the time the belief was formed the respondent had carried out a reasonable investigation;

      iii) the respondent otherwise acted in a procedurally fair manner; and

      iv) dismissal was within the range of reasonable responses.

   e) If the dismissal was unfair, what is the appropriate remedy, including whether any award should be reduced due to contributory fault and/or to reflect the chance that the claimant would have been fairly dismissed anyway had a fair procedure been followed?

Procedure and Preliminary Issues

5. The hearing took place remotely via CVP. It was agreed at the start of the hearing that the evidence would be restricted to liability, contributory fault and Polkey, with other remedy issues being left to a future remedies hearing, should one be required. The hearing was originally listed to last two days but, due to the volume of evidence and preliminary applications made at the start of the hearing, it was only possible to complete witness evidence during those two days. The hearing was therefore reconvened on 30 April 2021 to hear oral submissions and

to deliver oral Judgment. In advance of the reconvened hearing the parties' representatives helpfully provided copies of their written submissions to me. Having delivered oral Judgment, Mr McGrath immediately requested written reasons and it was therefore confirmed that these would be sent alongside the Judgment.

6. The tribunal heard evidence from the claimant and from seven witnesses on behalf of the respondent: Najma Bibi (complainant), Hayley Moseley (colleague), Deborah Wilkinson (colleague), Christine Bayley (notetaker and investigator), Simon Garner (investigating manager), Martin McCormick (disciplinary manager) and Neil Rudge (appeal manager). There was also a tribunal bundle of 299 pages (although it was agreed that those documents relevant to remedy would not be reviewed at this stage), comprising a main bundle of 298 pages and one additional document (an email dated 20 January 2020 from Ms Bibi to Mr Garner which had been disclosed late).

7. The claimant had originally submitted a witness statement in the form of a spreadsheet, but upon securing legal representation sought to replace this with a witness statement written in a more conventional format on 3 February 2021. Following an objection dated 24 February 2021 from the respondent's representative on the basis that the claimant had an unfair advantage, having already had sight of the respondent's witness statements, and that new allegations of procedural unfairness had been raised, Employment Judge Harding wrote to the parties on 18 March 2021 confirming that the new witness statement could be used in proceedings. However, Employment Judge Harding also made clear that a witness statement cannot expand on the issues set out in the pleaded case and that any expansion would require an application to amend.

8. It was submitted before me on behalf of the respondent that the claimant's witness statement did expand on the pleaded case yet there had been no application to amend. The claimant's representative submitted that there was no need to make an application to amend, as this forms part of the considerations as to range of reasonable responses and part of the Burchell and Strouthos tests (which are explained in more detail in the Law section below). It was agreed that I would consider this point at the same time as reading into the case.

9. Under Rule 29 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013, the tribunal has the power to allow amendments, either on its own initiative or on the application of a party, having regard to the Overriding Objective in Rule 2. An application to amend can be granted at the hearing itself, as long as the other party is given the opportunity to respond to the amendment (*W Devis and Sons Ltd v Sexton EAT 558/79*).

10. However the first question must be whether or not an application to amend is required, or whether the claim as it stands is sufficient to cover the allegations made. It was submitted on behalf of the claimant that this is not a new claim at all and that it falls within the scope of the general Burchell test, however on behalf of the respondent it was submitted that this is a new amendment.

11. As Employment Judge Harding pointed out, a witness statement cannot expand on the issues set out in the pleaded case. The claimant's case is as set out in her claim form. Any expansion of these would require an application to amend.

12. The claim form as a whole must be considered (*Ali v Office of National Statistics 2005 IRLR 201, CA*).

13. In my view the claim form does not contain the allegations of procedural unfairness on which the claimant now sought to rely. The case of *Ladbrokes Racing Ltd v Traynor EATS 0067/06* contains helpful guidance on this point. In that case the claimant sought to cross-examine witnesses on procedural fairness, when his claim form had not set out any procedural allegations. It was found that the tribunal had fallen into error in finding that the respondents should have seen that line of questioning coming, the key point was that it had not been made out in the claim form. The tribunal should instead have asked whether the claimant wanted to apply to amend their claim and if so, request information about that amendment in order to consider it. I therefore rejected the submission that no application to amend was required in this case.

14. Having made that finding, Mr McGrath then made an application to amend the claimant's claim form. He confirmed that the nature of the amendment was to add in the procedural matters that were in the witness statement but not in the claim form. He submitted that the claimant had originally been unrepresented and that her updated witness statement had been prepared following the receipt of legal advice. He argued that it had been disclosed in ample time for the respondent to assess it and to address it with any documents required. He also pointed out that the respondent had itself provided some late disclosure in this case, and that all the witnesses relevant to the matters in question were present at the hearing. He therefore argued that there was no hardship or prejudice to the respondent in allowing the amendment.

15. Mr Wayman on behalf of the respondent opposed the application. He submitted that the claimant should not have assumed no application would be required, and should have realised the new matters were significant and made an application to amend at the same time as preparing the second witness statement. He said that the nature of the amendment was to make significant procedural criticism, and that the timing and manner of the application was that it was only made on the afternoon of the first day of the hearing, when timing was tight, and only made under duress. I was referred to the case of *Selkent Bus Co Ltd v Moore 1996 ICR 836*, noting that it was relevant if the application was made close to the hearing date. He pointed out that the claimant was no longer a litigant in person and that she had professional advice since at least February. He said that there was a clear prejudice to the respondent, as the respondent had not had the opportunity to take full instructions, as the respondent was entitled to proceed based on the claim as pleaded.

16. After a short adjournment, I concluded that the application to amend should not be allowed. I considered *Selkent* and *Cocking v Sandhurst (Stationers) Ltd [1974] ICR 650*, including the balance of injustice and hardship.

    a) I found that, whilst the tribunal will adopt a flexible approach, the claim form does not contain facts from which the allegations in question could be identified, and therefore the nature of the amendment was significant.

    b) I had no specific observations in relation to the relevant time limits.

    c) In relation to the timing and manner of the application, delay in itself does

not mean that the application must be rejected, but it is a factor to consider. Why was the application not made earlier? It is true that the respondent's witnesses are the same ones who would give evidence on these points, and that the respondent has known for a number of weeks that the claimant was making points about procedure in her witness statement. However, equally the claimant has known since 24 February (when the respondent wrote to the tribunal about the matter) that the respondent objected to the raising of new matters in the claim form. An application could have been made at that point, but was not. Equally, Employment Judge Harding wrote to the parties on 18 March 2021, making clear that a witness statement cannot expand on the pleaded case without an application to amend. By this time the claimant was represented, and could have made that application swiftly, in time for it to be considered before today. Whilst the respondent could have taken instructions on these arguments before today, I agree that the respondent is entitled to proceed based on the case it has before it, and in the absence of an application to amend from the claimant, would have had no certainty that the claimant did indeed intend to rely on those matters. I am also conscious that these allegations were first made in a witness statement submitted some time after witness statements were due to be exchanged.

d) I also considered what would happen if I allowed the amendment. The respondent contended that it had not had the opportunity to take full instructions. This was only listed as a two day hearing and realistically, if amendment is allowed, and an adjournment granted for the respondent to take instructions and amend its pleadings, this would mean postponing the hearing, also incurring additional costs through the relisting of a new date.

17. Therefore, factoring in the balance of injustice and hardship, whilst I appreciated that refusing the amendment would mean that the claimant could not proceed with those procedural allegations set out in the relevant paragraphs of her witness statement, on balance I found that the hardship caused to the respondent by granting the amendment would be greater, having regard to the above including the real practical consequences of allowing the amendment. Paragraphs 10, 11, 12, 13, 17, 18, 22, 23 and 24 of the claimant's witness statement were therefore to be deleted.

Findings of Fact

Background

18. The relevant findings of fact are as follows. References to page numbers are to the agreed Bundle of Documents.

19. The claimant was employed by the respondent from 21 November 1995 to 24 January 2020, with 24 years' service at the time of her dismissal for gross misconduct. Immediately prior to her dismissal, she was employed as a credit control supervisor. The claimant's dismissal related to three specific alleged incidents in which she had made allegedly inappropriate comments to one of her team, Najma Bibi.

20. The respondent is a motor vehicle dealership employing in the region of 625 employees. The respondent operates 8 car franchises in 21 locations. It has one HR role (Mr Garner) who has one additional administrative person at his disposal for backup and has access to legal advice as and when required. It has an Employee Handbook (page 254) and an Equal Opportunities Policy (page 298) which was affixed on a noticeboard, although the claimant said she had never seen it and I accept that to be the case. The Equal Opportunities Policy referenced various outdated pieces of legislation such as the Race Relations Act, and not the Equality Act 2010 (although in evidence it was submitted that the policy dated from around 2012 to 2014). Regardless, I find that employees did not have a clear understanding of where this policy was to be found, and it was significantly out of date.

21. The claimant had a clean disciplinary record at the time of her dismissal. It was submitted that the claimant had in fact been subject to some informal discussions previously however I saw no evidence to suggest any significant conduct matters had been raised with her.

22. The claimant attended training in 2017 entitled "Discrimination in the Workplace: Essential Law for Managers" (page 288): the claimant submitted in cross examination that the content only included certain protected characteristics, specifically pregnancy and bereavement, and not race/religion, and in fact that she had forgotten all about it until she had seen evidence of it through disclosure for these proceedings. That said, she did say in her interview with Mr Garner and Ms Bayley on 8 January 2020 that she had been on "courses" (page 41). In evidence she said that this was not race/religion, but rather about what you can and cannot say at work. Mr McCormick gave evidence that he too had attended this training yet he also separately confirmed in evidence that he had not had any specific training on race/religion. On balance, I find that this training was broader than just pregnancy and bereavement given that the course title makes no reference to the course being restricted in that way, however the content clearly had not resonated with the audience given the lack of detailed memory of its content and in any case it was over two years old by the time of the incidents. That said, I do find it unlikely that the claimant would have said that she had been on courses and knew what she should and shouldn't say unless, whether as part of this training or another piece of training, she had done so, and I find it strange that the claimant did not think to mention the content of the training she had been on until the hearing.

23. Sheena Holdcroft-Carr was the office manager, the claimant was a supervisor, and the rest of the witnesses who gave statements during the disciplinary process formed the remainder of the team. Ms Holdcroft-Carr worked part-time and the claimant was the most senior member of the team in her absence.

24. Najma Bibi has been employed by the respondent since 16 July 2019 as a Sales Ledger, and was still in her probationary period at the time of the alleged incidents. Prior to joining the respondent, Ms Bibi had attended two previous interviews with the respondent but had not been successful: on her third attempt, whilst unsuccessful for the role she had originally applied for, she was put forward for a different vacancy within the claimant's team, and the claimant decided to offer her the role. The claimant was Ms Bibi's line manager, and would have a say as to whether or not she passed her probationary period.

25. Ms Bibi reported the incidents that ultimately led to the claimant's dismissal, and she gave evidence that she had considered resigning because of them but had decided to report them instead. There was discussion in evidence about whether Ms Bibi had in fact considered resigning, and the fact that the claimant was not aware of this. I accept Ms Bibi's evidence she she did think about this, but I also accept however that the claimant was not aware of this.

26. Ms Bibi describes herself as a British Pakistani. She is Muslim. Much was made in evidence as to whether the matters which led to the claimant's dismissal were matters of race or religion, and whether or not they were framed as such. I find that neither the claimant, nor the witnesses, had given any particular thought as to whether she was a British Pakistani Muslim, or a British Pakistani who was Muslim (as two separate things, one relating to race and the other to religion) – and notably the claimant described Ms Bibi in her witness statement (at paragraph 3) as "an apparent Asian/Muslim", conflating her race and religion into one concept. Likewise, I find that when Ms Bibi raised her complaints, she had not given any real thought to whether the allegations she raised were ones of race or religion: this was simply because Ms Bibi (and equally the witnesses) had not had to address the issue before this case, and in reality she sees herself as a combination of all of these things.

The complaint

27. On 7 January 2020 Ms Bibi approached Ms Holdcroft-Carr to report an incident that had occurred on 6 January. She said that the claimant had made a certain comment to her on that date and that there had also been previous occasions on which other comments had been made. There were no notes of this meeting in the Bundle.

28. Ms Bibi had kept a log of the incidents on her phone (pg 287), which she says she prepared on or around 26 November 2019 and then added to as further incidents occurred. This was not provided to anyone at the respondent as part of the disciplinary process (nor was she asked to provide it) but I find that Ms Bibi used it herself to remind herself of the timeline of events. Whilst it may not include every single detail about every single incident, Ms Bibi explained that she had made some of the notes in a rush as she was not allowed to use her phone at work. I accept this explanation, and note in particular that the comments are in short note form and include typographical errors (including a date error regarding the date of the Muslim Prayer Incident), which suggest this was the case. Had they been compiled at a later date for the purposes of preparing a case against the claimant, I would have expected them to have been more detailed and without those errors.

29. The respondent launched an investigation into the allegations, which was conducted by Simon Garner and Christine Bayley. Ms Bayley stated that she was only the notetaker at the meetings in her witness evidence, however Mr Garner confirmed in evidence that they worked as a team. Given that Ms Bayley was present alongside Mr Garner when presenting their findings to Mr McCormick (paragraph 8 of Mr Garner's witness statement), I find that Ms Bayley was indeed more than just a notetaker and played some active part in the process. Mr Garner was experienced in dealing with disciplinary investigations, although this was the first to include allegations relating to race and/or religion.

30. Ms Bibi attended an interview with Ms Bayley and Mr Garner to provide details about the the alleged incidents on 8 January 2020 (page 39). The allegations were as follows:

    a) that the claimant had been discussing some mistakes that Ms Bibi had made with her and had said "If you keep making these mistakes I'll end up sending you back home" (the "**Send Back Home Incident**").

    b) that a few weeks after the above incident, around the end of October 2019, Ms Bibi was putting on a parka style coat and the claimant pulled the coat over her head and made a quote from the film East is East with a Pakistani accent. It was later argued that the words "Dirty Bitch" were used but this was not referenced on 8 January, and in fact not until the appeal – however throughout it was clear that the allegation was that a quote was made from the film (the "**East is East Incident**").

    c) that following a knife attack on London Bridge, on or around 26 November 2019, there had been a group discussion about the attack, during which the claimant asked Ms Bibi if she had ever been approached to join ISIS (the "**ISIS Incident**"). In her witness statement Ms Bibi referenced this comment as being "Are you a member of ISIS" which is of course an entirely different (and more serious) allegation, and Ms Wilkinson and Ms Moseley used the same reference in their witness statement for the purposes of this Tribunal hearing. I find that the allegation was that she had been approached, not become a member (which was confirmed by Ms Bibi and Ms Wilkinson in evidence before me), and the disciplinary allegation was consistent with this.

    d) that on 6 January 2020, there was another group conversation, this time about the killing of Qassem Soleimani, the former Iranian General, by US forces. The claimant was alleged to have asked Ms Bibi whether she would be praying at the mosque like those shown on the news. This was the event which prompted Ms Bibi to report her concerns (the **"Prayer Incident"**).

31. There was also an allegation that in 2019, near the beginning of Ms Bibi's employment, another employee named Julie Hawley had referred to her as "Muslim Girl" (the "**Muslim Girl Incident**").

32. During the interview Ms Bibi said that over time she had become "more uncomfortable" by comments made, and then the incident on 6 January 2020 (the Prayer Incident) had made her "really uncomfortable". Whilst she did not use the specific word "offended", or say specifically that she felt anxious, did not want to attend work or wished to resign, I find that she was very clear that she was unhappy about the comments made and indeed the fact she chose to report them substantiates this. Regardless of the words used, the message is clear that the conduct was unwelcome. Likewise, whilst she again did not refer to being "singled out", this is again what was being inferred and I find it reasonable that it was interpreted that way by the respondent.

33. The claimant was also interviewed on 8 January 2020 (page 41). The claimant did not sign the notes from this meeting. This was in contrast to the notes from meetings with other witnesses who did. I accept the respondent's explanation

that this was because the claimant was absent from work at the time the notes were produced. However she accepted through her witness statement that the notes were broadly accurate, and raised no complaint about them during the disciplinary process.

34. During her witness evidence to the Tribunal, the claimant referred to some notes which she allegedly took on a notepad at the time and later typed up (both in respect of this meeting and subsequent meetings). Ms Bayley submitted in evidence that no one took notes other than herself, and the claimant's representative had referred to the notes as having been prepared some time after the meetings. I accept this and find that the claimant's notes were produced from recollection, rather than being contemporaneous. That said, I was presented with an example of where it was accepted that a comment included by the claimant but which did not appear in the respondent's notes was, in fact, made. I therefore find that the claimant's notes were a genuine attempt to recall what had been said. I find also that the notes taken by Ms Bayley were broadly accurate, albeit not verbatim, as accepted by the claimant herself.

35. The claimant's position during the interview was that:

a) she did not make the Send Back Home comment, or the ISIS comment;

b) that she had "been on courses" and "know you have to be careful what you say";

c) that she was shocked by the allegations;

d) that she had apologised on 6 January after the Muslim Prayer Incident;

e) that she was not being racist with the East is East Incident, it was a "group thing";

f) that others had said other things over the years, that she had asked Julie Hawley not to call her Muslim Girl, and that Ms Bibi had said she had had worse than that; and

g) that Ms Bibi had been whispering to Ms Johnson and Ms Wilkinson, and that she had previously got upset when the claimant was training her and she felt she couldn't supervise Ms Bibi in case she twisted what she was saying.

36. On the same day, J Grainger, Janine Lawton, Elysia Brassington, Debbie Johnson, Hayley Moseley, Debbie Wilkinson, Julie Hawley and Angela Corbett were also interviewed about the allegations (page 45 to 57). None of the witnesses had advance notice of the meetings. The witnesses commented on the allegations as follows:

a) the Send Back Home Incident: none of those interviewed recalled hearing this comment.

b) the East is East Incident: Elysia Brassington was not aware of this incident but did observe that Ms Bibi wore a coat one day and then never wore it again. Debbie Johnson said that she had heard the claimant make

a quote from East is East using a Pakistani accent - she said that she did not think there was malice on the claimant's part but that it was "close to the cloth". Hayley Moseley also said she heard this comment: she said that she saw the coat that the claimant pulled up and an accent and quote from East is East. She also commented that the claimant had said things in the past. Julie Hawley recalled an incident with a parka coat and said that it was banter, and Angela Corbett also recalled the claimant making a comment about East is East. Janine Lawton and Debbie Wilkinson did not hear this incident.

c) the ISIS Incident: Janine Lawton said that she had heard a question about ISIS, as did Debbie Wilkinson, who added that the claimant fires questions at Ms Bibi but she did not think there was malice in it. Elysia Brassington, Debbie Johnson, Julie Hawley and Angela Corbett had not heard this comment.

d) the Prayer Incident. Janine Lawton said that she had heard the claimant ask if she had been to the mosque, and say that this was a joke - she said that it was mainly this incident in her opinion that made Ms Bibi uncomfortable, and that she thought the comments were made in ignorance not malice. Elysia Brassington heard some words about praying and the mosque but not the comment itself. Hayley Moseley said that she had heard the claimant asking if Ms Bibi went to the mosque and then a few minutes later say that she was joking – she said that it took her aback. Debbie Wilkinson said that the claimant asked Ms Bibi "have you been to the Mosque to pray" and that she thought the comment was "wrong". Julie Hawley said that she heard the comment - but it was not made in malice - she said that the claimant had never been nasty to Ms Bibi and that the claimant had always been the one to correct everyone else. Angela Corbett heard the claimant ask whether Ms Bibi went to the mosque and said that she was shocked by this and did not like what was said. She said that the claimant then changed the conversation.

e) the Muslim Girl Incident: Debbie Johnson and Debbie Wilkinson said that Julie (Hawley) would call Ms Bibi "The Muslim Girl". Debbie Wilkinson said that the comment stopped when Ms Bibi retaliated. Hayley Moseley commented that both the claimant and Julie would call Ms Bibi "Muslim Girl", but that she thought the trigger for this was the claimant and that Julie did not mean anything. Julie Hawley confirmed that she had used the phrase "Muslim girl" and said that the claimant had told her to be careful what she said.

37. Ms Grainger said that she had not heard any of these alleged comments. The only member of the team who was not interviewed was Ms Holdcroft-Carr, but she had not been in work on the days of the alleged incidents.

38. The claimant was suspended from work on 8 January 2020, and this was confirmed to her in writing by letter dated 10 January 2020 (page 58). In this letter it was stated that there was an investigation into "comments and actions made to another employee". In evidence it was confirmed that the reference to "actions" was the alleged touching of Ms Bibi's hood.

39. The claimant has alleged that Ms Holdcroft-Carr made a comment to a colleague

on 8 January that she would be working alone in future, and that this meant that the outcome of the claimant's disciplinary had been pre-determined. If such a comment was made, that could equally however have been a reference to the period of suspension, and I accept that Ms Holdcroft-Carr was not involved in the decision to dismiss the claimant in any case.

40. Further interviews were then conducted with the claimant, Ms Moseley, Ms Hawley, Ms Brassington and Ms Bibi on 10 January 2020 (pages 59 to 69). In respect of the interview with the claimant on 10 January, the claimant's notes differ in some respects from Ms Bayley's, although again in her witness statement the claimant confirmed that Ms Bayley's notes were "reasonably accurate" and therefore I find that they were. The claimant's notes however record Mr Garner as having said that Ms Bibi had reported the claimant as having picked on her in relation to the East is East Incident, and the claimant being asked by Mr Garner whether she would have said the same comment to "the Black girl" (Shanee). Mr Garner did not recall saying this, but could not say whether this comment had been made or not. Ms Bayley did not recall this question. I find that, on balance, the claimant did refer to this at the hearing – what that does not of course show however is whether the comment to Shanee actually happened or what the context for that comment was.

41. During this meeting, when referring to the East is East Incident, the claimant said that it was banter "but in hindsight you can't do that in this day and age", and in her witness statement when referring to this meeting the claimant said that she accepted in hindsight that it should not have happened. At the Tribunal however, the claimant sought to argue that her comments were a simple observation of a coat and film and not even banter (although she said that everyone else had laughed and taken it to be banter, including Ms Bibi).

42. In their respective meetings, Ms Moseley and Ms Hawley confirmed that Ms Bibi had commented that "she had had worse before" in relation to the use of the phrase "Muslim Girl".

43. In the interview with Ms Bibi on 10 January 2020 Ms Bibi commented that she felt "really bad", and that she did not want to get anyone into trouble. She said that the claimant was a nice person and it was just the comments, but that they were "racialist".

44. There was a further interview with Ms Bibi on 13 January 2020 (page 70), at which the claimant said that she had not raised the issues previously because she liked working at the respondent, but that Monday's comment (the Muslim Prayer Incident) had prompted her to raise it. She was asked what she wanted to come from the investigation and she shrugged her shoulders.

45. Additional interviews were conducted with Ms Lawton, Ms Johnson, Ms Moseley, Ms Wilkinson and Ms Corbett on 20 January 2020 (pages 72 to 79).

    a) Ms Lawton clarified that, in respect of the East is East Incident, the claimant had told Ms Bibi that she looked "like him out of East is East", and that the ISIS comment was "have you ever been approached by ISIS", when discussing a terrorist incident on Tower Bridge. She said that the question was only asked of Ms Bibi and not the others.

b) In the interview with Ms Johnson, she was asked about an allegation from the claimant that she had been whispering with Ms Bibi: Ms Johnson said that this was about Slimming World and I accept that to be the case. She also said that she heard the Pakistani accent used in the East is East comment but not the actual words, and that the claimant was holding Ms Bibi's hood but hadn't seen her put the hood up.

c) Ms Moseley confirmed that she had heard the quote from East is East but couldn't remember what it was as she hadn't seen the film, but the quote was made in a Pakistani accent and the claimant had pulled Ms Bibi's hood up. She also referred to other comments made by the claimant previously and commented that it was not what she said but the tone in which it was said.

d) Ms Wilkinson confirmed that the claimant had asked "Have you ever been approached by ISIS".

e) Ms Corbett said that she heard the East is East comment but not the actual quote so couldn't comment on whether an accent was used.

46. On 20 January Ms Bibi sent an email to Simon Garner, stating that she wished to file a complaint (page 79B). This email only came to light as part of late disclosure during March 2021. This was an unusual email with no real context, as by this time she had already been interviewed 3 times about the allegations, and it did not appear to have been requested or prompted by anything other than a general desire to put it in writing. Ms Bibi confirmed that she did not receive any response to it nor did she chase for one. Mr Garner further explained that he did not reply to this email, as it had arrived with him after he had already completed his investigation earlier that day, and he did not provide a copy to Mr McCormick or Mr Rudge. I find that, whatever the intention behind this email, it played no real part in the disciplinary process.

47. The claimant was invited to a disciplinary meeting by letter dated 21 January 2020 (page 80), which was hand delivered to her on that day. The letter was put together by Mr Garner, with Mr McCormick. Witness statements were enclosed with the invitation letter and the claimant was offered the right to be accompanied. In this letter the allegations were framed as "the complaint made by a fellow employee of your comments made to them. We consider these comments to fall in to the categories of Bullying and Harassment and contain racist context."

48. There was some discussion at the hearing as to whether "context" was a typographical error and should have said "content" but in any case I do not believe this significantly changes the nature of the allegations. There was no reference to "actions", nor was there any reference to religion. The respondent's position was that racism was a wide enough term to cover the conduct complained about – an "umbrella term" - and Mr McCormick said in evidence that he felt that the reference was wide enough to also encompass the alleged lifting of the hood in the East is East Incident. He believed he could consider anything referenced in the bundle of documents he was provided with (i.e. the meeting notes in addition to the various correspondence). It is clear that he did indeed consider the lifting of the hood in reaching his decision, and the notes he made of his decision reference "comments and actions". I find that in reality the matters to

be considered at the disciplinary hearing were everything related to the issues that had been discussed with the claimant previously and which was covered in the interviews with the witnesses.

49. The respondent's Equal Opportunities Policy (which does not define Bullying and Harassment in any case) was not included with the invite letter, and the Employee Handbook does not contain any Bullying and Harassment policy. Mr Garner confirmed in evidence that he viewed the ACAS definition as being appropriate in this case, but that Ms Bibi had never framed her allegations in the manner set out by ACAS as bullying. In evidence, however, the claimant confirmed that she did have an understanding of what bullying and harassment meant. I find that in practice the respondent did not give detailed consideration to the meaning of Bullying and Harassment, and used the words as a general term to reflect what was alleged to be inappropriate treatment of Ms Bibi. Equally, I find that the claimant understood the allegation in that way too, and had a general understanding of the meaning of the terminology.

50. Enclosed with the invite letter were the witness statements from the claimant, Ms Bibi, Ms Lawton, Ms Moseley, Ms Wilkinson, Ms Johnson, Ms Hawley, Ms Corbett, Ms Brassington and Ms Grainger. The letter also stated that the disciplinary process was enclosed, although it was submitted to me that it had not been – and I find on balance that it was not. That said, the claimant did not raise an issue about that at the time nor request a copy.

51. The disciplinary hearing took place on 24 January 2020 (page 82). It was conducted by Martin McCormick, Finance Director, and Mr Garner was also in attendance as notetaker. The disciplinary invite letter had referred to the meeting being chaired by Mr McCormick and Mr Garner, and the outcome letter was drafted as though from Mr Garner, but the evidence before me was clear that it was Mr McCormick who was in fact the decision maker. Given that the notes from the disciplinary meeting show that it was Mr McCormick who led the discussions and who notified the claimant of the outcome, I accept that evidence. Mr McCormick has previously conducted a handful of disciplinary hearings however this was his first involving matter of race and/or religion. He had had no formal training on disciplinary matters or on discrimination involving race and/or religion.

52. In advance of the disciplinary hearing Mr McCormick prepared a summary document containing a broad timeline of events to date and a list of the five incidents under consideration (page 293).

53. At the hearing Mr McCormick went through the summary he had prepared, although I find that no copy of this was provided to the claimant. They discussed each of the alleged incidents, and at no point did the claimant raise any concerns as to whether she had had proper notice of the allegations against her or raise any misunderstanding as to what those allegations were.

54. In relation to the East is East Incident, the claimant stated that the coat Ms Bibi wore was of the same style and colour as the one in the film and that it was banter. She denied using an accent.

55. In relation to the ISIS Incident she said that only 2 people heard this out of 5 interviewed about it. Mr McCormick asked the claimant if she remained adamant that she had not asked this question, and the claimant confirmed that to be the

case. In respect of the ISIS Incident, as outlined above, I find that the allegation that Mr McCormick considered was whether she had been approached by ISIS (and not whether she was a member of ISIS as suggested in some witness statement at the Tribunal hearing).

56. In relation to the Muslim Prayer Incident the claimant said that it was "just a question" and showing an interest in a minority, and that she had apologised for it. She said that a true racist would not have apologised. In her own notes of this meeting (page 221), the claimant had added "I sat moments after thought why have I apologised I should not have to justify asking a question in fact should be praised for showing an interest in the minority and trying to gain an understanding in alternative faiths". I find that the claimant did say "only kidding" or words to that effect after the Muslim Prayer Incident. However, I find that the apology she offered was not due to genuine remorse, but due to a realisation that she had potentially caused offence, and that throughout the process what she sought to do was to normalise the comments made. In evidence the claimant also submitted that her behaviour had always been professional, which again supports this.

57. Within the hearing notes there is a handwritten word which is not clearly legible, but was said by the claimant. During the hearing it was suggested that the word is "naiveity", although Mr McCormick could not remember that word being used - there has been no other suggestion as to what that word was and therefore I find that this is the word recorded in the notes, and that the Claimant was submitting to Mr McCormick that her actions had been naive.

58. The hearing was adjourned for approximately 2 hours, during which time Mr Garner discussed the case briefly with Mr McCormick. That discussion lasted only a small part of the adjournment, and the remainder of the time was spent by Mr McCormick alone reflecting on his decision and preparing notes to deliver his decision (these notes are at page 295).

59. Following the adjournment, the claimant was informed that she was dismissed for gross misconduct, effective immediately. No finding was made in respect of the Muslim Girl Incident and the Send Back Home Incident, however it was found that the claimant had behaved inappropriately in respect of the East is East, ISIS and Prayer Incidents. Mr McCormick informed the claimant of his findings, and stated that Ms Bibi had been offended by the comments which were because she was a Pakistani Muslim. He said that this was a serious offence which constitutes gross misconduct.

60. In advance of reaching his decision, Mr McCormick did not contact Ms Bibi to seek her views on what action to take, or to ask whether she thought mediation or training, accompanied by a potential warning would be sufficient (this being submitted by Mr McGrath to be a more appropriate sanction). In evidence Mr McCormick said he had himself considered training but felt it would not be appropriate, both because the claimant had attended some training previously on Equal Opportunities and also because he felt that training should not be required to know that the comments made were not appropriate. In relation to mediation, Mr McCormick did not believe that to be appropriate either, having regard to the claimant's position as a senior member of the team and the serious nature of the allegations in his opinion.

61. The claimant's dismissal was confirmed to her in writing by letter dated 28 January (page 89). This confirmed the reason for dismissal as being "comments of an offensive nature to a fellow employee which pertained to their ethnicity and religion. Under the company rules this constitutes bullying and harassment, the language you used is considered to be racist, therefore this is deemed as an act of gross misconduct". This was the first occasion where the word religion had been used in correspondence. Mr McCormick elected not to go through the allegations in turn as he wished the letter to be short, precise and "stick to the point". In his view, the reference to race was wide enough to include the religious aspect and language included both the accent as well as the words used. However, in delivering the outcome verbally, based on the notes of that meeting I find that more detailed information was given to the claimant, specifically dividing his findings into the three individual allegations that had been upheld.

62. Mr McCormick explained in evidence that it would be impossible for him to say what his outcome would have been had only one of the allegations been under consideration (specifically the East is East Incident, which it was accepted related to race). I find that Mr McCormick was motivated by all three of the allegations which formed the basis of his findings, and I accept his evidence on this point. He said that he might still have reached the same decision, but he did not know, and I find that to be an honest and transparent position to take.

The appeal

63. The claimant wrote to Mr Garner, requesting to appeal against the decision to dismiss her, by letter dated 31 January 2020 (page 90). The basis for her appeal was twofold:

    a) The penalty was too severe / unfair

    b) The investigation was not done correctly.

64. There was no suggestion by the claimant in her appeal letter that she had not fully understood the charges against her and I find that this was because she had fully understood them.

65. The claimant chased for a date for the appeal meeting by letter dated 17 February 2020 (page 91). The reason for the delay was because the proposed appeal manager, Neil Rudge, was on holiday. He returned from holiday on Monday 17 February and the claimant received an invitation to a meeting by letter dated 18 February 2020 (page 92). The appeal meeting was to be held on 20 February 2020, and the claimant did not raise any objection to this at the time. The letter informed her that Mr Neil Rudge would be chairing the meeting, supported by Simon Garner (although I find that in practice he was notetaker). Again the claimant was given the right to be accompanied, and she was informed that the hearing would not be a re-hearing.

66. In advance of the meeting, Mr Rudge met with Mr McCormick and Mr Garner to discuss the investigation process. There are no notes of this meeting. During this meeting, Mr Rudge was provided with additional information about the specific allegations that had been made against the claimant.

67. The appeal took place on 20 February 2020 (notes at page 94). Mr Rudge was

an experienced manager in dealing with appeals and had dealt with one appeal relating to race previously, although not at the respondent. There is some dispute about what was said at the start of the hearing. The claimant alleges that Mr Rudge said that he was starting with a blank page and that he hadn't read anything, however Mr Rudge denies this. Mr Rudge says that his position is that he was simply referring to a blank page as meaning he had no preconceived ideas about the case, but that he had in fact read all the documentation that had been presented to him, including the various statements. I find that he in fact meant that he had no pre-conceived ideas.

68. The claimant told Mr Rudge that the sanction was unfair because of her clean disciplinary record, that she thought staff were colluding, and that she had not had any training. This surprised Mr Rudge as he had instigated the previous training which the claimant had attended. However, as I have found above, that training was stale and not memorable in detail to the claimant or Mr McCormick, although I do find that the claimant had some memory of training given her comment at an earlier stage that she had been on courses.

69. The claimant also suggested mediation. Mr Rudge considered this but again felt that this would be inappropriate given the supervisor/subordinate relationship between the claimant and Ms Bibi. He did not think that it was appropriate to ask Ms Bibi her thoughts on the matter.

70. Following the appeal hearing, Mr Rudge decided to re-interview some of the witnesses. Whilst the appeal was not positioned as a re-hearing, this followed the claimant's comment during the appeal hearing that the notes were ambiguous and I find that Mr Rudge had a genuine desire to ensure that everything had been addressed. Ms Hawley, Ms Wilkinson, Ms Lawton, Ms Moseley and Ms Johnson were therefore re-interviewed on 24 February 2020 (pages 96 to 105).

71. In her interview on 24 February 2020 (page 102), Ms Moseley alleged that the claimant had said something along the lines of "Dirty Bitch" for the first time (this being a reference to a comment in the film of "Dirty Bastard" which was directed towards a mixed race British Pakistani boy). Ms Moseley was unable to explain why she did not raise this previously, despite having been asked in the first meeting whether there was any other relevant information. It was put in evidence that there may have been some collusion between Ms Bibi and Ms Moseley about this. Other than the fact that there was a reference to this particular quote, I have seen no other evidence to suggest collusion and given that several witnesses referenced there being a quote from East Is East, I find on balance that this was indeed the quote being referenced and that there was no collusion.

72. During her interview, Ms Hawley said that Ms Bibi had in fact asked the team the previous week whether they all go to church (page 97), and said that she thought this was the same thing as the Muslim Prayer comment. In evidence, Ms Bibi differentiated the two comments because the church one, in her view, did not victimise anyone and was not about a terrorist incident. I find that the two comments were indeed different in nature: the comment made by the claimant must be seen in the context of the events occurring at the time, specifically the drone strike which targeted a leading Iranian figure. In asking whether or not Ms Bibi went to pray, I find that by implication she was asking whether Ms Bibi's allegiances were with General Soleimani or the US administration who viewed him as a terrorist. In contrast, in asking whether colleagues went to church more

generally, this was (a) not targeted at one specific individual and (b) did not carry any undertone other than perhaps identifying whether the colleagues were practicing Christians or not.

73. These statements were not provided to the claimant and she therefore did not have the opportunity to respond to them, notably the comment about "Dirty Bitch" which had not previously been put to her.

74. Overall, Mr Rudge felt that the sanction of summary dismissal was the correct one, having regard to the seriousness of the events in question. Mr Rudge wrote to the claimant by letter dated 27 February 2020 with the outcome of her appeal (page 106). It was not upheld. In the outcome letter, he said that the employees interviewed had verified their original accounts and he had no doubt that the comments attributed to her took place. He said that, taking into account all points raised and the documentation provided, and taking into account her experience with the company, he had no alternative but to uphold the original decision.

Law

75. Section 94 of the Employment Rights Act 1996 ("ERA") sets out the right not to be unfairly dismissed. In order for a dismissal to be fair, it must be for a potentially fair reason under section 98(2) of the ERA. The burden is on the employer to show what the reason for dismissal was and that it was a potentially fair reason. Conduct is one of the potentially fair reasons.

76. Once a potentially fair reason has been established, section 98(2) goes on to provide that:

"…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.*

The burden of proof at this stage is neutral.

77. In cases relating to conduct the key case is *British Home Stores v Burchell [1980] ICR 303*. The employer must demonstrate that:

a) It genuinely believed the employee to be guilty of misconduct;

b) It had reasonable grounds for that belief; and

c) It had carried out as much investigation as was reasonable in the circumstances.

78. The question is not whether the Tribunal would have taken the same action as the employer, but whether what occurred fell within the range of reasonable

responses of a reasonable employer, both in relation to the decision itself and the procedure followed (*J Sainsbury plc v Hitt 2003 ICR 111,* and *Iceland Frozen Foods Ltd v Jones 1982 IRLR 439*). The starting point should be section 98(4) of the ERA, and in applying that the Tribunal must consider the reasonableness of the employer's conduct, not simply whether the Tribunal considers the dismissal to be fair. Put simply, the Tribunal must not substitute its own decision about what the employer should have done, and in many cases there is a band of reasonable responses that the employer could reasonably take. It is for the Tribunal to decide whether, in the particular circumstances, the employer's actions fell within that band.

79. Applying all of these principles, the key questions the Tribunal must consider are (in each case having regard to the band of reasonable responses):

i) Did the employer have a genuine belief that the employee was guilty of misconduct?

ii) If so, was that belief based on reasonable grounds?

iii) Had the employer carried out as much investigation as was reasonable?

iv) Did the employer follow a reasonably fair procedure?

v) Was it within the band of reasonable responses to dismiss the employee as opposed to taking other action such as a lesser sanction? If the dismissal was for gross misconduct, did the employer act reasonably both in characterising it as gross misconduct, and then in deciding that dismissal was the appropriate punishment: *Brito-Babapulle v Ealing Hospital NHS Trust [2013] IRLR 854*

80. The employer's size and resources are a relevant factor, as is the ACAS Code of Practice on Disciplinary and Grievance Procedures. The employee's length of service is also relevant (*Strouthos v London Underground Ltd 2004 IRLR 636*).

81. Disciplinary charges should be precisely framed, and considerations limited to those charges (*Strouthos, above*). Employees should know not only the case against them but the evidence being relied on, and should have the opportunity to dispute that evidence and bring forward their own evidence (*Spink v Express Foods Limited [1990] IRLR 320*). However a failure to make evidence available will not always amount to an unfair dismissal, where the employee is fully aware of the case against them and has had a proper opportunity to respond to it (*Hussain v Elonex plc 1999, IRLR 420*).

82. Equality and diversity training will become stale over time (*Allay (UK) Ltd v Gehlen UKEAT/0031/21*, in which it was found that equality and diversity training which was 18 months to 2 years old was stale).

83. If the dismissal is found to be unfair due to (at least in part) the procedure followed by the employer, then in considering the appropriate award of compensation, regard should be had to the likelihood that the dismissal would have taken place in any event, and the compensatory award may be reduced accordingly. *Polkey v AE Dayton Services Ltd 1988 ICR 142*.

84. If the dismissal is found to be unfair but it is also found that the employee contributed to their dismissal through their conduct, then the basic and/or compensatory awards may be reduced to reflect this under section 122(2) and 123(6) of the ERA. Contribution should be assessed broadly and in the categories of wholly to blame (100%), largely to blame (75%), equally to blame (50%) and slightly to blame (25%) (*Hollier v Plysu Limited [1983] IRLR 260*).

Conclusions

What was the reason for dismissal?

85. The reason for the claimant's dismissal was clearly conduct, and this is not disputed. This is a potential fair reason for dismissal.

Did the respondent have a genuine belief that the claimant was guilty of misconduct?

86. The next issue I must decide is whether the respondent genuinely believed that the claimant was guilty of misconduct. I conclude that it did. I have heard nothing to suggest that the claimant's dismissal was for any reason other than due to the three incidents identified by Mr McCormick – the East is East Incident, The ISIS Incident and The Muslim Prayer Incident, and Mr McCormick clearly felt they were misconduct, and indeed gross misconduct. I also conclude that there was a genuine belief that the comments related to race and/or religion.

Was that belief based on reasonable grounds?

87. I turn to whether that belief was based on reasonable grounds, based on the information available to the respondent. In considering this I deal with each of the incidents in turn:

    a) The East is East Incident. The claimant accepted that she had made a comment about Ms Bibi's coat, which was in reference to the film East is East. Therefore, as a minimum, the claimant had approached an employee who describes herself as a British Pakistani, referencing a film about a British Pakistani. The claimant says that this was merely a comment, but she acknowledges that other employees who heard the comment laughed and viewed it as banter. It is therefore clear that the comment was interpreted as a joke. Whilst she denied pulling the hood up and using a Pakistani accent, it was open to the respondent to take the view that this had happened: there were witness accounts that said so. By the claimant's own admission, in hindsight she should not have made the East is East comment.

    The claimant submitted that she had made a similar comment to a black employee: even if a comment about the coat had been made to another employee who was not Pakistani, there was no suggestion of an accent being used in that case to mock the employee and it was open to the respondent to conclude that in the context of Ms Bibi specifically, it related to her race and Ms Bibi was likely to have interpreted it as such.

b) The ISIS Incident. Whilst the claimant denied this incident, Mr McCormick was presented with witness statements from Ms Bibi, Ms Lawton and Ms Wilkinson to say that the comment was made. In these circumstances it was plainly open to the respondent to conclude that it was. I accept that the witness statements presented at the Tribunal referred to whether she was in ISIS: as outlined above, I have found that this was not what the disciplinary investigation was about. However, what is important is what was in the respondent's mind at the time of the dismissal and it is clear that this related to the lesser charge of being "approached" by ISIS.

c) The Muslim Prayer Incident. Again, the claimant accepted that this incident occurred, with no material dispute about the wording used, and also said that she had apologised soon afterwards. The claimant therefore accepted at the time by apologising that the conduct was inappropriate, and some of those interviewed as part of the investigation commented to the effect that they were shocked by what she had said. In those circumstances it was again plainly open to the respondent to take the view that the claimant had committed misconduct.

Had the respondent carried out as much investigation as was reasonable?

88. The respondent had interviewed Ms Bibi formally three times. It had interviewed 8 other witnesses in addition to the claimant, and had carried out further interviews at various points throughout the disciplinary process. The claimant was interviewed twice before being invited to a disciplinary meeting. In fact, it was argued on behalf of the claimant that the respondent had carried out too many interviews, by interviewing witnesses again as part of the appeal process. The only member of the team not interviewed was Ms Holdcroft-Carr, who had not been at work when the incidents took place. In my view, this is clearly within the band of reasonable responses, particularly given that some of the allegations were not in dispute.

Did the respondent follow a reasonably fair procedure?

89. I must have regard at this point to the fact that the claimant wished to raise certain procedural allegations at the hearing which were excluded as not being part of the pleaded case, as outlined above. In dealing with the procedure undertaken by the respondent, I have therefore not specifically addressed those points but I have considered the procedure followed as a whole. In doing so I have also taken account of the size and resources of the respondent, having its own HR practitoner and access to legal advice.

90. As a starting point, I conclude that there were elements of the procedure followed that were not ideal, and which could certainly be improved. For example, the role of each of those present at the meetings was not always entirely clear. The written correspondence with the claimant contained typographical errors, was brief and did not detail the specific incidents being investigated, nor did the dismissal outcome deal with each of the incidents in turn. That would certainly have been preferable. Enclosures also appear to have been missing from the invitation to disciplinary hearing.

91. Much was made in evidence about the language used in the written

correspondence, and whether the allegations for which the claimant were dismissed were the same as those she was charged with, and therefore under whether the respondent could properly have dismissed the claimant for the incidents that it did (in line with the *Strouthos* case referenced above). In this regard, there are two key points raised.

92. First, that the invitation to disciplinary referred only to "race" and not also to "religion" whereas the dismissal outcome letter referred to the comments "which pertained to their ethnicity and religion". It was submitted that any action should have been confined to race only, and that this limited to the charge to the East is East Incident (the other two Incidents being related to religion). Whilst again it would have been preferable to provide additional detail in both the invitation and outcome letter, it is clear to me from the evidence before me that everyone involved in the case, including the claimant, fully understood the allegations throughout to relate to both race and religion. At no point did the claimant object to the fact that the terminology in the letters did not match, and the claimant made various references showing that she herself conflated to the two issues – notably even describing Ms Bibi as an "apparent Asian/Muslim" in her witness statement. She had copies of all of the investigation meetings prior to the disciplinary hearing and therefore was under no illusion as to what the allegations against her were.

93. The second point raised about the language used was in relation to the fact that the suspension letter referred to "comments and actions made to another employee" whereas the invitation to disciplinary meeting referred to "comments". It was submitted that this therefore confined the issues to be considered to comments, and no regard should be had to any "actions" – specifically the alleged raising of the hood in the East is East Incident. This is in my view an over-simplistic approach – again the claimant had a clear understanding from all the evidence provided of what was being alleged, and the raising of the hood formed part and parcel of the East is East comment – the raising of a hood on its own is not a controversial act: what was controversial was that it was allegedly done at the same time as putting on a Pakinstani accent and making a quote from a film about a British Pakistani Muslim. The raising of the hood is therefore relevant to the comment itself in any case, but even if it were not, I find that overall the claimant had sufficient information to fully understand the charges.

94. I therefore distinguish the case of *Strouthos*, in which an allegation was framed as the "taking without permission" of a vehicle, but then the outcome related to "dishonesty", two clearly different things. In contrast, in this case, although the allegations may have been set out rather briefly, the overall picture of what was being considered was undoubtedly clear and sufficiently precise, as demonstrated by the fact that the claimant did not complain when those matters were discussed at the disciplinary hearing.

95. More generally in relation to the respondent's procedure, whilst there are certainly improvements that could be made to it as outlined above, overall it was within the range of reasonable responses. There was a detailed investigation, a formal invitation to disciplinary hearing, a disciplinary hearing with an adjournment before sanction issued, an outcome letter (albeit brief – but she had been given additional verbal detail about the findings at the hearing itself), a right of appeal, an appeal meeting, an appeal investigation and an appeal outcome. I do not find any real failure to follow the ACAS Code, and I do not find that the re-

interviewing of additional witnesses during the appeal process made the procedure unfair in any way. There may have been fairly short notice of each hearing, but again the claimant was already clear on what was to be discussed, and in relation to the appeal the claimant had specifically chased for a hearing date because she was concerned that it was taking a long time. She therefore had plenty of time to prepare and there was no need for her to await notification of the hearing date before doing so because it was her appeal and therefore she would have known what points she wanted to raise.

96. A point was also raised as to whether the claimant would have understood what definition of bullying and harassment was being used by the respondent. Whilst it would have been preferable to provide a definition, the claimant had an understanding of the basic concept, as she explained herself.

97. It was also submitted that the respondent should have approached Ms Bibi to ask her what sanction she would have wanted the claimant to have. It is a matter for the employer to decide and whilst one option would have been for the employer to seek Ms Bibi's views on that, the ultimate accountability lay with the respondent and I cannot criticise it for reaching that decision alone.

Was dismissal within the band of reasonable responses?

98. Finally, I consider whether the dismissal was within the range of reasonable responses. It is not relevant whether I would have dismissed the claimant. This case is one where, in my view, it would have been entirely open to the respondent not to have dismissed the claimant, but to have instead, as the claimant submits it should have done, offered additional training to her and combined that with a final warning – noting that the claimant's comments appear not to have been made in malice and that the training she had previously received was, at best, stale. However, in my view, dismissal for gross misconduct was equally within the range of reasonable responses open to the respondent. In particular:

    a) The allegations were serious. Much was made in evidence of comments made by Ms Bibi to the effect that she did not want the claimant to be dismissed, and the various comments that no malice was intended. To use the claimant's own submission, the comments were "naïve". However, whilst that may be the case, that does not detract from the effect of them. For example, Ms Bibi never wore the coat again. Other witnesses found the comments to be inappropriate and used expressions such as being "shocked" by them. Yes, Ms Bibi made no attempt to encourage the respondent to dismiss the claimant. However, the allegations were clearly upsetting to her. Again much was made of whether Ms Bibi was "offended", "upset" or "uncomfortable" or "really uncomfortable" – I do not believe this to be critical to the case. The comments worried her to the extent that she (a) kept a note of them on her phone and (b) formally lodged a complaint about them, despite being in her probationary period and the comments being about her manager. In my view, that is not something that an employee would do lightly. Whilst the claimant might have been subjected to other comments, both from within the respondent and in previous roles, that does not detract from the seriousness of these comments.

b) In relation to the matters which were disputed by the claimant – notably the lifting of the hood and the accent used in the East is East comment, and the ISIS Incident in its entirety, there was independent witness evidence to suggest that these matters had occurred, and it was open to the respondent to take the view that they had.

c) The claimant showed a lack of remorse. Whilst the claimant had made comments to the effect that she shouldn't have said some of the things she did and had apologised for the Muslim Prayer Incident, the overarching impression the claimant gave was that everything was meant in jest and was just a comment. She saw no racist nor religious context to what had been said. Overall, it is clear to me that, whilst she apologised at the time of the Muslim Prayer Incident, the claimant's key contention is and was that her comments were observations and were not discriminatory and/or bullying/harassment in nature. There was an inconsistency between her argument on the one hand that she had done nothing wrong, and on the other hand that she had rectified the situation in relation to the Muslim Prayer Incident by apologising at the time. In addition, whilst Ms Bibi made a comment about church some time later, there is a difference between a standalone comment such as Ms Bibi's and the comment made by the claimant given its context – in effect the claimant was seeking to find out which "side" Ms Bibi was on.

d) The claimant was Ms Bibi's line manager. It was therefore particularly important that she could be trusted to treat Ms Bibi appropriately. It was submitted that mediation would have been an appropriate outcome to the case – however I conclude that it was open to the respondent to take the view that mediation is about two parties trying to resolve a dispute, whereas in this case the issue fell squarely about what the claimant, who was in a position of seniority, had done to her subordinate.

e) Training: whilst there was a clear lack of up to date training and the Equal Opportunities Policy was out of date, the claimant had stated from the outset (on 8 January in her first interview) that she had been on courses and knew you had to be careful what you say, and there were references to her having corrected colleagues on their language on other occasions. In addition, the respondent took the view that the matters in question were matters that the claimant should not have needed training to understand were wrong. It was therefore open to the respondent to take the view that training was not the appropriate outcome.

f) Length of service: whilst it is certainly true that length of service is relevant, there are cases where the conduct is serious enough that an employee can be fairly dismissed for gross misconduct despite their long service and clean disciplinary record. This was one such case, and it was equally open to the respondent to say that given her long service, she should have known how to treat those who reported into her.

g) The claimant's appeal was only on two grounds: the severity of the sanction and the investigation. None of the points now raised in this Tribunal hearing about the wording used or other matters featured. As far as the respondent was concerned during the appeal, these were the only two issues the claimant had about what had happened.

99. I therefore conclude that the claimant was not unfairly dismissed. It is therefore not necessary to consider any contributory fault and/or reduction in compensation under Polkey.

Employment Judge Edmonds

Date 25 May 2021