



EMPLOYMENT TRIBUNALS

Claimant: Mr L Emery

Respondent: Lidl Great Britain Limited

HELD AT: Manchester (by CVP)

ON: 17 September 2021

BEFORE: Employment Judge Johnson

REPRESENTATION:

Claimant: unrepresented

Respondent: Mr J Boyd (counsel)

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant was fairly dismissed by the respondent by reason of his conduct. This means that his complaint of unfair dismissal is not well founded and is dismissed.

REASONS

Introduction

1. This claim arises from the claimant's employment as a shift manager at one of the respondent's stores in the North West. His employment terminated on 20 March 2021 when he was dismissed.
2. He presented a claim form to the Tribunal on 1 May 2021 following a period of early conciliation from 21 April 2021 to 23 April 2021 and brought a claim of unfair dismissal.

3. The respondent presented a response on 7 June 2021 resisting the claim and arguing that the claimant was fairly dismissed for the reason of gross misconduct.
4. The claim was accepted by the Tribunal and listed for a hearing with a standard ET2 letter being sent to the parties on 10 May 2021 and which provided standard case management orders to ensure that the case

The Issues

Unfair dismissal

5. Can the claimant prove that there was a dismissal?

Fairness

6. What was the potentially fair reason for the dismissal relied upon by the respondent – the respondent relies upon conduct.
7. If so, applying the test of fairness in section 98(4), did the respondent act reasonably in all the circumstances in treating that reason as sufficient reason to dismiss the claimant?
8. If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:
 - i. The respondent genuinely believed the claimant had committed misconduct
 - ii. there were reasonable grounds for that belief;
 - iii. at the time the belief was formed the respondent had carried out a reasonable investigation;
 - iv. the respondent followed a reasonably fair procedure;
 - v. dismissal was within the band of reasonable responses.

Remedy for unfair dismissal

9. Does the claimant wish to be reinstated to their previous employment?
10. Does the claimant wish to be re-engaged to comparable employment or other suitable employment?
11. Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.

12. Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.
13. What should the terms of the re-engagement order be?
14. What basic award is payable to the claimant, if any?
15. Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?
16. If there is a compensatory award, how much should it be? The Tribunal will decide:
 - i. What financial losses has the dismissal caused the claimant?
 - ii. Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
 - iii. If not, for what period of loss should the claimant be compensated?
 - iv. Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
 - v. If so, should the claimant's compensation be reduced? By how much?
 - vi. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
 - vii. Did the respondent or the claimant unreasonably fail to comply with it by [specify alleged breach]?
 - viii. If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?
 - ix. If the claimant was unfairly dismissed, did s/he cause or contribute to dismissal by blameworthy conduct?
 - x. If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?
 - xi. Does the statutory cap of fifty-two weeks' pay or [£86,444] apply?
17. What basic award is payable to the claimant, if any?
18. Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

Evidence used

19. The claimant gave evidence in support of his case.

20. The respondent called Ms S Swann (area manager – disciplinary hearing manager) and Mr T Vincent (area manager – appeal hearing manager)
21. There was a hearing bundle prepared by the respondent and agreed by the claimant. It was more than 300 pages in length including statements. Taking into account the witness statements within the bundle relating to allegations of inappropriate behaviour from the respondent's staff, who were not called as witnesses in these proceedings and who did not have an expectation that their names would appear in a judgment, I decided that it was appropriate to anonymise any reference to them. They are entitled to retain their right of privacy. Those managers involved in the proceedings will not have expected the same treatment as they were always potential witnesses in any Tribunal proceedings, and they have not been anonymised. I am satisfied that this decision is in accordance with Rule 50 and is in the interests of justice as it does not cause any prejudice to the claimant in terms of the fairness of these proceedings, given that the decision to dismiss him was the responsibility of Ms Swann and Mr Vincent.
22. The case was conducted remotely by the Tribunal's Cloud Video Platform (known as 'CVP'). I took into account the claimant's unrepresented status and applied the relevant provisions of the Equal Treatment Bench book concerning unrepresented parties (also known as 'Litigants in Person') and the overriding objective (Rule 2 of the Tribunal's Rules of Procedure), to ensure that Mr Emery could fully participate in the hearing.

Findings of fact

23. The respondent ('Lidl'), is a large supermarket chain which has stores all over the UK. It is a large employer and can be expected to have access to significant Human Resources ('HR') support and policies and procedures concerning employee conduct, disciplinary processes and grievances.
24. Of particular relevance in this case were Lidl's disciplinary policy, anti-harassment policy and COVID 19 guidelines, given that the issues which gave rise to the dismissal took place during the Covid 19 pandemic which reached the UK in March 2020.
25. The claimant, Mr Emery commenced his employment with Lidl on 11 October 2017. He was initially appointed as a Customer Assistant at Lidl's store (number '1293') located in Darwen. However, from 1 April 2020, Mr Emery was promoted to the role of Shift Manager at Lidl's store 817 in Blackburn. This was a position with some responsibility in the store and he would have authority over more junior customer assistants.

26. Mr Emery signed his contract of employment on 21 February 2020, which included details of examples of behaviour in the workplace that would be considered gross misconduct. The contract referred to the non-contractual disciplinary and anti-harassment policies.
27. The COVID-19 guidelines introduced in 2020 provided guidance to staff regarding health and safety practices that should be complied with to protect staff and customers.
28. On 21 February 2021, 'Employee L' (the *complainant*) who is a customer assistant at the Blackburn store raised a formal grievance against Mr Emery. She alleged that he had made comments and gestures of a sexual nature towards her. She had originally had a meeting with the Area Manager, Philip Byrne requesting that she be allowed to move to another Lidl store, but as the discussion progressed, she referred to Mr Emery's behaviour and that this was the reason why she wished to move store location and confirmed that she would like to raise a grievance.
29. Mr Byrne took handwritten notes during the meeting and these were signed by the complainant confirming that she wished to make a grievance. The note did not specify the precise nature of the complaints and simply described '*verbally sexual comments and actions towards myself by Lee [Emery].*' However, the formal grievance completed following the meeting on 21 February 2021 made reference to a number of suggestive comments by Mr Emery beginning in August 2021. Examples given included; '*you look really sexy*' and when fetching vegetables for the complainant when she was working on the till, saying '*its really big but you could have me instead*'. She also described Mr Emery hugging her and touching her bottom a few weeks after these comments had been made. She said that she was away from the Blackburn store until November 2020 and then in December when they were working shifts together, the complainant alleged that Mr Emery began touching her bottom again and poking the side of her breasts and making further sexual comments. She referred to a colleague (employee A) as witnessing these incidents. It is understood that he is a shift manager. She signed the statement on 21 February 2021.
30. Mr Byrne was the investigating officer for this complaint. He held a meeting with Mr Emery on 22 February 2021 and the handwritten note suggests that he was unaware of the complaint which Mr Byrne was investigating. He appeared surprised and denied any comments or touching of a sexual nature towards the complainant. He acknowledged that he had hugged her on one occasion, but that this was not inappropriate and had been in response to her complaining of a migraine. He further denied that he had made any inappropriate sexual comments to other female staff. When specifically asked whether he said to the complainant that she looked 'sexy', he

responded by saying *'No, only when she had make up that she looks nice and dolled up'*. He denied any other comments or touching. Mr Byrne informed him that he was suspended in order that an investigation could take place

31. Mr Emery was sent a formal notice of suspension by letter dated 24 February 2021. It confirmed that it related to an investigation into allegations of gross misconduct and would be subject to full pay. Mr Emery's contract of employment provided at paragraph 12.3 that he may be suspended without pay and paragraph 2.4 of the disciplinary policy also provided that Lidl may suspend employees, pending further investigation or disciplinary action. Taking into account the nature of the allegations under consideration by Mr Byrne and also Mr Emery's managerial position, it is understandable that suspension on full pay was a proportionate step to take, especially as a number of his colleagues were to be interviewed. Although the suspension involved Mr Emery being excluded from work for a number of weeks before the disciplinary hearings, I was satisfied that it was as brief as possible, especially given the number of witnesses who were interviewed.
32. While Mr Emery was suspended, Mr Byrne proceeded to interview a number of his colleagues about employee L's allegations:
 - a) Employee A, shift manager, said that he had not witnessed Mr Emery make any sexual comments but described him as being *'overly friendly'*. He said that the complainant had said to him previously that Mr Emery was making her feel uncomfortable and that she had asked him to cash up her till because she did not feel comfortable with Mr Emery doing it. He was then interviewed following Mr Byrne's meetings with other witnesses on 2 March 2021 and said he had seen Mr Emery hugging several female members of staff including Employee D and Employee E and he confirmed the 'till incident' as described by Employee E, below.
 - b) Employee B customer assistant said she had never witnessed any such behaviour.
 - c) Employee C customer assistant confirmed he had not witnessed any inappropriate behaviour from Mr Emery, but mentioned *'normal banter, but nothing flirty'*.
 - d) Employee D, customer assistant confirmed that Mr Emery had hugged her on a couple of occasions and that *'it was a little bit awkward. But I told him to not do it'*. She described an occasion where *'he hugged me from behind in the canteen when I was making a coffee. He grabbed me from behind and put his hands on my belly. I asked him what he's doing and he moved away.'* She also referred to another employee named ('M' to preserve her

anonymity) and Employee E also being hugged by him. She did not recall Mr Emery making any sexual comments.

- e) Employee E, shift manager, She mentioned that *'after November he started talk [sic] nice to me and would start hugging me, especially in the canteen. I wouldn't hug him back and keep my arms still. He would say "come here" and hug me. This would also happen in the warehouse a few times. I asked him why he's being so nice and told him why he's being so nice and told him that he's hugging me loads. I told him that he's hugging me more than my partner.'* She confirmed that she would tell him not to hug her as it was *'weird'*. She also recalled Mr Emery saying to her when she was about to leave work that *'you should stay longer, we could get one of guest [sic] beds and keep it in the back, we could watch a movie and lay down together, if you stay longer'*. Another incident that she referred to was when her till cash was short of £10 and she jokingly suggested that Mr Emery could check her pockets or bag, to which he replied that he could *'strip search'* her and then starting laughing to himself. She did not recall Mr Emery touching anyone else inappropriately or making sexual comments. However, she referred to further comments and incidents relating to her.
- f) Employee F, customer assistant, confirmed that when she first started working she received sexual comments from Mr Emery and described comments such as *'I bet you're a tease you'* and said that she found it *'very weird'*. She also mentioned that he put his hand around her waist and said that it made her feel uncomfortable but felt unable to say anything to him about it.
- g) Employee G, customer assistant, said that he had never witnessed Mr Emery touching any members of the team or making sexual comments.
- h) Employee H, customer assistant, recalled an assistant called Megan receiving sexual comments from Mr Emery about her appearance, although he was not specific as to what was said. He also referred to him touching Employee H in that he *'poked her in the sides from behind. [She] was shocked and I could tell that she was surprised, there was no need for it'*. He described it *'wasn't so much of a sexual way, but there was no need for it.'* He also said that he saw a similar incident with Employee L and H asked her if she felt Mr Emery was too close, to which she *'reacted angrily and said, "why have you heard something". I thought this was strange'*.
- i) Employee I, deputy store manager, said he had not witnessed Mr Emery make any inappropriate touching or sexual comments to members of staff. However, he said that Employee J had *'made me aware that [Mr Emery] had been inappropriate and was unsure of how to deal with it. I asked her if she wanted to speak with Employee K'*.

- j) Employee J, customer assistant, confirmed that Mr Emery had touched her and said that *'around March last year [Mr Emery] stroked my leg and face pretending to be nice in the canteen. I spoke to Sam the rep as it upset me and [he] had been to [sic] touching in the past. Sam wasn't aware of any previous issues but pulled [Mr Emery] into the canteen and told him how he made me feel. I then told [him] that he made me feel uncomfortable and the [sic] Sam told him it was unacceptable, and it was not to happen again'*. However, she said that a few weeks before the meeting he came over to her till and *'put both of his hands on my shoulders and moved his head towards my ear. He said, "sorry for stressing. I'm having a stressful day". He then said – "sorry I'm not allowed to touch you, or you don't like being touched"*. She said however, that she had never witnessed any sexual comments either to her or to a colleague
- k) Employee K, store manager, said that he had never witnessed Mr Emery touching any member of staff inappropriately. He said he had not been aware of any incidents until Employee A said that Mr Emery *'had made a joke, but nothing else'*.

All of the employees who were interviewed signed their statements which were handwritten. It was noted that many of them struggled to remember specific dates, but I did not consider that the gist of the events that they described were untruthful or unreliable. At the very least, they did indicate that Mr Emery was a manager who felt comfortable engaging in what is described as *'banter'* and what could often be sexual in nature and he appeared to be a *'tactile'* person, particularly with female employees.

33. The complainant was interviewed by Mr Byrne on 1 March 2021 and was accompanied by another staff member. The complainant was questioned about 3 specific allegations which she said took place on 19 November, 22 November and 12 December 2020. She referred to Mr Emery making sexual comments, looking at her inappropriately, calling her sexy and making jokes on 19 November. On 22 November, she described him putting his arm around her waist and feeling her bottom. On 12 December, she said that Mr Emery poked her on the side of her breast and that she then reported the matter to Employee K in the office, who agreed to speak with Mr Emery.
34. The complainant L then mentioned further incidents which did not appear to be sexual in content, but were belittling in tone. She was not aware that any of the incidents were witnessed, but again referred to mentioning her problems to Employee A. She confirmed that following her discussion with Employee K, no further issues had arisen between her and Mr Emery.

35. Mr Byrne then produced an investigation report on 5 March 2021 which identified the concern as being *'formal grievance of sexual harassment'*. He used a standard template form which he completed in his own handwriting. Concern 1 was described as *'sexual harassment'* and noted that 5 female employees reported being touched in an inappropriate way and 3 have reported sexual comments. Concern 2 was described as *'failure to follow social distancing'* he noted that Mr Emery accepted that he had hugged the complainant since November 2020 and that 5 female members of staff said they had been hugged and Employee H had witnessed the complainant being poked by Mr Emery. His recommendation was that the complainant L's grievance be upheld and that the case proceed to a disciplinary hearing.
36. Mr Byrne prepared a letter and sent it to Mr Emery on 9 March 2021 that the allegations had been made and were both considered to be potentially gross misconduct. He was invited to a disciplinary hearing on 12 March 2021, which would be heard by Ms Swann. A copy of the disciplinary policy was included, and that dismissal could be a sanction if gross misconduct is found to have taken place. He was reminded that he could be accompanied and that he had a right of appeal. A copy of the investigatory paperwork was also enclosed with the letter.
37. The meeting took place on 12 March 2021. Mr Emery was unaccompanied but confirmed that he was happy for the meeting to proceed and confirmed that he had received the pack of evidence sent by Mr Byrne. A handwritten note was taken by Jason Dymott and his notes described the meeting as an 'investigation', although it was understood to be a disciplinary hearing. The complainant's allegations were put to him and he denied that he had spoken or that he had touched her in the way that was alleged. He said that he *'side touched her on shoulder because she was upset, but no bum or breasts'*. He described going through a difficult time in December 2020 because of a personal matter. Reference was made by Ms Swann to other allegations made by other members of staff. On each occasion he denied that the allegation had happened or that it had not happened in way described by his colleague.
38. Ms Swann then went on to discuss whether Mr Emery had been appropriate getting so close to his colleagues while Covid 19 was a significant issue in the UK. He acknowledged that *'Covid never came into mind as people came up to me or tapped my shoulder like when [L] was upset, I didn't think of Covid, I just wanted to console her, I always wear a visor and continuously gelling my hands'*. When it was put to him that he should still maintain a distance of 2 metres, (which was the government's recommended safe distance at that time), Mr Emery said *'it wasn't maintained because my natural instinct is to comfort them, I've had all the training to run a store but never had training on how to deal with an upset staff member'*.

39. He confirmed that he touched the complainant on the knee to comfort her and when challenged by Ms Swann he said that he did not think it inappropriate. Mr Emery was taken to each of the allegations made by his female colleagues and while he initially said that they had not objected to his sexual comments, he accepted that with hindsight he should not have assumed that it was for them to apologise to him, given that he was the manager. He described himself as being on ‘a *learning curve*’.
40. He suggested that the complainant L and employee E were lying in their statements and disputed their versions of events in their statements obtained as part of the investigation. Ms Swann questioned him about this belief. He disputed that he had a meeting with the manager K about employee J. Ultimately, he recalled his comments made to L to be complimentary and repeated his view that he could learn things in future. He repeated his argument that there was a lack of training from Lidl concerning how a manager should console an upset member of staff. The meeting commenced at 2.15pm and ended at 5.40pm with Ms Swann deciding that she would consider her decision at a future date. The handwritten note ran to 19 pages and was signed by both Ms Swann and Mr Emery. Mr Emery’s continued suspension on full pay was confirmed while Ms Swann considered the matter further.
41. Ms Swann decided to carry out further interviews with L and J, but also with Sam Barry (the representative) and manager K.
42. Mr Barry explained that J had spoken with him in March 2020 and had said she was very upset because Mr Emery had touched her thigh high up and she had felt really uncomfortable. He said that he had spoken quite firmly with Mr Emery afterwards in his office and explaining that these actions should not happen again as they amounted to sexual harassment. Mr Emery said he did not mean to do something that might be considered sexual harassment. He then said that he spoke with both Mr Emery and J and Mr Emery apologised. Mr Barry said to Ms Swann that a lot of colleagues had issues with Mr Emery and he had to speak with him about his tone of voice as he could be perceived as being aggressive. He said he asked him to ‘*tone it down*’.
43. Manager K recalled speaking to both Mr Emery and Ms Ahmed about how Mr Emery was speaking towards her. While he was not specific about any allegations of inappropriate touching or comments, he recalled that Ms Ahmed felt uncomfortable with Mr Emery. In terms of other complaints from female members of staff, he said that they related more to about how direct he could be in terms of his speech. He said that he felt Ms Ahmed raised the grievance because ‘*...she just doesn’t like him, its personal*’.

44. Employee J was asked to focus on the incident where she had described Mr Emery coming over to her till. She explained that he had been unhappy about a till being unavailable but *'later on at night, stood near bin, came into till pod, put both hands on shoulders moved head near, said "its been a shit day, sorry for stressing" and then said "oh, I'm sorry, I'm not meant to touch you.'* She said that she thought he was referring to the previous conversation with Sam and he had been told then that his behaviour had been inappropriate. She confirmed that his actions were *'not so much...uncomfortable, but I don't like being touched and he could have said what he needed from a distance, didn't like hands on shoulders and didn't like the side comment. I've put up with it for a while, he only does it when we are around and didn't tell anyone thought maybe I was being silly, how do you tell someone that and not make it uncomfortable in work'*. When asked by Ms Swann whether there were other time that Mr Emery had touched her when she did not want to be touched, J described having to tell him that he could not cuddle her because of Covid. She recalled that he *'just stood there, if that doesn't say I don't want him to, I don't know what does'*.
45. All three of these witnesses signed the handwritten statements that Ms Swann obtained from them and it is understood that they checked what had been written before signing.
46. Ms Swann finally called complainant L on 17 March 2021. She focused about the extent to which Mr Emery practised social distancing and L said that he would come into the till pod, such as when dealing with a refund, but would not wait for her to leave the pod. She recalled that customers asked why he was not practising social distancing. She then discussed the allegation of 22 November 2020 and confirmed that Mr Emery *'...came over, out his arm around my waist, from my left to right, as he moved his arm away he touched my bum and squeezed it a little...thought it was just friendly at this point before it happened, I just laughed it off at the time I didn't know what to do. I'm only 19, quite new in the job, didn't want to cause a big thing, and its only me and mum at home, we rely on my job financially, we would struggle without it'*. She confirmed to Ms Swann that she did not feel comfortable being alone with Mr Emery and that he became *'more hands on'*. She was unable to recall precise dates as she said she did not intend to *'keep track'*. However, when asked about the incident on 12 December 2020, she mentioned opening up about the incident to her boyfriend and that Mr Emery had poked her in her breast causing bruising. She provided a copy of the photograph which showed the bruising to Ms Swann.
47. Ms Swann decided that having obtained this additional evidence, it would be necessary to hold a reconvened disciplinary hearing and invited Mr Emery to a further meeting on 20 March 2021, by letter dated 17 March 2021. She enclosed copies of the further meeting notes, notes of the first disciplinary hearing, timesheets and a copy of complainant's photo.

48. The meeting took place as arranged and again, Mr Emery did not bring a companion, but was happy to proceed with the reconvened hearing.
49. Ms Swann discussed the additional evidence with Mr Emery and it is not necessary to consider it in its entirety. However, he appeared to maintain his belief that he had not intended to cause any discomfort, that he was trying to console upset members of staff and that some allegations had been exaggerated. Mr Emery recalled his meeting with Mr Barry concerning the incident involving J, but could not remember whether he used the words *'sexual harassment'*. Ms Swann referred to the incident and suggested that her reaction in March 2020 might have prompted Mr Emery to be more careful in how he interacted with colleagues given that it made her feel uncomfortable. However, Mr Emery appeared to remain confused as to how he should console a member of staff who was upset. He referred to there being a *'big click [sic]* in the store which was enough to make J lie to two Area Managers for Lidl. He disputed that the photograph provided by complainant L indicated bruising as *'it wouldn't be red, it would be yellow or green'*. He accused her of exaggerating about putting his arm around her and touching her bottom *'to make things seem worse'*. Ultimately, he denied that the allegations made by complainant L against him happened as alleged and he believed that *'she has something personal against me'*, and that she was doing this *'to make me look really bad, to try to get me out of the store'*. He felt that she might want him out of the store because *'...maybe because I'm trying to make people do their jobs right the way Lidl want[s] it and I can be direct...they don't like it'*.
50. Ms Swann concluded by asking Mr Emery to read through the notes and gave him the opportunity to make any further comments before she adjourned to consider her decision. Mr Emery said that he wanted an opportunity to learn from this episode and to *take it all on board'*.
51. Ms Swann returned to give her decision half an hour later. She reminded Mr Emery of the two allegations that she had been asked to consider as disciplinary hearing manager. She said that he had failed to follow social distancing by hugging colleagues, despite Lidl providing clear guidance to staff and that this potentially amounted to gross misconduct. She said that had this been the sole allegation to consider, she would have imposed a final written warning. However, she also had to consider allegations of sexual harassment and she referred to inappropriate behaviour towards Ms Barnes in March 2020 and that this was a breach of section 5.1 of the sexual harassment policy. She also found that he had continued to behave inappropriately *'whether knowingly or not'* and had *cause and uncomfortable working environment'*. She said that *'on balance I find it difficult to believe your word over that of several employees. This behaviour cannot be tolerated in Lidl, although I believe that you have demonstrated a*

willingness to learn from this I have no option but to dismiss you'. He was reminded that he had 5 days from this decision to appeal.

52. Ms Swann gave clear evidence during the hearing as to how and why she reached her decision to dismiss Mr Emery. There had clearly been a lengthy investigation by Mr Byrne and while this was the case, Ms Swann was unwilling to reach a decision until she had considered the further evidence of key witnesses. While Mr Emery was not represented, the written notes of the disciplinary hearing indicate that he was fully able to participate and clarify and contradict the evidence that was put to him by Ms Swann. There was a weight of evidence from his colleagues that he had a history of behaving inappropriately towards female colleagues, despite being a manager and that even when his behaviour was *called out* by other managers or those receiving his attention objected, he did not appear to reflect upon his behaviour and how it might affect them, especially given his managerial position and the potential power imbalance that can arise from such a relationship in the workplace.
53. While Mr Emery sought to rebut or clarify the evidence of those interviewed by Mr Byrne or Ms Swann, I am satisfied that each witness gave reliable evidence which was broadly consistent with the evidence of colleagues where the factual background overlapped. While this might be the case, I saw no evidence of a clique (as Mr Emery put it), as the statements were not identical and the consistency was an indication of the way in which Mr Emery caused problems for female members of staff at the Lidl Blackburn store and how he failed to reflect and address his behaviour, despite having been warned about his behaviour as early as March 2020.
54. This would indicate why Ms Swann concluded on balance of probabilities that Mr Emery had behaved inappropriately towards female members of staff and that he had sufficient opportunity to address his behaviour without the need for formal training.
55. Ms Swann confirmed her decision in writing by letter dated 25 March 2021. It was a detailed letter of more than 3 pages in length and provided an explanation as to how she had reached her decision and the evidence which she had considered. The right of appeal within 5 working days was also confirmed. Mr Emery decided to appeal and did so by email which he sent on 22 March 2021, before he received Ms Swann's letter. His email appeared to suggest that there was a misunderstanding concerning how he had treated some of his colleagues and in relation to the complainant, he asserted the allegations were completely false and he questioned the provenance of the photograph that she relied upon.
56. Mr Vincent replied on 22 March 2021 and in his letter, he invited Mr Emery to an appeal hearing on 1 April 2021 at Lidl's regional office in

Runcorn. He was reminded of his right to be accompanied by a co-worker or trade union representative.

57. The meeting took place as planned and it appeared to only include Mr Vincent and Mr Emery. A handwritten note was produced and was included within the hearing bundle. He confirmed that he had physical contact with female colleagues, but again he asserted that it was *'only hugging when upset like [witness D] when she was off sick – always side hug – not front/back'*. He also suggested that witness J had changed her account. He made references to a clique at the workplace and suggested that the complainant wanted his role, and this may have explained why she fabricated her complaint against him. In many respects, the grounds of appeal raised by Mr Emery were of a similar nature to the arguments he made at the disciplinary hearing, namely any touching being innocent and non-sexual and simply a comfort for upset colleagues, that he did not say anything sexually suggestive or inappropriate to colleagues and that the complainant had been dishonest. No issues of consequence were raised concerning the decision regarding Mr Emery's breach of social distancing contrary to Lidl's Covid measures, but this is not surprising as this was not a subject specifically raised by him in his notice of appeal.
58. Mr Vincent did not give his decision at the appeal hearing, but in a letter date 5 April 2021. He noted the number of female employees who had complained about Mr Emery's behaviour and that it must have been inappropriate. He did not accept that there had been a change of account by witness J (as she he determined that she was simply sharing more information a second interview), or that the complainant had fabricated her evidence. Moreover, he noted that this behaviour had continued for over 12 months since the incident in March 2020 when he was warned about his behaviour. He therefore upheld the decision to dismiss and this final stage of the disciplinary process concluded.
59. Mr Vincent was a credible and reliance witness and appeared to manage the appeal in a fair and reasonable way. He did not appear to have been involved with the case prior to the final hearing.

The Law

Note: as the Tribunal only dealt with questions relating to liability during this hearing, the law relating to remedy is not considered in this judgment

60. Section 94 of the Employment Rights Act 1996 ('ERA') provides that an employee has the right not to be unfairly dismissed by his employer.

61. Section 98(1) of the ERA provides that in determining whether an employee has been fairly or unfairly dismissed, it is for the employer to show the reason (or principal reason) for the dismissal is a potentially fair reason as described in section 98(2) or some other substantial reason. Section 98(2)(b) ERA identifies the conduct of an employee as being a potentially fair reason and this is relied upon by the respondent employer in this case.
62. Section 98(4) ERA provides that where an employer has identified the potentially fair reason, the question of whether the dismissal is fair or unfair will depend on whether in the circumstances (including the size and administrative resources of the employer), the employer acted reasonably or unreasonably in treating the potentially fair reason as a sufficient reason for dismissing the employee.
63. Mr Boyd referred me to the well-known case of ***British Home Stores v Burchell [1980] ICR 303***, which is the case which provides Tribunals with guidance as to how to determine unfair dismissal claims involving conduct. It was held that an employer must establish:
- a) the fact of his belief of misconduct;
 - b) reasonable grounds to sustain the belief; and,
 - c) that he/she had carried out as much investigation as was reasonable in the circumstances.
64. He also referred me to the another familiar case of ***J Sainsbury's plc v Hitt 2003 ICR 111, CA*** which reminded Tribunals that when considering whether an employee was fairly dismissed, they should not substitute the dismissing officer's decision with their own view as to whether they would have dismissed the employee or not. Instead, the Tribunal should consider whether the decision to dismiss fell within the range of reasonable responses available to a dismissing manager given the particular circumstances of the case.
65. Section 108 of the ERA requires an employee to have worked continuously for their employer for a period of no less than 2 years ending with the effective date of the termination of their employment.
66. Section 111 of the ERA requires a complaint of unfair dismissal to be presented to a Tribunal before the end of the period of 3 months beginning with the effective date of termination, or within such period as the Tribunal considers reasonable where it is satisfied that it was not reasonably practicable for the complaint to be presented within the 3 month period.

Discussion

67. Mr Emery explained during his final submissions that he never denied having physical contact with colleagues, but this was never more than

a hug at 'side shoulder level'. He said that he never intended to cause any distress. He also argued that he had not received any training or guidance.

68. Mr Boyd acknowledged that this was a case where there was a great deal of evidence of the 'he said, she said' variety. However, he asserted that Ms Swann as dismissing manager weighed up the evidence and reached a proper decision following an investigation.
69. This was a case where there was no dispute that Mr Emery had been dismissed by Lidl. The respondent relies upon Mr Emery's conduct as being the reason for the dismissal and this is of course a potentially fair reason as described in the section above which describes the relevant law.
70. Applying **Burchell** principles and taking into account my findings of fact, I accept that Ms Swann genuinely believed that Mr Emery was responsible for the misconduct identified in the disciplinary process. I find that she had reasonable grounds to hold this belief based upon the balance of witness evidence obtained during the investigation. She did not however, simply rely upon the pack of evidence produced by the investigating officer, but also adjourned the disciplinary process in order that she could clarify issues that arose during the disciplinary hearing. On this basis she ensured that a proper and proportionate investigation took place. Ultimately, there were simply too many adverse comments against Mr Emery. While there was a suggestion of bias among his former colleagues and an allegation that some of them were attempting to get him dismissed, the balance of evidence and the nature of the evidence obtained during the disciplinary process meant that it lacked credibility, even if it was Mr Emery's belief.
71. Faced with the available information, it was reasonable for Ms Swann to establish that there was gross misconduct in respect of both allegations. She conceded that the 'Covid social distancing' allegation on its own would not justify dismissal. However, she said that it was ancillary to the findings of harassment which she believed justified dismissal. Inappropriate behaviour towards other members of staff is not acceptable and from a manager represents an abuse of power. Dismissal was within the range of reasonable responses available to a manager in this case.
72. I acknowledged Mr Emery's comments concerning his lack of training. However, he was a manager and there was evidence of training being made available to staff with clear policies regarding behaviour of staff. There was evidence of previous warnings have been made, albeit on an informal basis. Ultimately, Mr Emery was in a position of trust and power and he abused that position. I appreciate, that he may consider himself to be a 'tactile' person and have been able to engage in comments and physical contact in other circumstances elsewhere.

However, harassment is something that must be judged from the perspective of the recipient of the behaviour in question and if unwanted, it is inappropriate. Mr Emery had opportunities to adjust his behaviour and seems to have failed to do so quickly enough. For these reasons, dismissal was an appropriate sanction.

73. I did consider the question of process and was satisfied that there was no significant failure on the part of Lidl which caused me concern. Accordingly, the dismissal was procedurally fair. However, if I am wrong and there had been a relevant failure in process, I am satisfied that had these errors been corrected, it would not have changed the decision to dismiss, nor would it have delayed the decision by more than a few weeks.
74. Similarly, while contributory fault was not a relevant factor in these proceedings given the fairness of the dismissal, had dismissal not been an appropriate sanction, contributory fault would have been imposed at a level of 100%, given the seriousness of the allegations which it was reasonable for the respondent to conclude as being credible.

Conclusion

75. For these reasons, I must determine that Lidl fairly dismissed Mr Emery by reason of his conduct and his complaint of unfair dismissal is therefore not well founded and dismissed. For the avoidance of doubt, this means that his claim is unsuccessful.

Employment Judge Johnson

Date: 29 November 2021

JUDGMENT SENT TO THE PARTIES ON

2 December 2021

FOR THE TRIBUNAL OFFICE