Case Number: 2407202/2021

EMPLOYMENT TRIBUNALS

Claimant: Elina Borodinova

Respondent: Stateside Food Limited

Heard at: Manchester **On**: 21,22, 23 November 2022 and 24 November in Chambers

Before: Judge Miller-Varey, Ms A Jervis and Ms J Beards

Representation

For the Claimant: In person

For the Respondent: Mr Warnes (Solicitor)

RESERVED LIABILITY JUDGMENT

It is the judgment of the tribunal that:

1. The Claimant's claim that the Respondent subjected her to direct race discrimination, including by her dismissing her, is not well-founded and is dismissed;

2. The Claimant's claim that she was unfairly dismissed is well-founded and accordingly succeeds;

3. Absent errors in the process it was 20% likely that the Claimant would have been fairly dismissed, accordingly her Compensatory Award will be reduced by that amount;

4. The Claimant caused or contributed to her dismissal to the extent of 10% only and so her basic and compensatory award shall be reduced by 10%.

5. The Claimant's complaint of breach of contract is well-founded and accordingly succeeds.

6. The remedy hearing will be held on 21 December 2022.

REASONS

1. These reasons make reference to page numbers. Unless otherwise stated, these relate to the correspondingly numbered pages of the hearing bundle.

2. By a claim issued on 17 May 2021 [pp.2-19] the Claimant seeks compensation for unfair dismissal and for direct race discrimination. The Respondent defends all claims. It denies that the Claimant's dismissal was unfair or discriminatory, contending that it was for the potentially fair reason of the Claimant's conduct.

THE ISSUES (AS REVISED)

3. The issues for determination were identified by EJ Serr at a preliminary hearing on 15 December 2021. At that stage, they were formulated on the basis that the Tribunal should first determine whether the Claimant had been constructively dismissed by reference to various alleged breaches of the implied term of trust and confidence. The Claimant's resignation was given with notice, on 11 January 2021. The notice was due to expire on 2 April 2021.

4. During the hearing the Tribunal identified that the effect of there being (on any view) an express dismissal before the expiry of the Claimant's notice, meant that the Claimant's allegation of constructive dismissal was not capable of forming a cause of action. That was because the express dismissal – even if unfair – took effect and ended the Claimant's employment on the day it was made, i.e. on 26 February 2021. By that date, the dismissal allegedly represented by the Claimant's resignation with notice, had not yet taken effect. It follows that her employment terminated before any constructive dismissal, and any connected claim for compensation, arose.

5. The basis for that conclusion is:

- Under S.95(1)(c) Employment Rights Act (ERA) 1996, a dismissal will take place where an employee resigns, with or without notice, *'in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct'*

- However, there is then no corresponding, special provision specifying the effective date of termination in that event.

- Section 97 (so far as relevant) provides:

> **97.— *Effective date of termination.***
> *(1) Subject to the following provisions of this section, in this Part "the effective date of termination" —*

> ***(a) in relation to an employee whose contract of employment is terminated by notice, whether given by his employer or by the employee, means the date on which the notice expires****,*
> *(b) in relation to an employee whose contract of employment is terminated without notice, means the date on which the termination takes effect, and*
> *(c) in relation to an employee who is employed under a limited-term contract which terminates by virtue of the limiting event without being renewed under the same contract, means the date on which the termination takes effect.*
>
> [The Tribunal's emphasis]

- Given that, the Tribunal considers the correct approach is to apply the definition of EDT contained in s.97(1)(a), by analogy.

6. Judge Miller-Varey explained the Tribunal's analysis to the parties on the final day of the hearing, after the evidence had closed and before submissions were heard. The Respondent urged for a determination to be made on the allegation of constructive dismissal. The Tribunal has provided its view below as to whether - absent the express dismissal - the Claimant would have been constructively dismissed on the expiry of her notice i.e., on 2 April 2021. Although it is not an actionable complaint, we find it is a necessary issue for us to decide. That is because it is has the very strong potential to be completely determinative of the maximum period of loss both for any just and equitable compensation for unfair dismissal, as well as for the claim for wrongful dismissal/notice pay. We describe it as "potential" merely to reflect that we have not yet had the benefit of any legal argument from the parties about this, especially the Claimant. It would not be right to express any final view. We are confident, however, that we heard all of the evidence and argument the parties the parties wish for us to receive about the issue of whether the Claimant resigned or was dismissed as a result of the events down to 11 January 2021.

7. The revised issues to be determined are set out in Annex A to this judgment. We would add: the events relevant to the alleged constructive dismissal and relevant to the alleged unfair dismissal run somewhat in parallel. We therefore set out our factual findings about them in chronological order below. The alleged breaches of the implied term of trust and confidence identified at the case management stage were: failing to communicate about a large pizza order on 8 January 2021, changing attitude to the Claimant and hostility from October 2020 (to include ignoring the Claimant) and making a decision on dismissal that was pre-determined. We consider the last allegation fell away at the hearing during the Claimant's evidence because the Claimant said she did not know there would be any disciplinary at the time of her resignation. She also said this in cross-examination.

Mr Warnes: You thought I will resign because will dismiss me anyway?

Claimant: No

No because I didn't know

Even though Bessy Balough was saying?

No

8. In the circumstances, it is not necessary to strike out the allegation but we do disregard it.

THE HEARING

Preliminary matters

9. At the outset of the hearing the Claimant applied to introduce into evidence in the form of written statements/letters from the Claimant's former colleagues, Hasan Tailor, Abdul Raja, Sadaqat Khan and Quamar Abass. It also allowed a number of text messages and an email to be added that had not previously been disclosed by her. The Tribunal later heard evidence from the Claimant – which it accepted - that she believes (from line leader Loretta Anderson) that these statements/letters were handed to Mark Banham, who was the acting shift manager, for giving to Ashley Johnson, then factory manager. This was prior to the hearing of her disciplinary appeal.

10. Although not part of the agreed bundle, the Respondent did not resist the additional material being added as documents; it did oppose them being received on a par with formal witness statements. The Tribunal told the Claimant that as the statements were not prepared for the purpose of these proceedings, were not signed with a statement of truth and the makers had not been called to be cross examined on them, they could be received by the Tribunal but the Tribunal would have to give weight to them accordingly. The Claimant indicated that she did not wish to seek an adjournment in order to call the writers as witnesses.

Procedure, documents and evidence heard

11. The Claimant is of Latvian national origin. English is not her first language. She was assisted by Mr Taylor, for whom English is a first language. The Tribunal was satisfied, both from written materials in evidence from the Claimant and its interactions with her, that the Claimant's written and verbal command of English was sufficient for her to fairly participate without the need of an interpreter. The Tribunal reassured the Claimant that she must take time needed at all times to accommodate the additional burdens of any internal translation process. It made this assessment of the Claimant's capabilities, at the hearing. It did still seek for cross examination questions to be modified at one point, for greater simplicity.

12. The hearing bundle comprised 77 pages of documents, together with a witness statement bundle.

13. The Claimant gave evidence. Her evidence in chief was taken to comprise the witness statement exchanged immediately before the hearing together with the statement annexed to the ET1.

14. For the Respondent the Tribunal heard from Robert Coar (HR officer), Mark Glover (Claimant's shift manager), Mark Bridge (who conducted the disciplinary hearing) and Glenn Heron (who conducted the appeal hearing).

Findings of Fact

15. The Respondent manufactures chilled pizzas from raw ingredients. It runs across two sites in Manchester; Firebird and Wingates. The processes and machinery used across those sites are not identical. It has total staff of around 1050, of which 50% are based at the Wingates site. It has about 50 engineers overall, split between the sites. Of these 5/6 are allocated to each shift. The Respondent has a HR department of five. They also deal with recruitment.

16. The Claimant began work for the Respondent on 7 July 2014 at the Wingates site, initially as an operative within its production team. The production team runs a 24 hours operation across three shifts: 6am to 2pm, 2pm to 10pm, 10pm to 6am. The production team work with machinery which is designed to create pizza dough, to prove and stretch the dough into individual bases and to add toppings.

17. Within the production team the hierarchy of staff (from entry-level) is: operative, line leader, and team leader. Having climbed through that ladder, the Claimant was appointed as a team leader in spring 2020.

18. Only those people who are operatives - or factory cleaners - have no managerial responsibility for others. The Claimant's line manager was the shift manager. Above the shift manager was the deputy factory manager and the factory manager.

19. The Claimant's shift managers were Mark Glover and latterly Lee Bebbington. The line leaders on her 10-6 shift were Loretta Anderson and Munaf Adam.

20. The line managed by the Claimant had an efficiency target of 85% with 8% built in for downtime. It was a main focus of team leaders to maintain efficiency. The Claimant had a board to fill showing the performance of the line and of which she needed to make operatives aware.

21. Taking account of that structure, people relevant to this claim and their respective positions at the Respondent are quite numerous. Their names and, where relevant, their respective positions are for ease of reference set out in Annex B at the end of these Reasons.

Background to investigation

22. The Claimant managed 20 operatives working across a mechanised production line in which a number of sequential tasks were conducted. These were: mixing of dough, segmentation of dough into dough balls, automated dropping of balls into individual proving pockets, the retraction

process where the dough is dusted with flour and pinned to a series of four driven rollers which reduce the dough balls' thickness until they emerge pinned and flattened. The operatives then further pin the dough into the required shapes. The final stage is saucing. The production process required interaction between the operatives and the line machinery. The operatives worked within metres of each other, depending on the task at hand.

23. There were two particular parts of the machinery in the production line that, for safety reasons, the Respondent surrounded with closed metal cages. The space between the cages and the machinery was sufficient for staff to be fully within them, if access was obtained.

24. The first caged area was around the dough rollers ("the roller cage area"). This was accessible via a closed gate. Inside the handle to the gate is a lock. If the corresponding key is taken from the main panel to access the machine, once the key is turned the entire line automatically stops. Thus, anyone obtaining access to the roller cage area by the *intended* means will never be in proximity to the moving rollers with the attendant risk of physical harm. This is a safety feature. It is possible to bypass the key system. This is achieved by removing the handle. That process in turn involves releasing the screws which secure the handle to the access gate.

25. There was an accident in October 2020 whereby Mr Andrew Holloway, a deputy team manager on the 10pm - 6am night shift, together with a colleague, obtained access to the roller cage area whilst the line was running. Mr Holloway's purpose was to clean dough from the pinning rollers. This was not Mr Holloway's first time entering the roller cage area; he had been witnessed by team leader, Shakeel Abbas, insider the roller cage area previously.

26. Mr Holloway suffered an injury when his hand was caught between two rollers. This triggered an internal and external health and safety investigation. The Health and Safety Executive produced a report. That was neither disclosed nor placed before the Tribunal. The same is true of the internal report. Neither were shared with the disciplinary officer or appeal officer or Mr Coar supporting them.

27. As a result of Mr Holloway's accident, the Claimant was asked to change her usual shift and instead work the 10pm – 6am shift. After she returned to work on her normal day shift (starting at 2pm) she was asked to attend a meeting. We find Ashley Johnson actively told the Claimant the meeting was not an investigation. The Claimant was not told there was any implication for her position and was urged to be as honest as possible. The Claimant was completely honest. The Claimant had always enjoyed a good working relationship with Ashley Johnson.

28. The Claimant was interviewed across two meetings, the second of which was on Thursday 19 November 2021. Ryan Battersby, deputy health and safety manager and Ms Johnson were present during both. Mr Battersby asked questions. He made handwritten notes of the answers. Ms Johnson

throughout urged the Claimant to talk as frankly as possible about how she and her two line leaders operated line 29 safety guards. The questioning focused on this. Nevertheless, we find the Claimant made other relevant points to her interviewers, including:

(a) There had been unlimited access by staff to the second caged area ("the prover cage area") and an extra staff member had been approved by Ms Johnson herself to work within that area, for a period of around a year
(b) The Claimant's shift manager, Mark Glover had accessed the roller cage area by removing the handle and had asked the Claimant to join him in there whilst he had undertaken a "flour check".

29. Ms Johnson told the Claimant this was all irrelevant. The Respondent was concerned with access from the first pinning roller only. She told the Claimant that the flour check was a "company project" and therefore also acceptable.

30. Around the start of her shift on Monday 23 November 2020 the Claimant was provided by Ms Johnson with a typed statement which Mr Battersby had prepared for signature. The statement is headed *"Regarding the potential accessing of the inside areas of bakery line 19 guarded areas"*. The Claimant signed the statement. She raised with Ms Johnson around this time that she had remembered additional information to that in her statement. She was told by Ms Johnson to send a second statement to her and to Ryan Battersby, via email.

31. We reproduce core paragraphs in full because its scope, tone and mode of expression we find to be highly material. We will return to this in our discussions and conclusions.

I am fully trained to carry out my role as bakery team leader and have received full training on bakery line 29 using the company safe operating procedures. I am aware of the Castel key system and how to safely isolate and stop the production line in order to gain access if required. I'm experienced, and feel competent and trained to carry out the duties expected of me.

I have accessed the inside of the caged area of bakery line 29 since 2019 on a daily basis. I access the line in order to remove dough clear debris from the area, cleaning sensors etc. on occasion, I have cleaned the rollers whilst the line has been running by using a metal rod that is present in the area. This issue has always been present but I have never reported this to any manager and instead carry out these actions each day. I have chosen to carry out this action of removing bolts and keeping the line running to avoid downtime. This was my choice, as at no time has any manager put me under pressure to keep the line running.
I access the inside of the caged area by removing the bolts to the locking mechanism to defeat the safety system and to allow the production line to continue running. Once I have completed tasks inside of the caged area, I have replaced the bolts with my fingers. I know how to access in this way by removing the bolts as I witnessed an engineer access in the same way.

I did not ask to be shown how to gain access in this way, but just copied what I had seen.
I have never been asked or authorised by any manager to carry out a task from within the caged area or to defeat the safety system. I have not escalated any issues to my managers, or the fact that myself and my team defeat the guarding so they are completely unaware. I have on occasion authorised my staff, such as line leader Munaf Adam, to clean the pinning roller with a plastic scraper, whilst the line is still running and from within the caged area. The line leader, Loretta Anderson, regularly accesses inside the caged area with my permission to do a similar job. Both Munaf and Loretta remove the bolts and access the caged area in the same way. One of the 3 of us access in this way every day around 2 PM at shift change over.

I am aware that it is against company policy to defeat the guarding by removing the bolts, and to access the line whilst it is operational.

I confirm that the above is a true version of events as far as I can recall, and have been given the opportunity to read, amend, and ask questions about the content of this statement.

32. Later, on the same afternoon as signing the statement (i.e. 23 November 2020) the Claimant emailed Ms Johnson and Mr Battersby to add more information which she says that she had remembered during the weekend. She related two incidents. Her email of 16.56 reads as follows:

Mark Glover 2-10 shift manager did entry cage manually taking out screws while line running and did flour check approx.20 we both stay inside cage because he did ask me for a help.

And one day, line29 retractor unit 1st belt suddenly start working very slow, I call eng.eng came open gate manually, I call Mark to inform him about issue, he came down to bakery, and we both, together with Eng. Went inside cage first line dough was folding, Mark stay

Before 3rd pinning roller and folding dough back to make sure 4 lines running and 1 line not going for rework while eng working on it.

33. The signed statement was not amended by the Ashley Johnson or Ryan Battersby to reflect these points. The email was never annexed to the signed statement. The email was not given to the investigation team, to the disciplinary officer or the appeal officer who dealt with the Claimant's subsequent disciplinary. The latter despite it being annexed to the Claimant's own letter of appeal.

34. On 8 January 2021 the Claimant was told by the topping team leader that 7500 bases were needed. She told the dough mixer to stop production after

15 minutes therefore. She says she told her then shift manager, Lee Bebbington, that the shift would end early at 8pm. He did not comment.

35. Later, after the Claimant's team had gone, Mr Bebbington rang the Claimant to say that the topping team were significantly short of pizza and needed thousands more bases. Lee Bebbington said the Claimant would be in trouble with the factory manager for this. The Claimant expressed that Mr Bebbington should know better as the Shift Manager. The next day, Mr Bebbington called her into the office saying that whatever she does, she needed to tell him. The Claimant said that she already did. She pointed to her large workload.

36. Subsequent to this there was an incident in which Mr Bebbington spoke to the operatives managed by the Claimant directly. He shared information about stopping the loading of a line. He had not told the Claimant of this previously and she felt undermined and unable to explain the situation to the staff.

37. Before leaving on Friday 8 January 2021 the Claimant asked for a one-to-one meeting with Mr Bebbington. He said he was busy and when he had the time, he would meet with her. Mr Bebbington, in contrast to Mr Glover who was on the shop floor daily, spent less time on the shop floor. However, he did not avoid the Claimant or stay away from her more markedly than any other member of staff. He approached the job differently. We understand that this may have disquieted the Claimant but it was not an approach directed at her.

38. On 11 January 2011, the Claimant handed in a written letter of resignation to Mark Glover. In response to his enquiry about the reason, she told him that she was intending to return to Latvia to rest. This was also reflected in her letter of resignation which in its material parts read:

please accept this letter as formal notice of my resignation from my position as team leader… My last day of employment will be 02/04/ 2021.

Thank you for giving me the opportunity to work in this position for the past. I have thoroughly enjoyed working here and appreciate all of the opportunities you have given me.

However, I have decided it is time for me to move on to my next challenge

39. The Claimant says that her resignation marked the beginning of a period of no communication from management at all until the date she was subsequently dismissed. We do not find it necessary to make findings about this since it post-dates her resignation so could not have caused or contributed to it.

40. Three days after her resignation, the Claimant was invited to an investigation meeting.

41. The investigation meeting duly took place on 18 January 2021 conducted by Suzanne Allen and Robert Coar. The minutes of the investigation meeting are not verbatim and in the nature of notes. They are not of a very high standard and are elliptical in parts with sometimes confusing exchanges. We have not been provided with any handwritten notes which underpin them.

42. The minutes were not challenged by the Claimant or identified as materially inaccurate.

43. The investigators used as the basis and entire springboard for the interview, the statement which had been prepared by Ryan Battersby. At the meeting, the Claimant noticed that the email which she had sent was not on the table. It was not referred to by either Suzanne Allen or by Rob Coar. The Claimant did not raise it.

44. During the meeting, the Claimant raised issues around the engineers and Mark Glover having access to the roller cage area for the flour project. The Claimant had described that she had been struggling with the line and this had informed her actions.

45. The following exchange took place

Q: Struggling for over a year you go in everyday but your TL doesn't know.

A: Don't think he knows. Always busy on computer and other stuff.

46. Mr Coar had no direct practical experience of how the line worked in reality. He did not seek this out. His evidence to us was that he was not familiar with the ins and out. Rather he describes that he "understood", without identifying why or how, that certain shift managers were allowed to perform certain tasks but not the tasks the Claimant went into perform. We are satisfied he never investigated this independently. Correspondingly, he was unable to inform or to substantiate to the subsequent disciplinary and appeal officers any sound basis for that belief. As a matter of fact, he did not do so.

47. Following the investigation meeting, from around 10 February 2021 staff members on the 6am- 2pm shift were speculating about the outcome of the investigation, saying that the Claimant would be dismissed.

48. In the week of 25 February 2021, Ian Cathcart was acting as shift manager to the Claimant in lieu of Lee Bebbington. He asked the claimant why she was leaving and she explained her position. On behalf of factory manager, Ashley Johnson, he told the Claimant Ms Johnson wanted her to write

everything in an email or a letter about all of the issues that she had with Lee Bebbington. The Claimant did write that letter which in all was about 7 pages. She handed it directly to Ms Johnson before she went to her disciplinary meeting. The seven-page letter has never been found by the Respondent. It has been searched for. We are satisfied it was not handed over to the Respondent's HR department. It was not responded to.

49. On 24 February 2021 the Claimant was invited to a disciplinary hearing on 26 February. When she was handed the documents (which included the minutes of the investigation meeting and her signed statement of 23 November 2020), she noticed that her email of 23 November was not included. The purpose of the disciplinary hearing was described in identical terms to the investigation meeting and the allegation was phrased in the same generic way:

    your alleged act of gross misconduct for allegedly

    serious breach of health and safety
    serious negligence that could or does result in unacceptable loss, damage or injury

50. It did add that all of the evidence would be considered before any decision is taken regarding disciplinary action. One result could be dismissal [p.64].

51. The meeting duly took place and again the minutes have not been the subject of material challenge. There are of the same quality as the earlier minutes

52. Mark Bridge undertook the disciplinary hearing.

53. Mr Bridge's evidence to the Tribunal was that he decided that the Claimant contradicted herself in the disciplinary meeting because the Claimant stated shift managers were aware, but then in the next breath they were not. He also said that he believed it unlikely that Mark Glover had ever asked the Claimant to go into the roller cage area with him but that if he had that would have excused that one incident of entering the cage, not all of them.

54. We find the disciplinary meeting again used the statement of 23 November 2020 as its starting point This is evident from the clear symmetry between the questions on page 65, the order of which replicate the substance of the statement's first two paragraphs [p.50].

55. When asked about why, despite the Claimant's awareness of the system and experience, she was bypassing the safety system the Claimant indicated that engineers and her shift manager had. We find that Mark Bridge had no knowledge of either the existence of authorisations which

engineers enjoyed nor any authorisation which shift managers enjoyed. He even enquired of the engineers' identities.

56. The Claimant described to him that she had been asked by Mark Glover to stay inside the caged area. She denied that she had reported the requirement to enter the cleaning purposes to Mark Glover. She told Mark Bridge that her shift manager was not on the shop floor much. We are satisfied this was a reference to Lee Bebbington and not to Mark Glover, as by this time the former had substantially assumed that role. In any event the Claimant then provided an answer as follows [p.67]:

    MB: Would you do in front of them?

    EB: Yes Other day engineering came and rang MG. MG in caged area folding dough back to make sure line running stop

57. Later again, the Claimant commented she would clean the sensor if the shift manager was present.

58. The meeting was adjourned and then reconvened. Mark Bridge identified 5 matters by reference to which he dismissed the Claimant:

    Entered cage by defeating safety system.

    No risk assessment or authorisation.

    Placed line leaders at danger.

    Not authorised or asked or escalated factor felt needed to enter.

    Not then asked engineers to re-secure.

59. The Claimant then asked whether the decision to dismiss would be the same for Mark Glover. She was told that was another investigation. The biggest aspect in her case was that she had quotation marks *"authorised and encouraged"* staff to enter the cage.

60. The Claimant was obliged to empty her locker and left that day.

61. On 1 March 2021 the Claimant wrote to a 3 page letter to Mr Coar raising an appeal against her dismissal. The key grounds which she raised we find as follows:

    - The cage from the prover cage area had been missing for a year;
    - The factory manager had provided an extra staff member to work directly inside that area;

- The prover cage had been replaced the day after Mr Holloway's accident;
- Mark Glover actively folded dough manually inside the cage before the 3rd pinning roller for around 30 minutes;
- Mark Glover undertook the flour check and asked the Claimant to help him inside the roller cage area;
- The likelihood that other shift managers must have done the same should be investigated as health and safety rules should apply to any one, any time;
- The cage around the retractor unit had been removed for a time;
- The fact the Claimant had seen engineers entering the cage manually (5 were named) and that the Claimant had followed them in doing this;
- That the Claimant's practice in entering the cage manually was happening across all shifts;
- That the Claimant knew and admitted she should not go inside and should not let her line leaders go inside to but her motivation had been to achieve 100% efficiency;
- That the Claimant *did* raise issues with Ashley Johnson about the flour check which she had said it was simply the company project;
- That the Claimant felt her treatment was different to Mark Glover's because he is white British and that the company was racist;
- That Mark Bridge had indicated Mark Glover would be investigated; this had been mentioned at the outset of the investigation with Ms Johnson but it was unfair that this had not concluded before the Claimant's dismissal;
- The engineers were still entering the roller cage area manually; and
- That the Claimant had amended her statement by way of a 2nd statement as directed by Ashley Johnson.

62. She attached her email of 23 November 2020 expressing, in effect that its earlier exclusion from the materials in front of the investigators and from the enclosures to the disciplinary hearing investigation, made her suspect something was being deliberately hidden.

63. The appeal hearing was fixed for 15 March 2021. It was conducted by IT manager, Glenn Heron who received advice from Robert Coar. A two-page set of minutes was produced. As with the other sets, the style is not completely verbatim although no material challenge has been made by the Claimant to their accuracy.

64. Mr Heron recounted the findings of Mark Bridge in relation to the five points. The Claimant raised that she was doing what the shift manager had asked to do in the flour project. The Claimant alluded to her statement and produced a copy which Mr Heron read. The Claimant admitted she had made a big mistake and would learn. Mr Heron adjourned the meeting. When he reconvened, he said he had 2 options. The first was to uphold the decision or to give the opportunity to the Claimant to step down into a role

where she would not be managing staff and would also receive a level III warning. He expressed that he would need time to find out the exact role. He commented on the Claimant's honesty. The Claimant, rightly, understood the proposal to mean inevitably stepping down to the role of operative or cleaner since they alone had no management responsibilities. She declined it. The meeting concluded with Mr Heron recognising the Claimant's honesty. Her dismissal was confirmed.

65. The Respondent has furnished a table of outcomes [p.77] for the other people Mark Bridge was required by the Respondent to discipline. We are not satisfied that this list represents all of the team leaders and operatives that the enquiry arising from Mr Mr Holloway's accident spoke to. They are only those he was asked to deal with.

66. The table notes in each case the allegation and reason for sanction. The Claimant was the only one to be dismissed. The basis of that was that she had *"entered the cage by defeating the safety system. Put herself at risk by attempting to move dough from the roller. Took two other members of her team into the cage to carry out the same task of removing the dough putting them at high risk"*.

67. The outcomes otherwise were as follows:

    Level 3 warning for a team leader who *"entered the cage by defeating the safety system. Entered to clean the sensor but not touch any moving parts. Saw another member of staff entering the cage. She challenged but did not escalate formally investigate.*

    Level II warning for a team leader who *"Entered the cage by defeating the safety system. Enter to clean the sensor but not touch any moving parts"*

    Level II warning for a team leader who had *"witnessed Andrew Holloway in the cage prior to his accident (not on the same day) and challenged him but did not escalate or formally investigate"*.

68. Andrew Holloway returned to work for the Respondent following a period of sick leave between the date of the accident in October 2020 and April 2021. During the latter period no disciplinary action was intimated or started against him. He returned to his previous role. In the event he was able to complete around 4 days of work only. He then resigned. During those four days, no further investigation was mentioned to him. Mr Coar gave evidence that was because it felt only right in the circumstances.

69. The table to which we have referred says of him:

    Had accident when he defeated the safety system. Clearly, he had entered to clean dough of the roller as his hand got trapped by the roller.

The Tribunal's own factual findings relevant to wrongful dismissal, Polkey and contributory fault

70. It is convenient to set out here factual findings the Tribunal makes which are relevant to wrongful dismissal, Polkey (in particular because they inform the likely outcome of a reasonable investigation) and contributory fault.

71. We have deliberately hived off these findings, reflecting the critical importance of not making a substitutional decision on the unfair dismissal allegation.

The scale of defeating the safety system and authorisations to do so

72. The Respondent asserts that it was both permitted and necessary [ET3, p.23] for members of the Respondent's engineering department to access the roller cage area to observe the working of the machine whilst it is operational. They did this therefore by removing the screws to the handle and adopting the method we have already described. The Respondent's engineering department is significant. It employs around 50 engineers all together. We have not been provided with any risk assessments or policies in respect of this activity, nor any documentary evidence of the authorisations which the engineers enjoyed, contemporaneously. We find it happened frequently and that waiting time of 15-20 minutes was not out of the ordinary for them to respond. The engineers were seen at all times by operatives, line leaders and team leaders undertaking this work. It was not without risk just because they were engineers. Mr Coar told Ms Jervis that he did not believe there was a written protocol for this. We find there was no such protocol.

73. The Respondent also says that shift managers had previously been permitted to defeat the safety system in order to carry out a flour project whilst the machine was running [ET3 p.23]. The flour project was conducted over a week. Its purpose was to gather data about the weight of flour dispensed onto a variety of different sizes of pizza, whilst the dough moved through the rolling phase. This data was to establish the unit cost of manufacture i.e., for business management purposes. The Respondent has never asserted that any other level of staff below shift manager had permission to be within the roller cage area for the purpose of the flour project, or that the shift manager was empowered to request others to step within it, with him. Nor has the Respondent asserted that the shift manager was entitled to defeat the safety system or be within the roller cage area for any other purpose barring the flour project.

74. We have not been provided with details of any documentary or other risk assessment in respect of the flour project undertaken by shift mangers. We have not been provided with evidence of any written authorisation. Mr Glover's witness statement was curiously and conspicuously silent on the matter. He said nothing at all about entering caged areas. His evidence by way of an answer to a supplementary question of the Respondent's solicitor was simply that his task was "authorised".

75. In this regard we also note the Respondent has been required to undertake documentary disclosure under the terms of EJ Serr's order. We were also reassured on the first day that the Respondent had conducted a search for anything relevant. This had yielded the email attached to Mr Heron's witness statement but nothing further.

76. Putting all of this together, we are amply satisfied that the authorisation which Mr Glover enjoyed was verbal only, extended to him alone for the flour project, that it did not extend to allowing him to request others into the roller cage area and that no specific formal risk assessment had ever been undertaken for this. There was no written protocol underpinning access to caged areas when machinery was moving, by engineers.

Mark Glover requiring the Claimant to obtain unauthorised access

77. Mr Glover told the Tribunal that on one occasion only did he engage in entering the roller cage area for the purpose of the flour project. He accepts he asked for the Claimant's assistance with recording weights. He told us that the Claimant did not enter directly inside the roller cage area but was in the doorway of the cage *"to stop anyone else entering because they were not permitted to"*. He says the Claimant was not stood near the machinery. We do not accept this. We prefer the Claimant's evidence that, at Mr Glover's request, she both accessed and was inside the roller cage area for a period of around 15 minutes.

78. This arose because Mark Glover made a prior arrangement with the Claimant on the particular day to undertake the task at 7pm and for the Claimant to assist him. He removed the gate handle by removing the screws. He and the Claimant both entered the roller cage area. He had already prepared a skillet and there was already a small table inside the roller cage area. He then inserted a piece of cardboard between the rollers in order to collect the dusting of flour to be weighed. He read the weights to the Claimant which she wrote down. She was unable to assist Mr Glover further when he moved on (consecutively, as part of the same exercise) to undertake the same task at a different point in the roller cage area. The Claimant's function whilst in the roller cage area was **not** to block others. She was never instructed to do this by Mark Glover. Mark Glover's action were dangerous even though he was using cardboard which was likely to be chewed up. Nevertheless, there was the process of inserting manually between the rollers. That is why the Claimant warned him about it.

Other unauthorised access by Mark Glover

79. There was another day on which Mark Glover entered the roller cage area with the Claimant. The retractor unit started to work very slowly. The Claimant called an engineer and informed Mark Glover. The engineer defeated the safety system and the engineer, Mark Glover and the Claimant all went inside the roller cage area. There was a problem with folding dough and Mark Glover stayed (within the roller cage area) before the third pinning

roller, physically folding dough back to make sure the lines continued to run while the engineer worked to solve the problem. This was done to ensure continued productivity on which the Respondent places a very high emphasis. It was dangerous.

Other health and safety practice within a caged area on the same line

80. Within the prover cage area are "flights", positioned about a foot apart from each other. These flights move in rotation so that individual dough balls will fall into individual pockets for airing. The cage to the prover cage area was not consistently in place.

81. We are satisfied that in 2019 the Respondent caused the gate to the prover cage area to be removed. From that point until October 2020 there were no limitations placed upon operatives or other staff accessing this area whilst the line was running. Ashley Johnson, factory manager, did agree that an extra staff member could work directly inside the prover cage area. That was because an operating issue had arisen whereby double rather single dough balls were dropping into the proving pockets and manual intervention was required. Contractors were instructed to address this issue. Even once they had done so, the Respondent did not replace the gate. Whilst the additional staff member was removed and no limits, either physically or by way of management instruction, were placed upon any of its staff regarding access to the prover cage area. We are satisfied that operatives, line leaders and team leaders continued to do so. It was replaced in October 2020, the day following Mr Holloway's accident.

82. We are satisfied that there were real risks of injury arising to the staff member tasked with working within the prover cage area whilst the double dough problem was being rectified. We are satisfied that there were risks to staff having unlimited access to the prover cage area still once the problem had been solved but the gate not replaced. We accept that the risk of serious injury, in relative terms, was greater to individuals working inside the roller cage area than in the prover cage area. There are driven rollers creating small catch points in the roller cage area. Nevertheless, there were moving parts in the prover cage area which could cause injury. We also find (a) the very erection of a cage around this area and (b) the reinstallation of the missing gate to it, immediately following a workplace accident in the roller cage area, are compelling evidence of appreciable risk of harm and the need to protect staff from it by a hard physical barrier. It is also the case that only Mark Glover told us about the risk level. The Respondent did not produce any evidence of any contemporaneous risk assessments.

THE LAW

Race Discrimination

83. Under s13(1) of the Equality Act 2010 read with s9, direct discrimination takes place where a person treats the Claimant less favourably because of race than that person treats or would treat others. Under s23(1), when a comparison is made, there must be no material difference between the circumstances relating to each case. 'Race' includes nationality or national origins.

84. In many direct discrimination cases, it is appropriate for a tribunal to consider, first, whether the Claimant received less favourable treatment than the appropriate comparator and then, secondly, whether the less favourable treatment was because of race. However, in some cases, for example where there is only a hypothetical comparator, these questions cannot be answered without first considering the 'reason why' the Claimant was treated as she was. (**Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11; [2003] IRLR 285**)

85. Decisions are frequently reached for more than one reason. Provided the protected characteristic or, in a victimisation claim, the protected act, had a significant influence on the outcome, discrimination is made out. (**Nagarajan v London Regional Transport [1999] IRLR 572, HL**) 35 The case law recognises that very little discrimination today is overt or even deliberate. Witnesses can even be unconsciously prejudiced.

86. Section 136 of the Equality Act 2010 sets out the burden of proof. The burden of proof provisions require careful attention where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or another. (**Hewage v Grampian Health Board [2012] IRLR 870, SC.**)

87. Under s136, if there are facts from which a tribunal could decide, in the absence of any other explanation, that a person has contravened the provision concerned, the tribunal must hold that the contravention occurred, unless that person can show that he or she did not contravene the provision.

88. Guidelines on the burden of proof were set out by the Court of Appeal in **Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258**. Once the burden of proof has shifted, it is then for the Respondent to prove that it did not commit the act of discrimination. To discharge that burden, it is necessary for the Respondents to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of the protected characteristic, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive. Since the facts necessary to prove an explanation would normally be in the possession of the Respondents, a tribunal would normally expect cogent evidence to discharge that burden of proof.

89. The Court of Appeal in Madarassy, a case brought under the then Sex Discrimination Act 1975, states: 'The burden of proof does not shift to the employer simply on the Claimant establishing a difference in status (eg sex)

and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that on the balance of probabilities, the Respondent had committed an unlawful act of discrimination.

90. A false explanation for the less favourable treatment added to a difference in treatment and a difference in sex can constitute the 'something more' required to shift the burden of proof. (**The Solicitors Regulation Authority v Mitchell UKEAT/0497/12**.)

Unfair Dismissal

91. The test for unfair dismissal is set out in section 98 of the Employment Rights Act 1996. Under section 98(1), it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal, and that it is either a reason falling within subsection (2), e.g., conduct, or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

92. Under s98(4) '*… the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) 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 shall be determined in accordance with equity and the substantial merits of the case.'*

93. Tribunals must consider the reasonableness of the dismissal in accordance with s98(4). However, tribunals have been given guidance by the EAT in **British Home Stores v Burchell [1978] IRLR 379; [1980] ICR 303, EAT.** There are three stages:

    - did the respondent genuinely believe the Claimant was guilty of the alleged misconduct?

    - did it hold that belief on reasonable grounds?

    - did it carry out a proper and adequate investigation?

94. Tribunals must bear in mind that whereas the burden of proving the reason for dismissal lies on the Respondent, the second and third stages of **Burchell** are neutral as to burden of proof and the onus is not on the respondent (**Boys and Girls Welfare Society v McDonald [1996] IRLR 129, [1997] ICR 693**).

95. Tribunals must decide whether it was reasonable for the Respondent to dismiss the Claimant for that reason in all the circumstances of the case.

96. We remind ourselves that our proper focus should be on the Claimant's conduct in totality and its impact on the sustainability of the employment relationship, rather than an examination of the different individual

allegations of misconduct involved (**Ham v the Governing Body of Bearwood Humanities College [UKEAT/0397/13/MC**]

97. We have also reminded ourselves that the central question is whether dismissal was within the band of reasonable responses open to a reasonable employer. It is not for us to substitute our own decision of what we might have done in the Respondent's position.

98. The range of reasonable responses test (or, to put it another way, the need to apply the objective standards of the reasonable employer) applies as much to the question of whether an investigation into suspected misconduct was reasonable in all the circumstances as it does to other procedural and substantive aspects of the decision to dismiss a person from her employment for a conduct reason. The objective standards of the reasonable employer must be applied to all aspects of the question whether an employee was fairly and reasonably dismissed. (**Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23, CA**)

99. We also accept that when considering the question of the employer's reasonableness, we must take into account the disciplinary process as a whole, including the appeal stage. **(Taylor v OCS Group Limited [2006] EWCA Civ 702**)

100. Ultimately the question is whether the employer had a reasonable belief that the employee committed such serious misconduct that instant dismissal was justified. Just because the Claimant has committed gross misconduct, does not mean the dismissal was fair. We accept that the usual approach under s98(4) must be followed and the use of the label gross misconduct and the fact of summary dismissal is a factor to be considered along with all the other circumstances

101. In reaching our decision, we must also take into account the ACAS Code on Disciplinary and Grievance Procedures. By virtue of section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992, the Code is admissible in evidence and if any provision of the Code appears to the tribunal to be relevant to any question arising in the proceedings, it shall be taken into account in determining that question. A failure by any person to follow a provision of the Code does not however in itself render her liable to any proceedings.

102. Paragraph 12 of the code says: "*The employee should also be given a reasonable opportunity to ask questions, present evidence and call relevant witnesses. They should also be given an opportunity to raise points about any information provided by witnesses".*

103. On this point we have also had regard to ***Santamera v Express Cargo Forwarding t/a IEC Ltd*** **[2003] IRLR 273, EAT** in which the Claimant's grounds of appeal included not having the opportunity to put questions to those who had complained about her. At paragraphs 35 and 36, Wall J remarked thus:

a. *Whilst, in order to be fair, it is incumbent on an employer conducting an investigation followed by a disciplinary hearing both to seek out and take into account information which is exculpatory as well as information which points towards guilt, it does not follow that an investigation is unfair overall because individual components of an investigation might have been dealt with differently, or were arguably unfair. Whilst of course an individual component, on the facts of a particular case, may vitiate the whole process, the question which a Tribunal hearing a claim for unfair dismissal has to ask itself is: in all the circumstances, was the investigation as a whole fair?*

104. The issue of consistency of treatment is of some importance in this case. We take from the cases of **Post Office v Fennell 1981 WL 188133** and from **Hadjioannou v Coral Casinos Ltd [1981] 1 IRLR 352** (upon which both parties were given the opportunity to address us) the following relevant principles:

- That an employer has latitude in the way in which it deals with particular cases and a degree of rather than absolute consistency is what is required;

- Inconsistency may be demonstrated to the point of unfairness and this is a matter for industrial judgment i.e., within the operation of the ET (as per the President of the Court of Appeal in Fennell);

- Arguments about disparity should be examined with particular care (**Hadjioannou** at paragraph 25)

- In general, there are only three sets of circumstances in which such an argument of unbased on disparity will be relevant. These were advanced by Counsel for the Respondent in **Hadjioannou** and endorsed by the EAT at paragraph 23. The three sets of circumstances are these:

  *"**Firstly, it may be relevant if there is evidence that employees have been led by an employer to believe that certain categories of conduct will be either overlooked, or at least will be not dealt with by the sanction of dismissal.** Secondly, there may be cases in which evidence about decisions made in relation to other cases supports an inference that the purported reason stated by the employers is not the real or genuine reason for a dismissal. ...Thirdly... evidence as to decisions made by an employer in truly parallel circumstances may be sufficient to support an argument, in a particular case, that it was not reasonable on the part of the employer to visit the particular employee's conduct with the penalty of dismissal and that some lesser penalty would have been appropriate in the circumstances."*

  [the Tribunal's emphasis]

Status of materials given to an employer during an investigation and disciplinary process but not shared with the decision maker or appeal officer

105. In response to a question from the Tribunal about the status of material we may be satisfied was provided to the Respondent but not placed before the decision maker, Mr Warnes for the Respondent has also drawn our attention to the case of **Kong v Gulf International Bank UK Limited [2022] EWCA Civ 941.** The latter reflects the Court of Appeal decision but the relevant issue were dealt with (and not overturned) in the earlier EAT decision reported at **UKEAT/0054/21/JOJ**. The EAT was concerned with whether an individual can subject another to a detriment on the ground of a protected disclosure if he or she does not know about the protected disclosure. The Respondent relies on this as support for the proposition that in the context of an unfair dismissal, potentially relevant material or information which has been passed to one part of, or person within the Respondent, but which was not before the decision maker in a misconduct case, should not be imputed to the decision maker or appeal officer. We have noted and accept that as per Judge Auerbach at paragraph 64:

"... The starting point, recently reiterated by Underhill LJ in Beatt v Croydon Health Services NHS Trust [2017] ICR 1240 at [30], remains that, when considering a s 103A claim, ***as with any unfair dismissal claim, the "reason" for the dismissal "connotes the factor or factors operating on the mind of the decision-maker which causes them to take the decision."***

106. Judge Auerbach did go on to describe, *"it is well-established that the net may be cast wider where the facts known to, or beliefs held by the actual decision-maker have been manipulated by some other person involved in the disciplinary process who has an inadmissible motivation at least where he/she is a manager with some responsibility for the investigation"*

107. In the event our finding as we shall set out, is *not* that that the Claimant's dismissal was deliberately manipulated, whether by the active suppression of some missing materials or otherwise. Nevertheless, as a matter of law an investigation may be unreasonable where something short of bad faith, including plain oversight, causes it to disregard available evidence. This ultimately involves the usual industrial question of whether the investigators acted reasonably and account may be taken of the size and resources of the Respondent as provided for under s. 98(4)

Constructive Dismissal

108. The Tribunal derives from the case law the following principles of general applicability to a claim for constructive unfair dismissal which is founded (as the Claimant's claim is) on alleged breaches of the implied term and trust and confidence:

- Whether there has been a repudiatory breach of contract should be objectively assessed and the employer's subjective intention is not relevant (**Leeds Dental Team Limited v Rose UKEAT/0016/13/DM**).

- In general, there is well established distinction between cases where the fundamental breach is comprised of a course of conduct taken together and cases where a one-off, single act by the employer is relied upon as fundamentally breaching the contract. In particular the following principles are relevant:
- The act precipitating the resignation in a last straw case need not itself be a breach of contract (**Lewis v Motorwold Garages Ltd 1986 ICR 157 AC**)
- The last straw, if an incident which is part of a course of conduct that together constitutes a breach of the implied term of trust and confidence, will revive the employee's right to resign. In that situation it does not matter that they worked and affirmed the contract after earlier incidents forming part of the course of conduct (**Kaur v Leeds Teaching Hospitals NHS Trust 2019 1 ICR 1, CA)**
- The last straw does not need to be proximate in time or of the same character to the previous act of the employer (**Logan v Celyn House Limited EAT 0069/12** and **Omilaju v Waltham Forest London Borough Council 2005 ICR 481**). It need not blameworthy or unreasonable but must contribute to the breach of the implied term.
- An act which is entirely innocuous cannot be a final straw, even where it is interpreted by the employee as hurtful and destructive of his trust and confidence. (**Omilaju**).

109. We have agreed with the parties that depending on our primary findings on the issue of liability for any unfair dismissal, we will determine the issues of "Polkey" and of contributory fault. The relevant principles here are:

110. **Polkey**: this is the adjustment that may be made to any compensatory award, where in the main the unfairness flows from an unfair procedure. It is applied in accordance with principles established in the case of **Polkey v AE Dayton Services Ltd [[1987] UKHL 8; Software 2000 Ltd v Andrews [2007] ICR 825; W Devis & Sons Ltd v Atkins [1977] 3 All ER 40; and Crédit Agricole Corporate and Investment Bank v Wardle [2011] IRLR 604**. The Respondent said that the Claimant would have been dismissed in any event, therefore any award should be reduced by 100%. This was not conceded by the Claimant although she did not offer any substantive argument.

111. **Contributory fault:** Two deductions are possible under statute for culpable conduct in the slightly different circumstances set out in the ERA 1996:

Section 122(2) provides as follows:

"Where the Tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further

reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce that amount accordingly."

Section 123(6) then provides that:

"Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."

Breach of contract

112. The Tribunal must decide if the Claimant fundamentally breached her contract of employment by committing an act of gross misconduct entitling it to dismiss without notice. In contrast to the Claimant's claim of unfair dismissal, where the focus was on the reasonableness of management's decisions, and it is immaterial what decision we would ourselves have made about the Claimant's conduct, we must decide for ourselves whether the Claimant was guilty of conduct serious enough to entitle the Respondent to terminate the employment without notice. In reaching this decision we can take into account all of the evidence we have read and heard. We are not confined to the matters that were before the decision makers.

DISCUSSION AND CONCLUSIONS

Race Discrimination

113. The CMO established the allegations of unfavourable treatment which dovetail with those said to breach the implied term of trust and confidence. We have not upheld that there was materially diminished communication, changed attitude or a predetermined decision to dismiss the Claimant.

114. Her allegation that her dismissal is an act of direct discrimination remains.

115. We then began with the two stages of the burden of proof.

116. We first considered whether the Claimant had proved facts from which, if unexplained, the Tribunal could conclude that her dismissal was because she is Latvian. We find that she has not done so. Our reasons are that:

- The Claimant did not at the hearing lead evidence of, or identify, any act of other discrimination from the Respondent, excluding her dismissal.
- There is evidence in the table to which we have referred [p.77] that supports that a shift manager of Eastern European background found guilty of defeating the safety system to clean the sensors and not escalating access by other staff, was not dismissed.

- Mark Glover was not being looked into for the same actions, was of a different level in the organisation and was not before Mark Bridge. He is not a convincing comparator.
- There was evidence of a different motivation for not progressing the disciplinary against Andrew Holloway sooner; he was recovering from his significant injury. There was nothing to contradict Rob Coar's evidence that it felt like the right thing to do to allow Andrew Holloway time to recover physically and mentally. That was plausible. In real terms too, the period whilst Andrew Holloway was in actual factory work before any disciplinary process had started, and the period whilst the Claimant continued in actual factory work before her disciplinary action started, were not marked by any questionable difference. She herself had been back at work for months, and not just days, before it started.

117. The result of the burden not being shifted is that the Claimant must satisfy us that her protected characteristic of Latvian National origin was a significant influence on the outcome of her disciplinary. We have found no sufficient evidence to show that, on the balance of probabilities, it was. The race discrimination claim accordingly fails.

Unfair dismissal

Can the Respondent show the reason for the dismissal and that it was for the potentially fair reason of conduct?

118. We are satisfied that Mark Bridge held an honest belief in the Claimant's misconduct and so did Glenn Heron.

If so, was that belief held on reasonable grounds following as much investigation into the matter as was reasonable in the circumstances?

119. Their beliefs were not held following an investigation that fell within the range of reasonable responses to these events.

120. The Tribunal considers the formal disciplinary investigation was severely lacking. That conclusion takes into account that the Respondent is not a small employer and had 6 qualified HR professionals to call upon.

121. The investigation took as its entire premise that the statement of 23 November 2020, taken for a wholly different purpose, was sound and itself was built upon on a fair underlying investigation. To all intents and purposes, it treated the health and safety investigation and the ensuing statement of the Claimant as if they were part 1 of the *disciplinary* investigation. They well-knew it was not. They essentially abrogated part of their role to Ashley Johnson and Ryan Battersby with no regard to their different purpose, and any agenda. As appointed disciplinary investigators, they did not start with deducing the Claimant's account from first principles or make any independent enquiries of third parties or to obtain company documents. They did not get Ryan Battersby's notes or those documents whose

existence were implied clearly on the face of the statement. Essentially, the Claimant furnished the case against herself, in full.

122. This was not reasonable in circumstances where:

(a) Ms Allen and Mr Coar did not call for statements or surrounding information from Ms Johnson or Ryan Battersby about the scope of their investigation or contextualise the Claimant's statement in anyway e.g., by calling for the internal investigation reports or, if then available, the HSE outcome. Having, in reality, chosen to treat Ms Johnson and Mr Battersby as having completed part of their job, this required something by way of handover or background. Looked upon as pseudo disciplinary investigators – which is what they did - Ms Johnson and Mr Battersby had quite wrongly narrowed their focus. They had effectively silenced the Claimant on matters of direct relevance. By telling her they were not relevant and not causing her email to be passed on, a misleading impression arose. Ms Johnson allowed a statement to go forward which said the Claimant had never been authorised by any manager to carry out a task within a caged area. The fact was, she had received an email from the Claimant alleging precisely such an occasion.

(b) Neither Mr Coar and Ms Allen themselves had direct experience of or even tried to gather independent evidence of the operations of the "Castel key system" (to which the Claimant referred in her statement), the applicable safe operating procedures (to which the statement expressly made reference) and the "company policy" which the Claimant appeared to volunteer that she breached or how it had been imparted to her); and

(c) there were glaring features of the statement which, acting fairly and reasonably, called for much greater enquiry.

Features of the statement warranting greater investigation

123. To begin with the language used is very formal. We are certain it does not reflect the Claimant's verbal style at the investigation meeting which (though not before them) would be much consistent with the Claimant's email of 23 November 2020. Pausing here, we have noted the very polished and proficient use of English in the Claimant's most recent written statement. She described this as all of her own work. That does not change our view. We reflect that we are going back in time somewhat and language skills progress. With respect to her, we find the Claimant's verbal and written style at the time of these events, to have much more in common still with the 23 November 2020 email and her ET1 statement, than with her recent statement.

124. Acting reasonably, and having met and spoken to the Claimant, we conclude the investigators should have realised that the statement was significantly at variance with the natural description which the Claimant would afford to her actions.

125. It is strikingly confessional in tone and reaches beyond the Claimant's own actions. In the context of an ongoing health and safety investigation, it is also strikingly helpful to the Respondent. It volunteers things such as *"I have never been asked or authorised by any manager to carry out a task from within a caged area"*. Even more remarkably and unnaturally, the Claimant gives her view as to the actual state of managers' knowledge about daily accessing of the roller cage area. She states her mangers *"are **completely** unaware"* [our emphasis]. Nowhere does she suggest within the statement though that her accessing of the roller cage area has been done deliberately secretly or surreptitiously.

126. It did not disclose any of the other relevant matters to disciplinary issues that the Claimant was informing the investigators about e.g., that it was seeing her shift manager access the area too had been part of the reason she did so [p.55]. This needed to be contrasted with the statement's thrust of exonerating all managers from being connected to poor health and safety practice. Its core message was that the Claimant was on a frolic entirely of her own. In conflict with that statement, the Claimant when talking to the actual disciplinary investigators did *not* exclude that her shift manager did not know [p.56]. She was more equivocal, as we have set out (see paragraph 45 above).

Did the decision to dismiss fall within a range of responses open to a reasonable employer?

127. The effect of the flawed, unreasonable investigation was to contaminate the remainder of the disciplinary process, including the decision of Mark Bridge about sanction. It was a situation of "error carried forward". The consequence of never making any enquiry of Ashley Johnson, in particular, meant that the Claimant's email of 23 November 2020 was never unearthed for what it was. A contemporaneous and significant amendment to what was treated by the investigators and Mark Bridge as akin to a full free and informed statement, made in the disciplinary process itself. Mark Bridge himself acknowledged to us that if he learned that Mark Glover had authorised the Claimant to enter the roller cage area, that he would potentially have done more investigation. He was also clear that had he seen the statements/letters of the other staff at the disciplinary hearing then he would "probably" have adjourned. There is also the very important point that the 23 November 2020 email would have shown that the Claimant was consistently saying the same thing; it was not an afterthought now the matter had progressed with personal implications for her.

Was the dismissal procedurally fair?

128. It was not for all of the reasons identified.

If the procedure was defective, was it remedied on appeal?

129. It was not. The consideration of the Claimant's email of 23 November 2020 by Mr Heron did not mean that the deficient investigation, and everything that flowed from it, was remedied. That is because a reasonable investigation would have gone on a chain of enquiry that, consistent with our own Tribunal findings (see paragraphs 70-82) should and would have revealed those self-same things. All of those matters would have been placed before before Glenn Heron. In addition, it would have:

- Elicited the example of others being exposed to risk in the form of the unguarded prover area, by management knowingly and deliberately. In fact, management instructed a member of staff to do this. This evidence was not challenged.
- Brought forward corroboration from the other operatives who made written statements. Although we accept that it was the act of the Claimant's dismissal that brought them forward in early March – a fair and open investigation could have been launched at the appeal stage and those who wrote the statements, we are satisfied, would have come forward.
- We find the effect of their additional evidence would be that:
    i) Many people were going inside the roller cage area, including people from the morning shift. The bakery mixer told Jonathan Fairhurst bakery manager on the day of Andrew Holloway's accident that many people, aside from engineers and managers, were going inside the roller cage area. (Qamar Abass – bakery mixer).
    ii) That Loretta Anderson and Munaf Adam went inside of the roller cage area during periods when the Claimant was on leave (Hasan Tailor)
    iii) The habit of people entering the roller cage area had started in 2019 (Abdul Raja).
    iv) Overall, the only reasonable finding would be that the act of defeating the system (albeit for not necessarily the same purpose as the Claimant) was widespread.

130. This tribunal has only received evidence from Mark Glover that entering the prover cage area was less risky than the cage that surrounded the rollers. It is correspondingly circumspect about the degree of difference and it repeats what is said in paragraph 82 above. The fact remains however that the Respondent thought it fit to reinstitute the cage the day following Andrew Holloway's accident and the very fact it was caged speaks to the existence of risk without more. There remained appreciable danger and yet the Respondent's factory manager and shift manager were authorising it, and in case of the new staff member, encouraging it.

131. We consider this material (especially what should reasonably have been discovered as set out in paragraphs 70-82) all went to issue of the sense of security - for her position – that the Claimant felt in going into the roller cage area and in allowing others to do so, as to the level of misconduct. We think this inculcated a belief that a breach of health and safety in this way would not be likely to be treated as gross misconduct.

132. This is reinforced by her own line manager's actions inviting her into the caged area with him and standing for another period when he was folding dough. This indicated his cavalier attitude to risk to other employees. Also, that a potentially dangerous breach of health and safety did not necessarily equate with an act the Respondent would consider to constitute gross misconduct.

Would or might the Respondent have fairly dismissed the Claimant had a fair procedure been carried out?

133. We find that had there been a fair procedure there is a 20% chance only that the Claimant would have been dismissed.

134. Consistent with the case law to which we have referred it would not be within the range of reasonable responses for an employer acting fairly to overlook the expectations about treatment which its own actions had inculcated. There is no sufficient evidence to satisfy us of management complicity or knowledge of cleaning of moving dough rollers. That is a point really only developed by the Claimant in her most recent witness statement. Nevertheless, the Respondent, via its management, has presided over practices (especially in the prover cage area and the flour project) which in the mind of the Claimant, reasonably, caused her to regard *"wrong"* actions in health and safety terms as not being, at least automatically, the same as gross misconduct.

135. The fact she did not know of actual cases of other employees who had not gone through a disciplinary for the same actions as her own, and remained employed by the Respondent, is not to the point. We do not consider the false sense of security principle set out in **Hadjioannou v Coral Casinos Ltd [1981] 1 IRLR 352** to be confined to such circumstances. There was accordingly limited scope to fairly dismiss the Claimant.

136. In addition to this we were satisfied Mr Heron clearly did not want to dismiss the Claimant. He found her honest and credible. Therefore, if furnished with the output of a reasonable investigation, it is highly likely he would not have felt it appropriate to do so. He found her truthful and accepted what she said at face value. We think he would have been struck by the unfairness of her treatment and this would have tipped the scales significantly against dismissing the Claimant.

137. We do accept one response may have been to institute action against Mark Glover for himself inviting the Claimant into the prover cage area (we consider it certain he would be unable to prove that there ever existed a verbal permission which admitted of him taking a second subordinate member of staff in), and for the other incident involving the dough folding.

138. We also acknowledge and accept that a reasonable investigation would still have left at its core the Claimant's acknowledgement that she had allowed two subordinate members of staff to enter the area regularly for cleaning and dough scraping, exposing them to risks.

139. However, she continued to work for the Respondent with their blessing in exactly the same role, without incident, whilst managing substantially the same staff, for 3 months prior to her dismissal on 26 February 2021. She had her investigation meeting prior to her PDR, which her shift manager would have known of. She received a glowing report which Mark Glover endorsed in his evidence to us. The PDR shows that she was in the same role looking after 2 lines and doing a brilliant job. This would all have pointed to the need not to dismiss the Claimant as a response but to issue a level 3 warning instead.

Did the Claimant contribute to her dismissal?

140. The Respondent invites us to find 100% contributory fault by reference to the Claimant's blameworthy and culpable conduct in two ways; her underlying actions in accessing and allowing others to access the roller cage area and the withholding of evidence that would have made a difference to the dismissal. We reject that submission and conclude there was only a very modest level of conduct that can be characterised in this way.

141. It was allowing others to access the cage that was the material fact that led to her dismissal, in contrast to the other staff disciplined by Mark Bridge [p.77]. The Respondent in its cross-examination sought to suggest to the Claimant that had *"encouraged"* other members of her team. Not only did she not do so, there is no evidence from any quarter in these proceedings or before that suggests this. That includes even in the very partisan health and safety statement that was prepared. The term seems to have crept in, erroneously, in Mark Bridge's disciplinary findings. There is a clear in difference culpability between encouraging and permitting others to undertake a potentially dangerous act.

142. We also consider that we should avoid double-counting between Polkey and contributory fault if compensation is to remain just and equitable. As we consider the only remaining basis on which the Respondent would have reasonably dismissed the Claimant to be her actions vis a vis the line leaders, we find it would not be just for us to also make a second reduction to the Claimant's awards by reference to this conduct.

143. Secondly, the Respondent says she withheld evidence that she said would have made a difference.

144. We reject that this conduct can fairly be characterised either as blameworthy or culpable to anything but a small degree when set in context.

145. We have found it more likely than not that the statements from other operatives which we have seen were provided by Loretta Anderson to Mark Banham.

146. We find the terms of the email of her email to him of 3 March 2021 were seeking confirmation of letters having already been handed in. The final sentence in particular makes this clear. The writer was seeking confirmation for staff who had furnished the statements.

147. There is no reason why Mark Banham did not pass them on. The fact they were not before Glenn Heron does not mean that they were not in the possession of the factory manager. Our findings are already that the email of the 23rd November 2020 and the seven-page letter, both of which came into the possession and control of the factory manager, were not passed on. The Respondent was certainly aware of those two allegations in these proceedings and has not chosen to lead evidence from Ms Johnson to explain her dealings with these documents. We find it more likely than not that the staff statements were passed on to her. They were clearly in connection with, and intended to be considered in relation to, the appeal. The fact they were not placed before Glenn Heron would only signal to the Claimant that again the Respondent did not want to hear, and deemed irrelevant, anything other than what it considered the Claimant's own failure.

148. It does not behove the Respondent in those circumstances to say that the Claimant was at fault in not raising them further with Mr Heron, (clearly, they were available at no early stage to the appeal). We reject that there was culpable withholding from Mr Heron. The Claimant had good grounds to assume these were in the possession of the Respondent, which is a matter of fact they were. The Claimant's summary dismissal was completely startling to her for the reasons we have given about her sense of security. This placed the Claimant in an invidious position (which we accept was a scruple she honestly held before us, too) whereby she would be reluctant to deploy the statements herself directly, other than through the writers' intended channel. That had already been done. Put simply, she wanted the facts to be known but not to incur unjustified risks on behalf of those members of staff she considered, and described to us as, "brave" enough to support her. We accept that the Claimant was grossly conflicted. The Respondent's unfair and mismanaged investigation was the cause of her justified scruples. The Tribunal does not regard her care for the position of others working for the Respondent as culpable.

149. On the other hand, we found Mr Heron to be genuine in being willing to look at matters again. The Claimant though in the midst of an unfair process and bitterly disappointed and upset, was facing her last opportunity for making the Respondent reconsider her dismissal. Mr Heron made no reference to the statements and there was the potential for her to remind him of them. We find contributory fault at 10%.

Constructive Dismissal

150. The Claimant, we identify, relies on 3 elements as constituting the acts breaching the obligation of trust and confidence. These are the undershooting of the pizza order, Lee Bebbington instructing her staff without instructing her and thirdly, a general change in attitude in that the daily contact with the Claimant became more demanding.

151. We have excluded issues with the Ashley Johnson one-to-one which came only after her resignation

152. We have kept in mind the importance of the objective status of the alleged breaches.

153. We exclude that the Respondent contrived in any way to blame the Claimant wrongly for the pizza undershoot. We accept the Claimant's evidence that she was told by Lee Bebbington to expect to be told off by Ashley Johnson. Objectively and subjectively, that would have been quite unfair in the circumstances we accept happened. But in the event no disciplinary action did result between 8 January and her dismissal on 26 February 2021. And she still had not had any formal consequence – including an investigation meeting – from the earlier Health and Safety internal and external investigations.

154. We are fully satisfied that the Claimant personally then took it very seriously. She was someone we find placed emphasis on her own personal performance. Quite justifiably so. Her subjective distress was real and the PDR makes clear it was uncharacteristic for her to be connected to performances like this. However, we must have regard to an objective assessment of the conduct.

155. We also have found no evidence that - objectively - Lee Bebbington acted in a way that could be said to undermine trust and confidence to the requisite degree. The context of his lesser contact on the shop floor was not limited to the Claimant but across the piece. His style was different to Mark Glover. We are satisfied that after the accident, there were greater production pressures particularly upon the Claimant and Covid-related absence remained a problem contributing to these pressures. She was then running two lines.

156. We also exclude that the Claimant's resignation was the result of belief that her dismissal was already predetermined. This is not part of her ET1 statement. We find (Claimant's statement p.17 para 3) the rumour that she was to be dismissed arose in the two-week period 12 – 26 February. This was consistent with her evidence in cross-examination. This constructive dismissal claim substantially crept in as part of the allegation during the CMO. We are not satisfied this reflects any inconsistency on the Claimant's part therefore.

157. We also find she raised a grievance for the first occasion only after her dismissal – in the form of her seven-page letter to Ashley. It was also her intention to work for the whole of her notice period which is not easily reconciled with the matter going to the heart of the working relationship.

158. Finally, as a matter of causation it was clear in cross examination that the Claimant would not have resigned either in consequence of the undershooting pizza incident nor the general change in attitude towards. Rather, it was a combination of the two. That undermines her case on causation.

159. In these circumstances, we consider the Claimant was not constructively dismissed by the Respondent and that what happened on 8 January 2021 therefore was a straightforward, effective resignation with notice.

Wrongful Dismissal

160. Taking account of all of our own findings, the Claimant had not committed an act of gross misconduct. It seems clear the Respondent even accepts this by offering her a demotion at the appeal meeting.

161. Moreover, it needed to consider her service since, as we have set out, she had not been suspended.

162. We do not find the Claimant's suggestion that she would have taken a demotion (see p.19) to a lesser management role (logically line leader) as evidence of her accepting her dismissal was a fair sanction. This presupposes that the Claimant understood that demotion at the appeal stage necessarily entailed a formal dismissal and re-engagement. We consider this point is misconceived.

163. It is right to say that the object of damages for wrongful dismissal is to place the Claimant in the financial position she would have been in had the Respondent observed the contract by giving her notice. As the Claimant had already served her own resignation with notice at the time of her wrongful dismissal, the contractual liability of the Respondent to pay the Claimant for 3 months from 26 February 2021 would have ceased when her own resignation took effect, i.e., by 2 April 2021. It does seem to us that this is an issue of liability.

164. It is also right to observe here that any award for loss for wrongful dismissal *cannot* be given twice, i.e., it cannot be part of the compensatory award for unfair dismissal too.

Likely remedy points

165. We have ruled that all other issues in relation to remedy, beyond those set out in this judgment, remain live. The parties have been directed to serve, respectively, a counter schedule of loss (to the one filed by the Claimant with her most recent witness statement) and an updated schedule of loss. These should have regard to our findings. As a result of the nearness of the remedy hearing, they are timetabled to be exchanged in close succession.

166. The scope of the remaining issues arising with respect to remedy are set out in Annex A. Clearly only those in respect of unfair dismissal arise. There can be no question of an award for injury to feelings, as the discrimination claim has failed. Consistent with the overriding objective, including avoiding unnecessary cost, we express our view as to what are likely to be the most key issues

- Compensatory Award: Can ***any*** compensation award for the period after 2 April 2021 properly be just and equitable? We direct attention to what is said in paragraph 6 above, although stress that we have not yet had the benefit of argument on this yet so it is not a concluded view. The Claimant remains at liberty to do this at the remedy hearing, if she wishes.
- What, if anything, should be paid for loss of statutory rights?
- Does credit need to be given for amounts that were earned or should reasonably have been earned by the Claimant by way of mitigating (which means reducing) her loss? The Respondent bears the burden of proof of showing that the Claimant has acted unreasonably. **Norton Tool Co Ltd v Tewson [1973] WLR 45** supports that in generally the obligation to mitigate does ***not*** apply in respect of the notice period.

167. Finally, the Tribunal reminds the parties that ACAS remain available as a conduit for the renewal of any further discussions which, with the benefit of this judgment and reasons, they may wish to have together.

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Tribunal Judge A Miller-Varey
(acting as an Employment Judge)

9 December 2022

Case Number: 2407202/2021

Sent to the parties on:

9 December 2022

For the Tribunals Office

Notes

1. Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

ANNEX A

REVISED LIST OF ISSUES

1. Unfair Dismissal

1.1 In respect of the express dismissal (s.95 (1) (a)) ERA on **26/2/21** what was the reason or principal reason for dismissal? The respondent says the reason was conduct. The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.

1.2 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:

1.2.1 there were reasonable grounds for that belief;
1.2.2 at the time the belief was formed the respondent had carried out a reasonable investigation;
1.2.3 the respondent otherwise acted in a procedurally fair manner;
1.2.4 dismissal was within the range of reasonable responses.

2. Remedy for unfair dismissal

2.1 Does the claimant wish to be reinstated to their previous employment?

2.2 Does the claimant wish to be re-engaged to comparable employment or other suitable employment?

2.3 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.

2.4 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.

2.5 What should the terms of the re-engagement order be?

2.6 If there is a compensatory award, how much should it be? The Tribunal will decide:

2.6.1 What financial losses has the dismissal caused the claimant?
2.6.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
2.6.3 If not, for what period of loss should the claimant be compensated?
2.6.4 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?
2.6.5 If so, should the claimant's compensation be reduced? By how much?
2.6.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? 2.6.7 Did the respondent or the claimant unreasonably fail to comply with it by [specify alleged breach]?
2.6.8 If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

2.6.9 If the claimant was unfairly dismissed, did s/he cause or contribute to dismissal by blameworthy conduct?
2.6.10 If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?
2.6.11 Does the statutory cap of fifty-two weeks' pay or [£86,444] apply?

2.7 What basic award is payable to the claimant, if any?

2.8 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?

3. Wrongful dismissal / Notice pay
3.1 What was the claimant's notice period? the notice was due to expire on 2 April 2021 and she was dismissed with effect from 26/2/21. The Claimant says she is owed 5 weeks pay.

3.2 Was the claimant paid for that notice period?

3.3 If not, was the claimant guilty of gross misconduct? did the claimant do something so serious that the respondent was entitled to dismiss without notice?

4. Direct race discrimination (Equality Act 2010 section 13)
4.1 The Claimant is Latvian.

4.2 Did the respondent do the following things:
4.1.1.1 Failed to communicate with her about the daily plan from October 2020.
4.1.1.2 On 8/1/21 failing to communicate about a pizza order.
4.1.1.3 Changed their attitude to her following the accident to Andy Holloway in October 2020 and were hostile to her;
4.1.1.4 Ignored the Claimant;
4.1.1.5 Made a decision to dismiss the Claimant which was pre- determined;
4.1.1.6 Dismissed the Claimant either on 11/1/21 and/or 26/2/21.

4.3 Was that less favourable treatment? The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's. The claimant says she was treated worse than Andy Holloway and Mark Glover.

4.4 If so, was it because of race

5. Remedy for discrimination or victimisation

5.1 Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?

5.2 What financial losses has the discrimination caused the claimant?

5.3 Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

5.4 If not, for what period of loss should the claimant be compensated?

5.5 What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

5.6 Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?

5.7 Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?

5.8 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

ANNEXE B

Wingates operative staff

Ashley Johnson	Factory Manager
Mark Glover	Shift manager of the “2-10” shift, from May 2020 and direct line manager of the Claimant
Lee Bebbington	Shift manager of the “2-10” shift and direct line manager of the Claimant
Mark Banham	Shift manager
Denis Karbin -	Shift manager
Declan Donnel	Shift manager
Bessy Balough	Team leader (I.e. the same role as the Claimant), on a different bakery line
Ian Cathcart	Team leader on a different bakery line
Shakeel Abass	Team leader on a different bakery line
Andrew Holloway	Deputy team leader/line leader (reporting to Shakeel Abass)
Loretta Anderson	Line leader on bakery line 29, managed by the Claimant
Munaf Adam	Line leader on bakery line 29, managed by the Claimant
Hasan Tailor	Operative
Qamar Abbas	Bakery mixer
Abdul Raja	Operative
Sadaqat Khan	Operative

Individuals concerned with the Claimant’s disciplinary

Ryan Battersby	Deputy Health and Safety Manager
Susanne Allen	Investigation officer

Robert Coar	HR Officer who advised and was present at the investigation, disciplinary and appeal meetings
Mark Bridge	Factory manager from the Firebird site who conducted the Claimant's disciplinary hearing
Glenn Heron	IT manager who conducted the Claimant's disciplinary appeal