EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104232/2024

Held in Glasgow on 16, 17 & 18 September 2024; 28 & 29 October 2024

Employment Judge L Doherty

Ms M Henry	**Claimant** **Represented by:** **Mr I Service -** **Lay Representative**
Kibble Education and Care Centre	**Respondent** **Represented by:** **Mr D Gorry -** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Tribunal is that:

(1) the claimant was unfairly dismissed but that no monetary award should be made against the respondents;

(2) the claimant is a disabled person for the purposed of Section 6 of the Equality Act 2010 (the EQA);

(3) the claimant was not discriminated agianst contrary to Section 13 of the EQA and this claim is dismissed;

(4) the claimant was not discriminated against contrary to Section 19 of the EQA and this claim is dismissed.

REASONS

1. The claimant in this case presents complaints of unfair dismissal and disability discrimination. A final hearing took place over 5 days. The claimant was

represented by her partner, Mr Service; the respondents were represented by Mr Gorry, solicitor.

Issues

Unfair Dismissal claim

2. The respondent's position is that the dismissal was fair, and that the claimant was dismissed for a fair reason, which was conduct related, or in the alternative, that she was dismissed for some other substantial reason which was a breakdown in her relationship with staff.

3. The reason for dismissal is in issue.

4. The fairness of the dismissal under section 98 of the Employment Rights Act 1996 (the ERA) is also in issue. It is said the dismissal was unfair on the basis of an unreasonable investigation, the failure of the respondents to adhere to their own policies and procedures, as well as the ACAS code, and the fact that the penalty imposed was too harsh. It is also said that the decision to dismiss was predetermined.

5. In the event the unfair dismissal succeeds the tribunal will consider whether compensation should be reduced/ uplifted on the grounds of:

   (1) a *Polkey* reduction;

   (2) that the claimant contributed to her dismissal by her conduct; and

   (3) failure to adhere to the ACAS disciplinary code.

6. It was agreed that the hearing would be split into Merits and Remedy as there are a number of disputed issues arising from the schedule of loss. It was also agreed however that the tribunal would make findings in relation to a *Polkey* and contributory conduct and an ACAS uplift as part of its conclusions following this hearing.

Disability discrimination claim

7. The claimant relies on a hearing impairment. It is accepted that the claimant has that impairment. It is not accepted that it has a substantial adverse effect on her ability to carry out day to day activities. Disability status is therefore an issue for the Tribunal.

Section 13 claim

8. The issue is whether in dismissing the claimant the respondents treated her less favourably than they would have a hypothetical comparator.

Section 19 claim

9. The issue is whether the respondents applied a PCP whereby any employee who was loud was subject to disciplinary action; if they did apply that PCP, did the application of that PCP place those with the claimant's disability at a particular disadvantage and did it place the claimant at that disadvantage; if so, can respondents objectively justify the application of that PCP as being a proportionate means of achieving a legitimate aim.

The Hearing

10. The respondent presented their evidence first. Evidence was given by:

- Mr Jamieson, Admin/Data Records officer, who conducted the investigation;
- Mr Warner, Head of Corporate Services , who conducted the disciplinary hearing;
- Mr Macmillan, Director of Corporate Services, who conducted the first stage appeal; and
- Mr Souter Chief Operating Officer (COO), who conducted the second stage appeal.

11. The claimant gave evidence on her own behalf.

12. The parties lodged a joint bundle of documents.

Findings in Fact

The claimant – disability status

13. The claimant's date of birth is 27 March 1965. From birth, the claimant suffered from a hearing impairment. She required treatment for this as a child, and speech therapy to enable her speech. The treatment was largely successful.

14. The claimant no longer attends for treatment as she understands that nothing can be done about her condition. Audiometry tests performed in September 2024 indicate the claimant was suffering mild to moderate hearing loss at certain frequencies.

15. The claimant continues to suffer some hearing loss. She cannot hear high frequency sounds which results in some consonants sounding muffled to her or by being misheard by her. She considers she has a loud voice.

16. The effect of the claimant's impairment is that she regularly experiences difficulty in hearing what people say. She regularly has to ask people to repeat what they said. She finds this stressful as she considers the speaker is becoming frustrated. She has to have the television turned up to a hight volume to hear it.

17. The claimant's difficulties in hearing are exacerbated where there is background noise, such as noise in a pub or the background noise of a tumble dryer at work. The claimant has to go outside of the room where there is background noise to take mobile telephone calls. She relies on her partner to accompany her to events such as a parent's evenings where there is background noise in order to understand what has been said.

18. In social situations where there is background noise the claimant cannot hear what is being said, other than by the person closest to her. This results in her feeling isolated and she now avoids socialising as a result of this.

The claimant's employment

19. The claimant was employed by the respondent from 8 June 2017 to 1st November 2023. At the point of termination of employment she was a Domestic Team Leader. Her duties and responsibilities included planning and organising the domestic team (the Domestics), managing stock, and carrying out some cleaning duties. The claimant was one of two team leaders who had direct line management responsibility for the domestic team. The other team leader was a woman by the name of Isabel McCheyne. The claimant believed that she and Isabel were friends; they had exchanged family gifts over the years.

The respondents

20. The respondents are a charity providing support to children and young people between the ages 5 and 26 years, including daycare and residential schooling. They have around 700 employees over a number of sites. The respondents have a Chief Executive Officer (CEO) and a Chief Operating Officer (COO), who sit above an Executive Team of 5 directors, who sit above 9 senior leaders, who in turn sit above a middle management team. The respondents enjoy in house HR support.

21. The respondent's employees include a team of 22 domestic staff (domestics) who are line managed directly by the two team leaders, the claimant and Isobel.

22. The work environment of the domestic and other staff is such that there is as element of swearing by employees and the individuals in Care.

Disciplinary/grievance policy

23. The respondents have a number of policies and procedures in place, which employees can access via the organisation intranet. On induction employees are told but they can access policies in this way.

24. The respondent's disciplinary procedure sets out its purpose and general principles. It provides for;

- *the right to an unbiased hearing;*

- *the right for a party to put a case and know what is alleged against him/her;*
- *the right to be made aware of all evidence against him or her and have an opportunity to respond to that evidence; and*
- *the right to representation.*

25. The policy provides that at the investigation stage the minute taker will take no part in the decision making process. It provides that written reports (witness statements) should be prepared after each interview and countersigned.

26. The policy provides that the respondents can precautionarily suspend an employee and that a member of the executive team will always confirm such decisions in writing. It provides that all suspensions will be reviewed on a regular basis and will only continue as long as is necessary; and that the maximum period between reviews is 4 weeks.

27. The policy makes provision for the format of the disciplinary hearing and provides that the Chair of the disciplinary panel will confirm the allegations against the employee who will have the opportunity to provide counter evidence.

28. The policy provides an indicative but non exhaustive list of examples of conduct which may be regarded as gross misconduct.

29. The policy provides for a two stage appeal process. It provides the first level of appeal will be heard by an Executive Director and that it will include a written statement by the Chair of the disciplinary panel confirming the allegations against the employee and a summary of the decision.

30. The second stage appeal is to the CEO; where the CEO is unavailable for an extended period of time the employee will be given the choice (where practicable) of either waiting for the return of the CEO or to have their appeal heard by a subcommittee of the Board of Directors which will consist of at

least three members of the Board who have taken no part in the previous disciplinary procedures.

31. The policy provides that both levels of appeal hearing should include a written statement by the Chair of the disciplinary panel confirming the allegations against the employee and a summary of the decision and should end with a summation of the evidence by the person hearing the appeal.

Incident on 14 August 2023

32. On 14 August 2023 an incident occurred involving the claimant, Isabel and a Domestic, Paulina Sofka. The incident occurred in the laundry room in the presence of three other Domestics. The claimant was sitting down, Paulina got up and went into the kitchen. The Claimant head a scooshing sound and then felt something coming down over her and thought "*what the hell is that, air freshener*?" She looked at Isabel and said *"that's just fucking gone over me"*. The claimant 's hair and uniform were wet and she was angry and annoyed. The claimant turned round in her chair and sprayed Paulina back with air freshener. In response to which Paulina said *"no it wasn't meant for you it was meant for (another member of staff)." ."* The claimant said that was *"not nice"* and said to the others present *"you lot don't always smell very good yourselves".* As she was leaving the laundry, the claimant saw Isabel sniggering and rolling her eyes and said to her *I fucking saw you sniggering ,* or words to that effect. The claimant was angry as she considered this was not the type of behaviour suitable for a team leader.

33. The claimant met Paulina later that day. Paulina was upset but the claimant told her not to worry and to draw a line under it.

Investigation

34. On 17 August 2023, the respondents received a written grievance from Isabel complaining that she had been bullied by the claimant and that others in the domestic team had experienced bullying behaviour at the hands of the claimant.

35. Isabel did not want to engage in mediation.

36. Mr Jamieson, who line manages the domestic team as part of his duties of managing overall administrative services within the organisation, and who has 25 years' experience of working in Care, was asked by HR to deal with this. He considered his role was to gather information, compile a report and make recommendations at the end it. He interviewed Isabel on 25 August 2023 and took a statement from her. The minute taker was Ms Hart of HR.

37. Isabel made a number of accusations against the claimant. These included an accusation relating to an incident which took place in the laundry on 14 August 2023 in the presence of a two other Domestics (Paulina and Monica). It was Isabel's statement that Paulina, standing behind the claimant (who was sitting down) sprayed air freshener, some of which went on to the claimant's back. In response to this the claimant, while still sitting down, picked up the air freshener and sprayed it all over the front of Paulina. She said that Paulina was in close proximity to the claimant.

38. Isabel said that she must have flicked her hair and rolled her eyes and the claimant said to her *"I fucking saw that. Rolling your fucking eyes"* She said *"I am going up the fucking stairs about you",* which Isabel took to mean that she was going to make a complaint to management about her. She said that Paulina was upset by the incident.

39. Isabel also alleged that an incident took place on 15 August 2023 at Forrest View House. In her written grievance, she said she thought she would be punched by the claimant, however in her statement to Mr Jamieson she said that the claimant had verbally attacked her. She said it was a figure of speech and she did not know if the claimant would actually punch her; she said that she has been close to her face where there is no need and physically she had been straight in her face.

40. Isabel alleged that in the presence of Lisa and Monica, two other domestics, she said to her *"aw for fuck's sake Isabel put a fucking smile on your face".*

41. In the course of the interview Mr Jameson asked Isabel if anyone else had raised concerns with her regarding the claimant. She responded that other people have been at the sharp end and she had seen this. Mr Jameson asked if she could give a list of names. Isabel give the names of Gerry Brown, Paul McBarron, Gus MacLeod, Rachel Stevenson, Lisa Donnelly , Kate Connor and Mary Mciivain.

42. After he conducted that interview, Mr Jamieson wrote to the claimant on 21 August 2023 advising that a staff member had raised a number of concerns regarding her behaviour towards them which they considered inappropriate and that they had raised a formal grievance against her. The claimant was asked to attend a meeting on 23 August 2023. She was also advised that she would be entitled to be accompanied at the meeting by a work colleague or trade union representative.

43. The claimant chose not to be accompanied to; the meeting was noted by Ms Hart of HR.

44. Mr Jamison did not tell the claimant who had lodged the grievance, nor did he identify for her specifically what allegations had been made in that grievance. Instead, he asked her questions related to incidents which Isabel had complained about.

45. Mr Jamieson asked the claimant if she sprayed air freshener on Paulina on 14 August 2023. The claimant said that she did and gave her explanation of what had happened to the effect that her back was covered in air freshener; she said to Paulina that she had better not be spraying it at her. Paulina responded that it was because another member of staff was smelling. The claimant expressed disapproval of this. The claimant accepted that she sprayed Paulina back with air fresher. She said she knew it was childish but that she was annoyed; her hair and uniform were wet. The claimant was asked where she sprayed it on Paulina. She said her uniform; on the side.

46. The claimant said that Paulina apologised and became tearful; the claimant told her they would draw a line under it and that tomorrow was another day.

47. Mr Jamieson asked the claimant if she had ever acted inappropriately or aggressively, which she denied.

48. He asked her if her behaviour could ever be perceived as inappropriate or aggressive, which she denied. He asked her if she had ever reduced a staff member to tears. The claimant said that Isabel cries all the time and that she cries over anything. She was asked to give an example and said that on one occasion a member of staff (Mary) noticed Isabel looked *'pissed off'* and was rolling her eyes. The claimant said to Isobel words to the effect *"what is wrong with your face, you are a team leader and morale is down and you are supposed to keep it up. Mary noticed you have a face like thunder you need to rise above that and show them."*

49. The claimant was asked if she ever said to Isabel *"I fucking saw that rolling of your eyes".* The claimant said she could not remember her exact words but asked if it was about the Paulina thing, and that Isabel was laughing with the girls and rolling her eyes at the claimant in response to which the claimant told her it was not appropriate to do that, especially as she was a team leader.

50. Mr Jamieson asked the claimant if she said to Isabel *"I am going up the fucking stairs about you",* which the claimant denied. She pointed out that she and Isabel were friends.

51. Mr Jamieson asked the claimant did she say to Isabel *"for fuck's sake put a smile on your face your face is tripping you".* The claimant said she did not remember.

52. Mr Jamieson asked had anyone raised concerns about the claimant's conduct at work before which the claimants said she honestly could not remember if they had. He asked her had she ever told colleagues that they smelt and she did not. The claimant denied this and questioned why she would say this.

53. Mr Jamieson asked the claimant her had she ever thrown Jaffa cakes across the table to Isabel which she denied.

54. Mr Jamieson also asked the claimant if there had been an issue with people saying that she *"peed"* herself and only showers once a week. The claimant identified the member of staff who has said this.

55. After conducting these interviews, Mr Jamieson considered that it was necessary to carry out follow up investigations. He decided to carry out a series of interviews with 16 other members of the domestic team. He conducted all but two of these interviews on a back to back basis on 29 August 2023 in an attempt to avoid staff colluding with each other. He attempted to ask staff the same or similar questions which included questions about their working relationship with the claimant and Isabel, whether they had witnessed or heard any inappropriate behaviour on the part of the claimant.

56. The statements from seven staff members of staff contained nothing prejudicial about the claimant. Some staff statements were complimentary about her. Some staff commented adversely on the claimant's behaviours. Adverse comments were contained in the following statements:

57. Kate Eason said that she had a run in with the claimant on one occasion she said that the claimant followed her into a cupboard and was screaming in her face like a banshee.

58. Lisa Donnelly said that the on one occasion the claimant was shouting at her and Rachel in the corridor and was giving Rachel a hard time.

59. Pauline McLachlan said that on one occasion in the laundry, Isabel had not finished her conversation when the claimant was right on top of her saying that was not right and she thought this was quite hard on Isabel.

60. Paul McBarron said that his relationship with the claimant was good up until a COVID situation which had been well documented. He was asked if the claimant had acted inappropriately and said it was a misunderstanding. He said that the COVID situation had a bearing on his request to move job as he no longer felt comfortable. He did not think that that the claimant intentionally harasses or bullies people. He said he would have felt happier if the claimant had accepted responsibility for the COVID situation, but he still thought that

she was a nice woman who had taught him a lot. He was asked if the claimant had ever sworn at him. He said that the claimant swore but he did not think it was done in a nasty manner.

61. Mary McIlvain said her working relationship with the claimant was 'okay'. She said that on one occasion, a few years previously as a result of an issue with another Domestic, Michelle told some of the Domestics that they were a *"fucking disgrace".*

62. Paulina Sofka was asked about the air freshener incident. She denied making comments about another member of staff smelling; she said she sprayed the air freshener straight but some went on the claimant's back. The claimant started to shout straight into her face and sprayed her with air freshener all over the front of her. She said that Isabel Monica and Rachel were all present. The claimant started shouting and was very aggressive. She said she tried to explain it was an accident but the claimant said she was going to HR. Paulina said she went to another area and cried. The following day she did not answer her phone to Isabel or the claimant and she was looking for another job as no one treats her like that in the workplace. She said that this was not the first time the claimant had shouted at her and she does it when people are around. Paulina give the opinion that people are scared of the claimant. Paulina said she had had no other interactions with the claimant which caused her concern at work but she said she had seen the claimant make Isabel upset.

63. Monica Garrett also made a statement about the air freshener incident. She said that Paulina sprayed air freshener but did not say anything. The claimant erupted and accused her of spraying it on her saying *"you just fucking sprayed me with that"*; the claimant then took the bottle and sprayed Paulina. She said that we were all in shock and it was ridiculous. Isabel gave a smile and Michelle said *"aye you're fucking smirking at me I'll be taking this to HR"* and *"aye none of you three smell like roses".* She said her working relationship with the claimant had been fine till this point.

64. Rachel Stevens also made a statement about the air freshener incident. She said that Paulina sprayed some air freshener. The claimant then sprayed it on

Paulina. The claimant said to Isabel: *"I'm fucking warning you, I'll take this upstairs."* She was asked if the behaviour she experienced or witnesses at work was bullying and said yes. She said that she had been off work the previous week because of the claimant. She said she was off because of stress at work and at home.

65. Kay Parker said that Isabel had raised matters with her about the claimant's behaviour but had done so informally and she had not taken it further.

66. Other than the incident of 14 August 2003 and Isabels statement about 15 August, none of the witness statements were specific on the timing of when things had occurred.

67. On 30 August 2023, the claimant was called to a meeting with Mr Mayhew, an Executive Director and Ms Hart and was advised she was being suspended. A letter was sent confirming the decision. The decision to suspend was taken after discussions with HR. Ms Hart had attempted to telephone the claimant to inform her of the decision.

68. The letter sent to the claimant stated among other things:

"I refer to the formal complaint that was made against you by Isabel McCheyne, Domestic Assistant, whereby there were allegations of aggressive and unprofessional bullying behaviour. The decision has been taken to place you on paid precautionary suspension, with immediate, effect pending further investigation."

69. The claimant was offered Kay Parker as a support person. She was provided with details of a confidential counselling service and told that she could contact HR if she had any questions.

70. The claimant emailed Ms Hart querying the reason for her suspension and advising that there had been no mention of aggressive and unprofessional behaviour at her meeting with Mr Jamieson. She also said that Kay Parker had been on leave for the first 5 days of her suspension which did not help matters. She indicated that she was confused about the whole process.

71. Ms Hart responded to the effect that the letter calling the claimant to the initial grievance meeting advised that the grievance was concerning her behaviour towards a colleague which they deemed inappropriate. When the claimant attended the initial meeting, she was asked specific questions in relation to the grievance. A copy of her statement was sent to her. Ms Hart said she was not sure why the claimant was uncertain about what the allegations against her were. She said that the claimant was told both verbally in writing that she was suspended due to corroboration of allegations of aggressive and unprofessional bullying behaviour.

72. The claimant responded in an email of 7 September 2023 (P188) thanking her for her reply and saying it had helped sorted out some of the confusion. She explained that unprofessional aggressive and bullying behaviour had not been mentioned during the investigation or at the suspension meeting, only inappropriate behaviour but the suspension meeting implied a new allegation was being investigated. She also explained that Ms Hart's email had gone into her spam account and she had not received it.

73. The claimant was asked to attend another meeting with Mr Jamieson and Ms Hart which ultimately took place on 19 September 2023.

74. At that meeting, the claimant began by saying she did not know what she was accused of. She provided information about the friendly nature of her relationship with Isabel, what that involved and how Isabel behaved in the workplace.

75. Mr Jamieson said he had a few more questions. He asked if the claimant ever felt overwhelmed in the workplace and others have borne the brunt of this. The claimant denied this.

76. He asked had she ever said to staff *"none of the three of you smelt sweet like roses all the time".* The claimant said she may have said this but not aggressively, and if she had it was explained by the physical nature of the work.

77. He asked again she ever say to Isabel *"I fucking saw that rolling your fucking eyes".* The claimant said yes she did to Isabel that she should not have been rolling at eyes and laughing with the girls and that she should not encourage that behaviour. He asked did she ever say *"I'm going up the fucking stairs about you"* which the claimant denied. He asked did she ever say *"everything fucking everything gets back to me"* which she denied. He asked if she shouted in Paulina's face following the refresher incident which she denied saying that Paulina was behind her. She said that she sorted everything out with Paulina the following Monday.

78. The claimant accepted that she had said to Isabel *"aw for fucks sake put a smile on your face"* and that there were other instances where she had sworn at Isabel. She explained that Isabel knows that she swears and that there is a culture of swearing at Kibble. She said that Isabel calls her a *"sweary beastie".*

79. The claimant was asked if there was ever an instance where she screamed and shouted in a colleague's face, which she denied. She denied having pointed or shouted into Isabel face.

80. The minutes of this meeting were sent to the claimant and she notified some amendments some of which were accepted.

81. After this meeting, Mr Jamieson complied what was called an Internal Investigation Report. In the introduction, he recorded the specific points raised by Isabel in her grievance. Those were:

- On Monday 14 August 2023 the claimant used foul language towards Isabel and other staff members and that she had done so on other occasions;
- On Monday 14 August 2023 the cli claimant had sprayed Paulina with air freshener deliberately;
- That the claimant threw a packet of biscuits at Isabel in an aggressive manner;

- That the claimant had been verbally abusive to Isabel on various occasions causing her distress;
- That the claimant had left Isabel fearing for her physical safety due her to the close proximity, tone and volume of her voice;
- That the claimant had threatened to complain about Isabel;
- That the claimant was bullying Isabel;

82. The report provided a note of the names of 18 staff members interviewed and an overview of findings. These were:

83. *1.It has been established that MH deliberately sprayed PS with air freshener on Monday 14 August 2023. MH sprayed the air freshner over the front of PS. This was corroborated by three other members of staff. MH also admitted to doing this on purpose following being accidentally sprayed by PS a few seconds prior.*

84. *2.It has been corroborated by various members of staff that MH has used foul language towards Isabel specifically on 14 August 2023 among other occasions. This has also been accepted by MH and she admitted on at least two occasions she has sworn directly at IMcC . IMcC is aware that the MH swears in her normal use of language and calls her a sweary beastie. There has been acceptance by IMcC with regard to the general use of foul language by MH. A number of staff confirmed they had witnessed instances to support this.*

85. *3.It could not be established if MH threw a packet of biscuits towards Isabel in an aggressive manner.*

86. *4.It has been corroborated that MH had been verbally abusive toward IMcC on various occasions which has caused her distress. This includes reducing IMcC to tears whereby she has to be consoled by colleagues in the domestic team and beyond. MH herself has admitted to being loud due to deafness in one ear however there is a perception that volume tone and overall language*

could be perceived as a verbal abuse. A number of staff confirmed they had witness instances to support this determination.

87. *5.Although MH denied that her behaviour could be perceived as aggressive with intent to cause physical harm the behaviour while not threatening actual harm to IMcC could be perceived as nearing physical aggression due to the proximity of interactions alongside the volume tone and language used. A number of staff confirmed they had witnessed or experienced such behaviour.*

88. *6.MH threatened to complain about IMcC. This was corroborated by another member of staff during the air freshener incident. Although MH is entitled to approach management for support, it had been established that she threatened to complain using an aggressive tone.*

89. *7.It had been established that MH's conduct at work and behaviour towards IMcC is unprofessional and inappropriate it does not align with Kibble's values. Corroboration from colleagues as well as from the claimant's own admission on certain instances is indicative of there being an unhealthy relationship between the MH and IMcC.*

90. The report then made a number of recommendations which included that the claimant should be subject to disciplinary proceedings.

91. It also recommended that there should be discussion of the swearing culture within Kibble and that Isabel should have a welfare meeting.

Disciplinary hearing

92. The claimant was sent an invite to attend a disciplinary meeting on 13 October 2023 by letter dated 10 October 2023 from Ms Hart. The letter referred to the investigation carried out by Mr Jamieson *into concerns regarding her behaviour towards a colleague which was deemed inappropriate.* The claimant was advised the investigation had concluded and the matter has been referred to disciplinary panel for further consideration.

93. The letter contained all of the statements taken by Mr Jamieson, his investigation report and the original grievance. The witness statements were

not signed by the witnesses. The claimant did not receive signed statements until January 2024.

94. The claimant sought a postponement of the meeting on the basis that she did not have enough time to go through all the statements. This was granted and the hearing was rescheduled for 23 October 2023.

95. The disciplinary hearing was conducted by Steven Warner, head of Corporate Services, accompanied by Ms Hart as note taker. The claimant chose not to be accompanied.

96. The claimant came to the meeting with a statement which she wanted to go thought. Mr Warner considered that this would cut across the 7 points identified in the Investigation report and therefore rather than hear what he considered might be a general statement, he suggested taking each of the 7 points in turn. The claimant agreed to this. She said that there were various points in the statements which were false, citing in particular that Isabel had said she was working in a particular location (Forrest View) on one occasion when she could prove she was not. The claimant suggested the possibility there had been collusion between staff on the basis that she has smoothed things over with Paulina but there had thereafter been lengthy telephone call between staff involved.

97. Mr Warner brought the claimant back to the 7 points and began by asking the claimant to talk through the air freshener incident The claimant gave a lengthy answer in response effectively reiterated much of what she had said during the investigation. The claimant said that she thought that Paulina was spraying her deliberately and said to her *"what are you fucking doing spraying me with air freshener?".* She said she sprayed Paulina back in retaliation. Paulina denied spraying the claimant but said she had sprayed it because (name given) another member of staff smelt. The claimant said that was *"not nice"* and said *"you lot don't always smell very fresh".* The claimant said as she was leaving the laundry, she saw Isabel sniggering and rolling her eyes. She said to Isobel *"I fucking saw that you sniggering".* The claimant said she was angry as this was not the type of behaviour for a team leader.

98. Mr Warner asked the claimant why she sprayed Paulina. She responded that she was angry following the incident.

99. The claimant suggested there had been collusion between staff on the basis that they had all been in Staffa together which was unusual.

100. Mr Warner said that staff had a right to put in a grievance and he and Ms Hart both explained the staff grievance process.

101. Mr Warner put to the claimant that this behaviour could be construed as aggressive behaviour. The claimant did not accept this. She said she was sitting down and Paulina was standing up, so automatically Paulina was the more aggressive. She demonstrated this by standing up behind Mr Warner. Mr Warner said to him this seemed to be a form of aggression. The claimant responded that it wasn't aggressive, but that it was childish. She said that Paulina should not have sprayed her with air freshener.

102. The discussion moved on to swearing. Mr Warner put to the claimant that people have a different perception of swearing and some can be offended, although he said that he noted from the majority of statements most people were not. He asked the claimant about the incident where she said to Isabel to put a smile on her face. The claimant said that it was Kibble's language. She said that it was conversational, and she explained the circumstances in which it was said, as she had outlined during the investigation meeting. Mr Warner said that he thought this sounded like the claimant swearing at Isabel rather than conversational swearing. The claimant did not accept this and gave her examples of what she considered amounted to swearing at someone. She also pointed out that Isabel knew that she swore, and the friendly nature of the relationship which she had with her. Ms Hart interjected to say that regardless of whether Isabel had an issue previously, she now had. This had been raised formally. Ms Hart said that this had been addressed through the appropriate channels and by the claimant's own admittance she had sworn at Isabel and purposely sprayed another colleague with air freshener.

103. The claimant responded said that she never set out to offend and apologised it she had.

104. Mr Warner then dealt with point 3 (relating to packet of biscuits) saying that did not have to be discussed.

105. Mr Warner then dealt with point 4 which he said related to the claimant being verbally abusive and tied in with point 2 which he had already discussed. He said the claimant had admitted that she was loud because she was deaf in one ear.

106. He then moved to point 5 which he said related to physical safety. The claimant denied that that she had posed any threat and said it was a complete fabrication. The discussion moved to insulting comments attributed to another member of staff about the claimant, which she had not complained about formally.

107. Mr Warner then dealt with point 6, which he said was threatening to complain about Isabel. The claimant denied saying to the team *"I'll go upstairs about you".* She indicated that she could have complained to management about Rachel, but did not do so, instead dealing with her by taking her outside and speaking to her privately. She did not accept Mr Warners's suggestion that this could be seen as a threat or that some instances could be seen as unprofessional or inappropriate.

108. The meeting ended with the claimant complaining about being suspended on false allegations, the fact that her line manager carried out the investigation and the lack of support from Kay Parker.

109. Ms Hart sent the claimant minutes of the meeting, which the claimant responded to with some proposed amendments on 27 October 2023. She also voiced her concern that she was not permitted to read her statement at the hearing.

110. Ms Hart emailed the claimant on 30 October 2023 responding to some of the points raised by her. She indicated that she would have expected the claimant to raise anything relevant at the point when it was discussed. She also said

thar although it was not in the minutes, she and Mr Warner agreed that the claimant had been told that she could contact HR directly with anything following the meeting and that she agreed to this.

111. The claimant responded indicating that she did not recall this being said, and it was not in the minutes.

112. Mr Warner decided to dismiss the claimant. He issued the outcome of the hearing to her in a letter dated 1 November 2023. This runs to almost 4 pages and set out his conclusions and his reason for them.

113. In relation to point 1 in the investigation report (the air freshener incident), Mr Warner concluded that the claimant had deliberately sprayed Paulina with air freshener. He did not accept that Paulina had deliberately sprayed the claimant first, based on the statement from Paulina and other staff who were present. He considered that the fact that the claimant believed she had smoothed things over following the incident was irrelevant, as colleagues felt strongly enough to speak to management after the incident occurred.

114. Mr Warner considered that as team leader the claimant should have behaved professionally by raising it with the appropriate channels, including her own line manager. Furthermore, he concluded that the claimant lacked awareness as to severity of her actions and that she still believed her actions were justified and were childish rather than unprofessional.

115. In relation to the use of foul language, Mr Warner concluded that although there was a general acceptance that the use of foul language within the domestic team was a regular occurrence, he did not conclude that the claimant's use of such language had always been conversational, but rather, he concluded it had been used in a manner which could be deemed to be unprofessional and inappropriate which could be deemed to be aggressive and intimidatory towards others in the team. He considered this especially true considering the claimant was a team leader and was expected to be a role model for others in the team. He accepted that there was a difference between swearing in conversation and swearing at someone but he

concluded that *"in the instances we are talking about*" the claimants foul language was targeted at Isabel.

116. In reaching this conclusion, he rejected the claimant's position that her behaviour could not be seen as aggressive. He cited as an example of her aggressive behaviour her behaviour during the disciplinary meeting when she stood behind him to demonstrate what happened during the air freshener incident.

117. Mr Warner concluded that in relation to point 4, this linked into the point regarding foul language. He concluded that although the claimant used foul language as part of her everyday language at times her tone, volume and overall language could be considered verbally abusive.

118. In relation to point 5, Mr Warner concluded that the claimant had not posed any threat to the physical safety of her colleagues. He concluded that this was acknowledged by one of the statements during the investigation, recognising that they did not believe that the claimant would physically hit anyone. He did however conclude that the claimant's choice of language could cause colleagues concern for their safety, given the tone, volume and language used as well as her actions. He considered that although the claimant did not perceive her actions as aggressive, this may not be the perception of others. He stated that he considered that it was reasonable for the claimant's colleagues to perceive and interpret her conduct towards them as being aggressive, abusive and intimidating.

119. In relation to point 6 (threatening to complain about other staff), he dd not conclude that there was enough to categorise the claimant's behaviour as unprofessional or inappropriate.

120. Mr Warner did not deal with point 7 specifically.

121. Mr Warner concluded that the appropriate sanction was dismissal on the grounds of gross misconduct. His letter of dismissal included the following:

"After considering all the evidence I have concluded that the appropriate sanction in these circumstances is dismissal on the grounds of gross

misconduct. By your admittance you purposely sprayed a colleague who was in a junior position to you with air freshener in retaliation for what you believe was a purpose purposeful spray from them. In my view, this alone constitutes gross misconduct. I also consider your use of foul language towards colleagues with zero understanding of the potential effect on them, as unprofessional, inappropriate and also conclude that it could reasonably be perceived as aggressive and intimidating behaviour especially given the seniority of your position within the team."

122. Mr Warner's letter of dismissal also included his conclusions that at *times the claimant's tone, volume and overall language could be considered verbally abusive".* He also concluded that it was reasonable for the claimant's colleagues to perceive and interpret her conduct towards them as being aggressive abusive and intimidating,

123. Mr Warner considered whether some sanction less than dismissal was appropriate. He had considered issuing a final written warning, but that he believed that the seriousness of the claimant's actions towards colleagues to be completely unacceptable. He considered that the claimant did not appreciate why her behaviour had been considered unacceptable and this did not give him reasonable cause to believe that she would be able to change her behaviour moving forward or rebuild working relationships with the team.

124. While Mr Warner would have dismissed just for the air freshener incident, he may not have dismissed had it just been the other conduct which was before him.

First Level Appeal

125. The claimant was advised of right to appeal against that decision, which she did on 2 November 2023. The reasons for appeal were that the disciplinary action was too severe; the procedure followed was unfair as it did not follow the ACAS guidelines; all the evidence was not looked at properly; and there was discrimination. The claimant's request that she was accompanied to the appeal hearing by her partner, Mr Service, was denied.

126. The appeal was heard by Mr McMillan, Director of Corporate Service, on 24 November. Mr McMillan was aware of the claimants suspension at the time it occurred and that there was an allegation of spraying a colleague with air freshener. Ms Hart was in attendance.

127. At the outset of the hearing, the claimant read a detailed statement which expanded on her grounds of appeal (page 263 to 269). When the claimant finished reading her statement, Mr McMillan advised her that he would consider all the information and provide a response in writing.

128. Mr Mcmillan wrote to the claimant on 5 December 2023 with his outcome of the appeal. He concluded that the claimant spraying air freshener on Paulina and the other matters dealt with in the investigation and disciplinary hearing justified the decision to dismiss the claimant, which he upheld.

129. Mr Mcmillan's outcome letter ran to some 7 pages. He dealt firstly with the severity of the outcome. He indicated that having considered all of the information he deemed the claimant's behaviour unacceptable and dismissal was the appropriate sanction. He did not accept that this was a first offence but concluded that the claimant's behaviour over a significant period of time had been highlighted and brought to the respondent's attention for the first time through the grievance procedure. He stated that within the process there were a number of statements evidencing that behaviour and confirming it had been apparent throughout the claimant's employment.

130. Mr Mcmillan did not accept that the procedure followed was unfair, and he rehearsed the stages of the investigation and disciplinary procedure in his letter. These included the suspension procedure, which he considered had been dealt with appropriately and that the claimant had been advised by Sandy Mayhew on the telephone on 30 August 2023 that she had been suspended. He did not accept that the claimant did not know the reason why she was suspended, or that Mr Jamieson had asked her random questions; he concluded that Mr Jamison's questions were relevant to the purpose of the investigation. He concluded that the claimant knew what she was accused of at the disciplinary hearing on the basis of an email which she sent to Ms Hart

on 7 September 2023, stating that despite her confusion, all the information she provided had been clarified.

131. Mr Mcmillan did not conclude that all the evidence had not been looked at. He did not accept that the claimant was not permitted to state her case at the disciplinary hearing, on the basis that the claimant had wanted to revisit the whole investigation but that was not the purpose of the hearing. He did not accept that staff had colluded to lodge a grievance against her, on the ground that this was based on only the claimant's assumptions.

132. Mr Mcmillan did not accept that there had been any discrimination. He stated that although he understood that the claimant could be louder when speaking as a result off her hearing issues, she was dismissed due to her behaviour as a whole which he considered to be unprofessional inappropriate and at times aggressive and intimidatory. He stated that setting aside the volume, he considered the claimant's tone and overall language to be completely unacceptable. He stated that the respondents have followed the same process with the claimant as they did for all staff.

133. In the concluding part of his letter, Mr Macmillan stated that the claimant was not dismissed for speaking to the team as a collective, but rather for her behaviour as a whole throughout her employment, which had been brought to the respondent's attention following Isabel's' grievance.

Second level appeal

134. The respondent's procedure provided for a second level of appeal, which the claimant then exercised. The claimant was advised the CEO was not available to hear the appeal. The claimant asked that the appeal was heard instead by at least 3 directors. HR emailed the claimant on 22 December 2023 advising that the CEO was not available to hear the appeal and it was not possible in this instance to follow the policy completely due to various factors and that Mr Souter, the COO, would conduct it. Mr Souter had deputised for the CEO previously in conducting second level appeals. There was no COO position when the policy was written.

135. The claimant ‘s appeal letter reiterated the grounds relied upon at the first level appeal and added that her appeal grounds were not adequately covered in the appeal outcome with numerous points not being addressed and that she had doubts about the accuracy of the evidence presented against her. She again asked to be accompanied by Mr Service, which was declined.

136. The claimant’s letter of appeal ran to 8 pages.

137. The final appeal hearing took place on 5 January 2024. Ms Hart and Ms Kerr from HR were both in attendance. The claimant had asked for Ms Hart to have no further involvement on the basis that she considered her to be biased.

138. At the outset of the hearing, the claimant raised the fact that Ms Hart was present, and she also raised the fact that her appeal was not being considered by the CEO. The claimant then read a statement setting out her reasons for the appeal, and why she considered the dismissal was unfair.

139. At the conclusion of the hearing, Mr Souter said that he would be in touch in due course.

140. Mr Souter did not uphold the appeal, and he issued his outcome letter to the claimant on 22 January 2024. This was also a lengthy document running to 8 pages.

141. In rejecting the claimant’s appeal, the points of Mr Souter’s response included the following:

142. With the reference to the claimant’s point that the reference to unprofessional and inappropriate behaviour was too vague and she was not sure what it referred to, Mr Soutar rehearsed the steps in the investigation/disciplinary process and the questions asked. He did not accept that there was little evidence of aggressive behaviour.

143. The claimant had stated in her appeal that she was naturally loud but that did not make her aggressive. Mr Souter agreed with this, but concluded from the information he had that she was aggressive. He supported this conclusion

with reference to the statements about the use of foul language to colleges and the air freshener incident.

144. Mr Souter rejected the claimant's assertion that there was no evidence of this sort of behaviour throughout her employment, stating that staff had made reference to incidents that occurred before the process began. He considered that there were at least two statements which referred to incidents a number of years ago and he concluded on the balance of probabilities that the claimant had demonstrated such behaviour before but it had only been brought to the respondent's attention recently.

145. Mr Souter dealt with the fact that the respondents did not address matters informally indicating that the respondents could not force employees to take part in an informal process.

146. Mr Souter did not accept the claimant's point that an absence of training impacted matters, on the basis that the claimant's conduct with the air freshener incident/use of language was not a training issue.

147. It was the claimant's position that the suspension was not carried out in line with the respondent's policy; she did not know why she was suspended and she should not have been suspended but should have remained at work and been kept separate from Isabel. Mr Souter responded that the suspension by Mr Mayhew was in person, and that he considered the claimant knew the reasons for it. He reiterated that it was a precautionary suspension and not a prejudgment.

148. Mr Souter considered the claimant's point that the procedure took six times longer than recommended by ACAS. He explained the length of time taken was due to the complexity of the case, the number of people interviewed and the rescheduling of meetings on the claimant's request.

149. He rejected the claimant's position that she did not have an opportunity to state her case on the basis of the steps carried out in the process and how these were conducted.

150. Mr Souter noted that the claimant disputed a date of an incident alleged to have taken place by Isabel. He concluded that taking into account admissions made by the claimant of what he deemed unprofessional and inappropriate behaviour, this did not impact the decision to terminate her employment.

151. Mr Souter rejected the claimant's position that there was discrimination or that her hearing issues were used against her. He stated that it was not the claimant's volume alone that contributed to her termination but her use of foul language and aggressive and intimidatory manner.

Note on evidence

152. There were no material issues of credibility or reliability relevant to the issues which the Tribunal has to determine.

153. Notwithstanding the presence of Ms Hart at the second appeal, despite the claimant's objection on the grounds of bias, the Tribunal accepted the evidence of the disciplinary offices at each stage of the proceedings, that they were the decision makers and not Ms Hart or HR. Nor did the Tribunal conclude that Mr Warner had bullied the claimant at disciplinary hearing. He provided an explanation as to to why he told the claimant that he did not want her to read her statement , which was that he wanted to keep to the structure of Mr Jamieson's report and the claimant agreed to this. The fact that she did so is inconsistent with the suggestion that she was bullied.

154. The Tribunal did not form the impression that the clamant sought in any way to mislead. She was clearly upset by what had happened and at times she became tearful; she also became agitated and angry from time to time in giving her evidence; on some of those occasions she raised her voice. The Tribunal however did form the view that on occasion the claimant lacked insight. In forming this impression, the Tribunal takes into account the claimant's evidence in chief about the 14 August 2023 incident. She very candidly said she felt something coming down over her and thought *"what the hell is that, air freshener?"* She looked at Isabel and said *"that's just fucking gone over me.* She swivelled around in her chair and sprayed Paulina back in response to which Paulina said *"no it wasn't meant for you it was meant for*

(another member of staff)." She swore at Isobel for rolling her eyes and told the rest of the staff present they did not smell so good either. The claimant accepted she was angry, and she became agitated. She appeared angry when she was giving this evidence.

155. Despite the fact that the claimant accepted all of this, she also appeared to take the view that it was Paulina who was to blame; if she had not sprayed air freshener in the first place, none of this would have happened. It was Paulina who should have been disciplined for spraying a team leader. The claimant accepted that Paulina was standing behind her and could not see what she was doing, but justified her immediate response on the basis that it was a deliberate act, or at least the claimant could not know it was not a deliberate act, by Paulina. This view of matters appeared to the Tribunal to indicate a of a lack of insight on the claimant's part.

Submissions

Both parties helpfully provide submissions in writing which they supplemented with oral submissions. In the interest of brevity these are not rehearsed here, but were taken into account by the Tribunal and are dealt with bellow where material and relevant.

Consideration

156. Section 94 of the Employment Rights Act 1996 (the ERA) creates the right not to be unfairly dismissed.

157. Section 98 (1) provides:

> *"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—*
>
> *(a) the reason (or, if more than one, the principal reason) for the dismissal, and*
>
> *(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*

(2) A reason falls within this subsection if it—

(a) …..

(b) relates to the conduct of the employee,

…….

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."

158. The burden is on the employer to show the reason for dismissal and that it was a potentially fair reason. The burden is not a heavy one at this stage and the employer only has to show a potentially fair reason, not that dismissal for that reason was justified. A *'reason for dismissal'* has been described as a set of facts known to the employer, or beliefs held by him, which cause him to dismiss the employee. If on the face of it the reason could justify the dismissal, then it passes as a substantial reason, and the Tribunal goes on to consider the question of reasonableness under Section 98(4) of the ERA.

159. Mr Service submitted that the decision to dismiss the claimant was predetermined. The respondents wanted to do away with the claimant's role of Team Leader, and there had been a removal of some of her duties. Mr Service submitted that support for this is found from the fact that the claimant was never replaced and Isabel was not replaced after she retired. Mr Mcmillan knew about the suspension and the air freshener incident, this was the main point of interest rather than Isabels grievance, suggesting that there

was a discussion at Director level but the claimant was told she was being investigated for bullying Isabel.

160. Mr Service also submitted that the predetermination of the decision to dismiss could be decerned from the fact that Isabel was offered a welfare meeting as part of Mr Jamieson's grievance recommendations. The Tribunal did not accept this. Viewed objectively such a recommendation was not unreasonable in the situation where an employee had brought a grievance about alleged bullying and the Tribunal did not conclude that offering Isabel a welfare meeting supported the conclusion that dismissal was predetermined.

161. The tribunal did not find any evidence to support an alternative motivation for the claimant's dismissal beyond conjecture on her part. Further, the extent of the investigations and procedure prior to dismissal did not support this conclusion that the decision was predetermined or for a reason other than conduct. While the Tribunal is critical of aspects of the disciplinary process, it was not persuaded that the respondents had made up their minds to dismiss the claimant for some other reason and therefore embarked on the disciplinary process and went about finding evidence to support their decision. The Tribunal is supported in this conclusion by the fact that they had received a grievance which reasonably they had to investigate, information came to light as a result of that which objectively warranted further investigation and Mr Jamieson took the precaution of interviewing the majority of the witnesses on one day in an attempt to avoid any collusion.

162. Nor did the Tribunal consider anything turned on Mr Service's submission that Isabel only lodged the grievance because she wanted an excuse to go off sick. This was conjecture in the part of the claimant.

163. The Tribunal was satisfied that the claimant was dismissed for a conduct related reason which was spraying Paulina with air freshener and what the respondents believed amounted to her bullying and aggressive conduct towards Isabel and other members of staff, including the use of what the respondents considered to be foul language. In reaching this conclusion, the tribunal takes into account that the respondents had received a grievance

about the claimant's bullying behaviour from Isabel, statements from some members of staff containing allegations of aggression and swearing on the part of the claimant , and that the claimant had admitted some of the conduct put to her, in particular spraying Paulina with air freshener and swearing at Isabel , albeit she did not accept this was aggressive. The Tribunal was therefore satisfied that the respondents had made out the reason for dismissal under Section 98(1) of the ERA.

164. The Tribunal having reached that conclusion, the issue then is whether the decision to dismiss was fair or unfair under section 98(4) of the ERA. In considering this, the Tribunal reminded itself that the burden of proof is neutral and that the objective test of reasonableness judged by the standards of a reasonable employer applies to consideration of all the procedural and substantive elements of the decision to dismiss.

165. The Tribunal had lengthy submissions from Mr Service about a number of aspects of the process and decision to dismiss, which he submitted rendered the dismissal unfair.

166. He submitted that the decision to suspend the claimant, and the length of the suspension impacted the fairness of the dismissal; there was enough work and claimant should have been deployed away from Isabel, not suspended. The Tribunal did not consider that anything turned on this. The respondents, acting reasonably, were entitled to precautionary suspend the claimant in order to investigate what they considered were serious allegations of bullying behaviour and in circumstances where further allegations had emerged about her conduct. The claimant may have thought that she could be redeployed working away from Isabel but the respondents did not consider that there was enough work to redeploy her, which is an operational decision for an employer to make. It was not unreasonable that they were concerned about her continuing to interact with the domestic staff whom she line managed. Suspension was a reasonable operational decision and is not one which it is open to this Tribunal to interfere with or from which it could conclude was unfair.

167. The respondents policy provided for review of the suspension. Applying the objective standard of a reasonable employer not every failure to adhere to internal policy will render the dismissal process unfair. The fact that the respondents did not review the suspension in line with their own policy, fell into this category, taking into account that the disciplinary process was ongoing throughout the period of the suspension.

168. The ACAS Code at point 8 provides that the period of suspension should be as brief as possible and kept under review. The Tribunal did not consider that applying the objective standard of reasonableness the length of suspension impacted the fairness of the dismissal and did not render the suspension in breach of the ACAS code. While the period of suspension was fairly lengthy, it was reasonably explained by the complexity of the process which the respondents embarked upon. This process generated lengthy fact finding, investigation, disciplinary and appeals processes. The ACAS Code does not require a formal review of the suspension and there was ongoing disciplinary action throughout the period of suspension which rendered it appropriate for the suspension to remain in place.

169. The claimant raised major concerns about the length of her suspension on the basis that it was a topic of gossip in the workplace and allowed staff to come together to collude against her and make things up. The claimant, however, was not suspended until after Mr Jamieson had taken statements from the witnesses which were relied upon during the disciplinary proceedings and therefore the claimant's suspension could not have influenced what was said in those statements.

170. Mr Service relied on the policy failures at the appeal stage. The fact that the respondents failed to adhere to their policy as to who should deal with the second level appeal, applying the objective standard of a reasonable employer was not of itself capable of rending the process unfair in circumstances where the policy provides for an involved appeals process and Mr Souter, who had deputised for the CEO in hearing appeals, stood in to hear it.

171. Mr Service referred to the failure to summarise evidence at the hearings. There was no such summary, however the failure to summaries evidence as specified in the respondent's policy is not capable on an objective basis of rendering the dismissal unfair. It could not be reasonably concluded that the absence of such a summary impacted the fairness of the procedure which was heavily documented and where the claimant had all the witness statements, grievance letters and Mr Jamieson's report and was able to prepare comprehensive statements for the purposes of the disciplinary procedures.

172. Similarly, the failure to provide signed witness statements within the policy time frame could not reasonably be said to impact on the fairness of the dismissal. There was no evidence to suggest they were changed upon being signed.

173. Nor was it unreasonable to refuse the request that Mr Service attend the internal disciplinary meetings with the claimant in circumstances where there was no breach by the respondents of providing the claimant with her statutory right of accompaniment

174. As this is a conduct dismissal, the Tribunal took into account the guidance given in the well-known case of *British Home Store v Burchill 980 ICR 303, EAT* to the effect that:

a. The employer must believe the employee guilty of misconduct;

b. That the employer must had in mind reasonable grounds upon which to sustain that belief; and

c. At the stage at which that belief was formed on those grounds, the employer had carried out as much investigation into the matter as was reasonable in the circumstances.

175. The Tribunal began by considering whether the respondents did believe the claimant guilty of the misconduct for which she was dismissed. The Tribunal was satisfied that the respondents did believe that the claimant had sprayed Paulina with air freshener and that she swore at colleagues and behaved

aggressively with no understanding of the potential effect on them; that this was unprofessional and inappropriate conduct which could and also be reasonably be perceived as aggressive and intimidating behaviour on the part of the claimant. They had some witness statements which referred to the claimant having sworn and behaved aggressively, and the claimant had admitted some of the behaviours she was accused of, as indicated above.

176. The question was, whether at the time the respondents formed that belief, they had carried out a reasonable investigation and had reasonable grounds on which to sustain their belief.

177. The Tribunal firstly considered the reasonableness of the investigation.

178. Intrinsic to a reasonable investigation is that the employee knows what they are accused of and are given an opportunity to state their case having seen the evidence against them.

179. The claimant was very critical and upset about the fact that she was not told who lodged a grievance about her and given a copy of it as part of the grievance investigation. During the grievance investigation, the claimant was asked what she described as random questions by Mr Jamieson. The Tribunal had some sympathy as to why the claimant considered that to be the case as she was not provided with the context of the questions in the form of the written grievance. It did not conclude, however, as submitted by Mr Service, that Mr Jamieson's questions were looking for confirmation of guilt, as many of the questions simply asked the claimant whether she had said or done specific things.

180. It was submitted that it was unfair that the claimant was not made aware at an early stage of Isabel's grievances, as had she been given that opportunity she could have resolved matters with Isabel. It was not unreasonable, however, for the respondents to approach matters as they did. Isabel initially said that she did not want to pursue a grievance and therefore acting reasonably there was no need for the respondents to involve the claimant at that stage. At the point when she did lodge a grievance, Isabel told the respondents she did not wish to pursue mediation; it was not unreasonable

for them to respect this and not insist that she and the claimant engage in an informal consensual process.

181. Mr Service submitted that Mr Jamieson was untrained and as her line manager should not have carried out the investigation. It was not unreasonable however for a member of staff with Mr Jamieson's level of seniority and experience to carry out a grievance or disciplinary investigation without formal training. Nor is it unreasonable for a line manager to conduct a grievance or disciplinary investigation for his direct reports.

182. In any event, the grievance investigation was followed by a disciplinary process. In advance of the first disciplinary hearing, the claimant was provided with Mr Jamieson's report, the grievance and all of the witness statements.

183. There was an issue with the timing of the first disciplinary hearing, which was initially fixed some 2 days after the date the documents were sent to the claimant, which Mr Service submitted this was unfair. The Tribunal agree that the claimant could not reasonably be expected to consider the volume of documentation sent to her prepare for her disciplinary hearing in that time frame. However, the respondents agreed to a postponement of the hearing, which did allow the claimant a reasonable time for preparation and therefore nothing turned on this.

184. The Tribunal considered if the information the claimant received before the disciplinary hearing reasonably set out the charges against her and provided her with the evidence the respondents were relying upon in support of these charges, so that the claimant had a fair opportunity to respond to them.

185. Mr Jamieson's report specifically identified at charges 1 and 2 behaviour alleged against the claimant arising out of an incident on 14 August 2023 (spraying Paulia with air freshener and swearing). She was also provided with witness statements from Paulina, Isabel, Monica Garret and Rachel Stevens all of which dealt with the 14 August 2023 incident and clearly referenced that incident. In advance of the disciplinary hearing, the claimant therefore knew what the allegations were against her arising out of the 14 August 2023 incident and the evidence the respondent relied on in support of those.

186. Point 3 of Mr Jamieson's report (that the claimant threw a packet of biscuits across a table) was not relevant to the disciplinary process as it had not been upheld by him. It was submitted by the claimant that its inclusion was unfair. Albeit it was not necessary to include it, it could not be said that its inclusion was capable of rendering the process unfair in circumstances where it was included as part of Mr Jamieson's report, the totality of which was not unreasonably sent to the claimant.

187. Part of charge 2 and charges 4, 5 and 7 of Mr Jamieson's report were vaguely drafted and a degree repetitious. Charge 2 refers to the 14 of August 2023 incident but also talks about a general use of foul language.

188. Charge 4 refers to verbal abuse of Isabel on various occasions and that the claimant's behaviour could be *perceived* as abuse by Isabel. The charge does not identify what behaviour is said to amount to verbal abuse of Isabel in distinction from the allegations of 14 August 2023.

189. Charge 5 contains the allegation that the claimant's behaviour, whilst not threatening actual harm to Isabel, could be perceived as nearing physical aggression. It is said that a number of staff have witnessed or experienced such behaviour. Other than a general statement about proximity of interactions, volume, tone and language used, no specification is given about what the claimant's behaviour is, or what parts of the witness statements the respondents rely upon on making that allegation.

190. Charge 7 refers to the claimant's conduct at work and behaviour towards Isabel being unprofessional and inappropriate, and not aligning with Kibbles values. It does not specify what conduct is relied upon and what behaviour was directed towards which staff, in distinction from the 14 August 2023 incident. Nor does it state what Kibble values are relied upon.

191. The claimant was not directed to what parts of the 16 statements were relied upon in support of each of these allegations, or, other than the 14 August incident and Isabel's reference to 15 August 2023, when the alleged behaviour was said to have occurred.

192. Mr Service submitted that the claimant did not get a chance to state her case. The Tribunal understood this to refer to the fact that the claimant was not given the opportunity to read her statement in full at the first disciplinary hearing. It was not unreasonable for Mr Warner to take the approach he did, as it was directed to consideration of the charges, and the claimant agreed to it at the meeting. The Tribunal did not accept, as submitted by Mr Service, that the claimant was bullied into this. The Tribunal was satisfied that claimant was able to comment on the 14 August 2023 allegations at the first disciplinary hearing, and that at her two appeal hearings she was given the opportunity to read her statement in full, stating her case.

193. It was however unreasonable for the respondents not to specify the charges against the claimant in a way that allowed her to clearly identify what conduct was alleged, and what specific evidence the respondents relied upon in making each of those allegations, which they had chosen to separate into distinct charges.

194. The consequences of the respondent's failure to frame all of the charges with precision, to identify what evidence was relied upon in relation to these charges, and to specify when that behaviour was said to have taken pace, worked their way through the disciplinary process. In the course of the disciplinary hearing the specific parts of the witness statements (other than those which related to the incident of 14 August 2023) were not put to the claimant in the context of each of the separate charges. There was not real attempt to do this in the outcome letter at the disciplinary stages. Mr Warner dealt with the specifics of the 14 August 2023 incident but thereafter reached general conclusions about the claimant's behaviour. He concluded that '*at times'* the claimant's tone, volume and overall language could be considered verbally abusive, without reaching a conclusion as to what was said which he considered to be verbally abusive and when it was said. He concluded that it was reasonable for the claimant's colleagues to perceive and interpret her conduct towards them as being aggressive abusive and intimidating, without reaching a conclusion about the specific conduct which fell into this category or when or how often that behaviour had occurred.

195. Further, at the first stage appeal Mr Mcmillan rejected the appeal on the basis that the claimant had been dismissed for conduct throughout her period of employment with Kibble. The charges against her however, were not formulated in a way in which the claimant could have been aware that the accusations against her covered the entire period of her employment. Other than the 14 August 2023 incident, the witness statements were either vague or nonspecific about the timing of allegations. The decision to dismiss the claimant did not specify that part of charge 2 and charges 4, 5 and 7 related conduct throughout her period of employment with Kibble. It was unreasonable for Mr Mcmillan to introduce the claimant's conduct throughout her period of employment as a reason for rejecting her appeal in circumstances where this did not identifiably form part of the reason given to her for her dismissal. This unreasonable approach caried in to the second level appeal where Mr Souter, in rejecting the appeal and upholding Mr Mcmillan's decision, relied on the fact that staff had made reference to incidents which were said to have occurred before the process began and considered that there were at least two statements which referred to incidents a number of years ago. He did not specify what statements he relied upon, or what specific behaviour he found the claimant was guilty of in reaching this conclusion.

196. This approach to the disciplinary investigation was not that of a reasonable employer.

197. The Tribunal then considered whether the respondents had reasonable grounds upon which to sustain their belief in the grounds of dismissal.

198. Mr Service submitted that the respondents were not entitled just to accept what the witnesses said without further enquiry. He referred to the fact that Mr Warner talked about Paulina spraying the claimant by accident, when clearly the claimant did not know that that was the case. Mr Warner did not get an explanation of why Paulina had sprayed the claimant; the arrangement of the room meant it was more likely that Paulina sprayed the claimant on purpose. There was no corroboration of Paulina's evidence that the claimant was shouting in her face. Paulina's friends had not said that the air freshener

went on the claimant. Further, the respondents were not interested in the fact that the others were bullying another member of staff.

199. The Tribunal concluded that in this instance the claimant was told what she was accused of, and she had an opportunity to respond to it. She accepted that she sprayed Paulina with air freshener and that she had done so because she was angry. She categorised her behaviour as childish rather than professional. She accepted that she had sworn at Isabel and that she was angry with her.

200. It was not unreasonable for the respondents presented with the evidence they had to accept Paulina's statement that her actions were not deliberate. It was not the case that no enquiry was made as to why she sprayed the claimant. In her statement to Mr Jamieson, she said that she sprayed it 'straight' but some went on the claiman'ts back. She said she tried to explain that it was accidental to the claimant. Nor was it unreasonable for the respondents to accept that Paulina was upset by what the claimant did. The claimant said so during the investigation, albeit she believed she had sorted matters out with Paulina. The respondents acting reasonably were entitled to reach the conclusion that the claimant was angry and deliberately spayed Paulina in an act of retaliation.

201. It was not unreasonable for the respondents not to attach much weight to the claimant's position that there was bullying of another member of staff, when none of the statements, including the claimant's, confirmed that the member of staff who the claimant said was being bullied was present when Paulina sprayed the air freshener in the first place.

202. The Tribunal was satisfied that the respondents had reasonable grounds on which to sustain their belief that the claimant had been angry and deliberately sprayed Paulina with air freshener in an act of retaliation. They also had reasonable grounds upon which to sustain the belief that the claimant had sworn aggressively at Isabel on 14 August 2023. The claimant accepted that she swore at her and that she was angry with Isabel.

203. The respondents did not have reasonable grounds upon which to sustain their belief in the other grounds upon which they dismissed the claimant on the basis that they had not carried out a reasonable investigation at the point of forming that belief as set out above.

204. The Tribunal concluded that the second two limbs of the Burchell test had not been met in respect of the conduct for which the claimant was dismissed, other than her conduct on 14 August 2023. The reason for dismissal was therefore in part on the basis of conduct for which the respondents did not have reasonable grounds to sustain their belief and applying the band of reasonable response test, dismissal for such a reason fell out with the band of reasonable responses and the dismissal was unfair.

Compensation

205. This hearing was fixed to determine the merits, with remedy being held over, however it was agreed that as part of this judgement the Tribunal would deal with whether there should be any reduction/uplift to compensation on the grounds of *Polkey,* contributory conduct, and failure to comply with the ACAS code.

206. The claimant is entitled to a basic award and a compensatory award in terms of section 118 of the ERA.

207. Mr Service submitted there should be no reduction on any ground. Mr Gory sought reductions at the highest level.

The compensatory award

208. The compensatory award is calculated under Section 123 of the ERA and shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the claimant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

Polkey reduction

209. The Tribunal firstly considered if there should be any reduction under the principles to be derived from *Polkey v AE Dayton Services 1988 142 ICR HL.* Following that case, if there is evidence to support the conclusion that the respondents might have dismissed the clamant if they acted fairly, it is bound to consider whether compensation should be reduced to reflect the likelihood that the employee would still have been dismissed. The Tribunal is bound to consider whether there should be a *Polkey* reduction, even if that involves an element of speculation. In conducting this exercise, the Tribunal needs to consider both whether the respondents could and would have dismissed the employee. The Tribunal reminded itself that in considering *Polkey*, the burden of proof is on the employer.

210. The Tribunal found that the dismissal procedure was unfair as set out above. There was, however, evidence before the Tribunal which supported the conclusion that, despite the unfairness which it found, a potentially fair conduct reason for dismissal would have emerged. For the reasons set out above, the respondents would have been reasonably entitled to conclude that the claimant had deliberately sprayed Paulina with air freshener in an act of retaliation and sworn aggressively at Isabel on 14 August. The claimant had been told of this conduct at charge 1, had the opportunity to comment on it, the respondent had 4 witness statements confirming that it happened; and the claimant admitted that she did this although she did not accept that Paulina had not acted deliberately in the first place. The respondents would also have been reasonably entitled to conclude that the claimant swore aggressively at Isabel during the same incident, given the claimant's admission and the statements they had.

211. The Tribunal firstly considered whether the respondent could have reasonably dismissed the claimant for this reason. In doing so it reminded itself of the test laid down in the well-known case of *Iceland Frozen Foods Ltd v Jones 1983 ICR 17, EAT,* in which the court stated that:

(1) the starting point should always be the words of [S.98(4)] themselves;

(2) in applying the section [a] tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the… tribunal) consider the dismissal to be fair;

(3) in judging the reasonableness of the employer's conduct [a] tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;

(4) in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;

(5) the function of the… tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.'

212. The respondents would have reasonably been entitled to take into account the claimant's position of seniority to Paulina. She was Paulina's team leader and it was reasonable for the respondents to expect the claimant not to behave aggressively towards Paulina. The claimant complained in the course of the disciplinary hearing that she had not had training, but it was not unreasonable for the respondents to take the view, as they did, that not behaving towards more junior staff aggressively in an act of retaliation was not a training issue. It was also reasonable for the respondents to take into account the claimant's failure to appreciate the serious nature of her conduct. Her position was that her behaviour was childish, however she explained this by saying that that she was annoyed; her hair and uniform were wet. Mr Service submitted no account was taken of the claimant's sensitivities to smell because of her medical condition, however this was not the reason she gave for her reaction to Paulina during the disciplinary process. Not did she say this in her evidence as to what occurred on 14 August 2023.

213. Mr Service submitted that the respondent could not have known that the claimant would not change in the future, however an employer acting reasonably would be entitled to make a reasonable assessment based on the evidence available, even if the employer cannot know with certainty that their assessment is correct. It was not unreasonable for the respondents to take into account the claimant's lack of awareness about the impact of her conduct on Paulina. The respondents acting reasonably were entitled to make the assessment which they did. It was reasonable to take into account the degree of upset which Paulina felt, which supported the conclusion that the claimant's behaviour was aggressive rather than childish.

214. Acting reasonably, the respondents would also take into account the claimant's length of service and clean disciplinary record.

215. Weighting those factors together, it could not be said that a decision to dismiss the claimant for spraying Paulina with air freshener in an act of retaliation was one which fell out with the band of reasonable responses open to an employer.

216. The Tribunal also concluded on the evidence that the respondents would have dismissed the claimant for this reason alone. Mr Warner's letter of dismissal states so in terms.

217. The effect of these conclusions is that applying the principles to be derived from *Polkey,* the Tribunal concluded that had the unfairness found in the dismissal not occurred there was still a 100% chance that respondents would have dismissed the claimant and that it was just and equitable to reduce the compensatory award by that amount under Section 123 (1) of the ERA.

Contributory conduct

218. In light of its finding on *Polkey*, any contribution for contributory conduct would have no practical effect. For the sake of completeness however the Tribunal considered this

219. Section 123 (6) of the ERA provides:

> *"(6) 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."*

220. The question is should be any reduction to the compensatory award on the grounds that the claimant by her conduct caused or contributed to his dismissal.

221. The Tribunal was satisfied that the claimant deliberately sprayed Paulina with air freshener in an act a of retaliation and that she behaved aggressively to her when doing so. The claimant's evidence in chief in this point was that she was aware of Paulina getting up to go into the laundry. She then felt something coming down over her and thought "*what the hell is that, air freshener*?" She looked at Isabel and said *"that's just fucking gone over me"*. She did not see Paulina spray the air freshener The claimant turned round in her chair and sprayed Paulina back, in response to which Paulina said *"no it wasn't meant for you it was meant for (another member of staff)."* She swore at Isabel for rolling her eyes and told the rest of the staff present they *"did not smell so good either."*

222. Both the substance of what the claimant said about the incident and the agitated and angry manner in which she gave this evidence supported the Tribunal's conclusion that the claimant had acted aggressively towards Paulina, spraying her with air freshener in an act of retaliation and that such conduct on her part was culpable and blameworthy. This conclusion is also supported by the degree of upset which Paulina felt as a result of the incident. The claimant gave evidence to the effect that later Paulina was crying and saying she could not remain working with the respondents. Even if the claimant thought she had sorted this out, she clearly had not as Paulina remained upset and was looking for another job as reported to Mr Jamieson.

223. The Tribunal was also satisfied that it was this conduct which was the material cause of the dismissal. Mr Warner's letter makes clear that he would have dismissed the claimant for this conduct alone. The Tribunal found in these

circumstances the appropriate level of reduction to reflect contributory conduct was 100%.

The Basic award

224. The basic award is calculated under Section 119 to 122 and 126 of the ERA.

225. Under Section 122 (2) of the ERA, a reduction on the ground of the employee's conduct must be made where *'the tribunal considers that any conduct of the complainant before the dismissal was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent'.*

226. The Tribunal concluded that the claimant's conduct was culpable and blameworthy. Taking into her account her seniority to Paulina, and the aggressive nature of the conduct, the Tribunal was satisfied that it was just and equitable to reduce the basic award to zero.

ACAS uplift

227. In light of its finding above any uplift for a breach of the ACAS Code would have no practical effect. For the sake of completeness, however, the Tribunal considered this.

228. Point 9 of the code on investigation provides that:

"This notification (of the disciplinary case to answer) should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification.

229. There was a breach of this to the extent that all of the charges were not made clear, as set out above.

230. The Tribunal did not conclude that there was a deliberate intention on the part of the respondents to not to follow the Code . In reaching this conclusion it

took into account together with the fact that there had been considerable disciplinary procedures , include three hearings and a very extensive investigation. Taking all of this into account the Tribunal concluded that it would been just and it would be just and equitable to assess the uplift a 10%.

231. The effect of these conclusions is that no monetary award is made against the respondents.

Disability discrimination claim

Disability status

232. The claimant has the burden of proof to establish disability status under the Equality act 2010.

233. The EQA at section 6 defines disability:

"(1) A person (P) has a disability if —

(a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities."

234. Supplementary provisions on disability status are contained in Schedule 1 to the EQA, and in the Guidance on matters to be taken into account in determining questions relating to the definition of Disability (the Guidance), and the Equality and Human Rights commission Code of Practice and Supplement (the Code).

235. Schedule 1 (a) Part 1 to the EQA provides that:

"The effect of an impairment is long term if:

a) it has lasted for at least 12 months15

b) it is likely to last for at least 12 months or) it is likely to last for the rest of the life of the person affected"

236. Impairment is to be given its ordinary and natural meaning. It is a matter for the Tribunal to make a decision in each case on whether the evidence available establishes that the claimant has a physical or mental impairment within the stated effects.

237. In relation to normal day-to-day activities the Guidance provides:

"In general, day to day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport and taking part in social activities."

238. Substantial means *"more than minor or trivial".*

239. The focus should be on what an employee cannot do or can do only with difficulty, and not on what they can easily do.

240. It is accepted that the claimant that has a hearing impairment and that it is long term; the Tribunal was in any event satisfied that that is the case.

241. Issue is taken with the effect of that impairment and whether it is more than trivial or minor. The Tribunal was satisfied that the claimant does regularly experience difficulty in hearing what is said to her as a result of her difficulty hearing certain high frequencies sounds. Where there is background noise such as at work with a tumble dryer being on , or in a pub with music or wider conversation the claimant can only hear what the person closest to her saying. She in unable to take a telephone call if there is background noise. The claimant's inability to hear high frequencies results in her asking for things to be repeated to her on a regular basis, which she finds stressful.

242. The Tribunal also accepted the claimant's evidence that her hearing impacted her ability to take part in conversations socially and this has resulted in her becoming withdrawn socially.

243. The Tribunal was satisfied, applying the tests outlined above, that this had an impact on the day to day activity of taking part in conversation, and that given

the claimant has become socially withdrawn as result of this, the effect of the impairment was more than trivial or minor.

244. The Tribunal therefore concluded that the claimant had disability status under the EQA.

Section 13 claim

245. In considering the discrimination claims the Tribunal reminder itself that the claimant had the initial burden of proof. If she discharges that, the burden then shift to the respondent.

246. Section 13 of the EQA provides:

"(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

247. Section 23 of the EQA provides:

(1) On a comparison of cases for the purposes of section 13, 14, 19 or 19A there must be no material difference between the circumstances relating to each case.

(2) The circumstances relating to a case include a person's abilities if—

(a) on a comparison for the purposes of section 13, the protected characteristic is disability…

248. There is no issue of knowledge of the fact that the claimant had a hearing impairment was argued. The claimant told the respondents that she had this impairment

249. The Tribunal understands the claimant's position to be that the respondents used the volume at which she spoke to justify the decision to dismiss her. Mr Service submitted that the respondents knew the claimant had a hearing impairment; the respondents referred to the claimant's volume and tone three times in the investigation report and twice in the dismissal letter. He submitted

it was used to make her appear aggressive to colleagues, when it had been shown that she was not.

250. The respondent's position is that the claimant was dismissed because of what she said and the tone she took, not solely the volume of her speech. If the claimant spoke loudly because of a hearing impairment, no action had ever been taken against her for being loud.

251. The consideration of a claim under Section 13 requires a comparative exercise, comparing the treatment of the claimant with that of a with a real or hypothetical comparator. No real comparator is identified, and the Tribunal understand the claimant to rely on a hypothetical comparator.

252. Taking into account the terms of Section 13 and 23, on the claimant's case that she spoke loudly because of her hearing impairment, that comparator would be a person who did not have the claimant's protected characteristic and therefore did not speak loudly, but whose material circumstances were the same. That would be a person who the respondents had found had sprayed a junior line report with air freshener in an act of retaliation when she had been angry, had spoken angrily to other staff and sworn at another team leader during the incident on 14 August 2023.

253. The Tribunal agreed with Mr Gorry's submission that there was no evidence to support the conclusion that such a comparator would have been treated differently. In reaching this conclusion, the Tribunal takes into account that the claimant had worked for a number of years and there had never been an issue raised by other staff members or by with the respondents because of the volume at which the claimant spoke. It appeared to the Tribunal that the reference to the volume of speech in the disciplinary process reflected the claimant stating in her explanation of matters that she is loud, and the respondents attempting to explain that it was not her volume but her tone of voice and what she did which cause them a problem.

254. The Tribunal was satisfied that it was what the claimant did and said, and how she said things, rather than the volume at which she spoke which was the reason for the treatment complained of.

255. The effect of this conclusion is that the Section 13 claim fails.

Section 19 claim

256. Section 19 of the EQA provides:

> *"(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.*
>
> *(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—*
>
> *(a) A applies, or would apply, it to persons with whom B does not share the characteristic,*
>
> *(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,*
>
> *(c) it puts, or would put, B at that disadvantage, and*
>
> *(d) A cannot show it to be a proportionate means of achieving a legitimate aim."*

257. The starting point is to consider what provision, criterion or practice (PCP) is relied upon had been established.

258. The PCP identified by the claimant was that of subjecting employees who speak loudly to disciplinary action. It was suggested by Mr Service that the application of this PCP was supported by the fact that there were a number of references to the claimant's volume in the course of the disciplinary proceedings.

259. There was no evidence to support the application of such a PCP beyond this. The Tribunal did not conclude that such reference as there was to the volume of the claimant's speech during the disciplinary procedure supported the existence of the PCP relied upon.

260. The Tribunal did not conclude that the claimant was disciplined because she spoke loudly and there was no evidence of anyone else being disciplined because they spoke loudly.

261. The Tribunal was not satisfied that the PCP relied upon by the claimant had been established and the effect of this is that the Section 19 claim fails.

L Doherty
_____
Employment Judge

28 November 2024

Date

Date sent to parties **29 November 2024**