



EMPLOYMENT TRIBUNALS

Claimant: Ms N Moncrieffe
Respondent: Tesco Stores Ltd
Heard at: Croydon (by video hearing) **On:** 14 April and 6 May 2021
Before: Employment Judge Parkin

Appearances

For the claimant: Mr T Lester, Counsel
For the respondent: Ms L Gould, Counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that:

- 1) The claimant's claim is well-founded; she was unfairly dismissed by the respondent;
- 2) Compensation for unfair dismissal is to be reduced by a percentage of 90%; and
- 3) A remedy hearing, if required, is listed by remote video hearing on 5 July 2021, commencing at 10:00 am.

REASONS

1. The claim and response

By a claim form presented on 16 September 2020, the claimant claimed unfair dismissal from her position as a Picker with the respondent at its Croydon Customer Fulfilment Centre on 19 June 2020. In extensive narrative details of her claim, she criticised the adequacy, fairness and independence of the respondent's investigation, the conclusions drawn and the procedure adopted by and independence and approach of the disciplinary manager and maintained that she was dismissed for a different charge from that first laid against her. Notwithstanding some references to discrimination and an express citation of the out of time provisions in the Equality Act 2010, there was no discrimination claim under that Act presented although the claimant expressly referred to her own nationality and ethnicity as British Jamaican and that of the work colleague she was involved with, DS, as Jamaican.

2. In its response presented on 3 November 2020, the respondent admitted summarily dismissing the claimant on 19 June 2020. It said this was because of her gross misconduct in fighting with DS on the shop floor, and it had carried out as much investigation as was reasonable in all the circumstances, followed a reasonable procedure and formed a genuine and sustainable belief on reasonable grounds that she was guilty of misconduct; therefore, the sanction of dismissal was fair and reasonable. Alternatively, if the dismissal was unfair, it contended the claimant would have been dismissed in any event and/or that she caused or contributed towards her own dismissal.

3 The Issues

The liability issues were discussed at the start of the hearing and were as follows:

3.1 Has the respondent proved a potentially fair reason or principal reason for dismissing the claimant, within section 98(1) and (2) of the Employment Rights Act 1996. The respondent relies upon a reason relating to the conduct of the claimant, contending it summarily dismissed her for gross misconduct on 19 June 2020.

3.2 If so, applying section 98(4) ERA 1996, with no burden of proof on either side, the decision whether the dismissal was fair or unfair (having regard to that reason), depends on whether in the circumstances including the size and administrative resources of the respondent it acted reasonably or unreasonably in treating that as a sufficient reason for dismissing the employee, having regard to equity and the substantial merits of the case.

As to reasonableness, the claimant pointed in detail to procedural failings in the conduct of the investigation and disciplinary process such that the respondent failed to establish a fair and balanced view of the facts relating to the allegations against her, contending the investigation, disciplinary manager and note-taker were not independent but biased, that the disciplinary manager based his conclusions upon summaries which were inconsistent with the investigation notes and evidence before the disciplinary hearing and ignored evidence which could help the claimant or used it against her, failed to follow its own disciplinary policy and procedure and failed to provide a fair workplace appeal. The respondent contended that its decision to dismiss the claim was reasonable following a reasonable investigation and a fair procedure and was a reasonable sanction in all the circumstances; it was within the band of reasonable responses open to a reasonable employer.

3.3 The Tribunal agreed that it would hear submissions on and give judgment on contributory conduct and Polkey issues as part of the initial liability stage.

4. The hearing

The case was listed for hearing on 6 September 2021 but then brought forward to 14 April 2021 and held by CVP video hearing. In the event only the respondent's evidence could be concluded that day and evidence and speeches were completed on 6 May 2021 with judgment reserved. The respondent called its Croydon CFC

Delivery Operations Manager, David Joseph, who held the disciplinary hearing and decided to dismiss and its Crawley CFC manager, Jon Crouch, who heard the appeal. The claimant gave evidence on her own behalf. There was a joint bundle of documents (1-345). Before the second day of hearing, the claimant provided an up-to-date schedule of loss and remedy documents although these were not referred to in evidence.

5. At lunchtime on the first day, the respondent disclosed the full version of the Investigation Checklist including Paula Sheehan's "Rationale for Natasha Moncrieffe"; although a partial version of the checklist was included in the Bundle, the last page with the Rationale (which should have accompanied it) was listed separately at page 334 as being the Appeal Manager's Rationale; the claim was given time to consider and give instructions upon this new document. During the evidence of the claimant on the second day, the Tribunal was troubled by extraneous noises which sounded like someone prompting her on her answers; upon the Judge's inquiry, the claimant explained that a radio upstairs may be causing difficulties and turned it off and closed her doors. The Judge reminded the claimant of her obligation to give evidence unprompted and gave her the benefit of the doubt that she had not done so earlier; her evidence was concluded without further interruption.

6. Credibility of witnesses

Regrettably, the Tribunal did not find any of the three witnesses to be wholly reliable. It concluded that Mr Joseph, who consistently avoided answering questions when cross-examined, downplayed the impact of the strong recommendation by Paula Sheehan as to the claimant's guilt and failed to appreciate that the claimant had not seen the interview records before the disciplinary hearing; it could not accept that he had completely disregarded the versions of individuals he regarded as partial. Notwithstanding the very detailed response to the 22 points in the grounds of appeal provided by the appeal manager Mr Crouch, the Tribunal did not find that he gave full and objective consideration to the claimant's appeal, especially with a prepared response settled in advance by the HR team. The Tribunal also found the claimant's evidence generally inconsistent and often unreliable; by the time of her statement and the hearing, she was hardly prepared to accept the extent of her own involvement and culpability (although she had not denied striking DS with a teampad at the interview on 15 June 2020 and had acknowledged retaliation to the police relatively soon after the incident); she was entirely unconvincing about why she had not left the scene when it was apparent that DS did not wish to speak with her. Despite the tenor of her responses to the respondent in her interviews about DS's threats towards her and her witness statement where she stated she "avoided confrontation due to my fear of being physically attacked by DS whom I know is physically stronger than me", she had also told Ms Sheehan in that second interview that she was not scared of DS or even threatened by her.

7. The facts

From the oral and documentary evidence, the Tribunal made the following findings of fact on the balance of probabilities. It has initialised the identity of individuals and witnesses below Team Leader and management level. The teampad (or picking stick or scanner) is the hand-held stock location device used by pickers during their work.

7.1 The respondent is a major national retailer employing some 300,000 workers in the UK, with extensive management and administrative resources. It has a detailed online Disciplinary Policy, which is supported by prescribed checklists to be followed at each stage for the managers who are carrying out the various stages under the policy: suspension, investigation, disciplinary hearing, appeal.

7.2 Thus the Investigation Checklist includes within its guidance:

- Investigate calmly and promptly
- Gather all the relevant facts before memories fade, and establish whether a case exists
- Be objective, fair and consistent, and consider each case on its individual merits
- Avoid making judgements until all the facts are known- keep an open mind

The checklist includes guidance about the form of questioning in interviews and making decisions on the balance of probabilities, the investigator having the responsibility of deciding whether there is a disciplinary case to answer (Checklist p.6), that is to decide based on the evidence they have gained whether the conduct warrants the employee being invited to a disciplinary hearing (63-64).

The checklist expressly expects the investigator to provide “a copy of anything that will be used to make a disciplinary decision to the colleague” (Checklist p8).

7.3 The disciplinary policy at page 65 provides for the invitation to the disciplinary hearing to enclose a copy of any paperwork/documents relating to the disciplinary (unless they have been provided separately). Likewise, the Disciplinary Checklist, under Disciplinary Overview, at Step 2 states:

“Send letter inviting colleagues to hearing (with copies of all evidence)”(194);
and

under Step 3 Conducting the Hearing states:

“2. Explain the hearing is to deal with allegations of XXX in line with our disciplinary procedure and that they will have the opportunity to fully state their case/challenge any evidence and put forward any mitigation or evidence of their own”; and

“7. If the colleague challenges the statements, tell them we can re-interview with the specific questions they can put forward.”(196).

7.4 The claimant who is of Jamaican origin had been employed by the respondent since 4 October 2012 and worked as a picker (or personal shopper) at its Customer Fulfilment Centre (CFC) Croydon. She had a completely unblemished disciplinary record during that time. She worked on the morning shift (ie working in the very early morning).

7.5 The claimant felt that she had consistently been bullied by a colleague DS, who is also of Jamaican origin, in particular during an incident in April or early May 2020 when DS hit the claimant with a trolley she was using; the claimant believed this was a deliberate act by DS but DS refused to apologise.

7.6 In her witness statement, the claimant stated that on 28 May 2020 there was an incident in the canteen when she was threatened by DS that DS would give her “a

good beating". She immediately left the canteen in fear for her safety, but DS approached her once again and told her she was going to mess her up. In her first interview, she stated that Ds had threatened her again on the morning of 2 June before the incident.

7.7 The claimant never reported these incidents to her supervisors or management but did tell some colleagues who she was friendly with. She considered there was a supportive clique around DS, which she felt meant that formal action would not assist but an informal approach might.

7.8 The other person involved, DS, also acknowledged past friction and bad feeling which she did not report to her supervisors; she contended the claimant had deliberately hit her with a trolley. She too did not report any incidents with the claimant to supervisors or management, also feeling there might be informal resolution (within their community). The two had clearly known each other for a considerable time and had been friends previously.

7.9 Early in her shift on 2 June 2020, the claimant explained the situation to two colleagues LM and DL, who were on talking terms to DS, and hoped that they would convey a message to DS that the claimant wished to speak with her (to try to resolve the situation). LM was a friend of hers and she knew DL, whom she was also friendly and on speaking terms with, was a friend of DS's.

7.10 Although the claimant believed DL indicated that DS was prepared to talk, the opposite was true and DS did not wish to hold a conversation with the claimant at all and she told DL so. The claimant later suspected DL had "set her up" by failing to pass this on to her.

7.11 There was no active CCTV coverage and therefore no footage showing the area DS was working.

7.12 It was not in dispute that soon after her shift started, at about 5.30am, the claimant approached DS's workplace with LM and DL, having walked some distance from where she herself was working, intending to prompt some form of resolution. It was also not disputed that heated words were spoken and the two, DS and the claimant, ended up in a fight on the floor by DS's workplace which others had to intervene in and pull them apart.

7.13 The claimant was suspended by Alex Bozern, Picking Operations Manager, at 6.05 am, pending investigation and called to an investigation meeting early in the morning on 4 June.

7.14 The claimant reported a crime (of an assault on her by DS) herself to the police at 11.10am on 2 June (79-80). As a result, she then made a detailed statement to the police on 13 July 2020 (293-294) and signed it on 4 August 2020:

"On Tuesday 2 June 2020 at approximately 5.30am I was victim to an assault from a colleague at Tesco that resulted in me getting injured...

DS and I used to get along...

I heard from colleague that DS saying I am troubling her and, when it was in fact the other way around. I decided to speak to her about it. I asked LM and DL to come with me. The reasons why I asked them to go with me is that DS had been telling lies on me and I didn't want her to say stuff that I didn't. We went to aisle 29. DL was in front of me and LM. DL said DS and DS began shouting, saying "I don't want anyone to talk to me" I said "Is it because you know that you're lying on me?" DS started to swear at me in Jamaican swear words. Then DS made a rude comment ... I replied with an insult back... and I understand it was an insult but she was being horrible to me She got very upset and said "you're a troublemaker" I said "why do you think I'm a troublemaker?" DS had the Tesco hand held scanner in her hand. She approached me and hit me on the top of my head two times, very hard I was so scared and so shocked. I retaliated, however I cannot remember exactly what as I was so shocked. I believe I hit her, but not sure if I hit her on her hand or face. She grabbed my hair and pulled me onto the floor. I don't really remember what happened after this. I was blacked out for a few seconds due to the hit on my head. I think she may have hit me when I was on the floor on my forehead. I remember hearing screaming but I cannot remember any exact words spoken...

7.15 The claimant then also attended her GP on 2 June at 12.33 (165-166), having initially sought a consultation by telephone she had been advised to attend in person because she was reporting a head injury. She complained of being attacked by a colleague at work and examination showed her central nervous system was normal, but she had a minor head injury: small, tiny haematoma central scalp, swelling front left forehead, tender 1cm x 1cm with mild concussion. She was advised to use ice compression for swelling and to buy over the counter Neurofen.

7.16 On 2 June 2020, Mr Bozern sent her a letter confirming the claimant's suspension pending the investigation of an allegation of fighting on the shopfloor with DS. She was called to an investigation meeting on 4 June (78).

7.17 Paula Sheehan, Picking Manager, was tasked with the investigation. She interviewed many witnesses beginning with DS. The starting point in notes she made on her own investigation checklist was that the allegation was a "fight on the shop floor" and the key areas she intended to discuss with the colleagues (the claimant and DS) were to get them to "explain what happened" and whether there was "any history". Ms Sheehan dealt with all the interviews, with a separate note-taker and some employees were accompanied by trade union representatives.

7.18 There was a long interview with DS (81-92) on 3 June from 10.02-11.14am. DS blamed the claimant and explained there had been significant history of bad feeling. She received sympathetic questioning from Paula Sheehan: "...She strikes you first on eye/temple - before that strike did you tell her to leave you alone... did you at any time raise your voice or lose your rag at any time...". Although Ms Sheehan also put "...But you admit you put her to floor...", when DS replied that she was defending herself, Paula Sheehan said: "In your eyes when she strikes you your natural reaction was to defend yourself". She then allowed the representative to pass on hearsay comment of what an individual who is not prepared to come forward has heard said in the toilets (by the claimant and LM). DS went on to say that no report of

her head injury was recorded in the accident book although she had been given a pack of peas (for her head).

7.19 The next interview was with GD, on 3 June at 12.17-12.29 (93-95), before the claimant was interviewed. On the face of it an independent first aider who had not witnessed the incident but was called to give first aid, GD reported the swelling to DS's forehead and that DS said the claimant had caused it. However, her involvement was not simply as an independent first aider since she was then permitted to give the hearsay version that DS had complained to her about being threatened by the claimant several times previously and moreover that she had been told by someone else (who wanted to remain anonymous and would not come forward) that this person had heard a discussion between the claimant and LM about waiting in the toilet for DS to come in and deal with the issue. This tainted GD's independence and influenced Ms Sheehan's approach to the investigation.

7.20 The claimant was interviewed at length by Paula Sheehan on 4 June 2020 at 5.50-7.12am (102-115). At this and subsequent meetings with the claimant she was accompanied and represented by her GMB representative, Elson Briggs. The respondent normally recognised the USDAW trade union and was used to dealing with that union's representatives. Whilst the claimant considered that the respondent treated her representative suspiciously because of her different representation, nothing turns on this. The respondent was entitled to request Mr Briggs' accreditation and once he had established it, he played a full part in representing the claimant at the different meetings.

7.21 Having recounted the trolley incident, she said:

"I was walking past her and she said watch for me and you watch what I will do to you I got scared ... I told DL what she said as both have be(en) communicating about me, she said she will bring me to her to talk. Went to her try to talk to her she hit me with scanner twice. I blacked out fell on floor and LM was restraining her..."

She confirmed that DS had hit her twice on the head, maybe more - she couldn't remember. When asked if she hit DS at all with a scanner, she said she couldn't remember, she had blacked out on the floor and when she came round she saw LM holding her down and 5 people were pulling her away. She accepted she was not working on aisle 29 but had gone to look for DS to speak to her. She had gone with two others because to had threatened her, told her she was going to mess her up. Her representative encouraged the claimant to show Ms Sheehan her police report.

7.22 However, the tenor of Ms Sheehan's questioning of the claimant was slanted. When the claimant told her she understood that DS was telling lies about her, Ms Sheehan put: "You are listening to hearsay about DS ... so have been listening to hearsay for little while... has it been winding you up, getting to you... you purposely went to F2 to confront DS... so you purposely went to confront talk have it out with her...". The claimant maintained that she only went to talk to DS. She explained she had visited the GP who had examined her head injury. At the end of the interview, whilst not recorded in the notes, Ms Sheehan told the claimant at the end of the interview on 4 June that she would face a disciplinary hearing and Mr Briggs told her she should not proceed to this stage without fuller investigation and viewing the CCTV evidence.

7.23 Alex Bozern, Senior Picking Operations Manager was interviewed on 4 June at 8.36-8.47am (117). He confirmed that he had suspended the claimant pending investigation, that she looked upset and kept touching her bun on her head, but he felt she didn't look dazed or confused; he was not question further about her keeping touching the bun on her head. He said she did not complain of being hit by a team pad. When he saw DS, she did look confused and shaky with a lump on her and she did complain of being hit.

7.24 DL was interviewed on 4 June at 9.20-10.00am (96). She said the claimant told her she was going to go to DS taking LM as a witness because DS was telling lies on her. Ms Sheehan put to her: "But (the claimant) said she was going to confront DS that day in front of LM that day" and DL said "Yes... (the claimant) said she is going to talk to her as she is tired of it". She said the claimant was angry. DL had then told DS that the claimant was coming to see her and DS said "Not this morning". When she saw the claimant and LM in aisle 21 she asked where they were going, and they said to F" to DS. She had gone with them down there and DS said: "not this morning I'm not having it this morning" then she heard the claimant call DS a monkey; they were throwing insults at each other and it got heated, the insults were getting more aggressive from both sides. DS said in the end she can't be bothered with this, then the claimant whacked her with the scanner first they were both in each others' faces pointing with their scanners next the claimant struck DS somewhere in the face wasn't expecting that I had to scream. DS reaction was that she had the claimant on the floor, I don't understand what happened it was really quick...DS punched her with her fist...LM and KT pulled DS off... when the claimant got up she threw her team pad at DS but it didn't hit her it fell to the floor. She considered that the claimant started it but the instigator was LM because the claimant was a different person when LM was not about.

7.25 LB was interviewed 4 June 10.09-10.25am (124). She was a first aider who arrived when the incident had finished but saw a clear lump on DS head and no really obvious injury on the claimant. When she asked the claimant if she was all right, although the claimant replied "No", she did not follow this up at all.

7.26 Andrea Gunyho, a manager who had taken notes during Alex Bozern's suspension meetings with the claimant and then with DS, was interviewed on 4 June at 10.30-10.42am (120). The manager felt the claimant was quiet and very nervous when answering questions by Mr Bozern but saw no obvious injury on her and confirmed she did not say she had been hit over the head with a team pad or ask for a first aider. Whilst DS was not dazed or confused, she had an obvious lump on her head which was being treated by an ice pack.

7.27 SM, a picker, was interviewed on 4 June at 13.12-13.37 (128). She described being at F2 behind the claimant and LM and sing the claimant hit DS with her team pad after which they started fighting and the claimant was on the ground; after people came and broke it up she saw the claimant throw her team pad at DS but it didn't catch her. She said the claimant struck first and she saw the hands first because they were "proper cussing". Ms Sheehan put to her "But (the claimant) struck first?". She identified LM as the instigator who had pushed the claimant into it.

7.28 LM, a picker, was interviewed on 5 June at 7.02-7.34am (133), (140). She said that the claimant had told her that she wanted LM to follow her, there was a problem

because DS wanted to fight her and she needed to talk to her to see if she could resolve it. She was walking with the claimant and DL was already walking to F2: "So DS I can't remember who said what she wanted to talk DS looked like she wasn't in mood by reaction DS got in (the claimant) in face with scanner. DS hit the claimant in face with scanner". She said DS moved the claimant and flung to her to the floor and was kicking her with the scanner. She saw the claimant lose consciousness and went over to DS and DL was there and she was crying out saying "No No No". She went over and pulled DS off the claimant as she was on the floor. She told them they were going to lose their jobs for foolishness. When she was asked if she did not think a manager should be told if the claimant thought DS wanted to fight her she replied: "There are so many staff on shop floor if we are ladies and Jamaicans we try and sort it out even social distance we sought it out. If (the claimant) said she wanted to fight I would have said to report it to manager. Maybe we should have spoke to manager. But as ladies thought we could sort it peaceful way."

7.29 Senthoran Sandralcanthan, a Team Leader was interviewed on 6 June at 10.20-10.26am (148). He said when he arrived at the incident between the claimant and DS they were already apart and he only saw the claimant. He tried to scanner and noticed it was broken, with a crack on the screen. He felt the claimant was panicking, he didn't say any marks on her face or that she seemed dazed and confused. she did not say she'd been hit on the head or ask for a first aider. When asked if it was out of character and surprised him the claimant was in a fight, he said "Yes", he had never had an issue with her.

7.30 KT was interviewed on 6 June at 6.20-6.40am (148). She said she saw a group of girls surrounding DS: LM, the claimant, DL and heard DS say "Not this morning".. She added a good deal of background whereby she said she heard DS complaining of being bullied by the claimant and LM. She said she heard a lot of Jamaican swearing and the fight had already started when she arrived. The claimant did not seem dazed and confused but after being down on the ground got up and was ready for another round. She pulled DS off and DS told her she had been hit by the claimant with a teampad.

7.31 MA, Fresh Food Replenisher, was interviewed on 8 June at 7.34-7.43am (154). He heard screaming and saw two women fighting when he got there they were finishing, the claimant was on the floor but trying to get up and defend herself. He saw the other lady (i.e. DS) throw a scanner which the claimant ducked. He got hold of the claimant who at first wanted to go off again but he told her to calm down. The other one (DS) wanted to go off again, to fight again.

7.32 AB, Fresh Food Replenisher was interviewed on 8 June at 7.13-7.21am (157). He said he arrived on the scene when the argument was finished and MA was breaking it up. Both women were standing up. He felt the claimant seemed upset rather than dazed and confused and the two women were "still giving it to each other, arguing".

7.33 AJ, Picker, was interviewed on 8 June at 7.59-8.13am (160). She was not a witness to the incident at all but said that she had been telephoned by DS to ask her to tell the claimant to stop talking about DS and that she had done so. The claimant replied that she was not troubling DS but was going to go and have a talk with her since people were telling her that DS was troubling her. She was asked by Ms

Sheehan whether DS had said she was going to beat the claimant and replied that if the claimant came near to her in any form of way DS was going to “fuck herself”. She was not asked to explain that equivocal comment. She said the claimant had not told her she was going to fight DS but that she was going to take someone with her.

7.34 DS was interviewed again on 10 June at 10.12-11.02 (167). By this stage, Ms Sheehan had already made her mind up about who was at fault. She was keen to learn whether DS would be pressing charges. She identified to DS the witnesses she had interviewed. DS told her that she had tried hard to stay away from the claimant. She admitted hitting the claimant when she was on the floor, with her hand not with her team pad, having already been struck by the claimant with her teampad. She felt the claimant didn't want to talk to her but really wanted to fight. She said she had not complained to management before because although the client would have been spoken to the behaviour would still have continued.

PS concluded the interview:

“ My decision as to where we go from here. From what I've done an investigation a lot of people have said you said for her to stay away from you I see from statement you were just doing your job these girls came too area to look for you they weren't supposed to be in F2. Statements saying I is completely different to others. Have to do balance of probability. This fight happened and everyone involved needs to be spoken to.”

PS read to DS her Rationale for sending her to a disciplinary hearing before David Joseph, notifying her that LC (her USDAW representative) would be her representative again and then said: “It's entirely up to you about pressing charges. I can tell you that she has reported the matter to the police”.

7.35 The final interview with the claimant was on 15 June 2020) at 5.41-7.00am (177-187). Ms Sheehan started by saying that she had interviewed a lot of people including the people with the claimant, LM and DL, the people who came to break it up, the first aider who treated DS and the managers who suspended. The claimant confirmed that she had been threatened by DS who told her she “was going to fuck her up”; she said she had used the words “mess her up” earlier as she had not wanted to say the exact words. Ms Sheehan put to her that SM saw her strike first and that DS said she did hit you but said it was once you struck her with team pad. The claimant did not deny that, replying” OK”; she said SM and DS were friends but that DS attacked her first (180). Ms Sheehan said some witnesses who broke up the fight said DS was extremely calm and the claimant wanted another go. Although the claimant had provided her GP note PS told her she found it extremely strange that the claimant was hit and unconscious but didn't ask for a first aider; someone who lost consciousness is usually dazed and confused, but witnesses only said she looked upset and angry. The teampad she had been using was broken with a crack; 3 people had seen her throw it at DS after the fight; The claimant said she couldn't remember and couldn't explain why the teampad would be broken. Ms Sheehan put to the claimant that two who saw the incident, KT and SM, actually heard DS say: “Not today”. The claimant said she didn't hear that.

7.36 Ms Sheehan asked the claimant if she knew AJ and the claimant replied that she did and that she had been phoned by AJ a few days before; AJ had not told her DS wanted her to stay away but only that DS said the claimant was a troublemaker. When Ms Sheehan put to her that LM even said DS “didn't look in the mood the claimant said she didn't know” what LM would mean by that would she mean by that.

She told Ms Sheehan she wasn't scared of DS, she just wanted to sort out the issue but was challenged that in the previous interview she had said she was scared. The claimant responded: "I wasn't scared that she was going to do anything, I wasn't threatened". She denied striking DS first and could not explain why DS had a very visible lump on her forehead. Although the claimant's representative Elson Briggs referred to there being 3 other witnesses L, S and P who could support the claimant's version about the background of the relationship with DS and who she had told about the trolley incident, Ms Sheehan said that was not relevant. She said the CCTV did not show anything but: "A physical fight happened that morning. The AJ thing is probably nothing. Have interviewed everyone who was there and after. I need to go by what happened that morning." The claimant disputed that SM and KT were there during the altercation but Ms Sheehan was adamant they had been.

7.37 At the end of the interview, Paula Sheehan read her Rationale to the claimant for recommending disciplinary action, concluding her Investigation Checklist (334). She was sending her for a disciplinary hearing, again to be held by Mr Joseph but two days after DS's hearing:

"I have spoken to all involved from witnesses to 1st aider and also managers that done the suspension on both ladies.

I need to consider the events that happened that day and not past issues. Natasha has purposely gone to the frozen aisle to see DS, even though she has said she had been threatened earlier that morning. I do feel if someone was that worried about a situation then the last thing you should do is go and confront a person who you have been threatened by.

All witnesses have said an argument had started between both ladies and two people saw Natasha strike DS with the team pad which then DS has also admitted to then striking back. Both ladies have been injured during this "fight" but it was only D that was treated by first aider and showed visible signs of physical assault at the time.

There is no CCTV footage of the fight but the team pad that Natasha was picking with that morning is now broken (cracked screen). There is also proof that Natasha was supposed to be picking an ambient trolley and therefore should be nowhere on the frozen aisle, where did next was picking. I have retrieved proof of this from the dispatch.

I believe that Natasha had intent to talk/argue/fight DS that morning on the frozen aisle which has led to her hitting DS with the team pad at which point DS has then hit back putting Natasha to the floor. This has been seen by 2 other people.

If Natasha felt scared by being threatened by DS she should have mentioned it to a manager and all of this could have been put to bed but unfortunately it wasn't and therefore I need to decide what should be done.

This type of behaviour is not acceptable in the workplace and Natasha needs disciplinary action."

Whilst this rationale was read to the claimant and her representative, no written copy was ever provided to her and nor were the records of interview provided before her disciplinary hearing.

7.38 Mr Joseph met with and discussed the case with Paula Sheehan, the investigating manager before he held the disciplinary hearing; there is no record of their discussion.

7.39 Shortly before the claimant's disciplinary hearing, Mr Joseph had taken the disciplinary hearing in DS's case and had decided to issue her with a final written warning for her part in the incident i.e. for fighting on the shop floor; he had thereby reached his decision on DS's involvement and culpability before the claimant's hearing.

7.40 The claimant was called to attend a disciplinary hearing before Mr Joseph by letter dated 15 June 2020 (192):

“The purpose of the hearing is to discuss allegations of fighting on the shop floor with DS. As this hearing may result in disciplinary action being taken against you, up to and including your dismissal from the company, you are entitled to be represented at the hearing... This is a serious matter and you should make every effort to attend.”

Whilst referring to the possible sanction of dismissal, the letter included no reference to gross misconduct or the possibility of dismissal for a first offence “If the offence is a serious gross misconduct issue...” (Disciplinary Policy, 65)

7.41 Mr Joseph was a very experienced manager, trained and experienced at chairing disciplinary hearings and who had previously dismissed employees for gross misconduct. He knew the claimant only by sight and to say Hello to.

7.42 He had a structured disciplinary checklist, which he worked through (139-204), but missed the basic point that the documentary evidence compiled by Paula Sheehan had not been provided to the claimant notwithstanding the unusually substantial number of interview records. These were only provided to the claimant and her representative after the disciplinary hearing and dismissal outcome was notified to her. Whilst read to the claimant and her representative at the end of the interview on 15 June by Ms Sheehan, the rationale for the claimant to face a disciplinary hearing was never provided to her; Mr Joseph assumed this had been done and the interview records provided as well and considered it was also up to the employee and the representative to ask for the relevant documents.

7.43 The disciplinary hearing took place on 19 June 2020 (205-218). Mr Briggs again accompanied and represented the claimant. Mr Joseph was particularly concerned about the lump to DS's head and pressed the claimant why she had not referred to shock or injuries afterwards. He read from the interview records of AB and LB. Mr Briggs drew attention to the claimant's own head injury and visit to the doctors and to the fact that two witnesses saw her on the ground and questioned why LB had not followed up when the claimant said she was not OK. Mr Briggs referred to the claimant's GP note (164-166) and stressed the claimant's length of service and good record; he asked for leniency on her behalf, suggesting that whatever sanction was applied it should be equal (to DS).

7.44 Just after Mr Joseph had adjourned to consider his decision, he was approached again by Mr Briggs who was by then aware that DS had been disciplined in the form of a final written warning. Mr Briggs again urged Mr Joseph, who he clearly thought was already considering dismissal, that he should be even-handed in his approach to the two protagonists.

7.45 Despite his disciplinary checklist (193-204) Mr Joseph failed to appreciate Ms Sheehan had already pre-judged matters when she interviewed DS on 10 June, well before her final interview with the claimant and that the claimant had never been provided with a copy of Ms Sheehan's Rationale or the records of interview.

7.46 The Tribunal inferred that Mr Joseph, with or without HR assistance, referred to the policy definition of gross misconduct, which included: "Assault, including harmful or offensive contact with another person or threatening to harm someone" (66, 254-6) since reference to this was included in his letter of dismissal despite not having been set out in the letter calling the claimant to the disciplinary hearing. Despite its inclusion in the dismissal letter, in oral evidence at the hearing, Mr Joseph expressly stated: "I did not find the claim guilty of assault- she was guilty of harmful contact with DS". He conceded in evidence that, had he found the claimant was assaulted by DS, he would not have dismissed the claimant.

7.47 About an hour after the end of the hearing, Mr Joseph gave his decision to dismiss the claimant summarily. He attempted to pick out the versions of those he felt were unbiased witnesses rather than friends of DS and the claimant. Although not clear from his letter of dismissal, the witnesses he regarded as not being partial were GD (93), Andrea Gunyho (120) Alex Bozern (117) Senthoran Sandralcanthan (144), LB (123), MA (154) and AB (157). In fact, GD had dealt with background and history and not only her observations as first aider on the day.

7.48 He concluded that the claimant had taken matters into her own hands in leaving her workplace and seeking out DS and had then struck DS with a picking stick (team pad) which damaged it and caused injury to DS's head. He was concerned that there was no contemporaneous reference by claimant to her also having a head injury and disbelieved her version that she had fainted during the incident. He felt she had not taken any responsibility for her actions and he was not prepared to risk any repetition. He considered that that her doctor's note did not show that she had not started the fight. He was very concerned about the impression on other work colleagues if she remained at work after starting a fight and hitting a colleague. He did consider whether moving the claimant to a different store or changing her department or shift pattern was possible but felt the respondent had lost trust in her and moving her would simply have moved the problem on to a different area or store. In deciding to dismiss summarily, he was fully aware of the claimant's good disciplinary record.

7.49 On 25 June 2020, Mr Joseph sent a relatively brief letter confirming the summary dismissal (219):

"I am writing to confirm my decision to summarily dismiss you for gross misconduct. Fighting on the shop floor with another colleague. The reasons for this are:

1. Your lead manager, two line managers, two team leaders and 1st aider confirmed there was a severe swelling to colleague's head whom you had a fight with.
2. Team leader also confirmed that he found the screen of the picking device that you were using had broken screen when they retrieved the trolley and pick device.

3. You also confirm that you went to the frozen section to resolve the issue with the colleague during your picking hours without getting any authorization from team leaders or managers which resulted in the fight between you and the colleague.

As I stated in our meeting, I have only taken the witness statements of the people who were unbiased. We want everyone to maintain standards of behaviour or action in line with our values and our core purpose of serving our customers. Assault, including harmful or offensive contact with another person or threatening to harm someone is a serious breach of our company values and will not be tolerated. In your case, I believe your conduct on that day was totally unacceptable which may have resulted in more serious injury and stress to the colleague, yourself and other colleagues on the shop floor.”

The clear implication was that Mr Joseph found the claimant to be the aggressor who was responsible for an assault upon DS. He gave no explanation of which witnesses' statements he had seen and did not specifically identify the 6 witnesses he had regarded as unbiased.

7.50 After the disciplinary hearing, the claimant and her representative were provided with the records of interview. They examined, challenged and criticised many aspects in a letter of and grounds of appeal running to about 16 pages, setting out her own factual version, with 22 itemised points in addition to general representations that she considered there had been an unfair process with different accounts as to what really transpired being given but no full opportunity for a proper analysis of all the witnesses statements before she was dismissed, contending that she strongly believed she was dismissed because of her affiliation with the GMB trade union and that statements from witnesses supporting her case were ignored (224-245).

7.51 The appeal manager, Jon Crouch, was another very experienced manager, trained and experienced at disciplinary hearings and appeals. He had no previous involvement with the claimant. He was provided with the whole of the extensive investigation interviews, Ms Sheehan's rationale, notes from the disciplinary hearing, the dismissal letter, Mr Joseph's disciplinary checklist, the claimant's medical evidence, her personnel file and her appeal letter. He was also provided with an Outline of Case (247-249) probably by a People Advisor, summarising the versions of all the witnesses interviewed (which did not differentiate between those witnesses Mr Joseph had apparently viewed as partial and those he said he relied upon as being impartial). This was accompanied by a "Reasons to Uphold" document (250-252) probably prepared by the Croydon People and Safety Manager which purported to analyse the different versions of all witnesses who had been interviewed, concluding that only 2 of 13 were similar to the claimant's version; as the title suggests, the document effectively recommended to Mr Crouch that the claimant's appeal be rejected. The "Outline of Case" and "Reasons to Uphold" documents do not appear to have been shared with the claimant and her representative before or at the appeal hearing.

7.52 As before, Mr Briggs represented the claimant at the appeal hearing before Mr Crouch on 7 August 2020, which was again recorded by a note-taker (306-331). Mr Crouch had prepared for the hearing with an appeal checklist (295-302) and written notes to himself about points to pursue about several of the claimant's 22

itemised points. Mr Briggs pursued the claimant's case vigorously before Mr Crouch, questioning the independence of the first aider (GD) who had also dealt with background history between the claimant and DS, suggesting that Paula Sheehan had put leading questions to witnesses, questioning how Mr Joseph had selected the witnesses he regarded as unbiased and challenging the decision to dismiss one member of staff and not the other. During the appeal, Mr Crouch's approach was much more to deal with the 22 detailed points than the general tenor of the claimant's appeal alleging unfairness and bias.

7.53 After the appeal on 7 August, before the outcome meeting on 14 August 2020, Mr Crouch also met with Mr Joseph and interviewed him about his decision-making in relation to the disciplinary hearing (undated notes 303-305), having explained on 7 August that he would speak with Mr Joseph.

7.54 At the further meeting on 14 August 2020, Mr Crouch explained that he was rejecting the appeal. A detailed letter confirming that the dismissal was upheld was sent the same day (335- 337). Mr Crouch concluded that he did not see any evidence of the dismissal being unfair, that Paula Sheehan had carried out a full investigation and stated that Mr Joseph's reasons for dismissal were within the reasonable responses that an employer could make having considered the statements of all the witnesses, including where there could be conflict of interests based on friendships to both parties. He rejected any notion that the claimant's GMB trade union representation had made any difference to the investigation or disciplinary hearing.

8. The parties' submissions

The claimant made extensive submissions based upon a written skeleton argument containing her version of the factual background. On the major point of dispute about the altercation, the interview record of MA clearly identified the claimant was on the floor. The evidence supported her case that she went to speak with DS, which was reasonable to try and resolve things in a reasonable manner and consistent with guidance in the ACAS Code of Practice that, if it is not possible to resolve a grievance informally, it should be raised formally. There was a similarity of approach by DS and the claimant in not raising the matter formally. She went to talk but was attacked. There was confusion about the reason for dismissal which led to peculiarities in the way the disciplinary and decision to dismiss were handled; Mr Joseph stated a variety of different things about his reason for dismissal and his letter of dismissal included assault. He acknowledged he wouldn't have dismissed the claimant unless he thought she had attacked DS but then resiled to a broader reason of fighting on the shop floor and offensive contact by the claimant with DS. Either he shied away from finding who had started the fight or he attempted to go back in oral evidence on his finding at the time; his reasoning was confused and he didn't engage with the decision in any way. As to procedure, serious allegations of criminal misconduct should always be the subject of the most careful investigation. The visible injury to DS set Ms Sheehan against the claimant, who was very quickly suspended and off the premises without any proper inquiry about her wellbeing; the tone of her questioning by Ms Sheehan was very different from that of DS and by the 10 June interview of DS, she had already made her mind up. She failed to interview supportive witnesses named by the claimant's representative yet had clearly investigated what had happened before, for instance speaking to AJ who was not at

the incident. Mr Joseph repeatedly highlighted DS's visible injuries but gave no consideration to the claimant's injury; his own hearing and decision was unfair because, as well as being foisted with Paula Sheehan's one-sided investigation and rationale, the claimant went in blind without documentation in breach of the disciplinary checklist (pages 196 and 65). Her trade union representative firmly set out his view about the one-sided investigation and blame all being put on one person. Mr Joseph had already decided to give DS a final written warning and was not clear how he excluded the versions of partial witnesses or about his eventual finding but ignored evidence from third parties that this conduct was out of character on her part. At the appeal stage, there was a narrowness of approach by Mr Crouch suggesting his job was to answer specific points in the appeal letter.

9. The respondent's case was that it had fully explained the basis of the claimant's dismissal in its decision-making and the final written warning to DS did not indicate that she was merely a victim. The reason for dismissal was plainly misconduct; the Tribunal had to determine whether the respondent acted reasonably and had reasonable grounds for concluding the claimant was guilty as alleged. Mr Joseph's disciplinary checklist and evidence showed he gave detailed consideration to what the two women admitted and the neutral evidence of MA and AB which showed the claimant was still trying to continue the fight once pulled apart from DS; the claimant admitted in evidence she knew what she was dismissed for. The women were fighting but the claimant had gone to DS, either looking for trouble or knowing it could arise, with 2 witnesses and stayed when she knew DS didn't want her there and made inflammatory remarks. Even in her police statement she said she heard DS say she didn't want to talk; instead of leaving, she made the inflammatory remark: "You are lying". It was not a question of who hit whom first; she went looking for DS and was dismissed for fighting, which she admitted to; on her own account, she was not merely acting in self-defence. On reasonableness of investigation and procedure, this was not a police investigation. Although the claimant said Ms Sheehan should have interviewed more background witnesses, it was reasonable to concentrate on what happened on the day. In the interviews and at the hearing, there was no analysis of what different outcome there might have been had additional witnesses been interviewed. It was reasonable for Mr Joseph to ignore the evidence from friends on each side especially when the claimant said: "Don't listen to DS and her friends who are all a clique". Ms Sheehan interviewed appropriate witnesses; the two were not treated as victim and perpetrator but as women in a fight. Her investigation outcome had no bearing on Mr Joseph's decision especially when the witnesses supported her view that the claimant had a case to answer; he did not just accept her version but made a detailed analysis and refined it down to reliable evidence. The medical evidence was not crucial since they were both in the fight and both injured. Mr Joseph did not dismiss the claimant because she was the aggressor but considered what would have stopped the fight; had she not been there but raised her concerns with management first there would have been no fight. Neither the fact that DS may have got off relatively lightly nor not providing notes of evidence before the disciplinary hearing made the dismissal unfair; the detailed appeal letter and his notes showed Mr Crouch considered and dealt with the many points she raised. He might have provided a more detailed analysis but that did not mean the claimant would not have been dismissed or her appeal would not have been rejected. The appeal cured any defect on lack of provision of notes of interview; it could not be outwith the range of reasonable responses to dismiss someone in a fight in these circumstances and the claimant

said no more than that DS should have been sacked as well. If there was any procedural unfairness, a fair process with inevitably have led to this dismissal. The respondent relied upon the EAT authority of Hollier v Plysu contending that the claimant's conduct was culpable and blameworthy and any compensation for unfair dismissal should be reduced by 75-100%; she went looking for trouble or knowing it could arise, when DS said she didn't want to talk, the claimant didn't leave but accused her of lying, she told the police she retaliated and did not describe trying to get away but, when put to the ground, she engaged with DS and continued to fight. In terms of Polkey, a very minor procedural defect would not make the dismissal unfair; anything more could do so but the Tribunal should apply Software 2000 v Andrews and find the claimant would have been dismissed in any event.

10. The Law

10.1 The main statutory provisions are at Section 98 of the Employment Rights Act 1996. By sub-section 98(1) ERA:

"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 sub-section (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."

Then by sub-section (2):

- "A reason falls within this sub-section if it -...
- (b) relates to the conduct of the employee..."

Then by sub-section (4):

"... where the employer has fulfilled the requirements of sub-section (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 undertakings) 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."

10.2 In considering this alleged misconduct case, the Tribunal applied the long-established guidance of the EAT in British Home Stores v Burchell [1980] ICR 303. Thus, firstly did the employer hold the genuine belief that the employee was guilty of an act of misconduct; secondly, did the employer have reasonable grounds upon which to sustain that belief and thirdly, at the final stage at which the employer formed that belief on those grounds, had it carried out as much investigation into the matter as was reasonable in all the circumstances. The burden of proof in establishing a potentially fair reason within Section 98(1) and (2) rested on the respondent and there is no burden either way under Section 98(4). The Tribunal reminded itself that its role in respect of Section 98(4) was not to substitute its own decision had it been the employer for that which the employer had taken. In many

cases there is a range of reasonable responses open to a reasonable employer in respect of the investigation, procedure and substantive aspects of the decision to dismiss but each case turns on its own facts as to the nature of the investigation and extent of the procedure which is appropriate in all the circumstances having regard in particular to Section 98(4)(b). In respect of appeals, in Taylor v OCS Group Ltd [2006] IRLR 613, the Court of Appeal rejected the distinction between hearings which were merely a review from those which were a rehearing and reminded the Tribunal of the need to stand back and consider the whole picture:

"What matters is not whether the internal appeal was technically a rehearing or a review but whether the disciplinary process as a whole was fair."

Finally, the Tribunal also had regard to the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures (2015).

10.3 Contributory fault and Polkey reduction, if unfair dismissal

By section 122(2) ERA:

"Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly."

And by section 123(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."

For a reduction of the compensatory award under 123(6), the conduct needs to have been culpable or blameworthy in the sense that it was foolish, perverse or unreasonable. For the basic award, section 122(2) lays down a slightly different test: whether any of the Claimant's conduct prior to his dismissal makes it just and equitable to reduce the basic award, even if that conduct did not necessarily cause or contribute to the dismissal.

The Tribunal also needed to determine whether any percentage reduction should be applied to the compensatory award to reflect the chance that this respondent may have dismissed the claimant fairly in any event, if it had not dismissed her unfairly, following the House of Lords judgement in Polkey v AE Dayton Services Ltd [1987].

11 Conclusions

11.1 The Tribunal considered the parties submissions and applied its findings of fact to the law and legal principles in order to determine the issues. It accepted the claimant's submission that the investigator Paula Sheehan made her mind up very early about who was primarily at fault and engaged in more helpful and supportive questioning of DS than of the claimant. Despite maintaining to the claimant and her representative that the background was not relevant and only the events on 2 June 2020 were, she allowed in very considerable hearsay from witnesses supportive of DS, but declined to seek any input from the witnesses the claimant's representative suggested. Ms Sheehan's

stated approach to the claimant therefore contradicted her own initial instruction to herself that she should investigate whether there was any history between the two. However, the approach she stated she was taking to the claimant was not that actually taken and presented in the witness statements. The interview of AJ related solely to background and not at all to the incident itself on the day; that of GD covered past history as well as what happened on the day. Analysis of Ms Sheehan's input shows that she formed her firm conclusion about respective levels of guilt at a very early stage, certainly by the time of the sympathetic end to her interview with DS on 10 June 2020 (when she virtually invited DS to report matters to the police) but probably much sooner than that given the more sensitive questioning of DS contrasted with the challenging style of questioning of the claimant from an early stage; she then made a very firm recommendation that the claimant face a disciplinary hearing. Despite her saying on 15 June that she was only interested in what happened during the incident and immediately after, explaining why she was not prepared to interview any of the claimant's witnesses about earlier threats and background, the extensive evidence from others supporting DS about the background to the incident was already there; that evidence from the interviews remained in the documents relied on by the respondent right through to Mr Crouch's appeal and was summarised and was still relied upon in the preparatory Outline of Case and Reasons to Uphold provided to him.

11.2 There was a significant and surprising breach of the respondent's own procedure in failing to provide the witness interview records to the claimant ahead of the disciplinary hearing. Whilst it is clear that the claimant and the representative knew the gist of the allegation against her by the time of the second interview on 15 June 2020, this was a breach of the respondent's own policy and the subsequent letter calling her to the disciplinary hearing was very brief with the allegation simply: "Fighting on the shop floor with DS". However, the case against her was much more than this; even without the addition that she started the fight and struck first, the charge was clearly that she was the main protagonist having gone to seek out DS. In many cases, not seeing the actual written interview records of various witnesses in a misconduct disciplinary case may be of little significance where the employee knows the full extent of the employer's stated case against them. That was not so here; about 14 witnesses, including the claimant and DS twice, had been interviewed. Both under the respondent's prescribed procedure and as a matter of natural justice, she was entitled to know the way the respondent put its case against her.

11.3 Regrettably, the Tribunal concluded that the decision to dismiss by Mr Joseph was to a large extent pre-determined. Given the very firm conclusion by Ms Sheehan about the party principally liable for the incident, the Tribunal was driven to infer that she made this very clear to Mr Joseph. Mr Joseph had not only spoken with Ms Sheehan before holding his disciplinary hearing (although no notes of that conversation have been put in evidence), he had held the disciplinary hearing of DS and even reached his conclusion as to guilt and sanction for DS. In those circumstances, the Tribunal did not accept his frequent assertions in evidence that he was "unbiased and impartial" but concluded that it was inconceivable given the firm views and conclusions of Paula Sheehan and his prior involvement in determining upon DS's conduct that Mr Joseph would not then have found the claimant primarily at fault. He did not uncover the lack of balance to Ms Sheehan's investigation or the non-provision of the interview records and Rationale to the claimant. As to the disciplinary checklist and decision-making, Mr Joseph professed

to have taken a purist approach, involving an almost judicial capacity to disregard the unhelpful or tainted evidence of all the partial witnesses and only to rely upon those who were wholly impartial; this approach was simply not borne out by the evidence he gave and his difficulty explaining the stages of decision-making he went through and whether he genuinely did indeed conclude that the claimant was the first aggressor, striking first.

11.4 Moreover, by the time of the announcement of the decision to dismiss, the respondent shifted from “fighting on the shop floor with DS” alone to include expressly “assault/offensive conduct”, mirroring the gross misconduct definition within the disciplinary procedure. “Fighting” as an example of misconduct is not expressly set out within the non-exclusive categories within the disciplinary policy (although the claimant readily accepted in her evidence that she knew fighting would be gross misconduct and could lead to dismissal) whereas assault is expressly included as an example of gross misconduct. The Tribunal drew the inference that the respondent was seeking to make good by a “belt and braces” process at this late stage the inadequacy or insufficiency of the initial charge of fighting (which, it understood, DS also faced). Although Mr Joseph doggedly refused under cross-examination to accept that he had actually concluded that he had found the claimant struck the first blow and maintained that he only viewed her as the party primarily responsible because she had approached DS, the Tribunal concluded that he had indeed found her to be the aggressor who had struck first. Otherwise, there would have been no need for the addition of the term “assault” in the dismissal letter. Moreover, Mr Joseph’s evidence to the effect that he would not have dismissed the claimant had he found DS had in fact assaulted her would have been difficult to accept or understand.

11.5 The Tribunal also considered the appeal procedure flawed. Jon Crouch focussed very much upon the claimant’s 22 points itemised in the grounds of appeal, rebutting all but one of them. He had already been provided as part of his appeal pack with the document entitled “Reasons to Uphold”, which was effectively guidance showing him why as appeal manager he should reject the appeal. In these circumstances, the Tribunal could not conclude that Mr Crouch brought such a fresh and objective consideration to the whole matter as to put right the defects and procedural errors which have gone before. Instead, the Tribunal stood back and looked at the whole picture. In view of the considerable deficiencies identified above and viewed alongside the prior decision that DS was given a Final Written Warning, the respondent’s ultimate decision to dismiss this claimant fell outside the range of reasonable responses open to a reasonable employer. However, the difference of approach in the claimant’s case from that of DS is not what makes the dismissal unfair in itself; the unfairness lies in the procedure adopted by the respondent in particular the partial investigation by Ms Sheehan, the pre-judgment by both Mr Joseph and indeed by Mr Crouch where full disclosure of the voluminous interview records was only made to the claimant and her representative after the initial decision to dismiss had been reached. This was a major employer with the fullest resources available to it including detailed and rigidly prescribed procedures; however, there is always a risk that, as here, managers will work through prescribed procedures closely but intending to reach their own desired outcome or will overlook a major step (disclosure of interviews) designed to enable the employee to have a fair hearing. The claimant was unfairly dismissed.

11.6 Finally the Tribunal turned to consider matters of Polkey reduction and contributory fault. Whilst in some cases these would be entirely separate considerations, here the Tribunal concluded that deciding whether, had a fair process been followed, the claimant would have been dismissed in any event and, if so, when and what the percentage chance of that outcome would be, cannot meaningfully be separated from determination of contributory fault since doing so would be likely to penalise the claimant twice. In short, having never reported her concerns to management or raised a grievance, the claimant took it upon herself to go to where DS was working (quite a distance away in the workplace). Even on the most generous basis that she only wished to speak with her to try to resolve matters, she did so accompanied by LM and with DL in the vicinity. She left her own work and workplace without permission and her actions were bound to be seen as provocative by DS and potentially as threatening, not least because she was accompanied. Moreover, there is an abundance of evidence that DS's initial response was to the effect: "Not this morning"; she did not wish to engage. This was the clearest case of the claimant's own conduct causing or contributing towards her own dismissal. As the respondent's investigator and witnesses at the hearing firmly expressed, the opportunity for the fight to take place on the work floor could not have arisen if the claimant had not taken the matter into her own hands and sought out DS. The Tribunal finds therefore concludes there is a very high degree of likelihood that the claimant would have been dismissed at the same time in any event and applies a Polkey deduction of 90% to the compensatory award. Absent that conclusion, the Tribunal would have found a very high degree of contributory fault on the part of the claimant and would have made a reduction on that basis. However, in the circumstances here there is really a complete overlap between the factors taken into consideration under Polkey and those which would result in a reduction for contributory conduct here; therefore, it would not be just and equitable to make a separate reduction of the compensatory award for contributory conduct. That leaves the basic award which should be which is to be reduced by 90% in accordance with section 122(6) ERA. Overall, the claimant's total compensation is accordingly to be reduced by 90%.

11.7 Determination of remedy is adjourned to a separate hearing on 5 July 2021.

Employment Judge Parkin
Date: 29 May 2021