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EMPLOYMENT TRIBUNALS

Claimant: Mrs Natalie McGonigle
Respondent: WM Morrisons Supermarkets Plc
Heard at: East London Hearing Centre (by Cloud Video Platform)
On: Wednesday 13 October 2021
Before: Employment Judge Hallen (sitting alone)

Representation

Claimant: Not in attendance
Respondent: Mr. N. Bidnell-Edwards- Counsel

JUDGMENT

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was V by Cloud Video Platform. A face-to-face hearing was not held because the relevant matters could be determined in a remote hearing.

The judgment of the Tribunal is that the Claimant's claims for unfair dismissal and breach of contract/unlawful deduction from wages are not made out and fail.

REASONS

Background and Issues

1. The Claimant was a Team Leader employed by the Respondent between 18 August 2017 and 23 February 2021, at which time she was dismissed by reason of gross misconduct. She was a part time employee working 12 hours per week.
2. In her Claim Form received by the Tribunal on 27 April 2021, she claimed that she was unfairly dismissed by the Respondent and was owed a Covid bonus at the termination of her employment which was either a breach of contract or unlawful deduction of wages. She did not state upon what basis she was owed such bonus referring to no contractual

entitlement nor did she quantify the amount that was owed and how she came to such figure. The Respondent in its Response Form disputed that the Claimant was unfairly dismissed and cited that the dismissal was by reason of gross misconduct and that it was a fair dismissal. At the hearing, the Respondent disputed that the Claimant was owed any Covid bonus.

3. The Respondent's representative confirmed the correct name of the Respondent was WM Morrison Supermarkets Plc and not Morrisons plc as specified by the Claimant. The Tribunal amended the name of the Respondent.

4. The issues for the Tribunal in respect of the claim for unfair dismissal were firstly to determine what the reason for dismissal was and whether it was by reason of conduct as asserted by the Respondent. Thereafter, the Tribunal had to ascertain whether the Respondent acted reasonably in all the circumstances in dismissing the Claimant and in particular: -

- (i) Did the Respondent believe that the Claimant had committed the acts of conduct relied on?
- (ii) Had the Respondent reasonable grounds for that belief?
- (iii) Had the Respondent conducted such investigation as was reasonable in all the circumstances of the case?
- (iv) Was dismissal within the range of reasonable responses open to a reasonable employer?
- (v) With regard to the Covid bonus that the Claimant said she was owed, the Tribunal had to ascertain on the evidence produced by the Claimant what the basis of the claim was and whether the Claimant could prove that it was owed to her. If she could so prove, the Tribunal had to ascertain what was owed to her.

5. The Tribunal had an agreed bundle of documents in front of it made up of some 207 pages. The Respondent also called the dismissing officer, Ms Maureen Joslin (People Manager) and the appeal officer, Mr. Darren Abbott (Store Manager) to give evidence. The Claimant did not appear at the hearing, emailing the Tribunal on 12 October 2021, the day before the hearing, to confirm that she was unable to participate in this hearing due to her medical health and her doctors advise not to attend. She confirmed that she would be happy for the hearing to go ahead without her presence in respect of her claim for unfair dismissal and breach of contract/unlawful deduction of wages.

6. Pursuant to rule 47 of the Tribunal rules of procedure, the Tribunal was satisfied that the hearing should proceed in the absence of the Claimant as she wished for her claims to be determined in her absence on the evidence presented to the Tribunal. It was in the interests of justice to do so as the Respondent had prepared for the hearing and was present through its witnesses and counsel. The Tribunal was satisfied that a postponement was not warranted as it was not clear when if at all the Claimant would be well enough to attend the hearing. In addition to the evidence produced by the Claimant in the trial bundle, the Tribunal read the Claimants grounds in support of her claim which was taken by the Tribunal to be her first witness statement. It also read the Claimant's email to the Tribunal dated 4 October

2021 to Karen Bennett, Legal Officer which the Tribunal took as her second witness statement as well as the statements made by the Claimant in the bundle of documents during the course of the disciplinary hearings. The Respondents witnesses produced written witness statements and attended the hearing in person giving sworn testimony and were subject to questions from the Tribunal.

7. As the Claimant did not attend the hearing, preferring that her claim be adjudicated in her absence, the Tribunal confirmed that it would send out full written reasons for the judgment so that she could see the basis upon which it was reached.

Facts

8. The Respondent is a well-known supermarket in England and Wales employing thousands of employees. The Claimant had been employed by Morrisons since 18 August 2017 and at the time of her dismissal was a Team Leader in a position of authority at the Chelmsford store. She was dismissed on 23 February 2021 for gross misconduct which was the effective date of dismissal.

9. On 7 February 2021, the Respondent received a complaint that the Claimant pulled down her colleague's hijab on two separate occasions, without consent, and made comments about that colleague's appearance. The complainant ("S") stated that the Claimant's actions were disrespectful towards her religion. S's sister also wrote to the Respondent via Claire Grainger (Group People Director) on the 8 February 2021 providing further details of the allegations. This email from S's sister was included within the investigatory material considered by the dismissing and appeal officers.

10. The allegations against the Claimant constituted a serious breach of the Respondent's Morrisons' Respect in the Workplace Policy and the Covid-19 safety guidelines and as such the Respondent had reserved power to take disciplinary action against any employee found to be in breach of such policy including dismissal for gross misconduct for serious breaches of the procedures.

11. Following receipt of the complaint by S on 7 February 2021, the Claimant was suspended from work on full pay on 13 February 2021 pending the completion of a disciplinary investigation. As part of the investigation into the Claimant's misconduct, two colleagues, KR and AC, confirmed that they witnessed the Claimant pull down S's headscarf on 23 January 2021. Another colleague, AS, confirmed that he had witnessed the Claimant pull down S's headscarf on 25 January 2021. The Claimant attended an investigatory meeting on 13 February 2021 to discuss the allegations. During the meeting, the Claimant admitted to pulling down her colleague's hijab and commenting on her hair both on 23 January but not on 25 January 2021. At the investigation meeting, the Claimant said that in respect of the first occasion she was 'messing around' and saying that 'she looked pretty without it on' and 'pulled it down'. The Claimant confirmed that the reason for the headscarf worn by S was that it was due to religious reasons and that the pulling down of the headscarf was done with no malice and was done to amuse the Claimant as she 'was having a laugh.'

12. After the investigation meeting, the Claimant provided written notice of her immediate resignation from the Respondent in light of the allegations against her. The Respondent responded to this notice in writing on 15 February 2021 to acknowledge her resignation email and inform her that her employment would terminate with effect from 18

February 2021 in order to allow her enough time to reconsider and withdraw her resignation if she wished. The Claimant responded to Respondent by email dated 16 February 2021 to confirm that she had decided to withdraw her resignation. The withdrawal of resignation was accepted by the Respondent.

13. Following the investigation, Mr G. McKernon, the investigation officer, decided that there was a disciplinary case to answer in respect of the allegations against the Claimant. Ms Joslin was requested to deal with the subsequent disciplinary process by Julia Pearson (People Manager). Ms. Joslin had not had any previous involvement in the matter, and she was sufficiently senior to impose a sanction up to and including dismissal. In addition, Ms Joslin had extensive experience of the Disciplinary Policy and had dealt with cases under it since joining the Respondent. She had heard around 20 disciplinary and appeal hearings.

14. Ms. Joslin invited the Claimant to attend a disciplinary hearing on 23 February 2021. She informed the Claimant of the allegations and her right to be accompanied at the hearing by a colleague or trade union representative. She also informed the Claimant that a potential outcome of the hearing could be her dismissal for gross misconduct.

15. On receipt of the letter, the Claimant informed the Respondent, that having sought advice and due to her mental health, she would not attend the disciplinary hearing. The Claimant confirmed that, instead, she would provide a full written statement for consideration. The Claimant subsequently provided a fit note which signed her off work for two weeks, until 4 March 2021, citing depression and stress at work.

16. Mr. Roy Moore (the Respondent's Operations Manager) called Ms. Joslin after the Claimant made contact with him to request that the hearing be postponed. Ms. Joslin did consider postponement, however, she believed it was in the best interests of both the Claimant and S for the hearing to proceed, considering the severity of the allegations and the stress that prolonging the process could bring to both parties. Ms. Joslin particularly considered the fact the Claimant was signed off sick with stress at work and there was no date given as to when she would be feeling well enough to attend. Ms Joslin made this decision alongside Ms Pearson and Nicola Sheail, Regional People Manager.

17. Ms. Joslin wrote to the Claimant on 20 February 2021 to confirm that the disciplinary hearing would go ahead in her absence, in accordance with the Respondents' guidance on sickness during disciplinary processes. The Claimant replied to confirm that she would provide a written statement that should be read in full at the disciplinary hearing. The Claimant's mother delivered the Claimant's letter and statement dated 22 February 2021 which Ms. Joslin took receipt of prior to the disciplinary hearing on 23 February 2021. The fact that the Claimant had provided written representations, coupled with the fact that the Claimant had not expressly requested for the hearing not to go ahead, Ms. Joslin believed signalled she was happy with the decision to proceed with the hearing in her absence.

18. Ms. Joslin commenced the disciplinary hearing in the Claimant's absence on 23 February 2021. She was accompanied by Ms Pearson who was present to take notes. Ms. Joslin took with her to the hearing all of the documents from the investigation and the Claimant's letter and statement. She decided to review and address each of the points raised in the Claimant's letter and statement in turn.

19. The Claimant's letter began by querying the date of her alleged misconduct. She highlighted that one of the suspension letters that had been sent to her contained the wrong

date. Ms. Joslin understood that the Claimant was referring to the suspension letter sent on 13 February 2021. She confirmed that the error with the date had been recognised at the time, and a new letter had been sent to the Claimant with the correct date. The date of the complaint of S had been changed from 7 January 2021 to 7 February 2021.

20. The Claimant's letter also raised concerns regarding the investigation procedure followed. Ms Joslin reviewed the investigation documents and was satisfied with the procedure that had been followed. She did not believe that the fact that witnesses had been interviewed prior to the Claimant's investigation meeting on 13 February 2021 affected the fairness of the investigation. She noted that, in any event, the Claimant had admitted to having pulled down S's headscarf and this was supported by witness accounts. Ms. Joslin also believed it was appropriate for the Claimant to have been suspended.

21. The Claimant's letter queried the fact that she had not been represented during the investigation meeting on 13 February 2021. Ms. Joslin noted that this was in accordance with Morrisons' policy and that colleagues were not entitled to be represented at investigation meetings. She also noted that the Claimant had received a copy of the Disciplinary Policy which contained this information.

22. The Claimant's letter also made allegations regarding Mr McKernon's (the investigation officer) conduct of the investigation meeting, in particular that he had not shown any empathy towards the Claimant or taken any breaks. Ms. Joslin reviewed the investigation meeting notes and could see that they indicated that Mr McKernon had left the room on one occasion to find some tissues for the Claimant. Further, the meeting had also been adjourned on another occasion. Ms Joslin was satisfied that the Claimant's account of Mr McKernon's conduct during the investigation meeting was contradicted by the meeting notes.

23. The Claimant made additional allegations regarding the manner in which Mr McKernon escorted her from the premises after the investigation meeting, including that he placed his hand on her back. Ms. Joslin did not believe that this was particularly relevant to the investigation itself because it did not provide any explanation for, or impact upon, the Claimants' alleged failure to adhere to social distancing guidelines. In any event, the Claimant said she would raise a grievance regarding these allegations and Ms. Joslin agreed that they should be dealt with as a separate issue.

24. The Claimant made further allegations that a member of staff had been discussing her situation with colleagues. Ms. Joslin noted this complaint and decided that it should be dealt with separately from the Claimant's disciplinary procedure as this assertion did not appear to be relevant to her defence to the charges.

25. Ms. Joslin also checked the documents and correspondence from the investigation to determine the emails to which the Claimant stated had not received a response. She clarified that there was only in fact two emails: one on 5 February 2021 in which the Claimant requested Brain Maynard make contact regarding something which was unrelated to the allegations and investigation at hand; and another email which was sent on 14 February 2021, prior to which the Claimant had requested that any contact should be made to her husband and not her from that moment onwards.

26. The Claimant's letter provided her account of an incident involving AC, who was a witness to the Claimant's misconduct on 23 January 2021. The Claimant alleged that she

had spoken with AC on 5 February 2021 and that AC's mother and father had attended the store as a result. Whilst Ms. Joslin acknowledged the Claimant's comments, she did not believe they made any difference to her case because AC was not the only person to have provided a witness statement in respect of the particular allegation in question; KR had also provided a witness statement, and the Claimant had accepted that she pulled down S's headscarf. Therefore, Ms Joslin did not believe AC was biased, as the Claimant appeared to suggest.

27. After considering the points raised in her letter, Ms. Joslin moved on to consider the Claimant's statement. The statement started by claiming the act of pulling down S's headscarf was done in jest and with no malice or offence. Ms. Joslin found this difficult to believe; She did not believe there were any circumstances where pulling down a colleague's headscarf could be done in jest, as the Claimant had suggested. Ms. Joslin thought that, on balance, the Claimant would have understood the reasons why S wore a hijab and the implications of her acts. Ms. Joslin noted that the Claimant confirmed that she was willing to apologise to S and that there had been no intention to disrespect her religion.

28. The Claimant stated that S had not spoken to her about the complaint at the time, and she felt a discussion should have taken place between S and the Claimant before any more formal action was taken. Ms. Joslin felt this showed that the Claimant did not necessarily appreciate the seriousness of her actions. Ms. Joslin did not think it was relevant whether or not S raised an issue immediately. She also did not think it was relevant that the Claimant and S remained "friends" on Facebook.

29. The Claimant also raised that she felt victimised in that only she was being disciplined for lack of social distancing and that S had originally approached her. Ms. Joslin believed that being a Team Leader in a position of responsibility, it was within the Claimant's remit to ask S to step back if she felt uncomfortable. However, ultimately, she did not consider this allegation to be particularly important and so disregarded it before reaching her decision.

30. The Claimant attached photos of S not wearing her hijab to prove the point that she did not wear it all the time; Ms Joslin's opinion of this was that she was potentially trying to downplay the severity of her actions. Ms. Joslin believed this was beside the point entirely as it was within S's discretion when she chose to wear her hijab. The Claimant also made allegations regarding S being seen with her headscarf off and adjusting her hair. The Claimant alleged that S had made comments to male colleagues regarding fathering her children. Whether true or not, Ms. Joslin did not think it was appropriate to draw a conclusion from this that S was not therefore offended by the Claimant's actions. Ms. Joslin felt that the Claimant was trying to justify her conduct and that she did not fully appreciate the severity of the issues.

31. The Claimant raised the point that there was no CCTV available at the time that her misconduct was alleged to have occurred, being 23 and 25 January 2021. However, it was Ms Joslin's view that CCTV footage would not have made any difference to the Claimant's defence as the Claimant had admitted taking down S's hijab.

32. Ms. Joslin reviewed and addressed the Claimant's written representations, and the investigation material, for more than four hours. She went through all the allegations and points raised by the Claimant to ensure that she had covered everything and that she had not missed any information that should have been taken into account. She also took account

of the Claimant's four years' service with the Respondent into account and her clean disciplinary record.

33. However, after a careful review of the Claimant's case, Ms. Joslin was satisfied that the allegations in respect of the Claimant pulling down her colleague's headscarf on two occasions were well-founded. The Claimant had admitted to the misconduct, albeit on one occasion only. However, there was a witness to the second occasion as well and Ms. Joslin found it more likely than not that that the Claimant would have pulled her colleague's headscarf down on both occasions. The alternative, which seemed unlikely, would be that the Claimant pulled her colleague's headscarf down on 23 January 2021, and S and the other witness had made up their account of the Claimant having done it again on 25 January 2021. The Claimant had not put forward any mitigation for her actions, other than to say that she had done it in jest. Whether it occurred on one or two occasions, Ms. Joslin found this to be completely inappropriate and did not consider it to be reasonable mitigation.

34. Ms. Joslin considered alternative outcomes to dismissal, such as a final written warning or a relocation to another store. However, she was not convinced that the incident would not happen again. Ms. Joslin therefore thought it would be inappropriate to keep the Claimant within the business.

35. Ms. Joslin wrote to the Claimant on 24 February 2021 to confirm her decision that the Claimant was dismissed by reason of gross misconduct without notice or payment in lieu of notice with a date of dismissal of 23 February 2021. She also informed the Claimant that she had a right to appeal against this decision.

36. Mr. Darren Abbot, Store Manager, was appointed to consider the Claimant's appeal against dismissal which was lodged in writing on 2 March 2021. He had no prior knowledge of the Claimant and had sufficient experience in dealing with appeals against dismissal having conducted 20 disciplinary hearings and 3 appeals. In advance of the appeal hearing, Mr. Abbot reviewed the Claimant's letter of appeal, dated 2 March 2021 and the material collated during the investigation and disciplinary stages, including the Claimant's letter and statement which she submitted prior to the disciplinary hearing. He also discussed the case with Angela Gooch (People Manager).

37. The Claimant had been sent a letter inviting her to the appeal hearing arranged for 6 April 2021. The letter informed the Claimant of her right to be accompanied at the hearing and that it had been agreed that, in light of the Claimant's poor mental health, she would be permitted to attend the appeal hearing accompanied by her mother.

38. Mr Abbot held the appeal meeting on 6 April 2021. The Claimant attended with her mother. Ms Gooch was also present to take notes. Mr. Abbot opened the hearing by explaining the appeal process. He also clarified how he intended to structure the hearing, by reading through and addressing each point the Claimant raised in her appeal letter dated 2 March 2021.

39. The Claimant began by explaining that she felt more consideration should have been given to her poor mental health during the investigation and disciplinary stages. She stated that she was in no fit state to make a decision to adjourn her disciplinary hearing and said that she had not received any support during her absence. The Claimant also complained about Mr McKernon's attitude and demeanour during the investigation meeting because she felt he had behaved aggressively and insensitively towards her. She also alleged that

Mr McKernon had placed his hand at the base of her back when escorting her from the premises after the investigation meeting, which she said was a breach of Covid-19 guidelines. The Claimant believed that the disciplinary hearing should have been adjourned until she was fit to attend it, rather than going ahead in her absence.

40. The Claimant claimed that, on 5 February 2021, she had spoken with AC regarding her performance at work. She explained that AC's mother had attended the store and raised her voice, and that AC's father had approached the Claimant outside the store that evening. The Claimant suggested that, due to these events, AC was not a credible witness as there had been difficulties in their working relationship.

41. The Claimant also complained about the lack of CCTV footage available from the time of her misconduct. She objected to the fact that her failure to observe social distancing rules had been referred to during the disciplinary stage and referred to the photographs she had provided of other members of staff who were not observing social distancing rules.

42. The Claimant stated that the letter and statement, which she had submitted prior to the disciplinary hearing on 23 February 2021, had not been taken into consideration before the decision was made to dismiss her.

43. The Claimant also queried why S had taken so long to report the complaint against her, and also why the Claimant had not been spoken to about it prior to the investigation meeting on 13 February 2021.

44. The Claimant stated that she was accused of having removed S's headscarf on 23 and 25 January 2021. She refuted that she had removed S's headscarf on the second occasion in question. She also alleged that the two witnesses to the first incident, KR and AC, were not in work on that day.

45. The Claimant then stated that she felt as though S was not annoyed by her acts at the time, and that this was reflected by S remaining "friends" with her on Facebook, and that more consideration was being given to the S's sister who raised the complaint rather than to the Claimant's responses.

46. The Claimant raised that she did not understand why S had waited two weeks to raise the complaint from the act having taken place. She also queried why it had taken so long for someone to speak to her following S's complaint. The Claimant also reiterated that she had apologised for her acts which she insisted were not malicious.

47. Mr. Abbot decided to adjourn the hearing to review his notes and take a short break. When the parties returned, he sought to clarify the exact nature of the Claimant's conduct, given she had referred to it as playful and just banter. The Claimant explained that she had removed S's headscarf slightly, before commenting that her hair was beautiful. Mr Abbot enquired as to the nature of the Claimant's relationship with S, and why this conduct would seem appropriate, to which she stated they worked well and got on well together.

48. After listening to all of the representations made by the Claimant and her mother, Mr. Abbot decided to adjourn the hearing before reaching his decision. He discussed the points raised by the Claimant at the appeal with Ms Gooch. They put together a list of further enquiries to be investigated before Mr. Abbot made my decision regarding the appeal outcome.

49. Mr. Abbot conducted a further investigation meeting with Gareth Summerskill (Replenishment Manager) on 15 April 2021. The reason for this investigation meeting was because Mr Summerskill had been involved in dealing with a complaint raised by AC's father against the Claimant. Mr Summerskill had discussed the issue with the Claimant's line manager and that it was not taken any further.

50. Mr. Abbot then conducted a further investigation meeting with the original investigation manager, George McKernon (Fresh Food Manager). Mr McKernon recalled that the Claimant had been emotional during the meeting and that he had adjourned to allow her to compose herself. Mr McKernon confirmed that he had suspended the Claimant and she had requested to leave through the back door, but he had declined her request. Mr McKernon confirmed that he did not touch the Claimant when escorting her out and denied placing his hand on her.

51. Mr. Abbot conducted a further investigation meeting with Brian Maynard (Services Manager and the Claimant's line manager) regarding the incident between AC's father and the Claimant. Mr Maynard confirmed that the issue had arisen from the Claimant wanting to speak to AC about her poor performance.

52. Mr Abbot considered the Claimant's comments about feeling that there had been no consideration given to the fact she was suspended from work and experiencing poor mental health. Mr. Abbot acknowledged the Claimant's concerns and agreed that it would have been preferable for the Respondent to have sought to postpone the disciplinary hearing in order to allow the Claimant to attend. However, he also appreciated that there was no certainty as to when she would have been able to return to work. Further, the Claimant had provided a letter and written statement containing her representations to be considered at the disciplinary hearing. Having reviewed the written representations and heard the Claimant's further representations during the appeal hearing, which she had attended, Mr. Abbot was satisfied that had she attended the disciplinary hearing, the outcome would not have been different.

53. Mr Abbot contacted the head office in order to check whether there was any record of the Claimant or her mother, having called in to inform the company that the Claimant had attempted to take her own life. He also contacted the Respondent's customer complaints helpline in the same regard. From these investigations, there were no records of any such calls having been made, or indeed any calls having been received by the Claimant or her mother. Mr. Abbot noted that the Claimant's suspension letter had expressly stated that any concerns should be communicated to Roy Moore or George McKernon, but the Claimant had not contacted these individuals to report any mental health concerns.

54. Mr Abbot considered the Claimant's comments about having experienced difficulties in her working relationship with AC. He was satisfied that this had been dealt with at the time and he did not believe it affected AC's credibility as a witness. In any case, AC was one of two witnesses to the Claimant's conduct on 23 January 2021 (the other being KR) and therefore even if AC's statement was disregarded, there was still a witness confirming that the Claimant had pulled down S's headscarf. Further, the Claimant had admitted to pulling down S's headscarf on that occasion, therefore there was no apparent basis for the Claimant to challenge AC's credibility. For the same reasons, Mr Abbot did not believe it made any sense that AC was victimising the Claimant.

55. Mr. Abbot reviewed the order of the investigation. He was satisfied that the investigation had been commenced to obtain further evidence and witness statements before the decision was made to speak with the Claimant. He did not consider this affected the fairness of the investigation or the disciplinary sanction in any way.

56. Mr. Abbot reviewed the Claimant's letter and statement, which she had provided ahead of the disciplinary hearing on 2 February 2021. He noted the Claimant's position that S had been laughing when the Claimant removed her headscarf. He reviewed the witness statements and confirmed that there was no suggestion that S was laughing or had consented to her headscarf being pulled down. Mr Abbot did not consider the fact that S did not challenge the Claimant at the time of her conduct to be relevant.

57. Mr Abbot also acknowledged the Claimant's comments about social distancing. From the disciplinary outcome letter, it was clear that the reason for the Claimant's dismissal was because she had pulled down S's headscarf. He could see that an alleged breach of social distancing guidelines had been referred to in the Claimant's invitation to the disciplinary hearing. However, this was not included in the outcome letter as one of the reasons for her dismissal. Therefore, Mr. Abbot was satisfied that the issue of whether or not the Claimant and other individuals had observed social distancing was not material to the outcome of the disciplinary process.

58. In light of the Claimant's concerns regarding a lack of CCTV coverage, Mr. Abbot conducted further investigation to clarify the reason for why there was none available. He contacted the store to make enquiries and it was confirmed to him that engineers had been working on the CCTV over the period including 23 and 25 January 2021. In any event, given the Claimant had admitted to pulling down S's headscarf on one occasion, he did not think that the lack of CCTV footage impacted the overall decision to dismiss her.

59. Upon review of the disciplinary hearing notes, it was apparent to Mr Abbot that Ms Joslin, the disciplinary manager, had reviewed the points raised by the Claimant and considered them in a structured manner. In any event, Mr. Abbot had considered the written representations carefully, as well as the Claimant's letter of appeal and comments during the appeal hearing. After considering the case and the Claimant's grounds of appeal, Mr. Abbot decided not to uphold the appeal. He was satisfied that Ms Joslin's decision to dismiss the Claimant for gross misconduct was a fair and reasonable outcome. He did consider whether any sanction less severe than dismissal might have been appropriate. He acknowledged that the Claimant had apologised for any offence caused to S. However, considering the severity of the Claimant's conduct, the fact that she did not seem to fully appreciate the seriousness of her actions and the lack of any reasonable mitigation, he did not think that any sanction less than dismissal was appropriate. Mr Abbot delivered the outcome of the appeal to the Claimant by letter on the 15 April 2021 where he upheld the decision to dismiss her.

Law

60. Section 98(1) Employment Rights Act 1996 (ERA) provides that it is for the employer to show the reason or principal reason for dismissal of the employee and 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. If the Respondent fails to do so the dismissal will be unfair.

61. If the Tribunal decides that the reason for dismissal of the employee is a reason falling within Section 98(1) or (2) ERA it will consider whether the dismissal was fair or unfair within the meaning of Section 98(4) ERA. The burden of proof in considering Section 98(4) is neutral.

62. Section 98(4) ERA provides: -

“the determination of the question whether the dismissal is fair or unfair (having regards 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.”

63. In the case of **Iceland Frozen Foods Ltd v Jones [1982] IRLR 439 EAT**, guidance was given that the function of the Employment Tribunal was to decide whether in the particular circumstances 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.

64. In the case of **Sainsburys Supermarket Ltd v Hitt [2003] IRLR 23CA**, guidance was given that the band of reasonable responses applies to both the procedures adopted by the employer and the sanction, or penalty of the dismissal.

65. The Tribunal should not substitute its own factual findings about events giving rise to the dismissal for those of the dismissing officer (**London Ambulance NHS Trust v Small [2009] IRLR 563**).

66. In the case of **British Home Stores v Burchell [1978] IRLR 379 EAT**, guidance was given that, in a case where an employee is dismissed because the employer suspects or believed that he has committed an act of misconduct, in determining whether the dismissal was unfair, an Employment Tribunal has to decide whether the employer who discharged the employee on the grounds of misconduct in question and obtained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at the time. This involved three elements. First, there must be established by the employer the fact of that belief, that the employer did believe it. Second, it must be shown that the employer had in its mind reasonable grounds upon which to sustain that belief. Third, the employer at the stage on which he formed that belief on those ground, must have carried out as much investigation into the matter as was reasonable in all of the circumstances of the case.

67. With regard to contributory fault pursuant to s122(2) ERA 1996, a tribunal may reduce a basic award where it considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such as it would be just and equitable to reduce or reduce further the amount of the award to any extent.

68. With regard to the compensatory award (s123(6) ERA 1996), where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, the tribunal shall reduce the amount of the compensatory award by such proportion as it considers just and equitable.

69. To fall into this category, the Claimant's conduct must be 'culpable or blameworthy'. In respect of the compensatory award, such conduct must cause or contribute to the Claimant's dismissal, rather than its fairness or unfairness. Such conduct need not amount to gross misconduct (**Jagex Ltd v McCambridge UKEAT/0041/19**).

70. A tribunal should first assess the amount of loss under s 123 (1) ERA 1996 and then consider the question of contributory fault. Where an initial reduction has been made under s 123(1), this might alter the extent of the reduction under s 123(6). Accordingly, it may turn out that the reduction from the compensatory award under s 123(6) would be less than the reduction which it was just and equitable to make to the basic award under s 122(2) ERA 1996.

71. The EAT in **Steen v ASP Packaging Ltd UKEAT/0023/13, [2014] ICR 56** (Langstaff P Presiding) observed that a finding of 100% contributory conduct is an unusual finding, albeit a permissible finding. A Tribunal should not simply assume that because there is no other reason for the dismissal therefore 100% contributory fault is appropriate. It may be the case, but the percentage might still require to be moderated in the light of what is just and equitable: see **Lemonious v Church Commissioners UKEAT/0253/12** (27 March 2013, unreported) (Langstaff P presiding).

72. In assessing contribution, the tribunal should in turn, 1) Identify the relevant conduct; 2) assess whether it is objectively culpable or blameworthy; 3) consider whether it caused or contributed to the Claimant's dismissal; and 4) If so, determine to what extent it is just and equitable to reduce any award. (**See Steen v ASP Packaging Ltd UKEAT/0023/13/1707**).

Conclusion and Findings

73. In the first instance the Tribunal had to find the reason for dismissal. The Tribunal had no doubt in finding that the genuine reason was the Claimant's misconduct. The Respondent's policies were clear and should have been adhered to by the Claimant. The Respondent's Respect in the Workplace Policy made it clear to the Claimant that any serious breach of that policy such as discrimination due to a protected characteristic or bullying or harassment due to a protected characteristic based on race or religion could constitute a disciplinary offence and lead to dismissal. The Respondent's disciplinary procedure confirmed that examples of gross misconduct included: serious breach of the Respondents Respect in the Workplace Policy. The Respondent concluded that the Claimant had committed gross misconduct, specifically by pulling down S's religious headscarf on two occasions on 23 and 25 January 2021. Indeed, the Claimant had admitted to doing so on one occasion namely 23 January 2021. There was no doubt in the Tribunals view that the Respondent was entitled to find on the evidence gathered by it in respect to both of the dates in questions that the misconduct identified cumulatively amounted to gross misconduct.

74. The Tribunal then had to consider whether the Respondent conducted a reasonable investigation in all of the circumstances. The Tribunal found that the investigation was full

and thorough. This involved the investigation conducted by Mr. McKernan the investigation officer, Ms Joslin the dismissing officer and Mr. Abbot the appeal officer. Mr. McKernon interviewed all the relevant witnesses including the Claimant who admitted pulling down S's headscarf on one occasion. He also interviewed three other witnesses who confirmed that the Claimant had done so on 23 January 2021 (AC and KR) and one other witness (AS) who had seen her do so on 25 January 2021. The Tribunal was satisfied that as a result of Mr. McKernon's investigation he had collated sufficient evidence that of the allegations that warranted disciplinary action. The Tribunal accepted that an investigation need not be perfect or faultless, nevertheless, Mr. McKernon's investigation in the Tribunal's view amounted to a comprehensive investigation that supported the allegations and the reasonable grounds that ultimately led to dismissal.

75. As to whether the Respondent had a genuine belief in misconduct, there was no suggestion from the Claimant that the Respondent did not have a genuine belief that she had committed gross misconduct. Indeed, the Claimant had admitted that she had pulled down S's headscarf on 23 January 2021 and this was not challenged by the Claimant. Therefore, the Tribunal accepted that the Respondent did have a genuine belief that the Claimant had committed the misconduct for which she was dismissed.

76. The question for the Tribunal was not whether the Claimant committed the gross misconduct alleged, but whether the Respondent had reasonable grounds for that belief. Given the carefulness of the investigation, the Tribunal has concluded that the reasonableness of the belief was established. At the heart of the case appeared to be a misconceived belief on the Claimant's part that pulling down S's headscarf was done in jest and was not malicious. Given that the Claimant was in a position of authority as a Team Leader with the Respondent and should have been fully conversant with the Respondent's Respect in the Workplace Policy, the Tribunal could not see how the Claimant could have reasonably come to that conclusion. However, in this case the Claimant apparently considered that as a Team Leader in a position of authority over S she could conduct herself in the way that she did because she found it amusing.

77. Furthermore, much of the basis of the allegations were either admitted by the Claimant, or evidently true on the face of the documents, because as cited above she admitted pulling the Claimant's religious covering down on one occasion and this was independently witnessed by two witnesses AC and KR. It was reasonable in the Tribunal's view that the Respondent relied upon the evidence of AS who witnessed her doing so again on 25 January 2021. The Claimant did not allege that AS did not give an accurate account of what he had witnessed. She merely asserted that it was not true. She challenged AC's account but this related to the first incident on 23 January and was corroborated by another witness KR.

78. Furthermore, the Respondent was reasonable in accepting the evidence of the witnesses interviewed because there was no basis to believe or assume that they were anything other than honest in their account of the facts of the Claimant's misconduct based on the evidence presented to the Tribunal. Where the evidence of AC was challenged by the Claimant, Ms. Joslin and Mr. Abbott did further investigations to ascertain that AC was telling the truth and was not adversely motivated against the Claimant. In those circumstances, the Tribunal accepted that the Respondent had reasonable grounds to believe that the Claimant had committed the misconduct alleged.

79. With regard to the range of reasonable responses/fairness of sanction, the Tribunal noted that the Claimant herself admitted that she pulled down S's headscarf on one occasion and that this was on the face of it a serious breach of the Respect in the Workplace Policy. Employees of the Respondent are entitled to be treated with dignity in the workplace pursuant to such procedure and Managers of the Respondent must act in accordance with such procedures. As such the Respondent must have total confidence that its managers act in line with its principles and according to Respect in the Workplace Policy. Given that the Claimant failed to do this in many respects, it was clear to the Tribunal that she committed gross misconduct and that dismissal was entirely appropriate and within the range of reasonable responses. It was particularly relevant that the Claimant whilst accepting that her conduct was inappropriate, and she was prepared to apologise for it, she adduced evidence during the course of the disciplinary process to downplay or minimise the serious nature of her actions by questioning the motives of S for raising her complaint. This in itself supported the Respondent's decision that the Claimant was unlikely to change or modify her behaviour in future if she had been given a sanction that was a lesser penalty than dismissal for gross misconduct.

80. In relation to fairness of procedure, the Claimant made little if any criticism of the disciplinary procedure that was followed by the Respondent. The Respondent's disciplinary procedure was followed properly and fully by the Respondent. She was notified of the outcome of the investigation and the decision to progress to a disciplinary hearing. She was provided with all the evidence obtained through the investigation. She was invited to a disciplinary hearing with the disciplinary officer and was given an opportunity to respond to the allegations against her. She chose not to attend and gave a written statement and letter to be considered in her absence. That was a choice she was entitled to make, and Ms. Joslin considered her evidence in some detail. Each allegation was considered by Ms Joslin and dealt with by her as cited above in the facts section of this judgment. Ms Joslin considered the Claimant's defence or mitigation. Ms. Joslin was satisfied that the allegations in respect of the Claimant pulling down her colleague's headscarf on two occasions were well-founded. The Claimant had admitted to the misconduct, albeit on one occasion only. However, there was a witness to the second occasion as well and Ms. Joslin found it more likely than not that that the Claimant would have pulled her colleague's headscarf down on both occasions. The Claimant had not put forward any mitigation for her actions, other than to say that she had done it in jest. Whether it occurred on one or two occasions, Ms. Joslin found this to be completely inappropriate and did not consider it to be reasonable mitigation. The Respondent wrote to the Claimant with the dismissal decision and conclusions and gave the Claimant the opportunity to appeal. The Claimant appealed against the decision and attended an appeal hearing conducted by Mr. Abbott. The Tribunal found that the appeal conducted by Mr. Abbott was thorough and complete and included additional investigations conducted by him following the appeal hearing. After considering the case and the Claimant's grounds of appeal, Mr. Abbot decided not to uphold the appeal. He was satisfied that Ms Joslin's decision to dismiss the Claimant for gross misconduct was a fair and reasonable outcome. He did consider whether any sanction less severe than dismissal might have been appropriate. He acknowledged that the Claimant had apologised for any offence caused to S. However, considering the severity of the Claimant's conduct, the fact that she did not seem to fully appreciate the seriousness of her actions and the lack of any reasonable mitigation, he did not think that any sanction less than dismissal was appropriate. The Tribunal was satisfied that Mr. Abbott conducted a fair and reasonable appeal. In all the circumstances, the Tribunal accepted that that the fairness of the Respondent's procedure was established.

81. For the sake of completeness, even if the Tribunal had concluded that the dismissal was unfair, the Tribunal would have found that the conduct of the Claimant amounted to conduct before dismissal that should lead to a just and equitable reduction in any basic award or compensatory award. Given the seriousness of the Claimant's misconduct in pulling down S's religious head covering contrary to the Respondents Respect in the Workplace Policy, the Tribunal in all likelihood would have concluded that the reduction should be 100%.

82. In her Claim Form the Claimant claimed that she was owed a Covid bonus at the termination of her employment which amounted to either a breach of contract or unlawful deduction of wages. She did not state upon what basis she was owed such bonus referring to no contractual entitlement nor did she quantify the amount that was owed and how she came to such figure. In the absence of the Claimant proving the contractual basis of the bonus, the basis upon why she said she was owed it and the quantification of the amount owed, she did meet the burden upon her to prove her entitlement. As a consequence, the Tribunal dismissed this claim.

83. Given the above conclusions of the Tribunal, the Claimant's claim for unfair dismissal and breach of contract/unlawful deduction from wages are dismissed.

Employment Judge Hallen

15 October 2021