EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Mr Irvin Blake		The Color Company (TM) Limited

Heard at: London Central **On**: 11, 12, 13, 16, 17, 18 March 2020

Before: Employment Judge Stout
Ms T Breslin

Representations
For the claimant: Mr V Khanna (pro bono lay representative)
For the respondent: Mr R Gray (counsel)

JUDGMENT

The unanimous judgment of the Tribunal is that:

(1) The Respondent did not discriminate against the Claimant because of his race in contravention of ss 13 and 39(2)(c)/(d) of the Equality Act 2010 (EA 2010);
(2) The Respondent did not discriminate against the Claimant because of his age in contravention of ss 13 and 39(2)(c)/(d) of the EA 2010;
(3) The Claimant's claim of unfair dismissal under s 111 of the Employment Rights Act 1996 (ERA 1996) is not well-founded and is dismissed.

REASONS

Introduction

1. The Claimant was employed by the Respondent printing business from 13 June 2006 until he was dismissed, and paid in lieu of notice, on 23 July 2017. The Respondent's stated reason for dismissal was because of the Claimant's conduct. In dismissing the Claimant the Respondent relied on a Final Written Warning for misconduct previously given to the Claimant.

2. By a claim form received by the Tribunal on 22 November 2017 the Claimant brought claims against the Respondent for race discrimination, age discrimination and unfair dismissal.

3. Judgment was given at the hearing and these are the written reasons which are provided upon request. We have made minor amendments to the reasons given orally for accuracy, and so as to include in full the legal principles to which we had regard, which we only summarised when giving judgment orally.

The issues

4. The issues were agreed at the outset of the hearing to be as follows:

Unfair dismissal

(1) What was the reason for the claimant's dismissal? Was it:
   a. conduct, a potentially fair reason; or
   b. race; or
   c. age.

(2) If the reason for the Claimant's dismissal was conduct, was the dismissal fair in all the circumstances, namely:
   a. Did the Respondent genuinely believe that the Claimant committed the misconduct alleged?
   b. Was such a belief one that a reasonable employer could hold?
   c. Was the Respondent's investigation one that a reasonable employer could adopt?
   d. Was dismissal a sanction that was open to a reasonable employer?

Direct discrimination – age or race

(3) Was born in 1957 and describes himself as 'elderly'.
(4) The Claimant is black.
(5) His comparators are: David Payne and/or a hypothetical white or non-elderly man.

(6) The treatment complained of is:
   a. his receiving a final written warning for the incident with David Payne in January 2017;
   b. the investigation leading to the final written warning;
   c. his dismissal.

(7) Were any of these incidents less favourable treatment?

(8) If so, was the reason either age or race?

Remedy

(9) Basic award
(10) Compensatory award
(11) Injury to feelings
(12) Mitigation
(13) Contributory fault
(14) Polkey
(15) Adjustment for failure to follow ACAS Code of Practice on Disciplinary and Grievance Procedures[1] (the Respondent contends the Claimant unreasonably delayed in submitting his grievance; the Claimant contends that the Respondent failed to arrange for an impartial person to hear his appeal).

The Evidence and Hearing

5. At the start of the hearing, the employee panel member listed to sit on this appeal was ill. We informed the parties of this and explained that regardless of the composition of the panel all panel members and judges have sworn the judicial oath to do right by all manner of people after the laws of this realm, without fear or favour, affection or ill will. We indicated that both parties could have some time to consider whether they wished to consent to the hearing going ahead with only two panel members and indicated that an alternative would be to try to obtain an alternative employee member for tomorrow. They both indicated immediately, however, that they consented to proceed with two panel members.

6. It was also agreed that the name of the Respondent should be amended to The Colour Company (TM) Limited.

7. We received written witness statements and heard oral evidence from the following witnesses for the Claimant:

    a. The Claimant himself;
    b. Adam Costello (Print Operator who left the Respondent in May 2017);
    c. Dennis McNulty (Trade Union Branch Secretary for the GMB Trade Union).

8. We also heard oral evidence from David Butler (who is still employed by the Respondent) under a witness order sought by the Claimant. Exceptionally,

[1] That the parties were seeking adjustments in these respects was only identified in Closing Submissions.

with the agreement of both parties, because of Mr Butler's concerns about giving evidence under order in an acrimonious case where he was still employed by the Respondent but not called by them as a witness, all other witnesses and the Claimant were not present in the hearing room while Mr Butler gave evidence.

9. We received written witness statements and heard oral evidence from the following witnesses for the Respondent:

    a. Julie Rushton-Summers (Operations Manager);
    b. Greig Fairclough (Business Development Director);
    c. Gregg Newton (Senior Centre Manager);
    d. Philip Pearlman (Production Manager).

10. The Respondent also submitted a witness statement for Dorota Sawicka (Evening Shift Supervisor), but did not tender her for cross-examination as she has moved back to Poland.

11. We explained our reasons for various case management decisions carefully as we went along.

The facts

12. We have considered all the oral evidence and the documentary evidence in the bundle to which we were referred. The facts that we have found to be material to our conclusions are as follows. If we do not mention a particular fact in this judgment, it does not mean we have not taken it into account. All our findings of fact are made on the balance of probabilities. Page references are to the bundle of documents supplied by the parties.

The parties

13. The Claimant was employed by the Respondent as an Intermediate Operator from 13 June 2006 until he was dismissed, and paid in lieu of notice, on 23 July 2017. He is a Black British man. He was born in 1957 and describes himself as 'elderly'.

14. The Respondent is a printing company that supplies digital printing to both corporate and individual customers. It has 10 stores in the UK and four in the US. The business is owned by Elgin Loane. It has a lean management structure. Each store has a manager. Sitting above the store managers there is Business Development Director Greig Fairclough, Julie Rushton-Summers (Operations Manager), Keith Moore (Company Secretary/Financial Controller). Mr Fairclough heads up a small IT and sales team. Mr Moore manages four employees who are responsible for Payroll and Finance. Ms Rushton-Summers deals with Human Resources matters. The company is a

member of the British Printing Industries Federation (BPIF) which provides it with some external HR support.

History between Mr Payne and the Claimant

15. The Claimant and Mr Payne (who is White British and younger than the Claimant) worked together at the Cannon Street branch of the Respondent some time before the events with which these proceedings are concerned. It is not in dispute that there had been acrimony between them and that as a result the Claimant refused to work with Mr Payne and moved branches to the Curzon Street branch. In particular, there had been an occasion when the Claimant and Mr Payne had had a heated exchange. Mr Payne and the Claimant disagree about what was said on that occasion, and we do not need to resolve that dispute, but what is relevant to these proceedings is that by the time of the Christmas Party (below) there was still animosity between them regarding this issue.

Background evidence from the Claimant about racist culture at the Respondent

16. The Claimant gave evidence that he felt *"racism was always in the background at the Respondent Company"*. He referred in particular to the manager of the Cannon Street branch, who the Claimant suggested made people aware of his racist views. The Claimant did not complain about this conduct at the time (or any other such conduct that he mentioned in his witness statement) because he said that if you are black racism is a fact of life and not something you complain about unless you have to. We have not heard evidence about this alleged background from anyone other than the Claimant and the matters were not put to any of the Respondent's witnesses. The individual to whom the Claimant refers was not involved in the matters with which we have been concerned in these proceedings and (other than in relation to David Payne) it has not been suggested that there is any background evidence from which it could be inferred that the individuals with whom we are concerned were influenced by the Claimant's race. In those circumstances, it does not appear to us that this background evidence presented by the Claimant has any relevance to the matters with which we are concerned and so we make no finding as to its veracity. We have, however, considered very carefully as set out below the evidence that is relevant to the individuals with whom these proceedings are concerned.

The Christmas party incident

17. On Friday 29 January 2016 the Respondent held its late Christmas party at the Cavendish Hotel. It was for all staff and management. Dinner, with free wine and champagne and a free bar were provided. Mr Fairclough even helped out behind the bar at one point pouring free shots for staff.

18. On the evening of the event the Claimant realised that on the seating plan for dinner he had been placed only one seat away from Mr Payne at the same table. The Claimant was uncomfortable about this and raised it with Mr Summers and then Ms Rushton-Summers (who is Mr Summer's sister), but she said she had been too busy and not realised and it was too late to change so they should just get on with it. (Ms Rushton-Summers does not recall that conversation, but we accept a conversation along those lines took place.) Mr Payne, in a statement he submitted as part of the investigation into the grievance that the Claimant later raised about this incident, said that he realised only at the point of sitting down at the table. After a short time, he moved to an empty seat at another table. As a result there was no interaction between the Claimant and Mr Payne over dinner. They did, however, pass each other later on the stairs as the Claimant was coming out of the toilets and Mr Payne was going toward the toilets. Again there is a dispute between Mr Payne's account (as set out in his statement to the grievance investigation later) and the Claimant as to what happened on the stairs, which we again do not need to resolve, save to note that it was acrimonious.

19. Subsequently the two encountered each other again in the bar area at about 23.45. By this time Ms Rushton-Summers had gone home, having left at 22.30. Drinks had been spilled in the bar area before this encounter, as is apparent both from the fact that on the CCTV evidence (which we deal with below) yellow signs are out and bar staff are wiping the floor, and Mr Butler also gave evidence that drinks had been spilled.

20. As to what happened in the further encounter between Mr Payne and the Claimant there is considerable dispute between the parties. The Respondent's case is that the Claimant and his witnesses are lying in their accounts of what happened that night. Our findings are as follows:-

<u>The CCTV evidence</u>

21. For the purposes of these proceedings a third party disclosure order was made by the Tribunal requiring the Metropolitan Police Service to release the CCTV evidence held by the police as to the incident between Mr Payne and the Claimant that occurred in the bar area at about 23.45. This was provided to us by both parties on USB sticks. The videos on the two USB sticks appear to us to be identical. There are three videos. We begin with our findings as to what is shown on the video and then deal with the other witness evidence that we have received about this incident.

22. There were three short video clips which we viewed in chambers before reading any of the documentary evidence from either party and have viewed again as part of our deliberations. The names of individuals were supplied by the parties in the course of the hearing:

    a. *Lounge scuffle – bar view* – This shows the Claimant at the bar. Mr Payne approaches the bar and starts talking to the Claimant, who turns round. They are close together and talking into each other's

ears, presumably because the music in the bar area is loud. The Claimant appears to turn his head away from Mr Payne, but Mr Payne follows, talking into his ear. Mr Payne's proximity to the Claimant appears intimidating. The Claimant pushes Mr Payne away with his elbow, then Mr Payne throws some of his bottle of beer at the Claimant and the Claimant throws some of the drink from his glass at Mr Payne and Mr Payne throws more beer on the Claimant. Mr Payne then walks away. The Claimant turns to the bar. He looks uncomfortable and upset and wipes the drink from his head with a napkin from the bar. Mr Payne then comes back and from behind pours more beer on the Claimant's head and shoulders and walks away. The Claimant picks up a glass with dark liquid in it from the bar (the drink is in front of Anna Falconer) and lunges at Mr Payne's retreating back, throwing the glass with force towards Mr Payne. The glass can be seen flying through the air in a trajectory that misses Mr Payne, but the Claimant makes physical contact with Mr Payne with his arm/hand and they both exchange blows. Mr Payne still has the beer bottle in his hand during this exchange of blows and he hits the Claimant twice on the head with it. The bottle does not break on impact. The two are separated quickly by Mr Costello, Mr Loane, Ms Falconer and bar staff. Mr Butler is also present during the incident. He does not see the first drink-throwing but is behind them at the point that Mr Payne came back for a second time and poured beer over the Claimant's head and shoulders and the ensuing fight. This all happens between 23:42 and 23.45.

b. *Lounge scuffle – lounge view* – From this angle it is possible to see that during the first altercation the Claimant is talking to Mr Payne as well as Mr Payne talking to the Claimant, that the Claimant pushes Mr Payne away quite hard with his arm and that Mr Payne throws the drink in his face. It can be seen that Mr Costello is engaged prior to the fight in dealing with Davon who is evidently very drunk on the sofa. It is also possible to see what appears to us to be liquid landing on the floor behind Mr Payne during the fight. There is a mirror on the wall in which part of the action is reflected. We cannot otherwise see any more relevant detail from this view.

c. *Scuffle – forecourt* – Mr Payne and some others are in the forecourt. Mr Payne appears calm. The Claimant comes out with security and immediately crosses towards Mr Payne, gesticulating, speaking and apparently trying to get to Mr Payne. He is prevented from doing so by others who block him. Mr Payne then moves towards the Claimant aggressively and is also blocked by others. There are about 10 people on the forecourt during this. The Claimant then leaves and the final section of the video shows a further altercation between another black man and Mr Payne, with other people intervening to prevent them hitting each other. It is not possible to see who starts this further altercation. It is, however, possible to see that before it Mr Payne is talking with another black man and on apparently friendly terms. This all happens between 23:57 and 23:59.

The eye-witness accounts

23. We now deal with the witness evidence:-

24. In relation to the fight itself, the Claimant's account differs to what can be seen on the video and he maintains that the video must have been tampered with. In particular, he says that part of the incident is entirely missing from the video. He says that after Mr Payne poured beer on his head from behind, he went away and then came back and hit him over the head from behind with a bottle. His precise account of this has differed at different times, however. In his police interview on 11 February 2016 he described being hit on the top of his head from behind, that he did not remember much, was dazed, but saw and heard glass shatter as it happened. In his first written account of the incident on 10 November 2016 (his grievance/Notification of formal complaint) he says that he was *"violently attacked, by way of a champagne bottle being smashed over [his] head .. sustaining serious injury to myself"*. In the grievance interview with Ms Greatorex on 25 November 2016 he gave a similar account. In his witness statement for these proceedings, he gives a similar account again, but with variations. He does not say that it was a champagne bottle. He says that the bang was to the side of his head, that glass shattered over the bar area and he says that he threw his glass as Mr Payne was being dragged away and that it was then that Mr Payne threw a bottle at him so that he was hit for a second time. In oral evidence to the Tribunal the Claimant accepted that he tried to throw a glass at Mr Payne. His account was that he did so with violence because he thought he had just been hit over the head and was badly injured and wished 'to do the same to him'. He said that he only missed because Ms Falconer pulled his jacket, which put out his aim.

25. Mr Costello in a statement provided for the grievance investigation on 10 February 2017 said that he saw Mr Payne attack the Claimant with a glass bottle, with the bottle smashing in the process. He said that he *"didn't see any of the build up"*. In his witness statement for these proceedings Mr Costello said that he believed *"100%"* that the CCTV footage has been corrupted and that Mr Payne did not pour the beer over the Claimant's head at the bar but did smash a bottle over his head at that point. He considered this scene to have been removed from the footage.

26. Mr Butler gave a statement to the grievance investigation on 26 March 2017. This was at the instigation of the Claimant who had been asking him for months to give a statement. In his statement he said that he did see the initial throwing of drinks into each other's faces and then saw Mr Payne return and smash a bottle on the Claimant's head. He said it shattered into pieces and he was startled by what he was seeing. Mr Butler later retracted this statement following a conversation with Mr Fairclough as we set out below, but he attended the Tribunal to give evidence under a witness order. Mr Butler viewed the video evidence for the first time in Tribunal. He was clearly surprised by what he saw but accepted that as a result he may have been mistaken in his recollection.

27. Mr Payne did not give evidence to the Tribunal, but we have had the benefit of a transcript of his interview with the police on 16 February 2016 from which it is clear that his recollection of events also differed to what was on the video, although on being confronted with the video evidence he did not dispute that it was genuine. It is apparent from the transcript that he had also viewed the video with his solicitor and so watched it a number of times. We note also that, insofar as can be ascertained from the transcript, the video watched in that interview is the same as the one we have seen. When Mr Payne provided a statement to the grievance investigation in November 2016 he recounts what can be seen on the video evidence. We find that the manner in which he does that is consistent with the rest of the statement in that it is full of detail, very immediate and contains a wealth of background. We do not consider that the way it is written indicates he was viewing the video as he wrote it, as was suggested by Mr Khanna in closing submissions, but is simply his recollection of what he saw when he viewed the video with the police and his solicitor previously. We should note also that in his written statement and in his police interview Mr Payne refers to having suffered cuts during the incident, including to his head, top of his chest and shoulder which left him bleeding. His statement also includes reference to what happened in the yard afterwards when he said that *"a stocky black guy whose name I cannot remember … grabbed me by my shirt and began shouting in my face while shaking me, he was hurting me and I tried to push him off and he would not let go obviously drunk and before I knew it people were breaking us up"*.

Our conclusions on the facts of the Christmas Party incident

28. The Claimant suggests to us that the CCTV evidence could have been tampered with by the hotel before it was handed over to the police. This was a suggestion that he also made to the Respondent in the course of the grievance process, and a complaint that he made to the Independent Police Complaints Commission (IPCC) on 8 April 2017 where he suggested that the *"CCTV footage could have been edited on instruction from my employer to the Hotel"*. The Claimant gave evidence in his witness statement that he had been told by staff at the Hotel on 3 February 2016 (when he returned shortly after the incident) that they had been using the video footage for training.

29. We reject the Claimant's contention that the CCTV has been tampered with by the Hotel before the video was given to the police (which had happened prior to Mr Payne's police interview two weeks' later on 16 February 2016). We also reject the contention that any instruction was given by the Respondent to tamper with the video. Indeed, the suggestion that it was at the Respondent's instruction has not been seriously pursued in this hearing. Mr Costello did in his evidence suggest that the whole incident at the Christmas Party was somehow a 'set up' by the Respondent to engineer the Claimant's dismissal. This is implausible given that after the incident the Respondent took no action at all in relation to the Claimant and did not in the end even after he brought the matter up again by raising a grievance in November 2016 actually dismiss him for this incident. There is thus simply no

evidence from which it could be inferred that the Respondent had a motive to instruct the hotel to tamper with the video evidence.

30. In any event, it is in our judgment implausible that the CCTV could have been tampered with in the way alleged by the Claimant and Mr Costello. It would have involved splicing into the video evidence a quite complex sequence involving several people. The footage from two cameras would have to have been doctored in the same way, and the reflection of the incident in the mirror would also have to be dealt with. Even if it is possible with considerable technical skill and equipment to do something like this without the co-operation of the individuals who feature on the video (which we are not prepared to accept as a possibility in the absence of expert evidence), absolutely no evidence has been advanced as to any motivation the Hotel would have had to do this. Human memory is unreliable and the fact that people (even several people) remember an incident differently to what appears on a video is not in itself evidence that a video has been tampered with. In this regard, we add that this is particularly so where what individuals (the Claimant, Mr Costello and Mr Butler) thought they saw is not in our judgment very far from what did happen. It is relatively easy to see how what they remember could be a mix-up of what did happen. Mr Payne *did* approach the Claimant from behind at the bar with a bottle. The Claimant *was* subsequently hit on the head by Mr Payne with a bottle. From Mr Costello's viewpoint in particular, this would have appeared to be towards the bar area. It is very likely that there was a lot of glass on the floor immediately afterwards as the glass thrown by the Claimant certainly landed on the floor and the bottle used by Mr Payne, although it did not smash on impact, probably ended up on the floor and thus may have smashed then.

31. It follows that our findings as to what happened during the fight are as set out above and are based entirely on our viewing of the CCTV footage. It does not follow, however, that we find the Claimant, Mr Costello or Mr Butler to have been lying about this incident. We do not. Although details of their accounts have varied somewhat over time, the essence of their accounts have been consistent and, having seen them cross-examined, we find their memories of the incident to be genuine, albeit mistaken.

Events immediately after the fight

32. The Claimant travelled home after the incident with Mr Pearlman. On the train Mr Pearlman noticed that the Claimant had two bumps on his head and took pictures of them and recommended he should go to hospital to get them checked. The Claimant attended hospital after the incident at 03:16am on 30 January 2016 and we have the medical record of that which records that he had a lump on his head, but *"no broken skin/wound, no battle sign"* and was diagnosed with a minor head injury (p 397). The Claimant said he had concussion, but this is not mentioned on the doctor's form and we do not therefore accept that particular aspect of his evidence.

33. Mr Payne remained at the Hotel drinking until 2am after the fight. He was with Mr Fairclough and Mr Loane.

34. The Claimant was due back at work on the Sunday but called in sick as he was still suffering headaches. The next day 2 February 2016, he was asked to complete a sick form. He objected to this and spoke to Ms Rushton-Summers about the incident with Mr Payne. The Claimant's position was that this was gross misconduct by Mr Payne and that something should have been done about it by the company. Ms Rushton-Summers was not aware of the incident as she had left the party at 22.30 before it had happened and no one had spoken to her about it. She said that he should put his complaint in writing if he wanted it formally investigated.

35. On 3 February 2016 the Claimant visited the Cavendish Hotel seeking to view the CCTV evidence, but was refused access to it. It was on this occasion that he was told the video had been used for training purposes.

36. On 8 February 2016 the Claimant reported the matter to the Police.

37. On 11 February 2016 the Claimant gave a statement to the police (pp 344-348), the material parts of which we have noted above.

38. On 16 February 2016 Mr Payne was interviewed by the police (p 351ff), the material parts of that interview we have noted above.

39. A few weeks later the Claimant was appraised by Mr Summers and Mr Pearlman. He said there was discussion about the Christmas party incident again and that Mr Summers said he should put in a formal complaint if he wanted it investigated. Mr Pearlman did not recall this conversation, but we note that Mr Summers' position was consistent with Ms Rushton-Summers' at this point.

40. The Claimant evidently considered that the Respondent ought unilaterally to have investigated the incident without the need for a complaint by him. We do not agree. Ms Rushton-Summers had not seen the incident. The view of Mr Fairclough was that there had been a fight, but that it was probably a result of excessive alcohol consumption and his evidence, which we infer was broadly consistent with the 'office gossip' which Mr Pearlman referred to as happening after the party, is that there was no clear view as to who was at fault and Mr Fairclough's approach was effectively to 'let sleeping dogs lie'. We accept that was within the range of reasonable responses an employer could have regarding a situation such as this.

41. On 26 May 2016 Mr Payne was cautioned by the police for assault for pouring drink over the Claimant (p 148).

42. On 14 June 2016 the Claimant was told that Mr Payne had been issued with a police caution (p 60).

43. At this point neither the Claimant or Mr Payne told the Respondent that Mr Payne had been issued with a caution.

44. Mr Pearlman gave evidence that during 2016 he became concerned about the Claimant as he appeared to be struggling with his role and he wondered whether the Claimant should have a welfare meeting to see if he could move to a less demanding store or have a change in hours. We accept this evidence because the Claimant also acknowledged that he was struggling at work during this time but did not want to be *"registered for mental health or having depression or anything like that".* The first time Mr Pearlman mentioned this, the Claimant accordingly declined the offer of a meeting. Several weeks later he agreed to have it and so in the summer of 2016 a welfare meeting was arranged between the Claimant and Ms Rushton-Summers. At this meeting, Ms Rushton-Summers says that the Claimant did not want to discuss his welfare but told Ms Rushton-Summers that there was going to be litigation against the company. She invited Mr Pearlman into the meeting to hear this. He was very surprised as the Claimant had not mentioned this previously.

45. The Claimant referred to this discussion subsequently as being a discussion about redundancy. This is how he described it when raising a grievance on 10 November 2016. He also gave oral evidence that in a conversation outside while he and Mr Pearlman had been having a cigarette Mr Pearlman had said that the company could offer a redundancy package. Mr Pearlman denies this, and we accept Mr Pearlman's evidence because the Claimant's contention that redundancy was mentioned is inconsistent with Mr Pearlman's evidence as to his reasons for speaking to the Claimant and his ongoing concerns about him. It seems to us that the Claimant must have misconstrued what Mr Pearlman said. In any event, the Claimant did not place any particular reliance on his allegation that there had been a discussion about a redundancy package and this part of the Claimant's evidence was not put by Mr Khanna to any of the Respondent's witnesses. In the circumstances, we prefer the Respondent's account.

<u>The Claimant's grievance</u>

46. The Claimant gave evidence in his witness statement that he did not raise a grievance immediately after the incident (despite being invited to do so) because he wanted to await the outcome of the police investigation. After that, he thought he was too late as more than three months had elapsed. This is not a timescale that we find was mentioned by the Respondent at any point in relation to raising a grievance, but the Claimant may have confused this with the time limit for bringing a claim to the employment tribunal, which is something he may have discussed with his trade union representative Mr McNulty. In any event, it is apparent from the Claimant's evidence that Mr McNulty later explained that a negligence claim could be brought anyway. Ultimately, what appears to have prompted the Claimant to raise a grievance was his hearing that Mr Payne had been promoted.

47. On 10 November 2016 the Claimant submitted a written grievance about the Christmas Party incident (p 61). In that document, headed "Notification of a formal complaint", he described the incident as we have set out above. He said that he had reported the incident to the police who had given Mr Payne a caution. He stated *"To date, no actions have been taken towards the work colleague for violent conduct, plus physical assault with intent to harm towards myself as the victim".* He then listed that this included a number of things including not only aggressive behaviour and physical assault but *"Harassment and discrimination outside of work"*. Race and age were not mentioned.

48. Ms Rushton-Summers appointed Zoe Greatorex to investigate the Claimant's grievance. She had initially identified another employee to do this, but he was not available. Ms Greatorex's role in the company had evidently changed at various times but she was working closely with senior management and Ms Rushton-Summers regarded her as a trusted member of the team. She also considered that Ms Greatorex would have more time to deal with what may be a complex investigation as she did not have responsibility for any particular store. Ms Greatorex had worked for the Respondent for three years but had no prior experience of conducting investigations. Ms Rushton-Summers gave her some basic instructions and Robert Feld (a consultant to the Respondent) was asked to assist her. Mr Feld has a significant criminal record, but we cannot see that this has any bearing on what happened in these proceedings. He provided Ms Greatorex with assistance in drafting letters and in deciding what steps to take next. He even hand-delivered a letter to Mr Payne at some point. However, these are all steps that needed to be taken and we cannot see that it made any difference how much help Ms Greatorex had from Mr Feld in this respect. Their combined role was to collect the evidence. Neither of them had any part in deciding what should happen next, which was Ms Rushton-Summers's role as we set out further below.

49. On 25 November 2016 an initial grievance hearing took place (p 62). It was chaired by Ms Greatorex. Robert Feld took notes. The Claimant attended accompanied by his trade union representative Mr McNulty. He produced a typed letter/statement for the meeting setting out his account of events which was read out at the start. In the course of that meeting Mr McNulty is recorded in the notes as asking *"I have to ask this in my place – is this colour discrimination?"* The Claimant is recorded as responding *"No evidence"*. The Claimant and Mr McNulty were sent these notes on 29 November 2016 and asked to review and provide any amendments. They did not provide any amendments. In cross-examination, the Claimant suggested that the reason why he said *"No evidence"* at this point in the meeting was because he was answering a question that someone else in the room had asked. We do not accept this evidence. The typed notes at this point are consistent with the contemporaneous handwritten notes (p 72) which simply state *"No evidence of colour discrimination"* (running the question and answer together). If the Claimant or Mr McNulty considered this was not what was said they would have corrected it at the time, but it is clear that they did not. We find (for reasons dealt with below) that at the time the Claimant did not believe that there was any evidence of race discrimination and that is why he answered

as he did. We add that Mr McNulty had left out of his witness statement the fact that the Claimant replied *"no evidence"* to his question, and sought to maintain that the Respondent had failed to investigate a complaint of race discrimination. When cross-examined about this, Mr McNulty accepted that the Claimant had answered *"no evidence"* to his question but still maintained that the Respondent should still have investigated the possibility of discrimination even though the Claimant had denied there was any evidence of that. For reasons that we deal with later, we find Mr McNulty's position in this regard to be unreasonable.

50. On 1 December and again on 16 December 2016 the Claimant at his request viewed the CCTV with the Metropolitan Police. He had not seen it previously and he viewed it twice because it did not accord with his recollection.

51. On 1 December and again on 15 December 2016 the Claimant was asked by the Respondent (Ms Greatorex/ Mr Feld) if he would consent for the CCTV to be accessed by the Respondent, but he refused on 15 December 2016, asserting that the Respondent ought to be conducting its investigation only on the basis of witness evidence and internally without reference to the police (pp 90 and 102). We infer that the Claimant was reluctant to allow the Respondent to view the CCTV footage in part because he was receiving advice from Mr McNulty to the effect that the Respondent should not be contacting the police and because, having seen it himself, he realised that he could, at the least, be criticised for his part in the incident.

52. On 1 December 2016 Ms Greatorex approached the MPS with Mr Payne's consent and asked to view the CCTV evidence (p 90). She copied in the Claimant.

53. On 12 December 2016 Mr Payne was sent a letter inviting him to attend an investigation meeting and provided with the Claimant's letters of 10 November 2016 and 25 November 2016 (p 96).

54. On 14 December 2016 Ms Greatorex confirmed to Mr Payne that she was content to postpone the interview to give Mr Payne a chance to commit his account to paper as he had requested this (p 99).

55. On the same date, Ms Greatorex informed the Claimant (in response to a chasing email from him) that she was proceeding with the investigation as quickly as possible and asked him to sign the form for seeking CCTV evidence from the police under the Freedom of Information Act 2000 (p 98).

56. On 19 December 2016 Mr Payne provided an 11-page statement to the grievance investigation (p 74). Mr Khanna, on behalf of the Claimant, suggested that this statement seeks to portray the Claimant in a racially stereotypical way and as being an *"aggressive black man"*. We disagree that the statement portrays the Claimant as a racial stereotype. The statement is full of detail and seeks to give a flavour of how everyone mentioned in it speaks. There is a lot of swearing. It records some use of colloquial language by the Claimant which Mr Payne recognises as being of Caribbean origin

because, as he explains, his (i.e. Mr Payne's) *"wife of 27 years"* is *"of Caribbean decent"* (sic), and he has a mixed race child. While we acknowledge that this does not mean that Mr Payne could not be racially prejudiced, we see no trace of it in his statement. His statement is, however, full of accounts of many incidents which have led to him regarding the Claimant as untrustworthy and a poor worker. We make no findings at all as to the veracity of all this background material in Mr Payne's statement, save to note that it is plain from it why Mr Payne (for his part) was not getting on with the Claimant. We would add that the Claimant in his oral evidence to us was reluctant to suggest that Mr Payne might be racist. He said he was *"not sure"* and recounted an incident where Mr Payne had 'called another employee out' who had made a racist remark (albeit that he also accused Mr Payne of not standing up sufficiently for him, but we find that to be 'sour grapes' on the Claimant's part given the history between the two of them).

57. On 21 December 2016 an investigation interview took place with Mr Payne. He presented his written statement and agreed to sign police documents to permit the Respondent to have access to the CCTV (p 116). The note of this is very brief and it does not appear that Mr Payne was questioned in any detail on his statement.

58. On 5 January 2017 the Claimant was informed that a request had been made to the MPS for access to the CCTV evidence (p 101). Mr Payne had signed the request documents (pp 123 and 130).

59. On 10 January 2017 the Claimant was informed by Ms Greatorex that it was possible disciplinary proceedings may follow the outcome of the grievance investigation, although she sought to reassure the Claimant that she was keeping an open mind and it would not be her decision as to whether disciplinary proceedings would follow (p 133).

60. On 13 January 2017 Mr Payne's request for information was acknowledged by the MPS (p 135).

61. On 18 January 2017 the Claimant emailed the Cavendish Hotel and asked to view the CCTV footage (p 405) they held because he believed that held by the police had been tampered with. After some correspondence, the Hotel said on 31 January 2017 that the footage was no longer held by them (p 415).

Mr Morgan's complaint

62. On 25 January 2017 Mr Mike Morgan (who is a black employee) complained to Ms Rushton-Summers about the Claimant's conduct on a previous shift. In his email he said that the Claimant had refused to do a job he had asked him to do and Ms Sawicka and Mr Costello had ended up having to do it. He said that the Claimant was *"becoming intolerably arrogant and his work is seriously sub-standard"* (p 137). Ms Rushton-Summers came into the office on 29 January 2017 and spoke to the Claimant about this complaint. She did not write to him before speaking to him. In that interview, the Claimant said

that Mr Morgan was swearing at him which was not acceptable. Ms Rushton-Summers also spoke to Mr Costello who confirmed that Mr Morgan had sworn and Ms Sawicka who could not say either way. She also interviewed Mr Morgan.

63. After this, Ms Rushton-Summers wrote to both the Claimant and Mr Morgan. On 29 January 2017 she wrote to the Claimant advising him about reporting lines, working as a team and being 51 minutes late for a shift (p 138). This letter made clear that he needed to do as asked by supervisors, which included Ms Sawicka as well as Mr Morgan.

64. On 2 February 2017 Ms Rushton-Summers wrote to Mr Morgan reminding him that at no point was he to become abusive or aggressive towards a team member (p 139).

65. On 6 February 2017 the Claimant complained about Ms Rushton-Summers's actions regarding Mr Morgan's complaint, suggesting that she and other work colleagues were harassing him (p 141). He also said that he had been led by her to believe that their meeting had been informal.

66. On 7 February 2017 Ms Rushton-Summers responded, confirming that she considered her actions to have been appropriate, that the warnings had been informal and reminding the Claimant that he could raise a grievance if he wished (p 142).

Continued investigation of the Claimant's grievance

67. On 10 February 2017 Mr Costello at the request of the Claimant prepared a statement about the Christmas party incident which we have dealt with above (p 143).

68. Around this time Mr Payne informed Ms Greatorex and Mr Feld that the police had denied him access to the CCTV footage in response to his request (p 144). On 14 February 2017 Mr Feld contacted PC Daisy Mather asking whether there was any other way to obtain the CCTV footage. She responded saying that the alternative was to come to the station to view the footage (p 145).

69. On 21 February 2017 Mr Payne wrote to Ms Greatorex suggesting having a mediation meeting with the Claimant before anyone from the Respondent viewed the CCTV footage (p 147). He enclosed a copy of his 'simple caution form'.

70. On 22 February 2017 Ms Greatorex put Mr Payne's suggestion of mediation to the Claimant (p 149), but he refused that (p 154). We do not find that in putting to the Claimant Mr Payne's offer of mediation the Respondent was acting improperly or allowing Mr Payne to control the investigation. Since Mr Payne had made the offer, it would have been wrong for the Respondent not to have put that proposal to the Claimant. Had the Claimant been amenable

to it, it might have provided a resolution to the issue. There would have been nothing improper in that if the Claimant had agreed to it.

71. In the same email, Ms Greatorex also informed the Claimant that authority to view the CCTV evidence had now been received and that this would now form what she anticipated would be the final part of the investigation (p 149). She did not tell the Claimant that she was going to view the footage in the company of Mr Payne. Nor did she invite the Claimant to attend as well or give him the option of attending with her on another occasion.

72. On 28 February 2017 Ms Greatorex viewed the CCTV footage, accompanied by Mr Payne and PC Daisy Mather. She made notes on that footage, which accord fairly closely with our own findings (set out above). The only significant difference is that Ms Greatorex records that when the Claimant lunges at Mr Payne with the glass that it *"smashes on impact towards the left hand side of David Payne's neck – glass debris on the floor"*. We have not heard evidence from Ms Greatorex so it is not possible for us to reach any conclusion as to why she thought the video showed this when we cannot see it. In our judgment the video is not so clear at this point that Ms Greatorex's notes are not a possible interpretation of what happens as we acknowledge we may be mistaken about what appears to us to be the glass flying through the air. It is possible that the police had better facilities for viewing the video. It may be that what she records as glass debris landing on the floor is her interpretation of what we took to be liquid landing on the floor in the second video. It may be that Mr Payne suggested to her while they were watching that the glass was pushed into his neck. Or it may be that she formed that impression because she had previously read Mr Payne's statement in which he indicates that he was cut during the incident and suggests that must have been from the glass the Claimant attacked him with. In the circumstances, although we cannot see this part of the video in the way that Ms Greatorex did, we are not prepared to say her notes are unreasonable in this respect or that she was deliberately lying or unduly influenced by Mr Payne.

73. On 7 March 2017 the Claimant was informed of the grievance decision outcome by Ms Rushton-Summers. Ms Rushton-Summers confirmed, and we accept, that this was her decision and that Ms Greatorex did not make any recommendation to her as to what she should conclude. Ms Rushton-Summers stated in the outcome letter that *"It is clear from the CCTV evidence that the altercation between you and David Payne, which was all over very quickly, was much more serious than first envisaged"* and that *"both parties are equally at fault for serious misconduct, including violent behaviour towards one another"*. She informed him that disciplinary proceedings would be commenced against both of them, but that the offer of mediation remained open (p 161). She also informed the Claimant of his right to appeal to Mr Greig Fairclough.

Ms Sawicka's complaint

74. On 8 March 2017 the Claimant's supervisor, Ms Sawicka, wrote to Ms Rushton-Summers at 04.13am complaining about the Claimant's behaviour on a shift on Monday evening (6 March) (p 239). The essence of the complaint was that the Claimant had refused to deal with an urgent order that Ms Sawicka needed him to deal with because he was working on a less urgent job which he had been asked by Mr Pearlman to finish. Ms Sawicka ended up having to call Mr Pearlman (who was at home) and gave the phone to the Claimant so Mr Pearlman could speak to him. Ms Sawicka stated that the Claimant swore as he came to the phone and Mr Pearlman told the Claimant to do the job. The Claimant did then do the job, but was still surly, swearing at Ms Sawicka to *"fucking check it yourself"*. Ms Sawicka also provided a witness statement for these proceedings, although she was not tendered for cross-examination, and so we base our findings principally on her email complaint at the time, although we also accept part of her witness statement which (consistent with the evidence of Mr Pearlman) suggests that this was not the first time that the Claimant had been insubordinate to her. There had been many previous occasions. We add that we find Ms Sawicka's email to be genuine and cannot see, as suggested by the Claimant, that there is any significant change in the standard of English in the course of the email (Ms Sawicka is Polish).

75. On the same day Mr Pearlman emailed Mr Fairclough providing an account regarding Ms Sawicka's complaint (p 167) supporting Ms Sawicka's version of events. He provided the additional significant detail as to what he heard of the Claimant's swearing as he came to the phone that Ms Sawicka had mentioned. He said that he heard the Claimant say in an angry tone *"get out of my fucking way"*. He said, and we accept, that he did not speak to anybody else before sending his email, but did it unilaterally. In his evidence to us he explained that he felt the Claimant had often been intimidating and unco-operative with Ms Sawicka and that on this occasion he had felt that something ought to be done about it. In cross-examination, Mr Pearlman accepted there was a culture of swearing at the Respondent but that there was a difference between 'angry swearing' and 'conversational swearing' and 'angry swearing' was not acceptable. Mr Pearlman's email was sent using the Respondent's CZ Manager email account and thus appears to come from "Dave Summers". We accept, however, Ms Rushton-Summers' and Mr Pearlman's consistent evidence that this was just how the office email account was set up at this time and that Mr Pearlman's email was sent without input from Mr Summers.

76. On 9 March 2017 the Claimant appeared shaky and upset at work as he was concerned about the Christmas party incident and Mr Pearlman said he could go home (p 168).

77. On 13 March 2017 Ms Rushton-Summers asked Gregg Newton (a senior store manager) to interview the Claimant regarding the incident with Ms Sawicka. This Mr Newton did the same day. Without any warning he invited the Claimant into the Curzon Street meeting room and said that he had been given two accounts of an event and would like to hear his (p 193). He started reading Ms Sawicka's statement, but the Claimant stopped this saying that if

it was an investigation he needed notice of it. Mr Newton's notes record the Claimant as saying: *"You give me the written accounts and I'll write my truth"*. Mr Newton tried to continue, but the Claimant refused to participate and we find that, as recorded contemporaneously by Mr Newton, the Claimant's manner became aggressive, he raised his voice and walked out.

78. The Claimant and Mr McNulty complained that these written notes recorded the Claimant as saying *"I'll tell my truth man I'll write my truth",* which they said was broken English and racial stereotyping of the Claimant. They are obviously mistaken about this because this is not what the notes say. We do not find, however, that they are deliberately lying about the content of the notes because it is too obvious that the notes do not say what they allege. We asked the Claimant in oral evidence what it was he said at this point in the meeting, but he was not able to remember the precise words he used. In the circumstances, we can only conclude that Mr Newton accurately recorded what the Claimant said at the time and we find that what he actually put in the notes does not amount to racial stereotyping.

Disciplinary and appeal regarding Christmas party incident

79. On the same day the Claimant was invited by Ms Rushton-Summers to a disciplinary hearing regarding the Christmas Party incident (p 171). Enclosed with this letter were Ms Greatorex's notes of viewing the video.

80. On 14 March 2017 the Claimant appealed the grievance outcome (p 172). He complained that Ms Rushton-Summers could not make a decision on the grievance as she was not part of it and had prejudged it. He complained that the finding that both parties were equally at fault was wrong, in particular because Mr Payne had received a police caution and because Mr Payne had been present when Ms Greatorex viewed the video. He said the investigation was unfair. He said that he did not wish to take up the offer of mediation as *"mediation would not change the colour of my skin"*.

81. The Claimant's appeal was acknowledged on 15 March 2017 (p 175).

82. On 16 March 2017 the Claimant indicated that he would not be attending the disciplinary hearing scheduled for 20 March 2017 as he was appealing the grievance decision (p 173 / 175d).

83. On 22 March 2017 Mr Fairclough wrote to the Claimant informing him that the disciplinary hearing would be postponed and the Claimant invited to a grievance appeal hearing. He was also asked to provide evidence of an assertion he had made that there was an IPCC investigation into alleged tampering with the CCTV evidence (p 176). We should say at this point that there was evidently nothing improper in the Respondent inviting the Claimant to a disciplinary hearing before he had submitted an appeal against the grievance. Equally, it was right for the Respondent (as it did) not to proceed with the disciplinary hearing once the Claimant had appealed the grievance outcome.

84. On 26 March 2017 Mr Butler provided a statement about the Christmas Party incident (p 177), the content of which we have dealt with above.

85. On 31 March 2017 the Claimant complained to Charing Cross Police station about the CCTV footage (p 178).

86. On 4 April 2017 a grievance appeal hearing took place chaired by John Cadman (HR Advisor) and Greig Fairclough (p 181). The Claimant attended accompanied by Mr McNulty. The notes of this hearing show that the Claimant and Mr McNulty focused chiefly on their case that the CCTV footage was wrong and/or that Ms Greatorex had not actually seen it and/or that the Respondent should not have been using it in an internal grievance investigation. There was also discussion about what mediation might involve and the fact that the Claimant had not understood previously how this might work.

87. On 5 April 2017 the Claimant was sent the grievance appeal outcome by Greig Fairclough (p 187) who rejected the appeal, principally on the basis that no evidence had been presented that demonstrated the CCTV evidence had been tampered with and it was reasonable for the Respondent to rely on it. He also found that it was reasonable for Ms Rushton-Summers to have heard the original grievance. It was confirmed that the mediation offer remains open. On the same day (p 188) he was re-invited to a disciplinary hearing.

88. On 8 April 2017 the Claimant emailed the IPCC complaining about the investigation generally, the police failure to interview witnesses and reliance on the CCTV footage which as we have noted he believed could have been edited on instruction from his employer to the Hotel (p 388).

89. On 11 April 2017 there was a disciplinary hearing about the Christmas Party incident chaired by Ms Rushton-Summers, to which the Claimant was invited by letter dated 5 April 2017.

90. On 12 April 2017 the Claimant was informed by Gregg Newton that the investigation into Ms Sawicka's complaint had concluded but that it would be placed on hold pending the disciplinary regarding the Christmas party (p 189). He was sent copies of Ms Sawicka's complaint and Mr Pearlman's email (albeit in both cases without the original email headers included).

91. On 13 April 2017 the Claimant was informed of the outcome of the disciplinary hearing and issued with a Final Written Warning for the Christmas Party incident (p 194). In the outcome letter, Ms Rushton-Summers stated *"My conclusion is that your conduct was the first violent action in an altercation with David Payne where the actions of both parties were tantamount to very serious misconduct. This warning will remain live for a period of twelve months."* She explained that she considered it reasonable to base her decision on Ms Greatorex's notes of the video evidence and that she did not consider other witness evidence would have assisted given the passage of

time and the lack of sobriety of any of the witnesses. She rejected the Claimant's contentions that the CCTV had been tampered with or that Ms Greatorex had not viewed the footage. She stated: *"You did not lunge with a glass towards the left side of David Payne's neck. You were very clear in your assertion that this simply did not happen. For this to be true, the CCTV evidence would have had to have been tampered with such that the pictures showing you doing this would have had to have been an entirely new piece of created footage. I can find no reason to believe this to be at all credible."*

92. On 17 April 2017 the Claimant appealed the FWW (pp 208-209). He raised 15 separate appeal points, including an allegation that Ms Rushton-Summers was biased (*"Your discrimination and inclination against myself"*), that the FWW was intended to enable the company to dismiss him in the next 12 months (he referred to the new disciplinary action from Mr Newton, instigated by Ms Rushton-Summers). He said that work colleagues were not drunk, that the Respondent had not produced evidence of Ms Greatorex viewing the CCTV footage, that there had been a breach of confidentiality in the Respondent's contacts with the police about the case, and that *"There is no CCTV footage that shows me lunging a glass towards the left side of David Payne's neck. That is a categorical lie by Zoe Greatorex and David Payne"*.

93. On 20 April 2017 the Claimant wrote to Mr Fairclough objecting to him hearing the disciplinary appeal as he had previously heard the grievance appeal (p 211).

94. On 23 April 2017 Mr Butler retracted his witness statement (p 212), following a conversation with Mr Fairclough in which Mr Fairclough asked him whether he was sure that his statement was correct. This conversation made Mr Butler feel uncomfortable enough to retract the statement, albeit he did so in terms that suggested he had not really changed his view as to what had happened during the incident. We note that in our judgment it was inappropriate for Mr Fairclough to approach an individual witness such as Mr Butler in the way that he did rather than formally as part of a proper investigation.

95. On 24 April 2017 the Claimant was invited to a disciplinary appeal hearing, which took place on 2 May 2017. Mr Fairclough stated in this letter, on advice from BPIF, *"It is perfectly reasonable for me to chair this meeting given the size of The Color Company as the grievance and disciplinary are entirely separate matters"* (p 213).

96. By email of 26 April 2017 the Claimant objected again to Mr Fairclough hearing his disciplinary appeal, pointing out that the grievance and disciplinary were not two separate things and that Mr Fairclough was compromised (p 214). Mr Fairclough confirmed in response that the appeal would still go ahead as planned and he offered assurance that he would be considering it with an open mind (p 215).

97. The appeal went ahead on 2 May 2017 and on 8 May 2017 the appeal against the FWW was rejected by Mr Fairclough (pp 216-217). He did not respond point-by-point to the Claimant's 15 appeal grounds. He stated that he was

comfortable that a fair process had been followed, that Ms Greatorex had viewed the CCTV and that she had accurately recorded that the first violent action was made by the Claimant. He said he could find no evidence that the CCTV had been tampered with, and that *"In terms of the police not pressing any charges against you, I can only surmise that no complaint was raised by David Payne"*. He said that he did not consider Mr Butler's or Mr Costello's statements added anything because *"Mr Butler's statement has been amended and Adam Costello's statement clearly states that he did not see the build up to David Payne hitting you over the head with a bottle"*. He concluded: *"The fact that David Payne hit you over the head with a bottle [is] not in dispute. It is your violent conduct in advance of David Payne's action which has resulted in your Final Written Warning and I believe that it is fair to conclude that this did in fact take place"*.

98. In his oral evidence to the Tribunal, we asked Mr Fairclough why he had not dealt with each of the Claimant's points of appeal, and why he had not investigated the possibility that Ms Greatorex had misinterpreted the CCTV evidence, and whether he had discussed in advance with management what the appropriate sanction would be. He said that there had been a management discussion and agreement that final written warning was the appropriate sanction so as to avoid two people having to lose their jobs over an incident at the Christmas party. Ms Rushton-Summers denied this, but we find such a discussion did happen, albeit that she may not have been involved. In answer to our questions, Mr Fairclough also made clear that he did not think it would have made any difference if the Claimant had not put a glass in Mr Payne's neck as was recorded in Ms Greatorex's notes. Our impression is that Mr Fairclough had decided early on that a final written warning was the only appropriate outcome, and that he did not approach the appeal with an open mind.

99. On 17 May 2017 Adam Costello sent a draft resignation letter to the Claimant (p 224).

100. On 18 May 2017 Mr Costello resigned, sending a much shorter resignation letter than the draft he had sent to the Claimant (p 225).

<u>Disciplinary hearing for Ms Sawicka complaint</u>

101. On 25 May 2017 the Claimant was invited to a disciplinary hearing regarding the incident with Ms Sawicka (p 227). He was provided with that letter again with the text of Ms Sawicka's email of 8 March 2017, and Mr Pearlman's email of the same date and the notes of his own meeting with Mr Newton on 13 March 2017 (but not the original emails).

102. This was rescheduled twice and took place on 19 June 2017 (p 235). The Claimant in that meeting did not respond to the substance of the allegations but said that it was a *"biased disciplinary"*. He said that he had requested the original emails from Ms Sawicka and Mr Pearlman but they had not been

provided. He also asked why Ms Sawicka, Mr Pearlman and Tony Ali had not been interviewed.

103. Ms Rushton-Summers did not interview any more witnesses following the hearing. Nor did she provide the Claimant with the original emails of Ms Sawicka and Mr Pearlman before making her decision. This was because she did not have access to them during the hearing itself and did not in any event consider it necessary to do so because she was confident the emails were genuine and did not consider it would make any difference to produce the originals.

104. On 20 June 2017 it was decided by Ms Rushton-Summers that the Claimant should be dismissed on notice and she sent a letter to the Claimant informing him of the outcome (p 234). She enclosed with that letter the original emails of Ms Sawicka and Mr Pearlman. She stated that her decision was to dismiss the Claimant with notice *"for aggressive behaviour and swearing directly at a supervisor"*. She explained that given the Claimant's refusal to comment on the substance of the allegations, she believed it was *"reasonable to conclude that the allegation of aggressive behaviour and swearing towards a supervisor is true. This alone could potentially have been deemed to be a gross misconduct offence resulting in dismissal without notice, but I have considered it as the next stage of the disciplinary procedure (further misconduct resulting in dismissal with notice)."* She offered the Claimant the right to appeal to Mr Fairclough.

105. On 25 June 2017 the Claimant appealed the decision to dismiss (p 242). In his appeal he pointed out that neither Adam Costello nor Tony Ali had been interviewed in connection with the incident. He also complained about the notes of the disciplinary hearing which had left out bits of the conversation. He said that the minute taker (Mr Newton) was compromised because of his previous part in the investigation. He suggested that Ms Sawicka's email was not authentic as it appeared to be written by two people, *"1 with a perfect grasp of the English language and the other with broken English"*. He questioned also the authenticity of Mr Pearlman's email given it appeared to have come from Mr Summers. He also raised the previous incident where Mr Morgan had complained about him and suggested that that situation (which involved swearing by Mr Morgan) had been handled 'totally differently' by Ms Rushton-Summers and that this was very biased.

106. The Claimant's appeal was heard on 11 July 2017 by Mr Fairclough. He subsequently spoke to Mr Ali who responded that he had no recollection of events. He did not speak to Mr Costello who had resigned by this time. Mr Fairclough rejected the appeal (p 245). He found that the minute-taking was not problematic and that Mr Newton was not compromised and had made a fair record of the meeting. He rejected the suggestion that Ms Sawicka's email was written by two people. Regarding the incident with Mr Morgan he said *"In fact, comparing it to an incident involving Mike Morgan, it is reasonable to conclude that at the very least you admit to an element of poor conduct – but believe the Company's actions to be inconsistent and biased against you. I do not accept your contention. Firstly, the two incidents are*

clearly different with Mike Morgan's alleged swearing being a result of an employee's failure to follow reasonable management instructions. Secondly, that employee was you. If Julie Rushton-Summers was biased against you, I believe that she would have invoked formal disciplinary action against you at that time. The fact that this matter was dealt with informally demonstrates to me that there was no deliberate intention 'to cloud actual facts and terminate my employment', as you have stated. However, it does highlight a repeated pattern of poor conduct which has resulted in your dismissal and which I regret to say I believe to be justified."

Conclusions

Race and/or age discrimination

The law

107. Under ss 13(1) and 39(2)(c)/(d) of the Equality Act 2010 (EA 2010), we must determine whether the Respondent, in dismissing the Claimant or subjecting him to any other detriment, discriminated against the Claimant by treating him less favourably than it treats or would treat others because of a protected characteristic. The protected characteristics relied on by the Claimant are his race or age.

108. A detriment is something that a reasonable worker in the Claimant's position would or might consider to be to their disadvantage in the circumstances in which they thereafter have to work. Something may be a detriment even if there are no physical or economic consequences for the Claimant, but an unjustified sense of grievance is not a detriment: see *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11, [2003] ICR 337 at paras 34-35 *per* Lord Hope and at paras 104-105 *per* Lord Scott. (Lord Nicholls (para 15), Lord Hutton (para 91) and Lord Rodger (para 123) agreed with Lord Hope.)

109. 'Less favourable treatment' requires that the complainant be treated less favourably than a comparator is or would be. A person is a valid comparator if they would have been treated more favourably in materially the same circumstances (s 23(1) EA 2010). The Claimant relies on Mr Payne as his comparator. However, if we consider that Mr Payne's circumstances are not materially the same, we are invited also to consider how a hypothetical comparator would have been treated. We bear in mind in this regard that evidence about an alleged comparator may still be of important evidential value even if their circumstances are not materially the same so as to bring them within s 23(1) EA 2010.

110. The fact that someone is treated unreasonably does not mean that they have been discriminated against, they must have been treated less favourably, although unreasonable treatment may in appropriate circumstances provide evidence from which discrimination can be inferred (*Glasgow City Council v Zafar* [1998] ICR 120).

111. The Tribunal must determine *"what, consciously or unconsciously, was the reason"* for the treatment (*Chief Constable of West Yorkshire Police v Khan* [2001] UKHL 48, [2001] ICR 1065 at para 29 *per* Lord Nicholls). Discrimination must be a material (i.e non-trivial) influence or factor in the reason for the treatment (*Nagarajan v London Regional Transport* [1999] ICR 877, as explained in *Villalba v Merrill Lynch & Co Inc* [2007] ICR 469 at paras 78-82).

112. If a decision-maker's reason for treating an employee is not influenced by a protected characteristic, but the decision-maker relies on the views or actions of another employee which are tainted by discrimination, it does not follow (without more) that the decision-maker discriminated against the individual: *CLFIS (UK) Ltd v Reynolds* [2015] EWCA Civ 439, [2015] ICR 1010. What matters is what was in the mind of the individual taking the decision (save, perhaps, in certain exceptional circumstances as identified by the Supreme Court in the 'whistle-blowing' case *Royal Mail Ltd v Jhuti* [2019] UKSC 55 – circumstances which are not suggested by the parties to be relevant to the present case).

113. In relation to all these matters, the burden of proof is on the Claimant initially under s 136(1) EA 2010 to establish facts from which the Tribunal could decide, in the absence of any other explanation, that the Respondent has acted unlawfully. This requires more than that there is a difference in treatment and a difference in protected characteristic (*Madarassy v Nomura International plc* [2007] EWCA Civ 33, [2007] ICR 867 at paragraph 56). There must be evidence from which it could be concluded that the protected characteristic was part of the reason for the treatment. The burden then passes to the Respondent under s 136(3) to show that the treatment was not discriminatory: *Wong v Igen Ltd* [2005] EWCA Civ 142, [2005] ICR 931.

114. We bear in mind also the general legal principles set out by the Claimant in Mr Khanna's skeleton argument, especially that we must consider each allegation of discrimination separately and not simply in the round, and that discrimination is generally unconscious and unacknowledged and normally a matter for inference from surrounding circumstances, including evasive or false explanations. We have also had regard to the paragraphs of the Equality and Human Rights Commission Code of Practice to which the Claimant referred in his Skeleton Argument, including in particular the advice that employers should properly investigate any complaints of discrimination and must not discriminate in relation to the procedures adopted for investigating disciplinary and grievance matters, any more than in relation to the final outcome.

Conclusions

115. In this case the Claimant contends that the following were acts of race and/or age discrimination:

    a. His receiving a final written warning for the incident with Mr Payne at the Christmas Party;

b. The investigation leading to that final written warning;
c. His dismissal.

116. We have considered very carefully whether the Claimant's race or age played any part in the Respondent's treatment of him in relation to these three issues.

117. So far as the investigation that led to the FWW is concerned, the Claimant argues that this was discriminatory because of a number of matters. We have identified the Claimant's principal arguments and our conclusions in respect of each of them are as follows:

a. *Not investigating the Christmas Party incident until it was raised as a grievance* – We have already dealt with this in our findings of fact. It was a reasonable decision by the Respondent and fair to both the Claimant and Mr Payne. The Claimant's race and age played no part in this decision.

b. *Not identifying someone higher up in management to investigate the grievance (such as Mr Newton or Mr Loane)* – We find that the Respondent's choice of investigator was reasonable and there is no evidence from which we could infer a different person would have been appointed if the Claimant's race or age was different. In particular, there was no reason to choose Mr Newton rather than Ms Greatorex. A reasonable explanation was given for this by Ms Rushton-Summers who considered that Ms Greatorex was a trusted employee and, not having responsibility for a store, would have more time to deal with what was likely to be a complex investigation. Mr Loane would not have been appropriate given his seniority and direct involvement in the incident.

c. *Mr Feld's involvement in the investigation* - We have already dealt with this in our findings of fact. We do not find his involvement to have been unreasonable or improper and we can see nothing to suggest that the Claimant's race or age had anything to do with either Mr Feld's appointment or the way in which he assisted Ms Greatorex.

d. *Mr Payne was treated with more care than the Claimant was in relation to other complaints about which we have heard evidence, in that he received a formal letter inviting him to an investigation meeting and was provided in advance with the Claimant's written complaint, that letter being hand-delivered by Mr Feld, and Mr Payne was afforded an opportunity to put his account in writing and not questioned significantly on that written account* – We accept that these were all differences between the way that Mr Payne was treated in relation to the Claimant's grievance and the way that the Claimant was treated by the Respondent in relation to Mr Morgan's complaint and Ms Sawicka's complaint. In these respects, Mr Payne was treated more favourably than the Claimant was on those other occasions. However, there are explanations for this which are not

related to race or age, in that the grievance raised by the Claimant concerned a more serious matter, came much longer after the events in question, and Mr Payne's response to it was different in that he asked for an opportunity to put his account in writing (without, so far as we are aware, becoming aggressive or walking out as the Claimant did when spoken to by Mr Newton). Having put his account in writing, it is also apparent why there did not need to be significant questioning of that: his account was very full and the Respondent was also reasonably focused on obtaining and viewing the CCTV evidence which it was reasonably anticipated would be the most reliable evidence on which to base a decision. There is no explanation for why the letter was hand-delivered by Mr Feld, but this is a minor point. There is nothing here that gives rise to unfairness in the Respondent's investigation or which is in any way influenced by the Claimant's race or age.

e. *Breach of confidence in the Respondent's contact with the police* – We find the Respondent acted reasonably in seeking to obtain CCTV evidence from the police, with the Claimant's consent if possible, but without if it was refused. Further, when the Claimant alleged that he had complained to the IPCC but had not produced evidence of that, it was not unreasonable as part of an investigation to seek to check that with the police. In any event, none of this had anything to do with the Claimant's age or race.

f. *Mr Payne was present when Ms Greatorex viewed the CCTV evidence* – Because of the position taken by the police, the CCTV evidence could only be viewed by the Respondent at the police station with either Mr Payne or the Claimant present. Mr Payne had co-operated with the Respondent on this and so it was in the end Mr Payne who attended. That is the explanation for why this happened, which is to this extent nothing to do with the Claimant's race or age. However, we have also asked ourselves why the Respondent did not, once it was clear that the footage had to be viewed at the police station with Mr Payne present, tell the Claimant that or give him an opportunity to attend as well or instead. We do consider that this was unfair to the Claimant (a point we return to below), but we do not find that the Claimant's race or age had anything to do with why this approach was not taken by Ms Greatorex. There is no evidence that it occurred to her, it was not suggested by the Claimant even after he had heard it had happened, Ms Greatorex was an inexperienced investigator, dealing with an investigation that had already taken some time and with which the Claimant was not co-operating. All this is an adequate explanation for what happened and we cannot infer that the position would have been different if the Claimant's race or age had been different.

g. *Mr Payne being permitted to 'control' the investigation process by offering mediation before the CCTV footage was viewed* – we have dealt with that in our findings of fact. We do not find this was

unreasonable and the explanation for it is clear: it is because Mr Payne offered and nothing to do with race or age.

h. *The possibility of Mr Payne acting as he did because of racial prejudice was not investigated (in particular the fact that he was fighting with two black employees on the night of the Christmas party)* – The reason that this was not investigated was because the Claimant said when asked at the grievance hearing that there was 'no evidence' of this. Other references to discrimination made prior to and after this in written documents were not pursued by the Claimant in any of his meetings with the Respondent and he was unwilling even in Tribunal to suggest that race played a part in Mr Payne's actions. The fact that Mr Payne's statement referred to a fight with a second black man is not sufficient ground for the Respondent independently to have investigated the possibility of a racial motive because Mr Payne's statement indicates that it was a black man attacking him, not the other way round, and as we have noted already there is in our view no trace of racial prejudice in Mr Payne's statement. There is nothing here that ought to have prompted the Respondent to investigate discrimination in the face of the Claimant saying there was no evidence of it. The failure to do so had nothing to do with the Claimant's race or age.

i. *The Claimant being informed by Ms Greatorex that he could be disciplined before the investigation had concluded* – We have not heard evidence from Ms Greatorex as to why she did this, but in our judgment it was good practice to warn the Claimant as soon as it was thought this was a possibility. We find it was reasonable and nothing to do with the Claimant's race or age.

j. *Reliance on CCTV and failure to interview other eyewitnesses* – We find that this was also reasonable in the circumstances because as we have noted human memory is not reliable and CCTV will generally be the better evidence. This is particularly so in this case in the light of the time lag and the lack of sobriety of witnesses. We add in this respect that the fact that the Respondent took lack of sobriety into account was reasonable and there was no reason for the Respondent to attempt to distinguish between the relative levels of drunkenness of the witnesses. That would have been an impossible exercise, especially so long after the event. Race and age have nothing to do with the Respondent's approach to the investigation in this respect.

k. *The fact that Ms Rushton-Summers and Mr Fairclough both decided on the grievance / grievance appeal and then were also the decision-makers in relation to the FWW* – We find that it was unfair for Ms Rushton-Summers and Mr Fairclough to be the managers dealing with the disciplinary as well as the grievance. They could not possibly have approached the disciplinary with open minds as they had already looked at all points of substance as part of the grievance.

While this might have been acceptable in a smaller company, the fact of the matter is that there are number of other individuals in the company who could have been used, such as another store manager, or someone working in the teams beneath Mr Fairclough or Mr Moore, and Mr Moore could have dealt with the appeal. While we acknowledge the Respondent's point that the Claimant might have complained about Mr Moore as well, that was not a point made by the Claimant at the time and there is no reason why the Respondent could not have used Mr Moore to decide the appeal. This ought especially to have been considered when the Claimant objected to Mr Fairclough dealing with it, although we accept that the Respondent acted on advice in refusing to change course in response to that objection. In any event, we have also already found that Mr Fairclough did not approach the appeal with an open mind. However, while the Respondent's approach in this respect was unfair to the Claimant, we can find no evidence that his race or age had anything to do with it. Mr Fairclough's closed mind is fully explained by his view that the approach he was taking was fair and protected both the Claimant and Mr Payne from dismissal. Further, the Respondent appears simply not to have recognised this potential unfairness, and acted on advice in using Mr Fairclough as the appeal officer. This is adequate explanation.

118. In relation to the decision to issue a final written warning itself:

a. *The fact that Mr Payne had received a caution* – The fact that Mr Payne had received a caution and the Claimant had not was a relevant factor for the Respondent to take into account (and the Respondent did). However, it does not follow that the Respondent was bound to reach the same conclusion as the police about the incident. The Respondent was, on the contrary, required to reach its own view on the basis of the evidence before it. That evidence provided in our judgment a reasonable basis for the Respondent's conclusion, as variously expressed in the grievance and disciplinary outcomes (and on appeal) that the Claimant and Mr Payne were equally culpable in their conduct at the Christmas Party and that the Claimant had done the first physically violent act. This is what we have found the CCTV evidence shows. More importantly, it is what Ms Greatorex saw on the CCTV and reported in her notes on the basis of which Ms Rushton-Summers and Mr Fairclough reached their decisions. On our findings of fact, there is no evidence from which we could infer that the Claimant's race or age influenced the Respondent's decision at all. The Respondent's decision is wholly and adequately explained by the factual evidence that it had before it.

b. *Incorrect conclusion that they were both equally to blame/ the Claimant did the first violent act* – We have dealt with.

c. *Failure to discipline others for not having reported misconduct as required by their contracts/R's policy* – This was a point raised by Mr Khanna for the first time in cross-examination. It was not a point put to the Respondent at any point during the Claimant's employment, and we do not consider that the possibility of disciplining any of those who witnessed the incident at the Christmas Party (or Mr Payne for failing to report the fact that he had been given a caution) was something that the Respondent necessarily ought to have considered. Its failure to do so does not indicate unfairness to the Claimant or that the Respondent was motivated by race or age.

119. In relation to the decision to dismiss, in relation to the matters relied on by the Claimant as indicating that this decision was an act of discrimination, we find as follows:

a. *The lack of 'official investigation'* – The Respondent did not send the Claimant a formal invitation to an investigation meeting or provide the Claimant with the evidence in advance of that first meeting with Mr Newton. This was in accordance with the Respondent's normal procedure and is the procedure that was followed in relation to the complaint by Mr Morgan as well. There is no requirement in the ACAS Code of Practice for anything more formal at this stage of the process and we do not consider the process adopted was unfair to the Claimant. Although it was less favourable treatment than Mr Payne received when the Claimant's grievance was investigated we have already concluded that there is a good explanation for that which has nothing to do with the Claimant's race or age.

b. *The decision to dismiss based only on the statements of Ms Sawicka and Mr Pearlman and without interviewing Tony Ali, Mr Costello, Ms Sawicka or Mr Pearlman* – In our judgment there was no need to interview Ms Sawicka and Mr Pearlman in circumstances where the Claimant had not provided any challenge to their accounts and their accounts are (as noted in our factual conclusions) consistent with each other in the key respects (i.e. concerning swearing and insubordination). However, Ms Rushton-Summers should have sought to interview Mr Ali when the Claimant mentioned him in the disciplinary hearing. Her failure to do so was remedied on appeal by Mr Fairclough interviewing Mr Ali and it was apparent that Mr Ali's evidence added nothing. It was reasonable not to interview Mr Costello given that he was no longer employed by the company. There was overall no unfairness here. There is no evidence from which we can infer the Respondent's approach in this regard was influenced by the Claimant's race or age.

c. *The failure to provide the original emails prior to the disciplinary hearing* – In our judgment best practice would have been to have provided the original emails when they were first requested, but they were provided with the dismissal decision and the Claimant had an opportunity to challenge them on appeal, so no unfairness arises.

We cannot infer that the reason for not providing them when first requested was because of the Claimant's race or age. We find that it was because Ms Rushton-Summers was concerned about delay (the disciplinary hearing having been postponed twice) and honestly did not think it would make any difference because the Claimant had had the emails and she was satisfied (reasonably in our opinion) that they were genuine.

d. *The inconsistency in treatment between the Claimant and Mr Morgan* – The Claimant's point here is that Mr Morgan was not given a formal warning of any sort even though he had been found to be aggressive and had sworn at the Claimant. However, the difference is that there was considered to be mitigation for Mr Morgan's actions in that he was considered by the Respondent to have been reacting to insubordination by the Claimant, whereas the Claimant was found to have sworn aggressively at a manager and to have been insubordinate without any mitigation. Their circumstances were therefore materially different and there is no unfairness here. In any event, Mr Morgan is also black so his treatment cannot be evidence of race discrimination. Nor do we find the difference had anything to do with the Claimant's age.

e. *The reliance at the appeal stage on the prior warning that the Claimant had received as a result of the Mr Morgan complaint* – It was the Claimant who introduced the Mr Morgan complaint as being relevant to the dismissal decision so Mr Fairclough was bound to deal with it. The fact that in the course of rejecting the Claimant's contention that there had been unequal treatment between the Claimant and Mr Morgan he also pointed out that in fact the Mr Morgan incident was an example of another occasion when the Claimant had been insubordinate and had been reminded that he needed to do what he was told by supervisors does not render the decision to dismiss unfair. It was evidence that the Respondent could legitimately take into account in considering whether the decision to dismiss was reasonable. There is nothing from which we could infer that the Claimant's race or age had anything to do with this either, especially given that neither Mr Morgan or the Claimant had been disciplined formally for the prior incident.

f. *The fact that Ms Rushton-Summers and Mr Fairclough were the decision-makers again* – Although we have found that it was unfair for Ms Rushton-Summers and Mr Fairclough to have dealt with the disciplinary as well as the grievance in relation to the Christmas Party incident, we do not consider that they were precluded from dealing with this second disciplinary matter. It is frequently the case that the same chain of management has to deal with disciplinary matters in respect of employees on different occasions. This was a completely separate disciplinary matter unrelated to the Christmas Party incident. Absent evidence of particular animosity or bias on the part of the individuals, the mere fact that they have dealt with previous

disciplinary cases in respect of a particular individual does not mean that they are apparently biased in relation to new matters. This was not unfair. Nor, do we find, did the choice of Ms Rushton-Summers and Mr Fairclough as decision-makers have anything to do with the Claimant's race or age.

g. *The failure to review the circumstances of the FWW as part of the second disciplinary process* – We consider that this is unrealistic given that Ms Rushton-Summers and Mr Fairclough had been the decision-makers in relation to the FWW. They did not need to review the circumstances as part of their decision-making in relation to the dismissal. Their failure to do so had nothing to do with the Claimant's race or age.

120. Finally, we have stood back, and considered whether, notwithstanding our views on each of the individual points raised by the Claimant, there is here any overall picture that the Claimant was treated less favourably because of his race or age. We find there is nothing from which this could be inferred. The Claimant's discrimination claims accordingly fail.

Unfair dismissal

The law

121. The test for unfair dismissal is set out in section 98 of the Employment Rights Act 1996. Under section 98(1), it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal, and that it is a potentially fair reason falling within subsection (2), eg conduct, redundancy, or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. A reason for dismissal is the factor or factors operating on the mind of the decision-maker which cause them to make the decision to dismiss, or alternatively what motivates them to do so, save in the limited circumstances (not relevant here) identified by the Supreme Court in *Jhuti v Royal Mail Ltd* [2018] IRLR 251.

122. If dismissal is for a potentially fair reason, then the Tribunal must consider whether dismissal was fair in all the circumstances, taking into account in particular whether, given the size and administrative resources of the organization, a fair procedure was followed and whether it was fair to dismiss for that reason. At this stage, neither party bears the burden of proof, it is neutral: *Boys and Girls Welfare Society v McDonald* [1997] ICR 693. The Tribunal must not substitute its own view for that of the employer, but must consider whether the employer's actions were (in all respects, including as to procedure and the decision to dismiss) within the range of reasonable responses open to the employer: *BHS Ltd v Burchell* [1980] ICR 303 and *Sainsbury's Supermarkets Ltd v Hitt* [2003] ICR 111. Not every procedural error renders a dismissal unfair, the fairness of the process as a whole must be looked at, alongside the other relevant factors: *Fuller v Lloyds Bank plc* [1991] IRLR 336. A fair appeal may cure earlier defects in procedure, but an

unfair appeal will not necessarily render a dismissal unfair: *Taylor v OCS Group Ltd* [2006] ICR 1602 and *Mirab v Mentor Graphics (UK) Limited* (UKEAT/0172/17).

123. Where conduct is relied on as the reason for dismissal, in determining whether dismissal is fair in all the circumstances under s 98(4), the Tribunal must be satisfied that the employer has a genuine belief that the employee committed the misconduct in question, and that that belief is held on reasonable grounds, the employer having carried out such investigations as are reasonable in all the circumstances of the case: *BHS Ltd v Burchell* [1980] ICR 303 and *Foley v Post Office* [2000] ICR 1283.

124. Where a prior warning is relied on the Court of Appeal in *Davies v Sandwell MBC* [2013] EWCA Civ 135, [2013] IRLR 374 has held (at paras 22-24) – read – s 98(4) and must consider whether there were prima facie grounds for issuing a FWW, whether it was issued in good faith and whether it was manifestly inappropriate to issue the FWW (which would include, it is agreed, if it was an act of unlawful discrimination).

125. We were also referred to *Sweeney v Strathclyde* which confirms that a warning can be taken into account in relation to dismissal even if it was issued after the conduct for which the employee is ultimately dismissed (although we note that it may be relevant to consider that the employee would not in those circumstances have been under a 'warning' at the point the conduct took place and that this might be relevant to fairness).

126. In reaching a decision, the Tribunal must also take into account the ACAS Code on Disciplinary and Grievance Procedures. By virtue of section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992, the Code is admissible in evidence and if any provision of the Code appears to the tribunal to be relevant to any question arising in the proceedings, it shall be taken into account in determining that question.

Conclusions

127. Since we have found that race and age played no part in the decision to dismiss the Claimant, it follows that there is no remaining dispute that the reason for the dismissal was his conduct.

128. We have already considered the fairness or otherwise of all the points that the Claimant raised as part of his case on race and age discrimination and those points are all relevant to the fairness of the dismissal as well.

129. Since we found that there were two significant respects in which the decision to issue the FWW was unfairly dealt with (Mr Payne's attendance that the police station while Ms Greatorex viewed the footage and the use of Ms Rushton-Summers and Mr Fairclough as decision-makers in the disciplinary), we need to consider whether this rendered the FWW 'manifestly inappropriate'. We find that it did not. Since the decision was (reasonably in our judgment) based entirely on Ms Greatorex's notes of the CCTV evidence,

which broadly accords with our own, we cannot see that it would have made any difference to the outcome if there had not been these procedural defects. Moreover, the Claimant's conduct as shown on the CCTV is in our judgment sufficiently serious that a final written warning was a manifestly appropriate, not inappropriate, sanction.

130. It follows that the Respondent was entitled to rely on the FWW when considering whether or not to dismiss the Claimant for the Ms Sawicka incident. In addressing that incident, we find that (taking the disciplinary and appeal stages together) the Respondent carried out a reasonable investigation and formed a reasonable view on reasonable grounds that the Claimant had committed a significant act of misconduct in failing to follow a supervisor's instruction and in swearing at her. It is right to record that there is undoubtedly a culture of swearing at the Respondent, but as Mr Pearlman put it there is a difference between angry swearing and conversational swearing. There is no evidence that there was a culture of angry swearing as was the case with the Claimant on the facts before the Respondent in relation to this last incident. Mr Morgan had been informally warned about swearing previously (where there was mitigation as we have noted). Moreover, the evidence was that this last incident involved swearing with insubordination, in circumstances where the Claimant had very recently been reminded that he needed to do what all supervisors, including Ms Sawicka told him to do. In our judgment, it was reasonable for the Respondent to conclude that this was a significant act of misconduct clearly warranting a formal response.

131. The Respondent's response to the Claimant's offence on this last occasion was in our judgment proportionate, regarding it as a matter which, taken together with the previous FWW, warranted a dismissal on notice. We find therefore that the Claimant's dismissal was fair in all the circumstances.

132. It follows that the claim fails and we do not go on to consider *Polkey* or contribution or adjustment for failure to follow ACAS procedures.

133.

Polkey

The law

134. Section 123(1) ERA 1996 provides that, subject to the provisions of that section (and sections 124, 124A and 126) *"the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer"*.

135. If the Tribunal concludes that the dismissal was unfair but is satisfied that if a fair procedure had been followed (or that as a result of some subsequent event such as later misconduct or redundancies) the employee could or might have been fairly dismissed at some point, the Tribunal must determine when

that fair dismissal would have taken place or, alternative, what was the percentage chance of a fair dismissal taking place at the point: this is the *Polkey* principle as explained in *Contract Bottling Ltd v Cave* [2015] ICR 46.

136.

Our conclusions

137. s;lkdfj

Contributory fault

The law

138. Section 122(2) ERA 1996 provides that:

> "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."

139. Section 123(6) further provides:

> "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."

140. It should be noted that while s 123(6) requires an element of causation before a deduction can be made under that section, there is no such requirement in relation to a reduction of the basic award under s 122(2). Nor is there any such limitation on the Tribunal's 'just and equitable' discretion under s 123(1) as to what compensation, overall, is appropriate.

141. In every case, however, it must be established that there has been culpable or blameworthy conduct on the part of the employee in the sense that, whether or not it amounted a breach of contract or tort, it was foolish or perverse or unreasonable in the circumstances: see *Frith Accountants v Law* [2014] ICR 805.

Our conclusions

142. as;ldkfj

Adjustment for failure to comply with ACAS Code of Practice

The law

143. Section 207A(2) of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A 1992) provides that (in cases such as this to which that section applies) *"it appears to the employment tribunal that – (a) the claim to*

which the proceedings relate concerns a matter to which a relevant Code of Practice applies, (b) the employer has failed to comply with that Code in relation to that matter, and (c) that failure was unreasonable, the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%".

144. [*Need to put in employee one too*]

145. In this case, the relevant Code of Practice is the ACAS Code of Practice on Disciplinary and Grievance Procedures (March 2015) (the COP).

Our conclusions

146. The Claimant argues that there should be an uplift for failure to comply with paragraph 27 of the COP which provides that: *"The appeal should be dealt with impartially and, wherever possible, by a manager who has not previously been involved in the case."*

147. The

Overall conclusion

148. The unanimous judgment of the Tribunal is

Employment Judge Stout

Date: 20 March 2020

JUDGMENT [& REASONS] SENT TO THE PARTIES ON

23/3/2020

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FOR THE TRIBUNAL OFFICE

Where reasons were given orally at the hearing, written reasons will not be provided unless they are asked for by a request in writing presented by any party under Rule 62(3) within 14 days of the sending of this judgment.