EMPLOYMENT TRIBUNALS

Claimant: Ms A Alaga

Respondent: The Net-A-Porter Group Ltd

Heard at: **London South Employment Tribunal**

On: **24-27 February 2020**
& 27 April 2020 (in chambers, by remote video hearing)

Before: **Employment Judge Ferguson**

Members: **Dr S Chacko**
Mr G Henderson

Representation
Claimant: Mr C Ikoku (solicitor)
Respondent: Mr N Pourghazi (counsel)

RESERVED JUDGMENT

It is the judgment of the Tribunal that:

1. The Claimant's complaint of unfair dismissal fails and is dismissed.

2. The Claimant's complaints of direct race discrimination, direct sex discrimination and victimisation *as regards her dismissal* fail and are dismissed.

3. The Claimant's complaints of direct race discrimination, direct sex discrimination, victimisation and harassment related to race and/or sex *as regards the alleged failure to investigate her grievance about the "black monkey" comment* fail and are dismissed.

4. The remainder of the Claimant's complaints of direct race discrimination, direct sex discrimination, victimisation and harassment related to race and/or sex are dismissed because the Tribunal has no jurisdiction to hear them.

REASONS

INTRODUCTION

1. By a claim form presented on 24 August 2018, following a period of early conciliation from 13 to 28 July 2018, the Claimant brought complaints of unfair dismissal, race discrimination and sex discrimination. The Respondent defended the claim.

2. The issues to be determined were agreed at the start of the hearing and are as follows:

Unfair dismissal

2.1 What was the reason for dismissal? The Respondent asserts that it was a reason related to conduct.

2.2 Did the Respondent hold a genuine belief in the Claimant's misconduct on reasonable grounds and following as reasonable an investigation as was warranted in the circumstances? The burden of proof is neutral here, but the Claimant challenges the fairness of the dismissal in that:

2.2.1 A colleague, whom she can identify only as Helen, was found to have been sleeping at work and was not dismissed.

2.2.2 The evidence did not support the conclusion that she was asleep. In particular, evidence from colleagues who were nearby, to the effect that she was not asleep, was ignored, and evidence from managers who could only see her from a walkway, some distance away, was preferred.

2.2.3 Further, the investigating officer exaggerated this evidence, suggesting that the managers were standing by her desk.

2.2.4 Evidence was considered at the appeal stage which she had no opportunity to counter, in particular that

- This was not an isolated incident,
- She had in the past been given additional breaks to help her deal with her fatigue,
- She had been sent home a few times by her shift manager in the past as she could not stay awake,
- Although she had said she did not feel well on that day, in the past she had asked her line manger for time off when she felt unwell but that she had not done so on this occasion.

2.3 Was the decision to dismiss a fair sanction, that is, was it within the range of reasonable responses open to a reasonable employer when faced with these facts?

2.4 Did the Respondent adopt a fair procedure? The Claimant challenges the fairness of the procedure in respect of the conduct of the appeal hearing as set out above.

2.5 If it did not use a fair procedure, would the Claimant have been fairly dismissed in any event and/or to what extent and when?

2.6 If the dismissal was unfair, did the Claimant contribute to the dismissal by culpable conduct?

Harassment related to race and/or sex

2.7 Did the Respondent engage in unwanted conduct as follows:

2.7.1 Disciplining the Claimant on 14 April 2016 for early departure from work.

2.7.2 Issuing the Claimant with a written warning in May 2017.

2.7.3 On or around 25 May 2016, Diona Bennie, the Claimant's line manager, standing at the door of the toilet to record the time spent in there by the Claimant.

2.7.4 Failing to investigate the Claimant's first grievance raised on 20 July 2016.

2.7.5 Ms Bennie making the alleged "black monkey" comment on 15 July 2017.

2.7.6 Failing to investigate adequately the Claimant's grievance about this comment.

2.8 Was the conduct related to sex and/or race? The Claimant claims that all of the conduct related to race, and that the first four instances also related to sex.

2.9 Did the conduct have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her?

Direct discrimination on grounds of race and/or sex

2.10 Did the Respondent subject the Claimant to the following treatment:

- Dismissing her.

- Any of the treatment not found to have been harassment.

2.11 Did the Respondent treat the Claimant as alleged less favourably than it treated or would have treated the comparators? For the purposes of her race discrimination claim the Claimant relies upon a comparison with her colleague Helen, otherwise on hypothetical comparators. The Claimant describes herself as black. Helen is white. Her hypothetical comparator for the purposes of the race discrimination claim is a non-black employee in the same circumstances.

2.12 If so, can the Claimant prove primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of sex and/or race? In respect of the conduct at paragraph 2.7 above the Claimant claims that it was all because of race and the first four instances were also because of sex.

2.13 If so, what is the Respondent's explanation? Can it prove a non-discriminatory reason for any proven treatment?

Victimisation

2.14 Did the grievances raised on 20 July 2016 or 25 July 2017 amount to a protected act?

2.15 If there was a protected act, did the Respondent dismiss the Claimant and/or carry out any of the treatment at paragraphs 2.7.4 – 2.7.6 above because of the protected act?

Time/ limitation issues

2.16 In respect of any act or omission which took place before 10 May 2018:

2.16.1 Can the Claimant prove that there was conduct extending over a period which is to be treated as done at the end of the period? Is such conduct accordingly in time?

2.16.2 Was any complaint presented within such other period as the Tribunal considers just and equitable?

3. It was agreed that the hearing would be on liability only, but would include consideration of Polkey and contributory fault.

4. We heard evidence from the Claimant. On behalf of the Respondent we heard evidence from Ian Barnes, Diona Bennie, Tim Richards, Zahid Amin, Amanda Wareham-Taylor, Mark Carey and Ewelina Szypulska. We had a bundle of documents extending to 646 pages.

5. The hearing was originally listed for five days. The Tribunal was only available for the first four days and it was agreed at the start of the hearing that the evidence and submissions should be completed within three days, leaving the fourth day for the Tribunal's deliberations and judgment if appropriate. In the event, however, the Claimant was late on the second and third days, such that considerable time was lost and the hearing did not finish until 3.45pm on the fourth

day. The Respondent made two applications to strike out the claim on the basis of the Claimant's unreasonable conduct, both of which were refused for reasons given orally at the time. Written reasons for those decisions will not be provided unless requested in writing within 14 days of this judgment being sent to the parties. It is relevant to note, however, that in the course of our decision not to strike out the claim on the third day we found that the Claimant had not been truthful in her account of her journey to the Tribunal that morning.

FACTS

6. The Respondent is an online retailer of luxury fashion goods, employing over 1,930 people in the UK. The Claimant was employed by the Respondent as a Distribution Assistant at the distribution centre in Charlton Gate Business Park from 1 January 2012 until her dismissal with effect on 24 May 2018. Throughout her employment, the Claimant worked night shifts, from 8pm to 8am.

7. At all material times the Claimant was in the "outbound" department, consisting of approximately 50 Distribution Assistants, managed by three First Line Managers ("FLMs"). The FLMs were Diona Bennie, Tim Richards and Zahid Amin.

8. On 2 February 2016, Ms Bennie noticed the Claimant leaving a few minutes before the end of her shift. Ms Bennie asked a security supervisor to check the CCTV and it showed the Claimant leaving the building at 7.57am.

9. Ms Bennie's evidence, which was not directly challenged on this issue and which we accept, was that her managers were strict about time keeping and she had been trained to manage "to the last minute". She said the procedure was to note any concerns in a witness statement and it would then be investigated. This is what she did on 2 February.

10. The Respondent's witnesses also explained that employees are allowed to leave their workstations five minutes before the end of their shifts in order to gather their belongings and queue for the security turnstiles. They are not allowed to leave the building, however, until the very end of the shift. The Respondent deducts pay from those who arrive late or leave early, but operates a three-minute "grace period", so differentials of three minutes or less do not result in pay being deducted. It also treats late arrival and early leaving as a disciplinary issue.

11. The Respondent produced evidence of an employee in 2014 having been issued with a final written warning for leaving early. The employee's pass had not been working and he took advantage of this by entering the security hut at 7.51am and exiting the turnstile at 7.58am. This evidence was not challenged and we accept it happened.

12. On 5 February 2016 an investigation meeting took place relating to the Claimant leaving early on 2 February, conducted by Mr Richards. At the meeting the Claimant said her ID pass was not working and she had to go to her locker to get a sanitary pad. She accepted that she left security three minutes early, but said this was because she needed to change her sanitary pad, and by the time she had done so it was 8am. She accepted she had not mentioned the issue to a manager.

13. After the meeting Mr Richards saw CCTV showing that the Claimant had also left two minutes early on 4 February. The investigation meeting was

reconvened on 9 February. The Claimant denied that she had left early on 4 February and said she queued up that morning as normal.

14. The Claimant was invited to a disciplinary hearing, which took place on 19 February 2016 and was conducted by Amanda Wareham-Taylor, Distribution Shift Manager. Again, the Claimant denied leaving early on either occasion. The turnstile records showed that the Claimant had left at 7.58am on 4 February. The disciplinary hearing was adjourned and could not be reconvened, for reasons that are not relevant to these proceedings, until 14 April 2016. At the reconvened hearing Ms Wareham-Taylor issued the Claimant with a first written warning, to stay on file for 9 months. The Claimant was notified of the outcome in writing and informed of her right to appeal. She did not appeal the decision.

15. The Claimant gave evidence to the Tribunal that her access card had not been working on 4 February. We consider this implausible given that the Respondent's access records showed the Claimant using her access card at 7.58am that day, and the Claimant did not allege in the disciplinary hearing that her card was not working on that day. In fact, she accepted that her card was working but alleged that the timings on the turnstiles were wrong. Ms Wareham-Taylor adjourned the disciplinary meeting to investigate that allegation and, having done so, rejected it.

16. In her statement the Claimant also said that the reason she left early on 4 February was due to personal hygiene reasons. Again, we consider this implausible. The Claimant had never previously suggested that personal hygiene was the reason she might have left early on 4 February (as opposed to on 2 February). Her evidence during cross-examination on this issue was highly confused and unsatisfactory.

17. It is worth noting at this juncture that the Claimant frequently said during her oral evidence that she had not read the notes of investigation or disciplinary meetings and/or that the notes were not accurate, despite having signed them and/or confirmed in later meetings that she agreed with them. We consider that the Claimant raised this issue only where the notes did not suit her case, and we do not accept that any of the notes were inaccurate in any material respect.

18. On 24 May 2016 one of the other FLMs, Mr Amin, noticed the Claimant being absent from her workstation for a while. The access records, which record employees' movement through security gates, show that the Claimant was absent from her desk from 10.20pm to 10.57pm. Mr Amin asked her where she had been and she said she went to the toilet and after that she was praying. Mr Amin told her she is allowed to pray but said she must do it in her break time. The Claimant understood and agreed.

19. On the following shift, 25 May 2016, Ms Bennie noticed the Claimant being absent from her workstation for a long time. After around 35 minutes Ms Bennie went to the toilets to look for the Claimant. As she was approaching the upstairs toilets the Claimant walked out. Ms Bennie did not raise any issue with the Claimant at the time because she knew Mr Amin had recently spoken to her about praying and Ms Bennie wanted to check what the situation was with her praying. The access records show that the Claimant was absent from her workstation for 39 minutes.

20. In cross-examination the Claimant denied that she was away from her workstation for 39 minutes, despite accepting that the access records on the bundle show what time she passed through different doors in the warehouse. We found the Claimant's evidence on this issue to be unsatisfactory and somewhat confused. We accept that she was away from her desk for 39 minutes, as shown by the records.

21. The Claimant also said in her witness statement, "On various dates in May 2016, my line manager Dionne Bennie would stand at the door of the toilet to record what times the Claimant spent in the toilet when answering the call of nature". Ms Bennie denies this. In cross-examination the Claimant accepted that the only time she had seen Ms Bennie outside the toilets was on 25 May, and she did not know how long she had been there. When asked whether she maintained the allegation that Ms Bennie had been "recording" the time she spent in the toilet on more than one occasion, the Claimant gave confused and contradictory answers. We consider this aspect of the Claimant's case to be, at best, speculative. She had no basis to believe that Ms Bennie stood outside the door of the toilet on more than one occasion. Ms Bennie gave clear and logical evidence that she never did so, and only went to look for the Claimant on 25 May when she was away from her workstation for a long time. This is consistent with her witness statement at the time and the reliance on security access records during the disciplinary proceedings. In those circumstances we do not accept that Ms Bennie ever stood outside the toilet door in order to "record" how long the Claimant spent in there.

22. On 7 June 2016 an investigation meeting took place regarding the Claimant's absence from her workstation, conducted by Perry Gong, an FLM in another department. The Claimant was asked about 25 May and said she was in the toilet the whole time. She said that on 24 May she had prayed for 5 minutes and spent the rest of the time in the toilet.

23. The Claimant was invited to a disciplinary hearing regarding her absence from her workstation, but the disciplinary proceedings were suspended after the Claimant raised a grievance on 20 July 2016. The grievance included a complaint about the disciplinary action relating to leaving work early in February 2016 and alleged that the issue about changing her sanitary towel had been ignored, which was an act of direct discrimination. The Claimant alleged that Ms Bennie was picking on her and had waited "at the toilet entrance to record the time I spent in the loo". The Claimant said she was suffering from stress and depression as a result.

24. Around the same time, in July 2016, a disciplinary investigation took place relating to the Claimant sleeping at work. She claimed during the investigation meeting that she was taking medication that made her drowsy.

25. The Claimant was signed off work due to depression from 21 July 2016 until 28 February 2017.

26. The Claimant was invited to a grievance meeting on 8 August 2016. She did not attend. On 11 August the Claimant was asked to provide alternative dates for the meeting. She responded on 20 August asking that a grievance meeting be arranged when she is fully recovered and back to work.

27. The Claimant returned to work on a phased basis from 3 February 2017. An Occupational Health report was produced on 9 February 2017, noting that her absence had been due to "stress related disorders". The report records some discussion about sleep and tiredness on return to work. It also states:

> "We discussed her medication and she advises she does not feel either of her medications makes her drowsy. She advises the medication that could make her drowsy she takes in the morning. We also discussed a move to a day shift pattern to help her manage her sleeping but she feels it is more manageable on the night shift."

28. On 28 March 2017 the Claimant was invited to a grievance meeting on 4 April 2017. The meeting took place on that day, conducted by Ian Barnes, Operations Manager. The Claimant attended, but said that she did not want to pursue the grievance because "I want a peaceful life and the doctor said not to trigger my stress". Mr Barnes asked the Claimant to confirm that she was happy to work with Ms Bennie and the Claimant said she was. In a letter of 20 April 2017 Mr McCall wrote to the Claimant to confirm the grievance had been withdrawn and she would continue to work in the same unit. She was informed she had a right of appeal. The Claimant did not appeal the decision.

29. On 5 May 2017 the Claimant was invited to a disciplinary hearing about her absence from her workstation without authorisation. The hearing took place on 19 May 2017, conducted by Mr Richards. When asked about the second incident, on 25 May 2016, the Claimant said she had spent a long time in the toilet because of "stress", and that Ms Bennie was "giving me stress". At the end of the meeting Mr Richards issued the Claimant with a written warning, live for 9 months. He said it was based on the conversation that Mr Amin had with her on the first night, and the fact that she did exactly the same thing the following night. The Claimant was notified of her right to appeal. She did not appeal the decision.

30. On 29 June 2017, Andy McCall, a Night Shift Manager, witnessed an incident related to the Claimant's arrival at work. He wrote a statement explaining that at 7.55pm he saw the Claimant's car pull up and park directly outside the doors, not in a parking bay. The Claimant rushed out of the car and ran towards the turnstiles and security hut. She returned to her car at 8.02pm and Mr McCall asked her why she had left her car there. She replied "because I am late", and said she could not find anywhere to park. She then parked in a bay and walked back towards the turnstiles at 8.05pm.

31. The Claimant alleges that on 15 July 2017 she had a conversation with Ms Bennie during which Ms Bennie called her a "black monkey". The Claimant's witness statement states:

> "On the 15th July 2017 while I was insisting on my leave entitlements with my Line manager, Dionne Bennie, she called me, "Black Monkey". The reason I went to her was that Mr.Zahid had approved my annual leave but she cancelled it. I went to her in protest and wanted to know why she cancelled it. While I held the papers and wanted to show it to her, she pushed the papers away towards me and said, "Go away you black monkey".

32. It is not in dispute that the Claimant went to Mr McCall after the incident and claimed Ms Bennie had called her a black monkey.

33. Ms Bennie strenuously denies saying the words "black monkey" and says she was very upset by the allegation. Our findings in relation to this incident are set out in our conclusions below.

34. On 17 July 2017 an investigation meeting took place regarding the Claimant's clocking in on 29 June, conducted by Mr Amin. At the meeting the Claimant denied that she arrived at work after 8pm. Mr Amin referred the matter to a disciplinary hearing. He explained in his oral evidence that around this time there were some problems related to a change in the parking arrangements. Some employees were sent "letters of concern" because of lateness. He said the Claimant's case was more serious, however, because she had fraudulently clocked in and then returned to park her car. She also denied being late despite the turnstile records showing that she was.

35. On 25 July 2017 the Claimant submitted a grievance about the alleged "black monkey" comment. She described the incident as follows:

> "On day of 15th July 2017 around 1.00am, I went to diona to book my remaining 10 days holiday and she said I have 3 days and cancel my holiday that had been booked since march and approved by manager Sahid, Claimed that I was not entitled.
>
> Told her the holiday was approved based on my entitlement but she persisted and said she will follow it up and will talk to the manager Andy so as to be cancelled.
>
> Again, she informed me of other option to be paid for the holiday if I can work for it but I declined it and she looks upset and said the holiday will be cancelled and she said I should see Andy tomorrow YOU BLACK MONKEY."

36. Over the course of the next couple of the months the Respondent sought to arrange a disciplinary hearing relating to the clocking in incident on 29 June and a grievance meeting to discuss the grievance submitted on 25 July. There were delays in arranging both for a number of reasons including the Claimant obtaining union representation and the Claimant's ill-health.

37. In early October 2017 the Claimant was involved in a road traffic accident, as a result of which she was off work for around 10 days in October and a further period of around 10 days in early November. She returned to work in mid-November with reduced hours due to symptoms of whiplash.

38. The evidence of discussions between management around this time suggest that they were somewhat frustrated with the Claimant and wanted all of the issues with her employment resolved. On 10 October 2017 Mr Richards emailed two senior managers explaining that the disciplinary and grievance processes were still outstanding. He also said the following:

> "When she is at work she is constantly tired and keeps falling asleep. When she is challenged on why she is always tired she says it is the

> tablets she is on. She keeps making excuses that we the managers stress her out so she has to take them. She totally demotivates most of the team because she sleeps a lot and the perception from the DAs is we the management team don't deal with her. There are a few DAs that look after by waking her up before we find her asleep…"

39. The Respondent's evidence was that this was a longstanding problem, dating back to 2015 at the latest. We accept that there have been concerns about the Claimant sleeping at work since at least September 2015. There is an email in the bundle from Perry Gong (FLM) to Mr Richards in September 2015 noting that he had seen the Claimant a few times nodding off in her chair and he had spoken to her about it twice.

40. Ms Bennie gave evidence along the same lines, saying that the Claimant was often reported as being asleep at work. She said she and her fellow managers received complaints from the team about it or witnessed her asleep at her workstation.

41. The disciplinary hearing relating to the clocking in incident eventually took place on 11 December 2017, conducted by Rachel Bruce, an FLM. The turnstile access records showed the Claimant went through the turnstile and clocked in at 7.57pm, went back out at 7.59pm and then re-entered at 8.07pm. The Claimant did not dispute these timings and said she had rushed to clock in "To not be late". She claimed she had been at the briefing at the start of the shift but missed the start of it. At the end of the hearing Ms Bruce decided to issue a final written warning because the Claimant already had a written warning for conduct. Ms Bruce said the reason for the decision was that the Claimant had falsified her clocking in. The final written warning was to last 12 months. The Claimant was notified of her right to appeal. She did not do so.

42. During cross-examination the Claimant denied that she had attended work later than 8pm on 29 June 2017. Given the turnstile records showed that she arrived, after parking her car, at 8.07pm and the Claimant accepted this in the disciplinary hearing, we consider her evidence on this issue was not credible. We accept that she arrived at 8.07pm.

43. At a managers' meeting in mid-December 2017, at which Ms Bennie, Mr Richards and Mr Amin were present (described by Ms Bennie in her oral evidence as a "moderation meeting"), there was a discussion about the Claimant sleeping on duty. A decision was taken at this meeting that the next time the Claimant was found sleeping at her workstation, it should be reported and a disciplinary process should be followed. Both Ms Bennie and Mr Richards gave evidence that the reason the Claimant's sleeping had not been pursued as a disciplinary issue in the past was because of advice from HR that it was not appropriate to do so when she was taking medication that might make her drowsy. They said that by the time of the moderation meeting in mid-December 2017 they had been advised that she was not taking any medication that made her drowsy, so the matter could be pursued. It was not clear to us whether this was based on the Occupational Health report of February 2017 or something else. We did not have any evidence of advice from HR in writing or anything that related to the situation after the Claimant's accident in October 2017.

44. On 21 December 2017 both Ms Bennie and Mr Amin produced statements saying that they had witnessed the Claimant sleeping during her shift. Ms Bennie's statement reads as follows:

> "I was walking past packing line 4 at approximately 05:28. I saw Abiodun Alaga looking like she is asleep in her chair. She was sitting back reclined in her chair with her arms behind her head supporting her head. I stood in the walk way for a couple of seconds and she remained asleep. I went to the FLM desk to call Zahid Amin to come and have a look with me. We approach packing line 4 at approximately 05:30 and saw her asleep in the same position. After a few seconds she opened her eyes and saw us standing there."

45. Mr Amin's statement said he saw the Claimant "looing like she is asleep in her chair". He said he and Ms Bennie stood in the walk way for a couple of seconds and "After a few seconds she opened her eyes and saw us standing there".

46. It is not in dispute that Ms Bennie and Mr Amin were standing in the "walkway", which is a few metres from the desk where the Claimant was sitting, when they observed her.

47. On 22 December 2017 an investigation meeting was convened to discuss the Claimant sleeping during her shift, conducted by Tim Richards. The Claimant said she was not sleeping, "I just held me head as I had pain in my neck and headache". Mr Richards asked the Claimant to show him the way she was sitting. At first the Claimant posed with her hands holding her head from behind, leaning backwards on the seat, but she then said her hands were on the table and she was sitting down with her jacket hood up. She said she had "serious pain" and she might have been holding her head "to help move from side to side to give a bit of exercise". The meeting was adjourned because the Claimant complained of being in pain.

48. The grievance meeting about the "black monkey" allegation eventually took place on 24 January 2018, conducted by Mark Carey, Inbound Shift Manager. The notes of the meeting record the Claimant describing the incident as follows:

> "When I approached Diona she told me that I don't have any holidays left to take. I said I do. After that she got annoyed, pushed back the paper with my holiday balance on back to me in aggression and said 'no you don't you black monkey'."

49. The Claimant was asked if anyone else witnessed the conversation. She said, "Just me and Diona, maybe there was someone around but I can't remember who it was." The Claimant said she had asked Mr McCall to check the CCTV footage, but he said there was no function for audio.

50. On the same day, 24 January, Ms Bennie emailed Mr McCall as follows:

> "I would like to report to you that last rotation on the night of 16th of January I was approached by a DA, who wants to remain anonymous, regarding Abiodun Alaga. This DA told me that they were in Woolwich on their days off and bumped into Abiodun. The DA asked me, practically begged me, to please stay away from her

> when she comes back to work, as the DA said that she told them that I hate her and that when she comes back to work she will cause big trouble for me if I don't leave her alone…
>
> …I am not sure how I will be able to work with her when she returns to work. I have been going through a stressful situation with her since July 2016 and it is now nearly February 2018."

51. On 13 March 2018 Mr Carey conducted interviews relating to the Claimant's grievance. He spoke to Mr McCall and Ms Bennie. Ms Bennie denied calling the Claimant "black monkey". She said that another employee, Adam Ozdoba, had witnessed the conversation. Mr Carey interviewed Mr Ozdoba on the same day. He said he remembered the incident. He said,

> "I didn't hear anything wrong from Diona – it was a conversation which I caught towards the end. I remember Diona saying 'if you don't want to talk to me then you can go and speak to Andy."

52. On 9 April 2018 Mr Carey wrote to the Claimant to inform her that her grievance was not upheld. He said he found no evidence that the comment was made, as the only witness to the end of the conversation confirmed that they did not hear any racist comments.

53. The Claimant appealed against the outcome of the grievance on 15 April 2018. The Respondent sought to arrange a grievance appeal meeting, but the meeting was delayed twice at the Claimant's request.

54. The investigation meeting about the Claimant sleeping during her shift eventually reconvened on 9 May 2018. The Claimant agreed the notes of the previous meeting. The Claimant maintained that she was in serious pain at the time she was observed by Ms Bennie and Mr Amin. She said, "I came back after my break and wanted to ask to go home. But you [Mr Richards] were on the phone when I was standing in front of you." She said this was at about 1am. The Claimant suggested that the CCTV be checked. She also alleged that Ms Bennie hated her, and that there was an occasion when Ms Bennie saw "Helen" sleeping and simply raised it with her, instead of reporting it. Mr Richards decided to refer the matter to a disciplinary hearing. In his concluding remarks he said,

> "Diona observed you with your eyes shut and then she went and got Zahid as a witness. When they came to your desk they both observed you with your eyes shut. You didn't know they were until you opened your eyes and then you saw them standing next to you."

55. On the following day, 10 May 2018, the Claimant was invited to a disciplinary hearing about sleeping during her shift.

56. Also on 10 May, the grievance appeal hearing took place, conducted by Ewelina Szypulska, Inbound Shift Manager. The Claimant disputed that Mr Ozdoba had been present during the conversation. She also mentioned the CCTV again. Ms Szypulska confirmed the sound is not recorded on the CCTV. She also explained that the footage is only held for 30 days. Ms Szypulska upheld the original grievance outcome on the basis that no other evidence had been produced supporting the grievance. The Claimant asked what would happen now because

she gets agitated when she sees Ms Bennie. Ms Szypulska said they could arrange for mediation, but both would need to agree to participate.

57. The disciplinary hearing regarding the Claimant sleeping during her shift took place on 24 May 2018, conducted by Amanda Wareham-Taylor, Distribution Shift Manager. The Claimant was asked about her statement at the investigation meeting that she had tried to approach Mr Richards at around 1am. She said in fact this was after her second break (4.15am – 5am). The Claimant was asked about the medication she was taking at the time for pain relief. She said, "Didn't use drowsy one. No side effects, just relieve pains".

58. Ms Wareham-Taylor adjourned the meeting to consider the outcome. She established that Mr Richards had been on leave from 2am to 8am on the day in question, so the Claimant could not have approached him after her second break. The meeting was reconvened and Ms Wareham-Taylor found the Claimant had committed misconduct. She noted there were two witness statements from two managers saying that she was asleep, and the discrepancy in the Claimant's account about attempting to speak to Mr Richards. As the Claimant was already on a live final written warning, she decided to dismiss her. In the dismissal letter Ms Wareham-Taylor also noted that there were other managers on shift the Claimant could have asked if she wanted to go home because she was in pain.

59. The Claimant appealed against the decision to dismiss her. She said that Mr Richards had asked two colleagues who were beside her on the day in question and they told him they did not see her sleeping. She maintained she was not asleep. She also said they should check the CCTV.

60. The appeal took place on 20 June 2018, conducted by Ms Szypulska. The Claimant was represented by a union official. On the subject of CCTV, Ms Szypulska said that the footage is only held for 30 days and in any event they could not use CCTV for the purpose of the appeal. The union representative also raised the issue of the Claimant's health, saying he had seen an Occupational Health report advising that the Claimant should have micro breaks during her shift. The Claimant said that the pain she experienced was related to the car accident. She confirmed that the medication she was taking did not make her drowsy.

61. The Occupational Health report referred to by the Claimant's representative was a report produced on 3 May 2018. It referred to the Claimant's neck pain after her accident and adjustments that had already been made to her work. It included a recommendation that the Claimant take "micro breaks" while working to reduce muscle stiffness.

62. After the hearing Ms Szypulska interviewed the two colleagues the Claimant said had told Mr Richards they did not see the Claimant sleeping. They both said they were busy working and did not see the Claimant.

63. Ms Szypulska also interviewed Ms Bennie and Mr Richards. Ms Bennie said she had seen the Claimant asleep "loads of times". She said there had been an investigation into the Claimant sleeping two years ago. She also said in the past other Distribution Assistants had complained about the Claimant sleeping. She referred to the "moderation meeting" at which the managers discussed the Claimant's sleeping. Mr Richards also said this was not an isolated case and that other DAs were complaining about her sleeping. He said he had spoken to the two

colleagues the Claimant mentioned but they said they did not see anything. He did not document the conversations because they both said they did not want to get involved. He said he was aware of the situation with the Claimant's car accident and adjustments had been made to her work (e.g. not lifting heavy items).

64. On 19 July 2018 Ms Szypulska interviewed five other colleagues of the Claimant's. Two of them said the Claimant falls asleep "all the time". One said that sometimes she is asleep for an hour or more.

65. It is not in dispute that none of the notes of Ms Szypulska's interviews were given to the Claimant.

66. On 25 July 2018 Ms Szypulska wrote to the Claimant to inform her that her appeal was dismissed. She referred to the additional investigation she had carried out and the fact that this was not an isolated incident. She also said that the FLMs she had spoken to confirmed the Claimant had been given additional breaks to help her deal with her fatigue, and on a few occasions she had been sent home by Mr McCall as she could not stay awake. Ms Szypulska also referred to the Claimant's argument that she was not feeling well and had attempted to approach Mr Richards. She said the Claimant could have approached Mr Amin instead.

67. The Respondent produced evidence of another employee having been disciplined for sleeping at work. A letter dated October 2014 shows that an employee was found sleeping whilst on shift and was given a final written warning. The employee in question had admitted to sleeping, but said he was suffering from flu like symptoms. It was his first disciplinary offence. The Claimant queried the authenticity of the letter in cross-examination, but made no submissions on the matter. We have no reason to doubt it is genuine and we accept that it is.

THE LAW

Unfair dismissal

68. Pursuant to section 98 of the Employment Rights Act 1996 ("ERA") it is for the employer to show the reason for the dismissal and that it is one of a number of potentially fair reasons or "some other substantial reason". A reason relating to the conduct of an employee is a fair reason within section 98(2). According to section 98(4) the determination of the question whether the dismissal is fair or unfair "depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee" and "shall be determined in accordance with equity and the substantial merits of the case."

69. In misconduct cases the Tribunal should apply a three stage test, set out in *British Home Stores Ltd v Burchell* [1980] ICR 303, to the question of reasonableness. An employer will have acted reasonably in this context if:-

69.1 It had a genuine belief in the employee's guilt;

69.2 based on reasonable grounds

69.3 and following a reasonable investigation.

The Tribunal must then consider whether it was reasonable for the employer to treat the misconduct as a sufficient reason for dismissal. In respect of each aspect of the employer's conduct the Tribunal must not substitute its view for that of the employer but must instead ask itself whether the employer's actions fell within a range of reasonable responses (*Iceland Frozen Foods Ltd v Jones* [1982] IRLR 439).

Equality Act 2010 ("EqA")

1. The EqA provides, so far as relevant:

> **13 Direct discrimination**
>
> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
>
> (2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.
>
> …
>
> **26 Harassment**
>
> (1) A person (A) harasses another (B) if—
>
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
>
> (b) the conduct has the purpose or effect of—
>
> (i) violating B's dignity, or
>
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
>
> …
>
> (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
>
> (a) the perception of B;
>
> (b) the other circumstances of the case;
>
> (c) whether it is reasonable for the conduct to have that effect.
>
> **27 Victimisation**
>
> (1) A person (A) victimises another person (B) if A subjects B to a detriment because--
>
> (a) B does a protected act, or
>
> (b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act--

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

70. Race and sex are both protected characteristics under the EqA.

CONCLUSIONS

<u>"Black monkey" allegation</u>

71. The most significant factual dispute we must resolve is whether Ms Bennie called the Claimant a "black monkey" on 15 July 2017.

72. We have already found the Claimant not to have been a credible witness in a number of respects:

72.1 We found her account of travelling to the Tribunal on day three of the hearing, when she was late for the third time, was not truthful.

72.2 We have rejected her evidence that her access card was not working on 4 February 2016.

72.3 We have found that she disputed the accuracy of the notes of meetings or claimed she had not received them where the contents did not suit her.

72.4 We found her evidence that she was not away from her workstation for 39 minutes on 25 May 2016, and that she did not arrive late on 29 June 2017, was not credible. On both occasions her account directly contradicted the electronic access records and she offered no explanation for the discrepancy.

72.5 We have rejected the allegation that Ms Bennie stood outside the toilet door recording how long the Claimant spent in there.

73. We recognise it is possible that, notwithstanding those findings, the Claimant is telling the truth about the "black monkey" allegation. It is in the Claimant's favour that she reported the allegation to Mr McCall straight away and raised a grievance about it, which she saw through to the end of the process. Having considered all of the evidence as a whole, however, we find that it did not happen. We note that the Claimant's accounts of what was said has not been entirely consistent. We place little weight on that, since it is entirely possible that the Claimant would remember the offensive words more than their precise context. It is significant, though, that the Claimant has always said that the words were used right at the end of the conversation. Mr Ozboda said he had witnessed the end of the

conversation and remembered Ms Bennie saying, “if you don’t want to talk to me then you can go and speak to Andy”. This is very similar to the Claimant’s account in her grievance, with the exception of the offensive words (“see Andy tomorrow you black monkey”). This suggests that Mr Ozdoba did hear the relevant part of the conversation. He did not hear “anything wrong from Diona” and said she was “calm and normal”. The Claimant’s denial that anyone had witnessed the conversation is not credible. She has never suggested any reason why Mr Ozdoba would not be impartial, and she accepted in the investigation meeting “maybe there was someone around but I can’t remember who it was”.

74. We also take into account that the words alleged are extremely offensive and it is inherently unlikely that a manager of Ms Bennie’s experience would use them. Of course racially offensive language is sometimes used in workplaces, but given Mr Ozdoba’s statement that Ms Bennie was calm, and having heard Ms Bennie give evidence, we consider it implausible that she would use the words alleged. We found her to be a straightforward and credible witness. We accept that her outrage at the allegation is genuine.

75. Even looking at the matter in isolation, therefore, we are satisfied that it did not happen. Our concerns as to the Claimant’s credibility in general are obviously also supportive of that finding.

76. The Respondent invites us to find that the Claimant made up the allegation to spite Ms Bennie, whom she did not like because Ms Bennie had reported the Claimant for leaving work early and being away from her workstation, and because she was angry about the refusal of her holiday request. We note there is some evidence (albeit of limited weight because it is not attributed) of the Claimant making threats against Ms Bennie. It is self-evident that there were tensions between them because of the earlier disciplinary proceedings and the Claimant’s previous grievance. The Claimant could have been motivated by spite, by anger at the refusal of her holiday request or by a desire to deflect attention from the disciplinary proceedings. Taking into account our concerns about the Claimant’s credibility in general we are satisfied on the balance of probabilities that, whatever the motivation, the Claimant made this allegation to Mr McCall knowing that it was untrue, and pursued the matter through the grievance process and these Tribunal proceedings also knowing it was untrue.

Unfair dismissal

77. Ms Wareham-Taylor gave evidence that the reason for the Claimant’s dismissal was misconduct, namely sleeping while on duty. She also said that, having assessed all of the evidence, she believed the Claimant had been sleeping on the day in question. This evidence was not directly challenged in cross-examination and we accept it. It was the reason given at the time of the dismissal and although the Claimant has alleged her dismissal was an act of race or sex discrimination and/or victimisation, she has not alleged that the disciplinary process was a sham. We address the discrimination complaints below.

78. We are also satisfied that the Respondent had reasonable grounds to believe that the Claimant was asleep on duty. We assess this on the basis of the evidence before Ms Wareham-Taylor only, i.e. not taking into account the evidence of previous incidents of sleeping or any other evidence gathered during the appeal.

79. We observe that it is extremely difficult, perhaps impossible, to prove categorically that someone is asleep. We note that Ms Wareham-Taylor had the evidence of two managers who both said they observed the Claimant looking as though she was asleep, albeit for a relatively short time before the Claimant opened her eyes and saw them. The most significant aspect of the evidence, however, was the Claimant's own account. She accepted that she was sitting still and not working at the time. She did not dispute that her eyes were closed. The only dispute was whether she was in fact asleep, or was holding her head because she was in pain. She gave accounts in the investigation and disciplinary hearings that were inconsistent in important respects. At one stage she said her hands were on the desk, but later said her hands were behind her head. She claimed to have attempted to approach Mr Richards at 1am, but later said it was after her second break, at around 5am. Further, the latter account, which she maintained at the disciplinary hearing, could not have been true because Mr Richards was on leave from 2am that day. We consider that in those circumstances, where the Claimant's credibility was the main issue, it was reasonable for Ms Wareham-Taylor to form the view that the Claimant was not telling the truth, and on balance it was likely that the contemporaneous assessment of the two managers was correct, i.e. the Claimant was asleep.

80. As to the investigation, we consider that it was reasonable in its scope. It is difficult to see what other useful evidence could have been obtained. The Claimant argued that the Respondent should have obtained the CCTV but since she accepted that she was sitting still at the time, it very doubtful that it would have assisted Ms Wareham-Taylor, even if it were available.

81. We have given some consideration to the potential medical issues in play. The Claimant has not expressly argued that these matters should have been investigated further, but it was raised during the appeal and the Claimant's claim that she was "in pain" gives rise to possible questions about the effects of her car accident or medication that she was taking. The Respondent's evidence about the advice from HR regarding the Claimant's medication was rather unclear. We conclude, however, that in the circumstances there was nothing unreasonable about the Respondent's approach. The Claimant's case was that she was not asleep. She did not argue that any illness, injury or medication made her sleepy. On the contrary, when asked about her medication in the disciplinary hearing she confirmed it did not make her drowsy. The point raised on appeal related to an Occupational Health report that was produced around five months after the sleeping incident, so this was not a matter that the Respondent was obliged to take into account. It was not unreasonable, therefore, for the Respondent to proceed on the basis that there were no relevant medical issues.

82. The Claimant's contention that "evidence from colleagues who were nearby, to the effect that she was not asleep, was ignored" is not made out. She has no basis to challenge the evidence that Mr Richards spoke to the two colleagues in question who said they did not see anything and did not want to get involved.

83. Nor is it correct or fair to say that Mr Richards "exaggerated" the evidence by suggesting that the managers were standing by the Claimant's desk. The reference in the investigation meeting to the managers coming "to your desk" and "standing next to you" does not differ so significantly from Ms Bennie and Mr Amin's accounts of being in the walkway, a few metres away, to constitute an "exaggeration". It was his summary of the incident. There is, in any event, no

indication that Ms Wareham-Taylor placed any reliance on those words. She referred to the statements themselves, which made it clear they were standing in the walkway.

84. We are satisfied, therefore, that the Respondent held a genuine belief in the Claimant's guilt on reasonable grounds and following a reasonable investigation.

85. We must consider whether the sanction of dismissal was within the range of reasonable responses. The disciplinary history is not in dispute. The Claimant received a first written warning in April 2016. She was given a further first written warning in May 2017, live for 9 months. She was found to have committed misconduct within that period, in June 2017, and on 11 December 2017 was given a final written warning, live for 12 months. The sleeping on duty incident occurred on 21 December 2017. The Claimant did not appeal any of those previous disciplinary outcomes and she makes no complaint in these proceedings about the final written warning.

86. There can be no question that it was reasonable for the Respondent to rely on the final written warning. We have considered the guidance in Wincanton Group plc v Stone [2013] ICR D6. There is no basis on which we could find that any of the earlier warnings were issued in bad faith. The Claimant has not even alleged that Mr Richards who issued the first written warning in May 2017, or Ms Bruce who issued the final written warning, acted in bad faith. In both cases there was clear evidence in the form of access records proving the misconduct in question and the Claimant refused to accept any wrongdoing. There is also evidence that the Respondent takes issues of punctuality very seriously in general, so no indication that the Claimant was targeted for any reason.

87. The EAT observed in Wincanton that a final written warning implied, subject only to any contractual terms to the contrary, that any subsequent misconduct of whatever nature will usually be met with dismissal, and only exceptionally will dismissal not occur. Neither party has referred us to any relevant contractual provisions. Although the conduct in this case, sleeping on duty, was relatively minor, we consider it is obviously within the range of reasonable responses to treat it as misconduct. Ms Wareham-Taylor's evidence was that she considered it problematic from both a productivity and health and safety perspective. That is entirely rational. The Claimant has never argued that sleeping on duty should not be treated as misconduct, or that she was not aware it would be treated as misconduct.

88. There is no basis on which we could find that the Claimant was treated any differently to other staff in the same circumstances. The Claimant has never given any details about when or in what circumstances "Helen" was found to be asleep. The Respondent's witnesses all deny having found Helen sleeping in the past and there is no reason for us to doubt that evidence. On the contrary, there is evidence of the Respondent having issued a final written warning to another member of staff for sleeping on duty despite some mitigating factors including him suffering from flu-like symptoms at the time and having a clean disciplinary record.

89. It must follow, therefore, that dismissal was a reasonable sanction. The Claimant committed an act of misconduct very shortly after being given a final written warning. There were no exceptional circumstances that would make dismissal an unreasonable outcome.

90. As to procedural fairness, the Claimant challenges only the fairness of the appeal. Having found the original decision to dismiss reasonable, we consider any procedural failing in the appeal could only affect the fairness of the dismissal if it was so fundamental as to remove, in effect, the right of appeal. Even on the Claimant's case, the procedural failings in the appeal were not of that magnitude. It would have been preferable if the evidence gathered by Ms Szypulska were given to the Claimant to comment on before it was relied upon in rejecting the appeal, but we consider that even if that evidence had not been obtained, for the reasons given above it is inevitable that the dismissal would have been upheld. The points raised by the Claimant were considered and rejected.

Dismissal: direct race or sex discrimination; victimisation

91. The Claimant argues that her dismissal was an act of direct race or sex discrimination and/or victimisation. We note that these complaints were made for the first time in these proceedings. The Claimant did not argue in the course of her appeal that her dismissal was motivated by her race, sex or the fact that she had raised grievances in the past. In cross-examination the Claimant accepted that Ms Wareham-Taylor had not treated her less favourably on grounds of race or sex.

92. As noted above, there is no basis on which we could find that the Claimant's comparator, Helen, was treated more favourably.

93. As for a possible hypothetical comparator, this requires us to focus on the reason for the treatment. We have already accepted that the reason for the Claimant's dismissal was Ms Wareham-Taylor's genuine belief that the Claimant was guilty of misconduct while she was on a final written warning. The managers were somewhat focused on the issue of the Claimant sleeping on duty because of past concerns, but we find nothing untoward about their approach, and Ms Wareham-Taylor made her decision on the basis of the isolated incident alone. There is certainly nothing to suggest that race, sex or having raised grievances played a part at any stage in the disciplinary process.

94. The Respondent has given an explanation for the treatment and we accept it. The reason for the treatment had nothing to do with race or sex and was not motivated to any extent by the fact that the Claimant had submitted a grievance.

Other complaints

95. Of the other complaints of direct discrimination, harassment and victimisation, we have rejected the factual basis of some of them so those complaints could not succeed for that reason. There are also issues of jurisdiction to consider.

96. The only complaint to require substantive consideration is the complaint that the Respondent failed to investigate adequately the Claimant's grievance about the "black monkey" comment. Given that the grievance appeal concluded on 10 May 2018, the complaint is potentially in time. The only matter related to the investigation that the Claimant has specifically complained about is the Respondent's failure/ refusal to obtain the CCTV. Her complaint about the process is in all other respects essentially a complaint about the outcome. She disputed

that there was a witness to the incident and she objected to the fact that her grievance was not upheld.

97. We do not accept that there was any failing that could possibly found a complaint of direct discrimination, harassment or victimisation. Mr Carey investigated the grievance by holding a meeting with the Claimant and interviewing three witnesses. He provided an outcome that was entirely reasonable and accords with our finding that the incident did not happen. There was also an appeal, conducted by Ms Szypulska, which followed the standard procedure. As for the CCTV, a number of reasons have been given for it not being obtained, but significantly the Claimant has never disputed that the CCTV system does not record audio. When investigating a complaint about specific words used during a conversation, it cannot be a detriment or an act of harassment not to obtain CCTV that has no audio.

98. The complaints of direct discrimination, harassment and victimisation relating to this investigation therefore fail.

99. The remainder of the complaints, arising from the conduct set out at paragraphs 2.7.1 to 2.7.5 above, are in principle out of time. The Claimant argued that they formed part of a continuing act of discrimination which ended after 10 May 2018, but we have found that there was no act of discrimination on or after 10 May 2018. Even if the conduct formed part of a continuing act of discrimination, therefore, that act ended before 10 May 2018 and is out of time.

100. We do not consider it would be just and equitable to extend the time limit. The Claimant accepted in cross-examination that she could have brought complaints in the Tribunal about all of the matters that are out of time sooner. Further, as noted above, we have not accepted that Ms Bennie stood at the door of the toilet "to record the time spent in there by the Claimant". She quite reasonably went to look for the Claimant when she noticed she had been absent from her workstation for a long time. There is nothing in this conduct that could found a complaint of direct discrimination or harassment. We have found that the "black monkey" incident did not happen. There was no "failure to investigate" the Claimant's first grievance; she withdrew it. In a number of respects the Claimant has not given truthful accounts of what happened, including relating to the "leaving early" incident in February 2016 and the "absence from workstation" incident in May 2016. She did not appeal against the disciplinary outcomes for either incident and did not allege until these proceedings that they were motivated by race or sex. The delay is substantial and unexplained, and there is no good reason to extend the time limit.

101. The remainder of the complaints must therefore be dismissed because the Tribunal has no jurisdiction to hear them.

_____

Employment Judge Ferguson

Date: 1 May 2020