**THE EMPLOYMENT TRIBUNAL**

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**SITTING AT:** **LONDON SOUTH**

**BEFORE:** **Employment Judge Truscott QC**
**Ms N Christofi**
**Ms S Khawaja**

**BETWEEN:**

**Mr M Naeem** **Claimant**

AND

**Toolstation Limited** **Respondent**

**ON:** **26, 27, 28 August and 19 and 20 October 2020**

**Appearances:**

**For the Claimant:** **In person**
**For the Respondent:** **Ms R Dawson solicitor**

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was fully video. A face to face hearing was not held because it was not practicable and specific issues could be determined in a remote hearing.

**JUDGMENT**

The unanimous judgment of the Tribunal is that:

1. The claimant's claim of unfair dismissal brought under Part X of the Employment Rights Act 1996 is not well founded and is dismissed.

2. The claimant's claim of religious discrimination in relation to the failure to investigate his complaint about the incident on 2 September 2018 is not well founded and is dismissed.

3. The claimant's claim of religious discrimination in relation to his dismissal Is not well founded and is dismissed.

## REASONS

## PRELIMINARY

The respondent was represented by Ms R Dawson employment consultant who led the evidence of Mr S Gunner who was a Divisional Director at the time and Mr Peter Walker, Divisional Director. She proffered the witness statement of Mr P Logan for the value it had as he was not available for the hearing. The claimant represented himself and gave evidence on his own behalf. Evidence proceeded on the basis of the written statements. During the course of the cross examination of the claimant, it became apparent that the actings of Mr Logan were at the centre of the discrimination allegations both in relation to dismissal and failure to investigate the claimant's complaint. The respondent sought an adjournment of the hearing in order that Mr Logan could give evidence to the Tribunal. The Tribunal heard that two previous applications for an adjournment of this hearing had already been rejected. In the light of the detailed evidence this Tribunal had, it considered it appropriate to grant the request and the hearing was relisted for the earliest date suitable for all when the evidence of Mr Logan will be heard and the cross examination of the claimant resumed. There were a substantial number of documentary productions to which reference will be made where necessary.

## THE ISSUES

(1) The issues between the parties which fall to be determined by the Tribunal are listed at the case management hearing before EJ Ferguson on 26 June 2019 as follows:

*Unfair dismissal*

(i) What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")? The respondent asserts that it was a reason relating to the claimant's conduct. The claimant asserts that it was because of various issues he had raised in the past and that the respondent had a campaign to get rid of him.

(ii) If so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the respondent in all respects act within the so-called 'band of reasonable responses'? The Tribunal will consider the following questions:

a. Did the Respondent believe that the Claimant committed the misconduct in question?

b. Were there reasonable grounds for that belief?

c. Did the Respondent carry out as much investigation as was reasonable in all the circumstances of the case?

d. Did the Respondent follow a fair procedure in all the circumstances?

e. Was the decision to dismiss within a range of reasonable responses?

*Remedy for unfair dismissal*

(iii) The claimant seeks reinstatement and/or compensation.

*Equality Act 2010, section 13: direct discrimination because of religion or belief*

(iv) Has the respondent subjected the claimant to the following treatment:

a. Dismissing the claimant

b. Failing to deal with the claimant's complaint about the incident on 2 September 2018

(v) Was that treatment "*less favourable treatment*", i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances? The claimant is Muslim and relies hypothetical comparators.

(vi) If so, was this because of the claimant's religion or belief?

**FINDINGS OF FACT**

1. The claimant commenced employment with the respondent on 11 July 2011 as Customer Service Assistant in its Ruislip branch. On 15 October 2014, he was promoted to an Assistant Manager position in its Hanworth branch. On 22 February 2015, he was promoted to Store Manager in the Weybridge branch.

2. On 27 October 2016, the claimant says that the Regional Manager, Matt Goom stated that he would promote him to Senior Divisional Manager with a pay rise to £28,000, however, he did not follow through on his promise and the claimant raised the issue as a concern in his grievance submitted on 20 November 2017 [MN06].

4. The claimant says that Mr Goom promised to schedule a course entitled "Effective Disciplinary Training" in his appraisal on 27 October 2016. The training course he was scheduled to go on was delayed for 17 months. The claimant raised this matter in a grievance on 20 November 2017 [MN07].

5. The claimant was of the view that his store was not recognised or commended for its hard work. He highlighted this concern within his grievance dated 20 November 2017 [MN08].

6. In the course of his employment, the claimant says he was subjected to several incidents of abuse from customers as follows:

"On 3 January (December) 2015 a customer named Palmer (CN502414849)

began to threaten me and said: "if there wouldn't be CCTV here, I would stab this little immigrant prick in the neck". It was raised in my Grievance on 20.11.2017. (MN09 + MN10)
On 13 February 2016 a customer Traylen (CXX01610179) stated: "God knows what is going to happen with this country, don't know where you people are coming from and who is allowing you". The same customer made a false and unfounded complaint to the Company's head office ("Head Office"). I raised issue in email on 18 February 2016 (exhibit MN11) and in Grievance on 20.11.2017 (Exhibits MN12 and MN13).
On 9 March 2016, a customer named Mr Wilson used abusive language towards me and attempted to drag me outside of the Store. This incident was un-provoked as Mr Wilson was upset that the image of an item in the catalogue did not match the physical description of the item. It was reported to Regional Manager Matt Goom ("MG") via email on 9 March 2016 (MN14).
On 9 April 2018, Regional manager Phillips Logan ("PL") contacted me about an unhappy customer who complained to the Head Office and stated that the customer might return to the Store. PL advised that if needed I should use a panic alarm, so I reported the incident to police."

6. Following the incident on 9 April 2018, the claimant emailed HR on 10 April 2018, raising his concerns at the lack of procedure for responding to intimidating customers [MN37]. The claimant says that Mr Logan responded by saying that he never called him to say that the customer posed any threat, so "there was no action warranted". The claimant requested the telephone script of the colleague who took the customer's call [MN41]. Mr Logan took no action [MN42].

7. On 21 April 2018, a customer named Mr Pritcher wanted to return a transformer as an unwanted item. The claimant informed Mr Pritcher that the return would not be permitted as the packaging was not in a pristine and resell-able condition, following the respondent's return policy. Mr Pritcher became aggressive and said, "you fucking give me my money back, I have got no time to phone around other people". The claimant asked that Mr. Pritcher abstain from using offensive language to which he responded calling him a "Fucking Prick" twice whilst the claimant referred him to the contact centre to register his complaint. Mr. Pritcher said he would make a complaint against him. On 22 April 2018, Mr Pritcher returned to the store claiming that Head Office had authorised the refund. As the claimant was not notified of this by the team internally, he refused to complete the refund, which provoked Mr Pritcher again. Mr Pritcher said "what's is your fucking problem, you fucking Cunt…give me my money back now fucking nob." The claimant reported the incident to Mr Logan by telephone [MN43]). Mr Logan responded: "The company puts in place a number of measures to ensure the safety of colleagues including CCTV and panic alarms along with training on how to deal with difficult customers, so I am satisfied no further action is required at this stage" [MN44].

8. Separate from the incidents of abuse, on 19 May 2017, the claimant says that Dawn Glaser and Mark Reed, both regional managers, tried to force the claimant into an urgent transfer to the Slough branch on the instruction of Simon Robinson [MN39].

9. On 26 September 2017, Dawn Glaser tried to move the claimant to the Merton store. The claimant refused [MN06]. On 3 October 2017, she moved him to the Merton store for a temporary period [MN99].

10. On 7 November 2017, the claimant submitted a complaint against Dawn Glazer for picking on him and addressing him as a "culture type". HR did not acknowledge the complaint or issue him with an outcome [MN15]. The claimant considers this incident was a part of a campaign to dismiss him. The respondent did not follow through its complaint procedure although he sent several chasers about his 7 November 2017 complaint [MN16].

11. On 15 November 2017, Mark Reed entered the store to carry out an investigation into gross misconduct. The claimant raised his concerns through the grievance submitted on 20 November 2017 [MN17, MN18 and MN19]. The investigation for the gross misconduct could not proceed as he raised a grievance and Mark Reed was a part of the grievance [MN101]. The grievance is summarised by the claimant as follows:

> "Regional managers were intimidating towards my team and me in their campaign to get rid of me and misuse of her position for misconduct (exhibit MN20 and MN21).
> In this grievance, I raised the several incidents of abuse I was subjected to by customers, as listed within the section "Incidents of abuse" (exhibit MN22).
> The Company dismissed my grievance to address and make the appropriate arrangements to safeguard me from further incidents of harassments."

12. On 25 November 2017, the claimant raised a grievance against Dawn Glaser for interfering unfairly and unreasonably keeping him away from the hiring process of a potential team member [MN23].

13. The claimant raised another grievance against Dawn Glazer for her refusal to authorise his annual leave [MN23- 24]. He was absent through sickness during the period he requested.

14. On 30 November 2017, the Director of HR, Jason Gorin offered to settle the grievances submitted on 20, 25 and 29 November 2017. The claimant did not accept the settlement offer so the investigation continued [MN25]. On 4 December 2017, the grievance hearing was heard by Ed Onions a Division director. The outcome of the grievance was sent on 25 February 2018 [MN26]. The grievances were not upheld. The third grievance was not addressed within the outcome letter [MN29].

15. On 13 May 2018, the claimant emailed HR with his concerns regarding the outcome letter. The claimant raised his fourth grievance on 21 June 2018 because of the respondent's failure to address his third grievance within the outcome letter [MN30].

Incident on 2 September 2018

16. The claimant's account of the incident on 2 September 2018 in evidence is as follows:

> "Two customers named Mr James Anthony Daniel Hall ("JH") and Ms Bortay Hamidi ("BH, the Customers") came to the Store. The Customers were initially served by my colleague, Ky-Darren Woodcock ("KW"). The Customers requested that I inspect the boots they required in size 9 in a wide fit. While I was assisting the two Customers, JH accused me of bad customer service and bad behaviour. I thanked him for the feedback and suggested

that he contacts the information department at Head Office to register a complaint.
BH then said "you really have got a bad attitude, give me your full name, employee number and full details I want to complaint against you" I responded, "my name is written on the name badge, and I can give you head office contact information". BH was standing on the other side of the counter, facing me, she began pointing her finger towards me and said: "I know what is your problem, you have got bad attitude and bad service because you are a Muslim". BH repeated this comment three times. I responded saying that her comments are highly offensive, to which she explained that: "these comments are not offensive because I'm a Muslim too".
BH abusive behaviour warranted me to request her to leave the building as I felt intimidated and offended by her unacceptable behaviour. I informed BH that should she refuse, I will be forced to record her abuse as evidence for the police. BH refused to leave the Store, so, I pretended to film her. I had hoped that the threat of filming the BH and JH would be a deterrence for them but to no avail."

17. Mr Logan first became involved in the complaint when he received an email which was sent to him by the Customer Service Centre [485-487]. He called and spoke to the female customer on 4 September 2018. A note of the transcript of the customer's video was taken [489-490]. The female customer says "I am a Muslim, I am proud of it". Thereafter, the claimant says ",,, you cannot question my religion". In the note, the customer did not actually question his religion. Mr Logan produced a statement following his conversation with the customer [491-492]. She was extremely angry and upset about what had taken place. The conduct of the claimant left her very worried that he may access her personal details and she was unsure what he would do with them. She also told him that the claimant had filmed her on his personal mobile, without her permission and against her will. She was concerned about what he intended to do with the footage. The customer said that she was not racist at all with her comments to the claimant. She said that she told him that she herself was a Muslim and asked if he was a Muslim. She said this in the context of trying to establish common ground with the claimant in an attempt to calm the situation between them down, she said: 'are you a Muslim, I am a Muslim, I am proud, why is this happening?'.

18. The claimant said that he had not actually recorded the customer. During the investigation the claimant gave Mr Logan permission to view his mobile phone. He could not find any recording of the customers. The claimant told Mr Logan that a previous Regional Manager had given him permission to have his mobile phone with him in the store which was against company policy.

19. The next day Mr Logan viewed the CCTV from inside the branch on the date the incident took place. From viewing the video, he constructed a timeline [493-494]. At 16:02 on Sunday 2 September 2018, an argument is taking place indicated by the body language of the claimant and the female customer. At 16:06, the claimant appears to be videoing the customers. The male customer then starts recording the claimant at 16:06, a few seconds later. Ky Woodcock (Store Assistant) is seen on the CCTV on the nearby till, he was watching but not involved in the argument.

20. On 5 September 2018, as part of the investigation, Mr Logan met with the

claimant [495-528]. At the end of the meeting, the claimant was asked to review and sign the notes to state that he was happy that the content of the notes was correct. He did so.

21. When asked why he videoed the customers, the claimant said he wanted to defuse the situation as he considered that the customers had been racist towards him during the argument and he felt threatened. The claimant said that he had encountered racist issues in the past and it was (in his view) to protect his security. Mr Logan said that the store had fully working CCTV and panic alarms installed for that purpose if he ever felt threatened. There was also no formal record of any previous attacks at the store although the claimant had made several complaints regarding customers.

22. The claimant said that he had raised grievances in the past against a previous Regional Manager and Divisional Director and he considered that because of that they wanted to ‘get rid of him’.

23. As part of the investigation, Mr Logan interviewed Ky Woodcock [529-536] as he was clearly visible on the CCTV as being at the next till point only a few feet away from where the argument took place. Within the investigation report [563-566], Mr Logan highlighted that Ky had said that the claimant had never pressed record on his mobile. When asked how he knew this, his response was, ‘it didn't look like it when I walked by’. Mr Logan checked the CCTV and noted that Ky had not walked behind the claimant.

24. On 6 September 2018, the customer left a voicemail for Mr Logan, he returned her call. She said that both herself and her partner had received calls from the Police regarding the incident. Mr Logan informed the customer that he was happy to be the point of contact for the Police should they require any information.

25. On 8 September 2018, Mr Logan met with the claimant again and suspended him in order that he could carry out further investigations [551-552].

26. On 18 September 2018, Mr Logan conducted a further investigation meeting with the claimant. The purpose of this meeting was to follow up the investigation meetings that he had previously with the claimant on 5 and 8 September 2018 and to discuss the second complaint he received from the female customer on 6 September 2018 that the claimant had reported the male and female customer to the Police and the Police had made contact with them [567-584].

27. The meeting commenced with a discussion regarding the CCTV. Mr Logan explained that he was able to let the claimant view the video but he was not able to let him take a copy of the video with him. The claimant said that he considered that by not letting him take away the CCTV footage that was an indication that ‘the company wanted to drive the investigations their way to get the desired outcome’. When he asked the claimant if he had reported the customers to the Police, the claimant said that he told him of his intention to do so when they met on 5 September 2018. Mr Logan did not consider this to be correct, the notes of the meeting show [495-528] that the claimant was not clear if he had or had not reported the incident to the Police. He did not seek Mr Logan’s authorisation to do so. Mr Logan asked the claimant what information he had provided to the Police. Initially he said he wasn’t sure, then he said that he had provided the Police with the customer’s home

address and telephone number, he then confirmed that he had obtained the details from the customer's invoice from the day of the incident when they had purchased boots.

28. Mr Logan was aware from watching the CCTV that the claimant had not completed the sale and the invoice for the customer should have been provided to them at the end of the sale. The claimant said that he didn't remember exactly, but he knew he could obtain a copy of the invoice [479] from the customer's account on the system. Mr Logan had not provided the claimant with the customer's name in the earlier stage of the investigation. Mr Logan asked the claimant who provided him with authorisation to access the company system for the purposes of obtaining the customer's details, the claimant said that he did not need authorisation to report an offender. Mr Logan said that the correct process would have been, following the report to the Police, the Police would then have made contact with the company and the company would have processed the request for information in accordance with GDPR and the company's Data Protection Policy. The claimant accused Mr Logan of manipulating the investigation to progress his career.

29. The claimant reviewed the notes of the meeting, made any annotations that he felt were necessary and signed all the pages as confirmation that the meeting as documented was correct.

30. Mr Gunner, a Divisional Director, was initially approached by Ed Onions (Divisional Director) to conduct the Disciplinary Hearing with the claimant. He had never previously met or had any prior knowledge of the claimant.. The documentation presented in relation to the disciplinary was; original complaint by the customer to Mr Logan [485-488], a copy of the investigation notes [495-528,529-536,551-552], a statement from Mr Logan [491-492], a copy of the recording of the claimant from the customer's mobile phone, CCTV from the store, a transcript of the customer's recording from their phone [489-490] and a copy of the investigation report summary [563].

31. On 19 September 2018, Anne Redding (HR) sent a letter to the claimant inviting him to attend a Disciplinary Hearing on 25 September 2018 [585-586]. Ms Redding informed him that he was entitled to be accompanied by a companion and further explained that, if it was found that he had committed gross misconduct, it may result in disciplinary action. The letter also enclosed relevant documentation which was to be referred to and taken account of at the hearing which was the customer complaint email, meeting minutes from the investigation meeting 5 September 2018, meeting minutes from Ky Woodcock's investigation meeting, 5 September 2018 and a timeline of the CCTV footage viewed by Mr Logan, a transcript of the video footage recorded on the customer's mobile phone, a statement from Mr Logan regarding his telephone conversations with the customer in question, a copy of an email sent by the claimant to the HR Department on 7 September 2018, timed at 18:13, reference (regarding? referring to? a complaint about religious discrimination and harassment [549].

32. On 25 September 2018, Mr Gunner conducted a Disciplinary Hearing with the claimant who was given the opportunity to state his case, ask questions and present evidence [589-600]. The claimant said that he had before experienced encounters with the male customer who had previously accused him of having a bad attitude. The claimant did not raise issues regarding religion or belief

discrimination. He gave no indication that he considered that the customers' alleged actions against him amounted to discrimination against him from the company. In addition, the claimant did not say that he considered that the disciplinary action against him was part of a campaign to dismiss him on behalf of the company.

33. With regard to the customer complaint, after reviewing all the evidence and listening to the claimant's response, Mr Gunner could see from the video that the claimant gave the customer one minute to complete her purchase with no valid reason. The time of the incident was well within the company's trading hours and in line with Sunday trading legislation. The claimant did not put forward a reason that the sale had to be completed in a hurry, he did not have to leave for personal reasons. The claimant said that the customer was apologetic for taking her time and causing hassle to the store, which led Mr Gunner to believe that she was genuine and caused him to considered that the claimant's actions caused the dispute. Watching the video, the customer refers to herself being a Muslim and she is seen and heard asking the claimant why, as a fellow Muslim, she was being treated in such a poor manner. The claimant claimed that the customer was part of an organisation against Muslims but there was no evidence to support this. With regard to the escalation of the incident, the claimant was the first person to commence filming (or appearing to film) on his personal mobile phone, which then aggravated the situation and in turn commanded a response from the customer. Mr Gunner considered that the claimant had not acted in the professional manner that is expected of any of the company's employees, especially a Branch Manager, whose actions are viewed by colleagues who take guidance and instructions from him on a daily basis.

34. Mr Gunner weighed all the information he had and considered that the claimant had set out to antagonise the customer. If the allegation was in relation to the customer complaint alone, he would have considered a final written warning or maybe demotion as opposed to summary dismissal. During the hearing, Mr Gunner asked the claimant about the Data Protection Training he received on 19 June 2017 and 4 July 2018 and he confirmed that he had completed it. To establish the claimant's understanding of the training, he provided a theoretical example, he asked the claimant what he would do if he found a receipt on the floor of the store, he said that 'he would shred it'. He took from this that the claimant had a full understanding of the company rules in relation to GDPR and how important customer privacy is to the company. He concluded that the actions of the claimant in obtaining the customer's information was not a mistake, it was a deliberate breach. He decided that regardless of whether the customer's details came from a receipt, the system or directly from the order screen, the only place he could have obtained the information was from the company's database, deliberately breaking the company's GDPR policy. Mr Gunner concluded that the claimant went onto the till system for the sole purpose of obtaining the customers' personal data for the purpose of providing the information to the Police.

35. Mr Gunner decided that summary dismissal was appropriate in the circumstances because the claimant gained unauthorised access to the company system in breach of the Data Protection Policy [699-703]. The correct procedure to follow should have been to contact Head Office and make them aware that he was considering reporting the incident to the Police. The Police would then have made contact with the company (via the correct channels) to obtain the information they required. The claimant breached the GDPR (The General Data Protection

Regulation) and the FCA (The Financial Conduct Authority) policy by disregarding the company's GDPR policies.

36. Prior to the end of the hearing, the claimant wanted Mr Gunner to take into account that a complaint he raised about the customer on 10 September 2018 to the Employee Relations Department, had not been looked into. As the claimant had reported the incident to the Police, Mr Gunner took the view that the respondent would not commence any investigations until the Police investigation had been concluded.

37. The dismissal was confirmed by letter dated 28 September 2018 terminating the claimant's employment and setting out his right to appeal [601-604].

38. By email dated 5 October 2018, the claimant appealed against the decision to dismiss him [607-610]. The respondent acknowledged receipt of his appeal by letter dated 12 October 2018 and invited him to attend an appeal meeting to discuss his grounds for appeal on 22 October 2018 [611].

39. Mr Peter Walker is a Divisional Director of the respondent who was approached initially by Jason Gorin (HR Manager) to conduct the appeal as he had never met the claimant and had no knowledge of him. On 22 October 2018, he conducted an appeal hearing with the claimant. In attendance with him and the claimant was Damon Hitchcock (HR Advisor) acting as note taker and Bryan Lee (Union Representative). The grounds of appeal were based on the following points which were to be considered at the hearing:-

Point 1 – The claimant believed that he had the best customer service and his store and the team were one of the best performing.

Point 2 - There was no breach of the Data Protection Policy.

40. The claimant provided no new evidence or mitigation to consider at the Appeal Hearing. Mr Walker asked the claimant if he wanted to discuss further the Data Protection breach, he said that he did. The claimant said that Mr Logan was aware of his intentions to report the incident the Police. The claimant said that he felt he was being discriminated against due to whistleblowing as he provided a statement the year before and because he reported the company to the ICO. He did not put forward any evidence to support the allegation. The claimant wanted to know what involvement Simon Robinson had with the investigation, disciplinary and appeal process. Mr Walker answered that he had no involvement.

41. The claimant said that he considered that the previous grievances he had raised, of which Mr Walker had no involvement or knowledge, were being held against him in relation to the incident that had taken place with the Data Protection breach.

42. The claimant's union representative raised that the claimant had previously asked for an audit trail of a log of who accessed the systems to show if the system had been looked at by a particular person. Mr Walker looked into this but it was not possible to produce an audit trail, Mr Walker considered that the claimant had admitted during the investigation, disciplinary process and during the appeal hearing that he had accessed the customer's file on the respondent's system.

43. The meeting notes were signed by the claimant [615-620].

44. Following the hearing Mr Walker reviewed the notes from the investigation meetings that took place on 8th September 2018 and the disciplinary hearing on 25th September 2018. He saw that during both the meeting and the hearing that he had admitted that he had accessed the company's system for the sole reason of obtaining the customers' information. He then passed this information over to the Police to report the customer for racism. By his own admission he had breached the company's Data Protection policy and could not provide any new evidence or points. On 30 October 2018, Mr Walker sent the claimant his appeal outcome letter [621-622]. He said that with regard to Point 1 of the appeal that it was not necessary for him to conduct any further investigation into the claimant's belief that he had the best customer service and his store and team was one of the best performing. This point was not relevant to the dismissal. Point 2 was that there was no breach of the Data Protection Policy which was rejected.

45. In evidence to the Tribunal, the claimant denied accessing the company database:

> "In BH's complaint email, she stated that I knew her home address (exhibit MN84), and in the Company's Grounds of resistance, it states that I was aware of both Customers address (exhibit MN85). This confirms that the allegation of me obtaining the Customers information from the Company's database is false…On 3 September 2018 (on my day off), I began searching for JH's personal details. I was able to locate his information off some social media platforms and "mybuilder.com" where it stated JH and BH's full name, trading address and email addresses. I was also able to find further details on an invoice BH dropped as she was leaving the Store on 02.09.2018. I was also able to obtain BH's information online, but this was not registered within the Company's database (exhibit MN47)".

**SUBMISSIONS**

46. The Tribunal heard submissions from both parties with a skeleton argument for the respondent.

**LAW**

47. In determining whether or not a dismissal is fair, there are two stages. First, the employer must establish the principal reason for the dismissal and show that it falls within the category of reasons which the law specifies as being potentially valid reasons.

48. The list of potentially fair reasons is set out in section 98 of the Employment Rights Act. Misconduct is a potentially fair reason.

49. In this first stage of determining the reason for the dismissal, the burden of proof is on the employer. But he does not at this point have to establish that the principal reason did justify the dismissal, merely that it was the reason he in fact relied upon and that it was capable of justifying the dismissal. The question of whether it did in fact justify it will depend upon whether the tribunal is convinced that

the employer acted reasonably in all the circumstances in treating the reason as sufficient, i.e. whether section 98(4)– (6) has been complied with.

50. In **West Midlands Co-operative Society Ltd v. Tipton** [1986] ICR 192 HL in a passage of the judgment of Lord Bridge, with whom Lords Roskill, Brandon, Brightman and Mackay concurred, justified this approach as follows:

> "Under [s 98 of the Act of 1996] there are three questions which must be answered in determining whether a dismissal was fair or unfair:
> (1) What was the reason (or principal reason) for the dismissal?
> (2) Was that reason a reason falling within [subsection (2) of s 98] or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which that employee held?
> (3) Did the employer act reasonably or unreasonably in treating that reason as a sufficient reason for dismissing the employee?"

51. As to question (1), Cairns LJ said in **Abernethy v. Mott, Hay and Anderson** [1974] ICR 323 CA in a passage approved by Viscount Dilhorne in **W Devis & Sons Ltd v. Atkins** [1977] AC 931 HL.

> ''A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee. If at the time of his dismissal the employer gives a reason for it, that is no doubt evidence, at any rate as against him, as to the real reason, but it does not necessarily constitute the real reason. He may knowingly give a reason different from the real reason out of kindness …''

52. In **Kent County Council v. Gilham** [1985] ICR 233, CA, Griffiths LJ summed up the position as follows:

> 'The hurdle over which the employer has to jump at this stage of an enquiry into an unfair dismissal complaint is designed to deter employers from dismissing employees for some trivial or unworthy reason. If he does so, the dismissal is deemed unfair without the need to look further into its merits. But if on the face of it the reason could justify the dismissal, then it passes as a substantial reason, and the enquiry moves on to [ERA 1996 s 98(4)–(6)], and the question of reasonableness'.

53. In cases of alleged mixed motivations, once the employee has put in issue with proper evidence a basis for contending that the employer has dismissed out of pique or antagonism, it is for the employer to rebut this showing that the principal reason is a statutory reason. If the Tribunal is left in doubt, it will not have done so. Obviously if the employer manufactures an artificial reason in order to conceal the true reason, no Tribunal should simply accept the manufactured reason. As the Employment Appeal Tribunal commented in **Maund v. Penwith District Council** [1982] IRLR 399 EAT at 401:

> 'If an admissible reason is engineered in order to effect dismissal, because the real reason would not be admissible, the true view in our judgment must be that the employer fails because the underlying principal reason for the dismissal is not within [section 98(1), (2)]'.

54. However, cases can arise where at least part of the claimant's complaint is that some other manager or managers had an influence on the decision to dismiss. In **Royal Mail Group Ltd v. Jhuti** [2019] IRLR 129 it was held that, while normally the Tribunal will look at the dismissing manager's reason, if there is evidence that

another person higher in the organisation's hierarchy than the claimant has intervened in such a way as to make the decision-maker's reason in fact bogus, then applying the 'real reason' test in **Tipton** above a Tribunal can properly attribute that third party's motivation to the employer for these purposes.

**Dismissal for gross misconduct**

55. In common law gross misconduct is conduct by an employee which fundamentally repudiates his contract of employment and justifies summary dismissal. There are several authorities *inter alia* **Laws v. London Chronicle Ltd** [159] 1 WLR 698 and **Wilson v. Racher** [1974] IRLR 114 which confirm that gross misconduct is misconduct of such a nature that it fundamentally breaches the contract of employment. In the case involving the organist of Westminster Abbey, **Neary v. The Dean of Westminster** [1999] IRLR 288, who was summarily dismissed for gross misconduct, the Queen's Special Commissioner, Lord Jauncey, at paragraph 22 stated that:

> "…conduct amounting to gross misconduct justifying dismissal must so undermine the trust and confidence which is inherent in the particular contract of employment that the master should no longer be required to retain the servant in his employment."

56. This test for gross misconduct or repudiation was endorsed by the Court of Appeal in **Briscoe v. Lubrizol Ltd** [2002] IRLR 607 CA.

**Reasonableness of the dismissal**

57. The determination of the question whether the dismissal was fair or unfair, is established in accordance with section 98(4) of the Employment Rights Act, which states:

> (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case.

58. In the context of misconduct, the test of a fair dismissal is that it is sufficient if the employer honestly believes on reasonable grounds, and after all reasonable investigation, that the employee is committed the misconduct. In considering reasonableness in this context, the judgment in **British Home Stores Ltd v. Burchell** [1980] ICR 303 contained guidelines, cited in most tribunal cases involving dismissal for misconduct and are contained in the following quotation from the Employment Appeal Tribunal's judgment at paragraph 2:

> "What the tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct)

> entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. […] It is not relevant, as we think, that the tribunal would itself have shared that view in those circumstances. It is not relevant, as we think, for the tribunal to examine the quality of the material which the employer had before him, for instance to see whether it was the sort of material, objectively considered, which would lead to a certain conclusion on the balance of probabilities, or whether it was the sort of material which would lead to the same conclusion only upon the basis of being sure' as it is now said more normally in a criminal context, or, to use the more old-fashioned term, such as to put the matter beyond reasonable doubt'. The test, and the test all the way through, is reasonableness; and certainly, as it seems to us, a conclusion on the balance of probabilities will in any surmisable circumstance be a reasonable conclusion."

59. The Court of Appeal further considered **Burchell** in **Graham v. Secretary of State for Work and Pensions (Jobcentre Plus*)*** [2012] IRLR 759 by Aikens LJ at paragraphs 35-36:

> "35 …once it is established that employer's reason for dismissing the employee was a "valid" reason within the statute, the ET has to consider three aspects of the employer's conduct. First, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case; secondly, did the employer believe that the employee was guilty of the misconduct complained of and, thirdly, did the employer have reasonable grounds for that belief.
> 36 If the answer to each of those questions is "yes", the ET must then decide on the reasonableness of the response by the employer. In performing the latter exercise, the ET must consider, by the objective standards of the hypothetical reasonable employer, rather than by reference to the ET's own subjective views, whether the employer has acted within a "band or range of reasonable responses" to the particular misconduct found of the particular employee."

60. The Tribunal considered the cases of **Sandwell & West Birmingham Hospitals NHS Trust v. Westwood** 2009 UKEAT/0032/09 and **Eastland Homes Partnership Ltd. v. Cunningham** 2014 UKEAT/027/13 and considered the nature of the misconduct and whether the characterisation by the respondent that it was gross misconduct was reasonable.

61. It may be that the foregoing issue is contained within consideration of sanction. In relation to sanction, there are, broadly, three circumstances in which dismissal for a first offence may be justified:

a. where the act of misconduct is so serious (gross misconduct) that dismissal is a reasonable sanction to impose notwithstanding the lack of any history of misconduct;

b. where disciplinary rules have made it clear that particular conduct will lead to dismissal; and

c. where the employee has made it clear that he is not prepared to alter his attitudes so that a warning would not lead to any improvement.

62. In considering procedural fairness the Employment Appeal Tribunal in **Clark v. Civil Aviation Authority** [1991] IRLR 412 laid out some general guidelines as to what a fair procedure requires. But even if such procedures are not strictly complied with a dismissal may nevertheless be fair – where, for example, the procedural defect is not intrinsically unfair and the procedures overall are fair: **Fuller v. Lloyd's Bank plc** [1991] IRLR 336.

63. An employment tribunal must take a broad view as to whether procedural failings have impacted upon the fairness of an investigation and process, rather than limiting its consideration to the impact of the failings on the particular allegation of misconduct, see **Tykocki v. Royal Bournemouth and Christchurch Hospitals NHS Foundation Trust** UKEAT/0081/16 dated 17 October 2016.

64. Whilst there was some suggestion that the 'range of reasonable responses' test applies only to the decision to dismiss, not to the procedure adopted, this was rejected by the Court of Appeal in **Sainsbury's Supermarkets Ltd v. Hitt** [2003] ICR 111 CA. The Court of Appeal held in this case (at paragraph 30) that the 'range of reasonable responses' – or the need to apply the objective standards of the reasonable employer – applies:

> "…as much to the question of whether the investigation into the suspected misconduct was reasonable in the circumstances as it does to the reasonableness of the decision to dismiss for the conduct reason."

65. In relation to inconsistency, according to the Inner House of the Court of Session in **Conlin v. United Distillers** [1994] IRLR 169, the only relevant inconsistency relates to the dismissal itself and not previous disciplinary sanctions. Accordingly, the court held that the fact that the employee had been given a final warning after a first offence, whereas others had not, was not a basis for saying that the employer had acted inconsistently. The important feature was that the employer was consistent in dismissing employees who repeated the offence after a final warning.

66. However, four notes of caution need to be added. First, although the employer should consider how previous similar situations have been dealt with, the allegedly similar situations must truly be similar (**Hadjioannou v. Coral Casinos Ltd** [1981] IRLR 352 followed in **Procter v. British Gypsum Ltd** [1992] IRLR 7). In practice this is likely to set significant limitations on the circumstances in which alleged inequitable or disparate treatment can render an otherwise fair dismissal

unfair. The point is emphasised by the decision of the Court of Appeal in **Paul v. East Surrey District Health Authority** [1995] IRLR 305.

67. Second, an employer cannot be considered to have treated other employees differently if he was unaware of their conduct (**Wilcox v. Humphreys and Glasgow Ltd** [1975] ICR 333, QBD).

68. Third, if an employer consciously distinguishes between two cases, the dismissal can be successfully challenged only if there is no rational basis for the distinction made; **Securicor Ltd v. Smith** [1989] IRLR 356 CA.

69. Fourth, even if there is clear inconsistency, this is only a factor which may have to give way to flexibility. Accordingly if, say, an employer has been unduly lenient in the past, he will be able to dismiss fairly in future notwithstanding the inconsistent treatment.

70. Procedure is part of the overall fairness to be considered by the tribunal and not a separate act of fairness – see Langstaff J in **Sharkey v. Lloyds Bank plc** UKEAT/0005//15 (4 August 2015, unreported):

> …procedure does not sit in a vacuum to be assessed separately. It is an integral part of the question whether there has been a reasonable investigation that substance and procedure run together.

71. Procedural defects in the initial disciplinary hearing may be remedied on appeal provided that in all the circumstances the later stages of a procedure are sufficient to cure any earlier unfairness: **Taylor v. OCS Group Ltd** [2006] IRLR 613.

72. The Employment Appeal Tribunal in **Iceland Frozen Foods Ltd v. Jones** [1982] IRLR 439 summarised the way in which tribunals should approach the statutory question, saying at paragraph 24:

> "(1) The starting point should always be the words of section 57(3)[1] themselves;
>
> (2) In applying the section, an industrial [employment] tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the employment tribunal) consider the dismissal to be fair;
>
> (3) In judging the reasonableness of the employer's conduct, an employment tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;
>
> (4) In many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;

[1] Said provisions of the Employment Protection (Consolidation) Act 1978 having been superseded by section 98(4) of the Employment Rights Act 1996.

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

## Discrimination

73. Section 13 of the Equality Act 2010 ("EqA") deals with direct discrimination. It states as follows:

> "(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."

74. Section 23 EqA deals with comparators. It states as follows:

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

75. It is only if the Tribunal is satisfied that there is less favourable treatment when comparing the treatment of the claimant to what would have been received by the actual or hypothetical comparator, that the test of whether an alleged act was direct race discrimination arises and this requires a consideration of the reason for the treatment.

76. The Equality and Human Rights Commission: Code of Practice on Employment 2011 ('the Code of Practice') sets out helpful guidance for carrying out the comparator exercise. As to the identity of the comparator, paragraph 3.23 of the Code of Practice confirms:

> The Act says that, in comparing people for the purposes of direct discrimination, there must be no material difference between the circumstances relating to each case. However, it is not necessary for the circumstances of the two people (that is, the worker and the comparator) to be identical in every way; what matters is that the circumstances which are relevant to the treatment of the worker are the same or nearly the same for the worker and the comparator.

77. As to the comparison exercise for a hypothetical comparator, paragraph 3.27 of the Code of Practice confirms:

> Who could be a hypothetical comparator may also depend on the reason why the employer treated the Claimant as they did. In many cases, it may be more straightforward for the Employment Tribunal to establish the reason for the Claimant's treatment first. This could include considering the employer's treatment of a person whose circumstances are not the same as the Claimant to shed light on the reason why that person was treated in the way they were. If the reason for the treatment is found to be because of a protected characteristic, a comparison with the treatment of hypothetical comparator(s) can be found.

78. In **Amnesty International v. Ahmed** [2009] IRLR 884 Mr Justice Underhill (as he then was) (at para 34) confirmed that where the act complained of is not inherently discriminatory, it can be rendered discriminatory by motivation. This involves an investigation by the tribunal into the perpetrator's mindset at the time of the act. This is consistent with the line of authorities from **O'Neill v. Governors of St Thomas More Roman Catholic Voluntary Aided Upper School and anor** [1996] IRLR 372, the Tribunal should ask what is the 'effective and predominant cause' or the 'real and efficient cause' of the act complained about. In **Nagarajan v. London Regional Transport** [1999] IRLR 572, HL, it was stated that if the protected characteristic had a 'significant influence' on the outcome, discrimination would be made out.

79. The crucial question is why the claimant received the particular treatment of which he complains.

80. Paragraph 3.11 of the Code of Practice confirms:
The characteristic needs to be a cause of the less favourable treatment but does not need to be the only or even the main cause.

81. Paragraph 3.13 of the Code of Practice confirms:
In other cases, the link between the protected characteristic and the treatment will be less clear and it will be necessary to look at why the employer treated the worker less favourably to determine whether this was because of a protected characteristic.

82. The burden of proof provisions in relation to discrimination claims are found in section 136.

83. The Court of Appeal, in **Igen Ltd v. Wong** [2005] ICR 931 CA, has authoritatively set out the position with regard to the drawing of inferences in discrimination cases in the light of the amendments implementing the EU Burden of Proof Directive.

84. In **Laing v. Manchester City Council** [2006] ICR 1519 EAT, the Employment Appeal Tribunal held that the drawing of the inference of *prima facie* discrimination should be drawn by consideration of all the evidence, i.e. looking at the primary facts without regard to whether they emanate from the claimant's or respondent's evidence page 1531 para 65. The question is a fundamentally simple one of asking why the employer acted as he did: **Laing** para 63. That interpretation was approved by the Court of Appeal in **Madarassy v Nomura International plc** [2007] ICR 867 CA at paragraph 69. The Court also found at paragraphs 56-58 that 'could conclude' must mean 'a reasonable tribunal could properly conclude' from all the evidence before it. That means that the claimant has to 'set up a *prima facie* case'. That done, the burden of proof shifts to the respondent (employer) who has to show that he did not commit (or is not to be treated as having committed) the unlawful act, at page 878.

85. Tribunals should be careful not to approach the **Igen** guidelines in too mechanistic a fashion (**Hewage v. Grampian Health Board** [2012] ICR 1054 SC para 32, **London Borough of Ealing v. Rihal** [2004] EWCA Civ 623 para 26).

86. The Court of Appeal has confirmed the foregoing approach under the EqA in **Ayodele v. Citylink** [2018] IRLR 114 CA.

## DISCUSSION AND DECISION

87. The Tribunal considered the evidence of previous complaints made by the claimant against various members of the management team in order to identify whether there was any malevolent or discriminatory disposition towards him in later events. The Tribunal concluded that there was not. The respondent did not address the issues which were raised promptly or competently but the claimant was adept at pressing his case and this meant that the respondent did, with the exception of one grievance, eventually deal with his grievances albeit not to his satisfaction.

88. While the claimant made some complaint about Mr Logan prior to his involvement in the 2 September incident, the Tribunal considered that he carried out his investigative duties well and did not do so to harm the claimant or to discriminate against him because of his religion. The Tribunal did consider that Mr Logan was less responsive to the issues of abuse raised by the claimant than he should have been but this was not indicative of religious discrimination. In relation to the claimant's claim for overtime on 6 September 2018, Mr Logan authorised the payment as soon as he was able and his action cannot be construed as discriminatory.

89. The managers involved in the disciplinary and appeal procedures had no previous involvement with the claimant and the Tribunal was satisfied that they were not influenced by the previous managers nor did they conduct their stage of the proceedings in any inappropriate or discriminatory way.

90. The claimant articulated his case well during the hearing but his evidence not only expanded upon what he is noted to have said during the process, it at times contradicted it. He provided a source of the customer's details to the Tribunal, i.e. the Screwfix invoice [479] that he said he found in the car park, which was barely credible on its own account and, in any event, was never provided at any stage of the internal procedure. The Tribunal preferred the evidence of the respondent's witnesses which was straightforward and supported by notes which were countersigned by the claimant on each page. Any amendments to the meeting notes were initialled by both the claimant and the notetaker.

91. The claimant has alleged that Mr Logan over-exaggerated the situation. The Tribunal does not accept thathe or any of the other witnesses for the respondent did so. The customer was extremely concerned and very anxious about the incident which was exacerbated by the complaint to the Police.

92. The reason for dismissal was as alleged by the respondent, the breach of the GDPR policies of the respondent. The misconduct was appropriately categorised as gross.

93. The procedure adopted both in investigation and in discipline was addressed seriously by each manager involved and was conducted fairly. There was no inconsistency of treatment as between the claimant and other emloyees who had nreached the policy.

94. The dismissal fell within the range of reasonable responses.

95. The reason for the dismissal was the claimant's behaviour in accessing customer information on the respondent's equipment. It was not for any discriminatory reason. The reason his own complaint was not investigated was because of the ongoing Police investigation not because of any religious discrimination. He did not suffer any less favourable treatment because of religious discrimination either in relation to dismissal or the fact that his complaint was not investigated by the respondent.

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**Employment Judge Truscott QC**
**Date: 13 November 2020**