EMPLOYMENT TRIBUNALS

Claimant: **Mr P Aldwinckle**

Respondent: **UPS Limited**

Heard at: **East London Hearing Centre (by Cloud Video Platform)**

On: **17th &18th December 2020**

Before: **Employment Judge McLaren**
Members **Mr T Burrows**
Mr L Bowman

Representation
Claimant In Person
Respondent: Mr R Lassey, Counsel

JUDGMENT having been sent to the parties on 21 December 2020 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

Background

1. The claimant was employed from 2 August 1993. He started his career with the respondent as a package car driver and by March 2014 had been promoted to local sort team leader.

2. He was dismissed on 3 March 2020 following an altercation with another employee. The ACAS early conciliation period was on 20 April to 20 May 2020 and the claimant issued this claim to the employment tribunal on 16 June 2020.He brings claims of unfair dismissal and age discrimination.

Application for an adjournment

3. At the outset of the hearing the claimant applied for an adjournment. This was originally on the basis that his key witness was no longer attending. There was a discussion about whether this witness wished to attend and was unable to do so because of implied pressure from his employer, or whether this was his own decision. The respondent was able to take instructions and clarify that the

witness had not booked the time off work, although he had been told that he was able to do so and attend the court both by his line manager and by the senior site supervisor. We concluded that the witness had simply changed his mind and the claimant was clear that he did not want to force attendance via a witness order.

4. The claimant then explained that even if this witness was able to attend, he nonetheless wanted an adjournment. He understood that if an adjournment was successful his case would be unlikely be heard before August 2021 but felt that he needed to take legal advice. He did not understand the law and did not feel he was able to represent himself at this point.

5. The respondent objected to this application on the basis that the case had been running for some time and it was not reasonable for the claimant to decide on the morning of the hearing that they now needed legal advice. This would put the respondent to unnecessary cost.

6. I considered the application and refused it. Taking into account the overriding objective, which is to ensure the parties on an equal footing, deal with cases in ways which are proportionate to the complexity and importance of the issues, avoid delay so far as is compatible with proper consideration of the issues and save expense, I concluded that in the circumstances it would not be in accordance with this objective to postpone the hearing. The claimant had had every opportunity to take legal advice up to this point, there would be considerable delay before the hearing could come back before the employment tribunal and postponement was not a proportionate response.

Evidence before us

7. We heard evidence from the claimant on his own behalf, and on behalf the respondent from Mr Ian Lazarus and Mr Carl Robinson. We were provided with a paginated bundle of some 192 pages.

8. In reaching our decision we considered the evidence that we heard together with those pages of the bundle to which we were taken. We were also assisted by helpful submissions from both sides.

Issues

9. the issues in the case had been agreed between the parties at a preliminary hearing on 8 October 2020 as these.

Jurisdiction

1. In respect of any alleged acts of discrimination which occurred on or before 20 January 2020, does the Tribunal have jurisdiction to hear those claims?

2. In respect of the allegations of discrimination which relate to the period 20 January 2020 to 31 January 2020, do they form part of a continuing act under section 123(3)(a) of the Equality Act 2010?

3. In respect of any alleged acts of discrimination which are out of time, would it be just and equitable for the Tribunal to extend time under section 123(1)(b)?

Direct Age Discrimination (section 13 of the Equality Act 2010)

4. Was the Claimant subjected to the following less favourable treatment:

    a. The allegation that he was suspended and/or disciplined;

    b. The allegation that the Claimant was dismissed;

5. If so, was the Claimant treated less favourably than a hypothetical comparator and/or a real comparator. The Respondent notes the Claimant identifies a real comparator, Mr Josh Garside, in his claim form.

6. If so, does the identified comparator (Mr Garside) fall within the meaning of section 23 of the Equality Act 2010? Is the any material difference between the circumstances of the identified comparator (Mr Garside) and the circumstances of the Claimant's case?

7. If so, was any such less favourable treatment because of the Claimant's age and/or as he was soon to be eligible to claim a final salary pension? The Respondent will say that the Claimant was suspended and subsequently dismissed (following a reasonable and fair investigation) for committing serious acts of gross misconduct, in particular: abusive, threatening, disrespectful or objectionable behaviour contrary to the Respondent's Employee Handbook (Appendix D1 Disciplinary Code) Section A.

8. If the Tribunal finds that the Claimant has suffered unfavourable treatment, can the Respondent show that treatment to be a proportionate means of achieving a legitimate aim. The Respondent will rely on the following legitimate aims:

    a. The robust management of employee misconduct (including that of the Claimant); and

    b. To ensure a safe and respectful working environment for all employees.

The Respondent will say that the legitimate aims were achieved proportionately as the Claimant was given the opportunity to respond to the allegations against him at a disciplinary hearing following a reasonable and fair investigation of the incident.

Unfair Dismissal: Claim under Section 95(1)(a) of the Employment Rights Act 1996

9. Was the reason for the Claimant's dismissal a fair reason pursuant to section 98(2) of the Employment Rights Act 1996? The Respondent contends that the Claimant was dismissed for a fair reason, namely gross misconduct.

10. If so, did the Respondent act reasonably in treating misconduct as a sufficient reason for dismissing the Claimant, applying section 98(4) of the Employment Rights Act 1996 and in particular applying the British Home Stores Ltd v Burchell [1978] test as follows:

a. Did the Respondent genuinely believe the Claimant to be guilty of misconduct?

b. Did the Respondent have reasonable grounds for that belief?

c. In forming that belief, had the Respondent conducted a reasonable investigation into the allegations of misconduct?

11. Was the Claimant's dismissal in the range of reasonable responses of an employer?

Remedy

12. If the Claimant succeeds in any of his claims, is he entitled to any remedy from the Respondent, including:

a. Compensation for financial loss;

b. A declaration that he has been discriminated against pursuant to section 124(2)(a) of the Equality Act 2010; and/or

c. Recommendations pursuant to section 124(2)(c) of the Equality Act 2010; and/or

d. An award for injury to feelings;

e. An order for reinstatement pursuant to section 114 and 116 of the Employment Rights Act 1996;

f. An award of compensation for unfair dismissal, if so, should any award of compensation be reduced to reflect:

i. Any failure by the Claimant to mitigate his losses; and/or

ii. The fact that the Claimant's employment would have been terminated in any event (in reliance on Polkey v AE Dayton Services Ltd [1987])? and/or;

iii. Any contributory conduct of the part of the Claimant.

Finding of Facts

Contract/ terms of employment

10. The claimant's employment terms from his long employment with the respondent were included in the bundle. The most recent correspondence relating to his terms and conditions of employment were in a letter of 18 March 2014. This confirms that his terms of employment included noncontractual policies and procedures issued in the code of policy and procedure.

11. The bundle included at pages 86-124 extracts from the employee handbook. This employee handbook included a disciplinary policy which set out a series of stages depending on the severity of the conduct. It also included as an appendix D1 a list of examples of matters that would constitute gross misconduct for which summary dismissal would occur. This included abusive, threatening, violent, bullying, disrespectful or objectionable behaviour towards workers employees, customers or suppliers.

12. We were also directed to the UPS Dignity at Work Policy and section 1.4 which refers to managers having particular responsibility for setting standards and ensuring appropriate workplace behaviours were maintained. We were also directed to section 3.4 which included a non-exhaustive list of unacceptable behaviour including people in authority abusing their position by assuming a threatening or intimidating management style.

13. The bundle also included the Bullying at Work policy which provided that all employees must treat each other with courtesy, consideration and professionalism.

14. The claimant accepted that he was aware of the company policies and he understood the obligations placed on all staff and in particular on managers to act in an appropriate way. He understood the seriousness of abusive or threatening behaviour.

15. He accepted that his behaviour had not been courteous or professional He accepted that he had been abusive, he did not accept he had been threatening.

The investigation

16. It was common ground that an altercation took place at work on Friday, 17 January 2020. The claimant in his witness statement explained that at about 4:30 he heard Mr Garside talking to other employees and mentioning his name.

17. The claimant went into the office and asked Mr Garside to stop telling stories using his name and words were exchanged. Both Mr Garside and the claimant agreed that as the claimant left the office Mr Garside called him a "f****** C***". In reaction the claimant walked back towards Mr Garside. On the claimant's account to the tribunal, he touched Mr Garside's shoulder with his finger and said that Mr Garside needed a slap. The claimant was told to leave the office by another colleague, Mr Bigwood, who was present.

18. The same day the claimant apologised to Mr Bigwood for the language he had used. The claimant and Mr Garside apologised to each other the same day by telephone. The pair apologised to each other again on site on the 20th January.

19. On 20 January the incident that occurred the previous Friday was escalated to human resources. An investigation occurred in which Mr Hughes spoke to all the employees who witnessed the incident and asked them for brief statements. This included a discussion with the claimant. Mr Hughes informed the claimant that had been told by HR to suspend the claimant and that he would get a letter inviting to a disciplinary hearing.

20. The policy on suspension states this

"In serious cases, consideration should be given to a period of suspension with pay while investigations are carried out. Periods of paid suspension may be appropriate, for example, where relationships have broken down where there are concerns around the Company's ability to have trust and confidence in the employee during the investigation, in gross misconduct cases or where there are risks to employee and company property or responsibilities to other parties. Suspension is not an assumption of guilt and is not considered a disciplinary

sanction. An employee under paid suspension must not engage in other paid employment."

21. We note that suspension is suggested in cases of gross misconduct. The claimant in cross examination accepted that he was suspended because of the incident that had occurred. This was characterised as potential gross misconduct. We find that the suspension was in accordance with company policy and was not motivated in any way because of the claimant's age.

22. Mr Lazarus told us that Josh Garside was not similarly suspended because the incident was less serious as it did not include allegations of physical assault. We also find that the claimant was not treated less favourably than Mr Garside in being suspended. We find that the policy meant that the claimant would be suspended but Mr Garside would not. The difference in treatment was entirely because of the different allegations that were being investigated.

23. It was agreed that on 21 January 2020 Mr Hughes gathered witness statements from both employees involved the incident and those who witnessed it and prepared an investigation summary which was included in the bundle at page 128 -134. That investigation summary states that the claimant physically assaulted Mr Garside by grabbing hold of his clothing on his chest and forcing him against the wall.

24. The relevant witness statements taken at the time all have slightly different accounts. Ms Carr refers to the claimant backing Mr Garside up into a wall. She makes no reference to anything else. Mr Bigwood has more detail and referred to the claimant storming into his office through the closed-door, grabbing hold of Mr Garside by his clothing on his chest, forcing him backwards against the wall and making threats to him about violence. Mr Garside, in his statement given at the time, says after a brief barrage of words there was a slight altercation where he was pushed against the wall. We note here that Mr Garside did not attend. We have therefore given little weight to the statement he produced for the hearing, It is, however, of little relevance because the question we have to answer is whether the respondent's actions at the time were reasonable. It is his contemporaneous account given to his employer, which we have, that is relevant, not what he may now say occurred.

25. The claimant also gave a brief statement at the time and simply said that they had an altercation in Mr Bigwood's office and that they had words. He described this as words said in the heat of the moment and a reaction to what he was called. He said it would never happen again and sincerely apologised.

26. We find that all relevant witnesses were spoken to fairly shortly after the incident. We find the investigation was a reasonable one in all the circumstances.

<u>The disciplinary hearing</u>

27. Mr Lazarus was presented with this investigation report and the witness statements when he returned from annual leave and he reviewed these prior to chairing the disciplinary hearing.

28. On 28 January 2020 the claimant was invited to attend a formal disciplinary hearing to take place on 30 January. The letter of invitation identified that this was potentially a case of gross misconduct. The claimant was informed of his right to be accompanied and directed to where he could find the

disciplinary procedure as well as being provided with copies of the investigation summary and the accompanying witness statements.

29. The notes of the disciplinary meeting were included in the bundle. They show the claimant confirming that he was marching towards Mr Garside, accepting that he was probably aggressive and that he was fuming. The notes say that he prodded Mr Garside in the shoulder and said that if there was a repetition of the abusive language that he would give the individual a slap and put him through the window.

30. The notes also show the claimant disagreeing that he assaulted Mr Garside. It is put to him that any physical contact in an aggressive manner is assault. The claimant replies he did not assault him. Mr Lazarus comments that if you put your hands on him that is assault and the noted reply is that the claimant's wife had said that, and that he knew he was in the wrong. We find that a reasonable understanding of this exchange would lead Mr Lazarus to conclude that the claimant agreed his actions amounted to assault

31. The claimant in his evidence to us, disagreed with the accuracy of the notes. He believed that they were incorrect and that he had not said that he was going to give Mr Garside a slap and he had not mentioned anything about a window. He explained that Mr Garside was considerably younger and fitter than he was and there was no way that he would have any physical confrontation with him. His account was that he had simply put his finger on Mr Garside's shoulder and said you need a slap. This was not physical contact. He had never physically assaulted anybody in his entire life. Saying that you need a slap is entirely different from a threat to deliver one. The notes should have reflected this but were inaccurate.

32. The claimant also disputed Mr Lazarus' evidence that he was given an opportunity to read the notes at the end of the hearing. He told us that this had not happened and that he had asked for them to be emailed to him by the HR notetaker. The claimant accepted that he had the notes of the disciplinary hearing prior to the appeal and had not raised any comments as to their accuracy. Mr Lazarus was confident that the notes were accurate. We accept the accuracy of the notes. On the balance of probabilities, we conclude that the claimant would have challenged them earlier had he believed them to be inaccurate.

32. The hearing was adjourned for a short period for Mr Lazarus to consider his decision and in his witness evidence he told us that he reconsidered all the witness statements and concluded that they were consistent that the claimant acted in an aggressive manner towards Mr Garside and engaged in physical contact. So far as Mr Lazarus was concerned, the claimant had accepted that he had approached Mr Garside aggressively and had prodded him and therefore Mr Lazarus had formed a genuine belief that the allegations against the claimant had acted in an inappropriate manner were proven and that he had acted contrary to the disciplinary code showing abusive, threatening or violent behaviour towards a fellow worker. Mr Lazarus therefore concluded that this was an act of gross misconduct.

33. Mr Lazarus was asked several times why he accepted the testimony of Mr Bigwood over that of the claimant and the other two witnesses. Mr Bigwood is the only individual who states there was any physical contact between the

claimant and Mr Garside. Mr Lazarus explained that he took the statements into account but was also influenced by the claimant's own account which, as set out above based on the notes, had the claimant accepting that he was aggressive that he prodded Mr Garside and said he would give the individual a slap.

34. Mr Lazarus agreed that, if he had believed that there had been no physical contact and no threats, limited to language only, then the outcome would have been different, and it would not have been dismissal. That was not, however, what he believed the claimant had said at the time.

35. We find that Mr Lazarus had a genuine belief in the claimant's guilt. This was a reasonable belief based on the statements made by those involved, including Mr Garside, and in particular based on what he reasonably believed to have been the claimant's admissions in the disciplinary hearing. We have already concluded that the notes are an accurate reflection of what was said at the time, and on that basis, we find that it was reasonable for Mr Lazarus to believe that the claimant had acted in an aggressive manner, had made physical contact with a junior member of staff and had issued a threat, both in relation to a slap and to putting Mr Garside through a window. We find Mr Lazarus reasonably and genuinely believed both these comments are threats of physical action and were accompanied with physical contact which, however it occurred, ended up with Mr Garside backed against a wall.

<u>The disciplinary sanction</u>

36. Mr Lazarus told us that he considered the appropriate sanction and felt the dismissal was necessary and appropriate, both because of the severity of the conduct and because the claimant held a managerial position. Higher standards are expected of mangers We accept his evidence. He did not believe that the claimant had fully understood the severity of his behaviour and did not trust that a similar incident would not happen again. The claimant had been unable to explain why he had done this when he was asked, and we accept that the respondent therefore could have no certainty that it would not occur again. He took into account the claimant's length of service and good record and the fact that he was provoked, but nonetheless did not feel this mitigated sufficiently against the appropriate penalty. In his view assaulting and threatening a member of staff was completely unacceptable. We accept that this was a reasonable decision in the circumstances of the case.

37. Mr Lazarus relayed the decision to the claimant who was told that he would receive a letter confirming the decision and was advised of his right to appeal.

38. Mr Lazarus had also been the disciplinary chair of the meeting that gave Mr Garside a final written warning. Mr Lazarus gave evidence as to the process he followed in relation to Mr Garside. He told us that he had found that Mr Garside had used inappropriate language towards the manager and that his conduct was completely unacceptable. He concluded, however, that the appropriate disciplinary sanction was a final written warning. It was not serious enough to dismiss him.

39. Mr Lazarus differentiated between the two individuals because he felt the claimant was the aggressor in the situation and approached Mr Garside before

contact was made and threatening him. It was the physical and threatening nature of the claimant's conduct which made it far worse than Mr Garside.

40. The claimant in his appeal letter made reference to previous incidents of threatening words or behaviour by others over the years and no dismissal resulting. Mr Lazarus was unaware of any. The claimant did not provide any specific details but referred in general terms to unspecified incidents.

41. The claimant told us that before Mr Lazarus returned from holiday, he had already heard on the grapevine that he was going to be dismissed. He later clarified in submissions to us today that these were comments made by Mr Bigwood. He did not ask Mr Lazarus whether he was aware that Mr Bigwood had been making these comments, nor did he raise this at any time during the disciplinary hearing. We accept Mr Lazarus was unaware of any such comments being made.

42. The claimant believed that the company made this decision in order to avoid the cost of his final salary pension. He explained that he had made a pension enquiry and had discovered that if he retired at 60, his age at the time of dismissal, he would lose out significantly as it was the last five years that added the value to his final salary. He explained that cost saving was a continual issue at the respondent, and he believed this was the company's motive in dismissing him.

43. This was put to Mr Lazarus who told us that he was unaware of the claimant's pension situation, nobody gave him instructions on any particular outcome, and he was the sole decision maker. his decision was entirely based on the severity of the conduct. The claimant was a valued member of his management team and his dismissal left a hole in the team that was difficult to fill.

44. The claimant was unable to produce any evidence that Mr Lazarus's decision was interfered with or influenced by external factors and we accept Mr Lazarus' account that this did not happen. We therefore find that he was the sole decision maker, and he based his decision on the witness statements that he was shown, and the claimant's account given in the disciplinary process. He was not influenced by any desire to avoid pension costs.

<u>The Appeal</u>

45. The claimant lodged an appeal against dismissal on 7th of February. His letter of appeal set out a number of grounds for that appeal. It did not include the inaccuracy of the disciplinary notes. It included a difference in treatment between himself and Mr Garside. The claimant also took issue with Mr Bigwood's statement as being untrue, suggested that his exemplary employment record and long service had not been taken into account and that his dismissal was inconsistent with treatment of others in the past.

46. We heard evidence from Mr Carl Robinson who chaired the appeal hearing. He told us that prior to the appeal meeting he was provided with and read the investigation summary and witness statements, the outcome letter, minutes of the disciplinary hearing and the claimant's appeal letter. He also discussed the matter with Mr Lazarus before the appeal hearing. We are satisfied by the evidence given by both Mr Lazarus and Mr Robinson that this discussion was limited to introductions as the individuals had not met each other and

Mr Robinson was attending the site at which Mr Lazarus works and a brief reference to Mr Lazarus being disappointed at the situation. It was limited to this.

47. The claimant attended the meeting with Mr Garside as his companion. The claimant again admitted that he and Mr Garside had a disagreement which escalated and resulting in the claimant poking Mr Garside and threatening him. Mr Bigwood the supervisor in the room did nothing about it and the claimant and Mr Garside had since apologised to each other.

48. The claimant suggested that Mr Bigwood's statement was untrue and, while the claimant accepted he should have handled the situation differently, he felt Mr Bigwood could have intervened sooner. He did not agree that Mr Bigwood had split the two of them up as Mr Bigwood said in his statement.

49. Mr Robinson discussed with the claimant the allegation that the dismissal had been predetermined. The claimant suggested that he had been told before Mr Lazarus returned from this period of annual leave he was going to be dismissed. When asked further questions on this by Mr Robinson, the claimant was unable to provide any further information.

50. Mr Robinson agree he would speak to Mr Bigwood himself. This is because of the comments the claimant had made about Mr Bigwood's statement. In this meeting, Mr Bigwood confirmed that the claimant had made physical contact with Mr Garside, either holding or pushing and threatened to punch him. The claimant was not given the opportunity to comment on this additional statement, but it confirms the physical contact which the claimant disputes

51. Mr Robinson could find no reason to overturn the decision which he believed to be correct. The claimant was a member of the management team and had engaged in physical contact and threatened to harm another member of staff.

Relevant Law

Unfair Dismissal

52. There are five potentially fair reasons for dismissal under section 98 of ERA 1996: capability or qualifications, conduct, redundancy, breach of a statutory duty or restriction and "some other substantial reason" (SOSR). In this case the parties agree that the reason was conduct.

53. Once the employer has established a potentially fair reason for the dismissal under section 98(1) of ERA 1996 the tribunal must then decide if the employer acted reasonably in dismissing the employee for that reason.

54. Section 98(4) of ERA 1996 provides that, where an employer can show a potentially fair reason for dismissal:

55. "... the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) -

56. (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

57. (b) shall be determined in accordance with equity and the substantial merits of the case.

58. By the case of Sainsbury's Supermarkets Ltd v Hitt 2003 IRLR 23 tribunals were reminded that throughout their consideration in relation to the procedure adopted and the substantive fairness of the dismissal, the test is whether the respondent's actions were within the band of reasonable responses of a reasonable employer. In this case the Court of Appeal decided that the subjective standards of a reasonable employer must be applied to all aspects of the question whether an employee was fairly and reasonably dismissed. The tribunal is not required to carry out any further investigations and must be careful not to substitute its own standards of what was an adequate investigation to the standard that could be objectively expected of a reasonable employer.

59. We reminded ourselves of Hadjioannou v Coral Casinos Ltd 1981 IRLR 352, EAT which accepted the argument that a complaint of unreasonableness by an employee based on inconsistency of treatment would only be relevant in limited circumstances

- where employees have been led by an employer to believe that certain conduct will not lead to dismissal.
- where evidence of other cases being dealt with more leniently supports a complaint that the reason stated for dismissal by the employer was not the real reason.
- where decisions made by an employer in truly parallel circumstances indicate that it was not reasonable for the employer to dismiss.

60. The EAT's decision was subsequently endorsed by the Court of Appeal in Securicor Ltd v Smith 1989 IRLR 356, CA and in Paul v East Surrey District Health Authority 1995 IRLR 305, CA .

Compensation

61. Polkey v AE Dayton Services Ltd [1987] IRLR 503 (HL) established the following principles: Where a dismissal is procedurally unfair, the employer cannot invoke a "no difference rule" to establish that the dismissal is fair, in effect arguing that the dismissal should be regarded as fair because it would have made no difference to the outcome. This means that procedurally unfair dismissals will be unfair. Having found that the dismissal was unfair because of the procedural failing, the tribunal should reduce the amount of compensation to reflect the chance that there would have been a fair dismissal if the dismissal had not been procedurally unfair.

62. The compensatory award may be reduced where the claimant's conduct has contributed to the dismissal, commonly referred to as "contributory conduct" or "contributory fault". The reduction can be anything up to and including 100%.

63. The basic award may be reduced where the claimant's conduct before the dismissal is such that it would be just and equitable to reduce the award. There is no need for the conduct to have contributed to dismissal or for the employer even to have known about it at the time of dismissal

64. Where the tribunal finds that the dismissal "was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding" (section 123(6), ERA 1996).

65. Three factors must be present for a reduction of the compensatory award for contributory fault: The claimant's conduct must be culpable or blameworthy. It must have caused or contributed to the dismissal. The reduction must be just and equitable (Nelson v BBC (No.2) [1979] IRLR 346 (CA).

Age Discrimination

66. S13 of the Equality Act defines direct discrimination as:

> (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.
>
> Section 13(2) is silent as to what may amount to a legitimate aim for the purpose of justifying unlawful age discrimination. The Supreme Court in Seldon v Clarkson Wright and Jakes (A Partnership) 2012 ICR 716, SC, held that direct discrimination can only be justified by reference to legitimate objectives of a public interest nature, rather than purely individual reasons particular to the employer's situation, such as cost reduction or improving competitiveness. Two broad categories of legitimate social policy objective were identified. These were 'intergenerational fairness' — which could include facilitating access to employment by young people; enabling older people to remain in the workforce; sharing limited opportunities to work in a particular profession fairly between the generations; promoting diversity and the interchange of ideas between younger and older workers, and 'dignity' — which would cover avoiding having to dismiss older workers on the grounds of incapacity or underperformance and avoiding divisive disputes about capacity or underperformance.

Burden of proof

67. In Igen v Wong ltd [2005] EWCA Civ 142, [2005] ICR 931, CA. remains the leading case in this area. There, the Court of Appeal established that the correct approach for an employment tribunal to take to the burden of proof entails a two-stage analysis. At the first stage the claimant has to prove facts from which the tribunal could infer that discrimination has taken place. Only if such facts have been made out to the tribunal's satisfaction (i.e. on the balance of probabilities) is the second stage engaged, whereby the burden then 'shifts' to the respondent to prove — again on the balance of probabilities — that the treatment in question was 'in no sense whatsoever' on the protected ground.

68. The Court of Appeal explicitly endorsed guidelines previously set down by the EAT in Barton v Investec Henderson Crosthwaite Securities Ltd 2003 ICR 1205, EAT, albeit with some adjustments, and confirmed that they apply across all strands of discrimination.

69. We reminded ourselves that the Court of Appeal confirmed in Madarassy v Nomura International plc [2007] EWCA Civ 33, [2007] ICR 867, [2007] IRLR 246, that a claimant must establish more than a difference in status and a difference in treatment before a tribunal will be in a position where it 'could conclude' that an act of discrimination had been committed.

Conclusion

70. We have considered the relevant law and applied this to our findings of fact, taking the issues list as our guide. It was submitted by counsel for the respondent that any alleged acts of discrimination which occurred on or before 20 January were out of time. The claim form was submitted one day late. The relevant potential act of discrimination that the claimant complains of is his suspension. We accept that the claimant has not provided any evidence as to why it would be just and equitable to extend this time limit. We would accept it is not a continuing act and therefore on its face this claim is out of time. Nonetheless, we have made findings of fact in relation to the suspension and concluded that it was not in any way related to the claimant's age.

71. The claimant was suspended in accordance with the disciplinary policy. Mr Garside was not suspended; this was also in accordance with the disciplinary policy. The claimant was suspended because of the nature of the suspected conduct and any claim for discrimination on this basis would fail, even if were not brought out of time.

72. Turning then to the other allegations of direct age discrimination, we conclude that Mr Garside is not an appropriate comparator. The acts for which both were disciplined were different and Mr Garside is not a manager. The appropriate comparator would therefore be a hypothetical one that is a manager who also committed a similar act.

73. The claimant has provided no evidence of age discrimination beyond a mere assertion that his pension and /or age was a factor. We conclude that he has not met the required burden of proof. Nonetheless, we have gone on to consider the merits of his claim.

74. On the facts as we have found them, we are satisfied that the claimant was dismissed by Mr Lazarus based on a reasonable belief that the claimant had committed an act of gross misconduct which followed a reasonable investigation. We have concluded that he was the sole decision maker and that his decision was not influenced by anyone else in the respondent's organisation and was not to do with the claimant's age and/ or because he was soon eligible to claim a final salary pension. We find that the claimant was suspended and subsequently dismissed because it was reasonably believed that he had committed acts of gross misconduct. His age played no part whatsoever in the decision.

75. Turning then to the unfair dismissal, we conclude that the claimant was dismissed for a fair reason, namely gross misconduct. We also conclude that the respondent genuinely believed the claimant to be guilty of this misconduct and it had reasonable grounds for that belief. It reached this belief having conducted a reasonable investigation into the allegations of misconduct. We are also satisfied that in all the circumstances dismissal was within the range of reasonable responses of an employer.

76. While there was a procedural error in not providing notes of the appeal hearing, this would not make any difference to the outcome

77. For all these reasons the claimant's claim for age discrimination and his claim for unfair dismissal do not succeed.

Employment Judge McLaren
Date: 7 January 2021