# EMPLOYMENT TRIBUNALS

**Claimant:** Mr Sam King

**Respondent:** Furniture Village Limited

**Heard at:** Nottingham

**On:** 7 and 8 December 2020

**Before:** Employment Judge Phillips (sitting alone)

**Representation**
**Claimant:** Mr B Whittingham of Counsel
**Respondent:** Mr K Wilson of Counsel

# RESERVED JUDGMENT

1. The Claim of unfair dismissal fails and is dismissed.

# REASONS

## Background

2. The Claimant presented his claim to the Employment Tribunal on 20 July 2019. He had been employed firstly in a senior sales role and later as a sales consultant at the Nottingham store of the Respondent. The Claimant says he worked there since the beginning of October 2015 whereas the Respondent says his employment commenced on 7 September 2016. In any case, it is not disputed by the parties that he had more than two years continuous service for the Respondent.

3. The Claimant was dismissed on 27 March 2019. The Respondent said the reason for his dismissal was the Claimant's serious misconduct, namely using homophobic language towards a colleague at a work's Christmas party and conducting himself in a wholly unprofessional manner within the workplace by creating an intimidating, hostile and unprofessional atmosphere towards

colleagues.

4. The Claimant contended that his dismissal was unfair contrary to Section 94 of the Employment Rights Act 1996 ('ERA.')

**Issues**

5. It was not in dispute that the Claimant was an employee of the Respondent and had the requisite length of service to bring a Claim for unfair dismissal. It was also not in dispute that the Claimant was dismissed by the Respondent.

6. The Claimant alleges that the decision to dismiss was unfair for a number of reasons, namely:
    i. that there was a culture of other homophobic remarks being made without the relevant colleagues being disciplined;
    ii. that the decision to dismiss did not fall within the band of reasonable responses pointing to the Respondent's own disciplinary policy;
    iii. the disciplinary process was not fair because
        a. he was unable to effectively challenge evidence produced by the Respondent from his colleagues during the disciplinary process;
        b. he was not provided with original, signed copies of the statements from his colleagues produced during the disciplinary investigation;
        c. a statement from one colleague was selectively removed from the disciplinary process causing concern that positive feedback from colleagues had been removed from the process;
        d. the appeal hearing took place in his absence as the Respondent would not agree to a date when his union representative could attend; and
        e. he had an outstanding grievance which the Respondent did not deal with in full before deciding to dismiss him; and
    **iv.** by virtue of having raised grievances against his store manager and the sales manager, the Respondent had decided to manage him out of the business following a conversation in which he alleges he was told to consider his future at the company. The Claimant alleges that the grievance process led to the disciplinary investigation.

7. It is for the Respondent to establish the reason for the dismissal and also show that the reason was potentially fair. The Respondent says that the reason related to the Claimant's conduct or in the alternative for some other substantial reason, namely an irretrievable breakdown in the working relationship between the Claimant, the Respondent and his colleagues.

8. The Respondent avers that the disciplinary process was fair. In the event that the Tribunal considers the process to have not been fair, it invites the Tribunal to reduce any compensatory award by 100% for the Claimant's contributory conduct. The Respondent invites the Tribunal to find that the Claimant's conduct was blameworthy in this regard.

9. In relation to Polkey, the Tribunal was invited by the Respondent to find that the procedural flaws only delayed dismissal by a very short period of time and that in the circumstances, dismissal was inevitable because the Claimant's continued employment was untenable.

## Evidence

10. The Tribunal heard evidence from the following witnesses:
    i. Andrew Amso, the Respondent's disciplinary decision maker;
    ii. Stephen Sing, the Respondent's appeal decision maker;
    iii. Lauren Dobbs, HR Manager for the Respondent;
    iv. Angela Smith, administrator for the Respondent;
    v. Graham Clifford, salesman for the Respondent; and
    vi. the Claimant.

11. Some 21 months had elapsed since most of the matters in question arose. Generally, the witnesses were able to recall details but in some cases their recollection was not perfect. I did not find this diminished the credibility of their evidence.

12. Mr Amso was a credible witness. He was able to recall all significant events, albeit was unable to give exact dates on which certain events had occurred. Notwithstanding this it was clear that he understood the Respondent's disciplinary policies and the factors relevant to his decision. He spoke clearly about the steps he took in reaching his determination, who he spoke with and when.

13. Mr Sing was also a credible witness. He was clear about what he could and could not remember. His experience of undertaking disciplinary hearings and appeal hearings was evident. He was able to effectively set out the reasons as to how and why he reached his decision on appeal. He also gave clear evidence about the incidents which the Claimant alleged demonstrated a culture of homophobic comments amongst colleagues at the Respondent's Nottingham store.

14. Mrs Dobbs gave credible evidence. She is an experienced HR professional. She had experience of dealing with both grievance and disciplinary matters for the Respondent.

15. Ms Smith came across as an honest and credible witness. Her evidence was clear as to how she felt working with the Claimant and how his behaviour made her feel at work and at work social events.

16. Mr Clifford was equally credible. His account of the incident which occurred with the Claimant at the 2018 Christmas party was believable. He was honest

when questioned about his generally good working relationship with the Claimant and it was clear that he had been upset and offended at the comments the Claimant had made to him.

17. I found the Claimant's evidence lacking. At times his answers were at odds with all of the evidence presented to the Tribunal. He would often change tack mid answer or take long pauses which gave the appearance that he was carefully analysing how best he thought he should answer a question given his case. When he simply answered questions directly, he had to make several concessions. An example being when it was put to him in cross examination that his case suggested a management conspiracy, he conceded that there was no evidence of the same.

18. In my findings of fact, the page references I use are those from the final bundle of documents agreed between the parties.

**The Law**

19. In this case, it was common ground that the Claimant was an employee, had been continuously employed for not less than two years, had brought his claim in time, had been explicitly dismissed and there was no reliance on the reason for dismissal being automatically unfair.

20. Section 94 ERA provides that an employee has the right not to be unfairly dismissed.

21. Section 98(1) ERA provides:

*(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—*

*(a)the reason (or, if more than one, the principal reason) for the dismissal, and*

*(b)that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*

*(2) A reason falls within this subsection if it—*

*(a)relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,*

*(b)relates to the conduct of the employee,*

*(c)is that the employee was redundant, or*

*(d)is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.*

*(3) In subsection (2)(a)—*

*(a)"capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and*

*(b)"qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.*

*(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.*

22. It is for the Employer to show that the reason for the dismissal is either one of those reasons set out in s98(2) ERA or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

23. In this case, the Respondent avers that the Claimant's conduct was the reason for dismissal. Mr Wilson, for the Respondent referred the Tribunal to the Supreme Court's decision in **Royal Mail Group Ltd v Jhuti [2019] UKSC 55** as to the Tribunal's duty to identify the real reason for the dismissal.

24. He further referred the Tribunal to **IDS Employment Law Handbook, Vol 12, para 6.227** and the decision of the EAT in **Singh v London Country Bus Services Ltd [1976] IRLR 176** as to the question of how conduct outside of the workplace can constitute 'conduct' within the meaning of s98(2)(b) ERA.

25. If the employer satisfies the Tribunal that it did dismiss for a potentially fair reason, the Tribunal must go on to consider whether the employer has acted fairly within the meaning of Section 98(4) and apply the "band of reasonable responses" test. It must ask whether the employer acted within the range of reasonable responses open to a reasonable employer. This is the test set out in **Iceland Frozen Foods v Jones [1983] IRLR 439**.

26. In reaching that decision, the Tribunal must consider the three aspects of the employer's conduct set out in the test in **British Home Stores v Burchell [1978] IRLR 379**, which is:

    i. Did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case?
    ii. Did the employer genuinely believe that the employee was guilty of the misconduct complained of?
    iii. Did the employer have reasonable grounds for that belief?

27. If the answer to each of the three questions above is yes, the Tribunal must then decide on the reasonableness of the response of the employer. The band

of reasonable responses test does not simply apply to the question of whether the sanction of dismissal was permissible; it is relevant to all aspects of the dismissal process. This includes whether the procedures adopted by the employer were adequate (**Whitbread plc v Hall [2001] IRLR 275**) and whether the investigation prior to dismissal was fair and appropriate as per **J Sainsbury Ltd v Hitt [2003] IRLR 23**.

28. In reaching a determination as to the question of reasonableness, the Tribunal must not substitute its own view for that of the employer. The question of reasonableness must be judged according to the objective standard of the way in which a reasonable employer in those circumstances, in that line of business, would have behaved as per **NC Watling & Co Ltd v Richardson [1978] ICR 1049** at [1056].

## The Facts

29. The Claimant had worked for the Respondent, initially as a Senior Sales Consultant and latterly as a Sales Consultant at the Respondent's Nottingham Store. The evidence of all of the witnesses could not have been clearer that the Claimant was what is known as 'top book' meaning he was one of the most effective sales consultants at the company.

30. He had worked for the Respondent since 2016. During this time, the Claimant had been subject to prior sets of disciplinary proceedings. On 9 October 2017 he had received a first written warning for swearing at Steve Piraino, the Sales Manager at the Nottingham Store. Copies of the relevant correspondence is at pages 46 and 28 of the bundle. And on 21 January 2019, the Claimant was issued with a first written warning in relation to failures to follow and comply with the Respondent's cash handling policy. Copies of correspondence, minutes and outcome letter are at pages 51-53 and 72-77 of the bundle.

31. I need not make any findings in respect of the first of these incidents as it did not form part of the disciplinary proceedings which ultimately led to the Claimant's dismissal. The disciplinary matters relating to the failure to follow the cash handling policy equally did not form part of the decision to dismiss the Claimant but were dealt with in evidence. The Claimant alleged that the fact that other colleagues were not following the cash handling process was a demonstration of how he was being singled out for different treatment and that this incident foreshadowed what would later transpire.

32. In his evidence, the Claimant said that colleagues would often not go in twos to take cash envelopes to the safe, which was a breach of the Respondent's cash handling policy. Mr Amso and Ms Dobbs gave evidence about the incident. Their evidence was that the Claimant had failed to have cash countersigned by a colleague prior to it being taken to the safe. This was a strict requirement which protected all members of staff. If the cash taken was double checked and countersigned by an employee, it protected the person receiving the cash should monies later goes missing. They sought to

distinguish the countersigning from the requirement of two people to take the money to the safe. This they said was the preferred method but was not always required if, say, the store was busy. The countersigning process was, however, mandatory.

33. In this regard, I prefer the Respondent's witnesses' evidence. Some aspects of the cash handling policy were mandatory (the countersigning process) and some aspects (such as the requirement for two people to take money to the safe) were preferred but not essential. The notes of the disciplinary meeting are clear evidence of this.

34. On 26 October 2018, the Claimant raised a grievance regarding the different treatment he alleged he was receiving from Mark Welch, the Nottingham store general manager, compared to his colleagues. The grievances raised can be summarised as colleagues not being pulled up for lateness to sales meetings, issues relating to the taking of a deposit, the manager not stopping other sales consultants from cutting in on his sales (or actively encouraging them to do so), issues regarding amending orders, the conduct of prior disciplinary proceedings and failures by colleagues to comply with the Respondent's cash handling policy. A copy of these grievances can be found at pages 55-63.

35. The documents at pages 64-71 of the bundle document the receipt of the grievance, arranging a meeting between the Claimant and HR and the outcome letter dated 26 November 2018.

36. The Tribunal heard evidence from the Claimant that the grievance was not properly dealt with in full. The Respondent's evidence was that some of the matters were not capable of forming a grievance and were matters which could be dealt with by the Claimant discussing the issues with his manager. In respect of the cash handling policy, the Respondent directed the Claimant that they were matters which would be considered as part of the ongoing disciplinary process.

37. Having considered the evidence on this point, I accept the Respondent's evidence. The matters raised by the Claimant in relation to the actions of other sales consultants cutting in on sales and this being endorsed or encouraged by management, were not supported by the evidence in this case. In any event, properly constituted, they did not form matters upon which a grievance could properly be raised by the Claimant.

38. The Respondent was also correct to direct the Claimant to the disciplinary proceedings which were about to commence in relation to the cash handling procedure in respect of the Claimant's assertions regarding cash handling. It was more appropriate for them to be dealt in that process and they were considered as I have already found.

39. The Claimant sought to appeal the outcome of the cash handling disciplinary and this was acknowledged by letter dated 5 February 2019, at page 94 of the bundle. The appeal was heard by Gary Riley on 20 February 2019 at the Nottingham store, the minutes of which are at pages 114-117 of the bundle. The appeal upheld the original decision to issue a first written warning letter. The Respondent considered the points raised by the Claimant in respect of other breaches of the cash handling policy as part of this appeal hearing, in my view fairly.

40. I next consider the five separate grievances raised by the Claimant in letters emailed to Lauren Dobbs on 22 January 2019. They are at pages 78-91 of the bundle. I summarise them as follows:

    i. one regarding Mark Welch, the store manager, at a sales meeting saying the sales results percentages were surprising when everyone knew the Claimant would be towards the top;
    ii. one regarding Mark Welch, the store manager, failing to stop another sales colleague claiming the credit for a sale on 13 January 2019;
    iii. one regarding Steve Piraino, the sales manager for not acknowledging the Claimant as the best performer in sales meetings over several dates;
    iv. one regarding Steve Piraino, the sales manager, had cut in on a large sales order on 28 December 2018; and
    v. one regarding Steve Piraino, the sales manager, sending in another sales consultant to cut in on one of the Claimant's sales.

41. The Respondent confirmed receipt of these grievances by email on 29 January 2019 and sought to hold an informal meeting between the Claimant, Lauren Dobbs and Andy Amso on Thursday 31 January 2019.

42. The Tribunal heard evidence about this meeting from the Claimant, Andy Amso and Lauren Dobbs. Both parties agree that at the meeting, the Claimant was told that the issues he had raised were not grounds for grievances. Having heard evidence from all three on the points raised in the grievances and having read them in the bundle, I accept the Respondent's evidence of this meeting. Similarly, with the earlier set of grievances, they appear to be low level complaints which would not be capable of forming a grievance under the Respondent's grievance policy.

43. The Claimant's assertions of mistreatment in effect amount to little more than a series of minor concerns, which would no doubt be common in any such sales orientated business. They were issues which the Claimant could and should have sought to deal with informally with the management within the Nottingham Store. This was how the Respondent dealt with the issues and how it proposed the Claimant should deal with such issues in future.

44. Here, in one answer, the Claimant's evidence was telling – in a longer answer about the grievances, he commented that. "I was gutted that Steve Piraino

had not been touched" by the grievances which I find to have been the motivating factor. The grievances were less about the actual treatment the Claimant had received but were in fact attempts to get his managers in to trouble, and perhaps a settling of scores.

45. The Claimant further alleges that at this meeting he was told that he "had a decision to make" which he interpreted as a suggestion that he should consider if he still wished to work for the Respondent. This was directly put to both Ms Dobbs and Mr Amso in cross examination and both denied anything of the kind was said to the Claimant. I prefer their evidence on this point to that of the Claimant.

46. My finding is reinforced by the evidence given by Ms Dobbs about how the Respondent recognised the Claimant as being a top sales performer and hoped to be able to dampen the Claimant's concerns so that he could work effectively within the Nottingham store.

47. The grievance outcome letter, at page 100 of the bundle sets out the Respondent's view that the complaints raised were trivial and accordingly could not properly form grievances. It highlighted that the Claimant had failed to discuss his concerns with the store management. It further referred the Claimant to the Respondent's employee assistance programme should he require any confidential advice or support.

48. In her evidence, Lauren Dobbs recalled that during the informal meeting, the Claimant had appeared to have scratches to his face, and this gave her cause for concern. I make no findings about this but do note that the letter gives credence to the Ms Dobbs' evidence that the Respondent was genuinely concerned about the Claimant's welfare.

49. A further issue which needs to be dealt with in relation to these grievances, is the Claimant's assertion that the grievances stemmed from his concern regarding an email which had been sent out companywide stating that the Christmas period was a crucial period for sales and any employee not meeting targets would be put on a capability procedure. It is this email, not produced as evidence before the Tribunal, which the Claimant alleges makes his grievances more serious because his managers were effectively affecting his ability to meet his targets.

50. This point was not forcefully put, but nevertheless, requires some examination. Mr Clifford and Mr Amso were asked in cross examination about the email, neither could recall the specific email but confirmed that such an email wouldn't be out of the ordinary. I prefer their evidence on this point. The Claimant sought to put a great deal of weight in his evidence on the effect the email had on him but there was no evidence before me to suggest that the concerns he raised about his managers behaviour were ever likely to affect

his performance. Equally there was no evidence before the Tribunal of the Claimant having discussed these concerns with anyone either colleague or managers. I have already set out that it was accepted that the Claimant was a top book sales consultant. In the circumstances I cannot conclude on the evidence put before me that the Claimant's assertion that the behaviour was effectively going to lead to him being put on a capability procedure was at all likely.

51. Turning next to the disciplinary proceedings which ultimately led to the Claimant's dismissal, it is important for me to find facts about the train of events that was set in motion. The Claimant alleges that following the informal meeting relating to the January 2019 grievances, the Respondent had decided to manage him out of the business and so went looking for evidence to use against him.

52. This is strenuously denied by the Respondent and its witnesses. Lauren Dobbs instead gave evidence that she had first become aware of some of the Claimant's colleagues having concerns about not wanting to travel with him to a roadshow for sale colleagues at another store and female colleagues not wanting to work late night shifts with the Claimant on their own. She says this was following a store visit on or around 7 February 2019.

53. In her evidence, she states that she returned to the Nottingham store on 11 February 2019 to investigate and speak to the Claimant's colleagues. During this process, statements were taken from some 5 staff members.

54. At pages 104-106a, the Claimant has included screenshots of WhatsApp messages between himself and Pamela Brookes, a colleague in the store. In the messages, she says, " I was made to write a statement" and said that, "It's not good and it's not bad." So far as this goes as to the question of whether there was a process being engineered to get damaging information about the Claimant, it is of little use. Miss Brookes was not a witness before the Tribunal and taken literally, at most, it suggests the Claimant's colleagues were asked to write about issues they had with the Claimant. It does not support a conclusion that the Claimant's colleagues were forced to write statements which were disparaging to the Claimant.

55. There is simply no other evidence whatsoever upon which I could safely conclude that there was in fact any ulterior motive to Ms Dobbs seeking to investigate whether there were any issues amongst the Claimant's colleagues. I have already found that I do not accept the Claimant's account of the nature of the informal January meeting regarding his grievances. The assertion that the process was instigated with the purpose of building a disciplinary case against the Claimant is without foundation. I accept the evidence of Ms Dobbs that the process began initially informally to ascertain what issues existed and only when certain issues came to light, did it then move to a more formal evidence gathering stage.

56. During the process of evidence collection, a number of issues were identified: colleagues not wishing to work evening shifts with the Claimant, interactions with the Claimant ending in the colleague being in tears, the Claimant whistling the Laurel and Hardy theme tune at colleagues if he did not think they were doing their job correctly and one colleague reporting being uneasy or anxious working with the Claimant. The anonymised statements are set out in the Investigation report at pages 126a-126c of the bundle.

57. Following these discussions, Graham Clifford emailed Lauren Dobbs on 11 February 2019 setting out an incident which had occurred at the Respondent's Christmas Party in December 2018. A copy of the email is at page 101 of the bundle.

58. The email alleged that the Claimant had been demanding Mr Clifford buy him a drink as all the drinks vouchers and supplied drinks had been used. Mr Clifford stated that he refused to buy the Claimant a drink and that the Claimant had told him, "I've known some gays in my time, but you are tightest" and after more refusal, the Claimant had become aggressive and told him, "come on ya fucking poof, buy me a fucking drink."

59. At around the same time, on 13 February 2019, the Claimant had emailed Lauren Dobbs to ask about the possibility of mediation relating to his January 2019 grievances. Ms Dobbs replied on 14 February 2019 to confirm that mediation would be beneficial and that she would seek to arrange for the Store Manager and Sales Manager to be involved in the process.

60. During evidence, it was put to Miss Dobbs that her response appeared at odds with what would happen later than day, when she attended the Nottingham store to suspend the Claimant pending disciplinary proceedings. I accept her evidence that the grievances were rightly being treated as a separate and distinct matter from the disciplinary process which was about to commence.

61. On 14 Feburary, at some point in the afternoon, Ms Dobbs suspended the Claimant on full pay pending investigation into the Claimant's behaviour at work and the Christmas party in December 2018. The letter suspending the Claimant is at page 103 of the bundle. Its contents do not mention specifically what conduct the Claimant is said to have undertaken but rather sets out an investigation would be undertaken following a number of serious complaints from colleagues about the Claimant's conduct.

62. In evidence, the Claimant said he had initially refused to leave the store until he had been given a letter confirming his suspension. Ms Dobbs was cross examined about the failure to include specific reference to the alleged homophobia in the letter and she explained that she had typed the letter with the Claimant present because he wanted the suspension in writing before he would leave. I prefer Ms Dobbs evidence on this point.

63. The Claimant was subsequently invited to an investigation meeting which was held on 26 February 2019. Present were the Claimant, Gregg Crouch and Lauren Dobbs for the Respondent. Minutes of the investigation meeting are included in the bundle at pages 119 – 120. During the course of this meeting, the Claimant was asked about the issues which had been raised by colleagues, namely:

    i. Angela Smith and an issue regarding not charging customers for a replacement handle and Angela becoming upset;
    ii. Colleagues not wanting to work late nights alone with the Claimant;
    iii. An incident with Sue Sellers, a colleague, where the Claimant had told her his fists were clenched ready; and
    iv. The alleged homophobic remarks at the party.

64. The Claimant explained that the handle issue was actually an example of customer service because he did not believe a customer with a product less than a year old should have to pay to replace a handle. He denied being the reason anyone would not want to work late night shifts alone with him or creating an atmosphere on the sales floor. He explained that the fist clenched had been a joke which he and Sue Sellers had laughed about because she had made the same joke the week before to another colleague. And in relation to the offensive language at the Christmas party, he explained that he was drunk but could see himself using the words Graham Clifford attributed to him, although he couldn't remember saying them. The notes record that he was apologetic if Graham Clifford had been upset by anything he had said.

65. When asked about issues in the round at work, he set out that he felt all of the complaints were the work of the sales manager who he perceived was threatened by him.

66. In terms of my findings, it is clear from the evidence of Angela Smith, that the Claimant made her feel uncomfortable. Mr Clifford was equally clear that he had found the remarks. "tight gay" and "fucking poof" offensive and hurtful. I accept both of their evidence about their experiences working with the Claimant and the specific incidents they cited.

67. The Claimant's evidence regarding the incident at the Christmas party was not credible. Whilst accepting the words used sound like something he might have said whilst drunk, he did not deny using the words saying he could not admit what he did not remember. He did however appear contrite and apologetic whilst giving evidence. I find he did use the words attributed to him by Graham Clifford and that they were clearly homophobic in nature.

68. There is a question as to why Mr Clifford had not been forthcoming sooner. In his evidence he recalls telling other colleagues about the comments on the morning after the works Christmas party. He asserts that as the comments were made at a social event, he wasn't sure whether he was able to raise the

issue with managers. I accept this as the reason for the delay between reporting the comments in February 2019 and the event itself in December 2018.

69. I also deal here with a point raised by the Claimant regarding other incidents of homophobic comments being made in the workplace. The Claimant alleges that on one occasion following an event where staff had shared rooms, one colleague handed another colleague £20 and said it was "for the gay sex last night". The Claimant alleges that this was said publicly with store management present. Mr Amso and Mr Sing were asked about this incident and neither could recall anything being said along the lines mentioned by the Claimant.

70. However, in my decision, even had such a comment been made, there is a stark difference between this example and the Claimant's conduct. On the evidence, I cannot find that the comment the Claimant described was made. Even if it were, there is little benefit in comparing it to the comments made by the Claimant. Equally, I am not able to extrapolate from the sole incident cited by the Claimant that there was a culture of homophobia in the workplace in which managers participated and tacitly encouraged. There is simply no evidence to support such a finding in this case.

71. By letter dated 6 March 2019, the Claimant was invited to a disciplinary meeting on 13 March 2019. The letter can be found at page 125 of the bundle. It sets out the matters which the disciplinary process would consider namely that the Claimant had conducted himself in a wholly unprofessional manner within the workplace, having created an intimidating and unprofessional atmosphere towards colleagues and that he had used homophobic language towards a colleague.

72. The meeting on 13 March 2019 was subsequently rearranged at the request of the Claimant so that his union representative could attend with him. It took place on 21 March 2019 and was chaired by Mr Amso whose notes are included in the bundle at pages 131 – 138. The typed minutes of the meeting are included at pages 138a-138h.

73. The handwritten and typed notes give an account of what occurred during the meeting and I do not set those out here. During the meeting a number of issues arose which require some examination. The first related to the statements from the Claimant's colleagues which had not been provided at the beginning of the meeting.

74. Mr Amso repeatedly left the room to consult with Ms Dobbs who gave evidence that her role was simply to guide Mr Amso on the process if required. The Claimant in submissions asserted that it was in fact Ms Dobbs who was effectively chairing the meeting from outside the room. Mr Amso returned and provided the statements in the shortened form as reproduced in the

investigation report to the Claimant and his union representative.

75. The meeting continued, albeit the union representative recorded that they required the full statements, signed on headed paper as in their current form it was not possible to confirm the veracity of their contents.

76. In evidence, the Claimant accepted that he was able to identify who had written each statement in any event and had given his agreement for the meeting to continue. Ms Dobbs confirmed that with the exception of the statement provided by Pamela Brookes, all of the statements provided were reproduced faithfully. I accept her evidence on this point.

77. When it was put to her about her role, her evidence was clear – she had played no role whatsoever neither in the disciplinary decision nor in the decision on appeal. This was confirmed by the evidence of Mr Amso and Mr Sing who were clear that they had taken the relevant decisions themselves without interference. I accept their evidence not least because other than the Claimant asserting Ms Dobbs had some undue influence on the process, there was no evidence whatsoever of this occurring.

78. A further point raised by the Claimant related to Ms Dobbs acting as a filter, and here, Mr Whittingham in submissions drew attention to the omission of the statement of Pamela Brookes. It was put to Ms Dobbs that the omission of this statement was because it contained positive things about the Claimant and of this there could be little doubt because in her Whatsapp message she had said that her statement was neither good nor bad.

79. Ms Dobbs rejected this entirely. She described the statement provided by Pamela Brookes as being quite disparaging, emotive and offensive about the Claimant. She describes the decision to omit the statement from the process entirely as a way of ensuring the process was not a witch hunt. When pressed she went further and said that from the way the statement had described the Claimant, it gave the impression that he was a 'nut job.' In the absence of evidence from Pamela Brookes, I accept Ms Dobbs evidence. It was clear that she had very carefully considered the possible effect of the inclusion of the statement from Pamela Brookes and in the interests of fairness excluded its inclusion from the proceedings.

80. With respect to the provision of the statements upon which the disciplinary process had been progressed, I find the Claimant had been provided at all material times with all of the information upon which the process was based. He suffered no disadvantage as a result and had been made aware of the nature of the allegations against him in earlier correspondence. Equally, he and his union representative were given time during the disciplinary meeting to consider the contents of the statements and were free to make any comments upon them that they wished to make. At no point was the Claimant

disadvantaged by their provision during the disciplinary meeting. In fact, the Claimant accepted in evidence that he knew who had written each of the statements.

81. Mr Amso gave evidence regarding the Claimant's demeanour during the process describing the Claimant as appearing to not take the matter seriously. I make no finding on this point but do note that the Claimant did at times during his evidence appear flippant, however I found this to be more a reflection of the stress of his situation as opposed to not taking the situation seriously.

82. Following the meeting, Mr Amso retired to consider his decision. In his evidence he stated he didn't need to undertake any further investigations but did wish to speak with Graham Clifford to ascertain how the Claimant's remarks had made him feel. Upon Mr Clifford confirming that he had been offended and upset by the comments, Mr Amso decided that the only option open to him was to dismiss the Claimant for serious misconduct.

83. It is worth mentioning here that the Respondent's disciplinary and grievance procedures are included in the bundle from page 268o. On pages 268s-268t there is a list of matters which the company deems as Gross Misconduct. Amongst these are violence or threatening, bullying or grossly offensive behaviour and harassing, bullying or victimising another employee on the grounds of race, colour, ethnic origin, nationality, national origin, religion or belief, sex, sexual orientation, gender reassignment, marital or civil partnership status, age or disability.

84. It would, therefore, appear that Mr Amso could have treated the Claimant's behaviour as gross misconduct. Explaining his decision to dismiss for serious misconduct, he describes allowing the Claimant some time to find a new job and leaving with some notice pay. I accept his evidence and note that he might have chosen, in line with the disciplinary policy, to dismiss for gross misconduct in these circumstances.

85. Mr Amso informed the Claimant of his dismissal at the conclusion of the meeting on 21 March 2019. The decision was confirmed by a letter dated, 27 March 2019 which is at pages 139-141 of the bundle.

86. By emails on 29 March 2019, 31 March 2019 and 2 April 2019, the Claimant set out his grounds of appeal. By my calculation there were some 40 points raised by the Claimant which he wished to be considered as part of his appeal.

87. The parties then attempted to arrange a mutually convenient date for the appeal hearing. The correspondence is at pages 155-156, 159-160, 162-171 and 173-176 of the bundle. I do not set that out in detail here but note that on multiple occasions, the Respondent agreed to reschedule a hearing, even where the date had been one suggested by the Claimant as being available.

A final date of Friday 17 May 2019 was set for the appeal hearing, having been rearranged to four separate dates since the initial date of 18 April 2019.

88. The Claimant emailed the Respondent on 15 May 2019 to confirm he would not be in attendance on 17 May because his union representative could not attend. In his email at pages 177-180 of the bundle he then set out 38 points in support of his appeal containing the same points in the earlier 40 but distilled slightly.

89. Mr Sing wrote to the Claimant on 21 May 2019, and informed the Claimant that he would be undertaking further investigations into the points raised by the Claimant before making a decision about the appeal. A copy of this letter is at page 181 of the bundle.

90. On 3 June 2019, Mr Sing wrote to the Claimant setting out his decision with regards to the Claimant's appeal. The letter at page 182 of the bundle set out the Respondent's reasons for upholding the decision to dismiss the Claimant. In his evidence, Mr Sing explained that he went through all of the documents provided to him as part of the appeal alone. I accept his evidence. He also considered the emails from the Claimant and the points he had raised.

91. He was cross examined about the appeal hearing date and it going ahead in the Claimant's absence. He appeared unaware of the full details in the change of dates and appeared to suggest he had provided his availability to the Respondent's HR team to accommodate an appeal hearing. For someone in a senior role, such as Mr Sing, this appears to perfectly reasonable and I prefer his evidence to that of the Claimant. When cross examined the Claimant had to accept that the Respondent had specifically listed appeal hearings on dates which he had previously confirmed he could attend.

92. In the circumstances, I find that the Respondent was reasonable in seeking to arrange an appeal date which would be mutually convenient for both parties. It rescheduled the appeal date on multiple occasions over the period of a month and cannot be said to have not complied with the ACAS Code of Practice to allow sufficient time for availability of an employee and their union representative to be factored in. An employer cannot be expected to allow appeal proceedings to remain unresolved for an unspecified period, at some point it must make a final decision. In this case, the Respondent acted reasonably in this regard.

93. I have already found in the circumstances, that dismissal for serious misconduct was a finding open to the original decision maker and logically, it was also therefore, open to Mr Sing to reach the same conclusion. The final appeal decision was communicated to the Claimant by letter dated 3 June 2019.

**Determination**

94. I therefore turn to applying the facts I have found to the law in the case.

95. Given my findings, I conclude that the Respondent has shown the reasons for the Claimant's dismissal required by section 94 ERA. This was a conduct dismissal and given my findings, the Respondent dismissed the Claimant owing to his conduct, specifically homophobic remarks made to a colleague at the works Christmas party and his behaviour generally towards his colleagues which was untenable.

96. Mr Whittingham for the Claimant, asserted that the evidence showed that conduct was not the real reason for the dismissal, rather the Respondent had decided to manage the Claimant out of the business. This was not supported by the evidence, which I have found was clear. Equally there was simply no evidence that the Respondent had gone on a fishing expedition to find material from the Claimant's colleagues upon which it could found a disciplinary action against the Claimant.

97. It is clear that the Respondent was correct to treat the homophobic comments as occurring within the workplace, not only because they occurred at an event where only work colleagues were present but also because the ramifications of the comments were ongoing within the workplace.

98. The Respondent has therefore shown a potentially fair reason for the dismissal.

99. Next, I must consider whether the response of the Respondent in choosing to dismiss falls within the band of reasonable responses. I am required to go through the three questions set out in **British Home Stores v Burchell [1978] IRLR 379.**

100. Firstly, whether the employer carried out an investigation into the matter that was reasonable in the circumstances of the case. Here, I have found that the Respondent did undertake reasonable investigation. It spoke to all colleagues concerned and with the Claimant himself. In relation to the question of the homophobic comments, I note that it would be difficult to see what more investigation the Respondent could reasonably have done, given the Claimant did not admit but did not deny the comments and accepted they are likely to have been things he would have said whilst drunk. Mr Clifford's evidence, in this respect, was especially helpful, because it was clear that the words used by the Claimant had been offensive and hurtful. Mr Amso and Mr Sing both independently spoke to Mr Clifford to ascertain his account and his views and in the circumstances, the investigations undertaken were sufficient.

101. In relation to the other issues raised about the Claimant, it was clear that thought had been given as to what the Claimant had said in response. Mr Sing's decision on appeal was delayed whilst he worked through the issues raised with the Claimant and spoke to the colleagues concerned. In a situation where effectively on an allegation by allegation basis, it is one employee's word against another, through its investigations, the Respondents investigations at both disciplinary and appeal stage were sufficient in the circumstances.

102. The second question is whether the employer genuinely believed that the employee was guilty of the misconduct complained of. There can be little doubt in this case, that the Respondent did genuinely believe the Claimant had made the comments to Mr Clifford at the works Christmas party. The Claimant accepted they were words he was likely to have said, albeit not admitting saying them and offered to apologise to Mr Clifford about them. Mr Clifford was entirely believable; the words used to him were offensive and had caused upset and distress. On any reading of the evidence in this case, the two decision makers would have been in little doubt that the Claimant had made homophobic comments.

103. In relation to the other misconduct alleged by colleagues when taken it the round, it would have been obvious to the Respondent on reviewing the accounts of the Claimant's colleagues and the Claimant's comments upon them that that he had undertaken conduct in the workplace designed to cause upset towards his colleagues. The clearest example is the whistling of the Laurel and Hardy theme tune, which in evidence the Claimant accepted was to belittle colleagues and make them get on with their job as he perceived it to be. Some colleagues did not wish to work alone with him on evening shifts and would swap their shifts to avoid having to do so. In these circumstances, the Respondent would have held a genuine belief that the Claimant had conducted himself as reported by his colleagues.

104. The third question is whether the employer had reasonable grounds for that belief. Again, the answer is yes. It had spoken to the colleagues involved, it had heard what the Claimant had to say and specifically in relation to both the homophobic comments and the whistling of the Laurel and Hardy theme tune, it would have had reasonable grounds to believe that they were true. The Claimant, by his own admission, was likely to have said words to the effect of what Mr Clifford had complained of and admitted whistling towards colleagues. There could be no clearer grounds upon which the Respondent could have believed the Claimant was guilty of the misconduct complained of.

105. Finally I must consider whether the response of the Respondent was reasonable in relation to all of the circumstances of the case including whether the process by which it reached that conclusion and dismissed the Claimant was reasonable.

106. I have made findings as to the responses open to the Respondent as to the

action it decided to take already in this decision. Mr Whittingham submitted on behalf of the Claimant that even were the findings of serious misconduct correct, there had been no consideration whatsoever on the part of the Respondent as to whether dismissal was the only appropriate outcome. Two of the Respondent's witnesses, Mr King and Mr Amso both fielded questions from Mr Whittingham on this point. Their response was that the effect the Claimant had on his work colleagues and morale within the store was such, that it would not have been appropriate to consider moving the Claimant to work in another store. I find this to be a reasonable conclusion by the Respondent in the circumstances of the case.

107. I have equally made findings about the processes and manner in which the Respondent's decision makers made their decisions. The process was fair and allowed the Claimant a full opportunity to make representations about anything which gave him cause for concern. The Respondent made significant efforts to organise meetings at dates convenient for all parties and it was ultimately reasonable for them to have gone ahead with the final appeal hearing when it became clear that it was unlikely a mutually convenient date was going to be found.

108. Taking all of the above in account, the Respondent's decision to dismiss therefore falls within the band of reasonable responses which would have been open to a reasonable employer. The Claimant's conduct caused considerable upset to his colleagues, the behaviour was actually classified within its disciplinary process as potentially being gross misconduct, it carried out reasonable investigation, the process was fair, the Claimant had ample opportunity to challenge the evidence and ultimately the decision to dismiss was reasonable. For these reasons, the Claimant was not unfairly dismissed.

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Employment Judge Phillips

Date: 26 January 2021

JUDGMENT SENT TO THE PARTIES ON

29 January 2021

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FOR THE TRIBUNAL OFFICE

**Note**

This was a remote hearing. The parties did not object to the case being heard remotely. The form of hearing was V- video. It was not practicable to hold a face to face hearing because of the Covid19 pandemic.

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