EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr Behzad Bahmanzad	AND	Lidl Great Britain Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD PARTLY REMOTELY **ON** 10, 11 and 12 May 2021
By (Hybrid) Cloud Video Platform

EMPLOYMENT JUDGE N J Roper **MEMBERS** Ms R Hewitt-Gray
Ms H Scadding

Representation
For the Claimant: In person
For the Respondent: Mr T Sheppard of Counsel

The Tribunal was assisted by a Farsi Interpreter Mr N Rahimi

JUDGMENT

The unanimous judgment of the tribunal is that the claimant's claims are dismissed.

RESERVED REASONS

1. In this case the claimant Mr Behzad Bahmanzad, who was dismissed by reason of gross misconduct, claims that he has been unfairly dismissed, and that he was discriminated against because of two protected characteristics, namely race, and religion and belief. The claim is for direct discrimination, and harassment. The respondent contends that the reason for the dismissal was conduct, that the dismissal was fair, and that there was no discrimination.

2. This has been a hybrid and mainly remote hearing on the papers which has been consented to by the parties. The claimant and the Employment Judge were present in person, and the remainder attended remotely. The form of remote hearing was by Cloud Video Platform. A full face to face hearing was not held because it was not practicable, and all issues could be determined in a remote hearing. The documents to which we were referred are in a bundle of 316 pages, the contents of which we have recorded. The order made is described at the end of these reasons.

3. We have heard from the claimant. For the respondent we have heard from Mr Andy Mannion, Mrs Kate Watson, Mr Thomas Doyle, Mr Darren West and Mr Mark Hart. The Tribunal was assisted by a Farsi interpreter Mr N Rahimi, as requested by the claimant, although these proceedings were conducted in English. We have also seen and considered the relevant CCTV footage of the incident in question.

4. There was a degree of conflict on the evidence. We have heard the witnesses give their evidence. We found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.

5. <u>The Facts:</u>

6. The respondent is the national supermarket operator which originated in Germany. Its British operation now has over 850 stores and employs more than 25,000 people. The claimant Mr Behzad Bahmanzad is of Iranian nationality, and he adheres to the Islamic faith. The claimant speaks good English, but it is his third language. The claimant was employed as a Customer Assistant (formerly known as Store Assistant) from 27 July 2014 until his summary dismissal for gross misconduct on 21 October 2019. The claimant was employed at the respondent's store No. 1215 at Wolseley Road in Plymouth.

7. The claimant signed a written contract of employment which referred to the respondent's Disciplinary and Grievance procedures which were provided to the claimant in his induction pack. An updated written Disciplinary Procedure was adopted in June 2019. Under that disciplinary procedure there is a non-exhaustive list of examples of gross misconduct which are expressed to be likely to result in summary dismissal. These include at 2.6.4 (k) "actual or threatened violence or physical assault of any person, bullying, unlawful discrimination or harassment".

8. The incident which ultimately led to the claimant's dismissal took place just before 8 am on 3 October 2019. This involved an altercation between the claimant and another employee namely Mr Mark Hart, from whom we have heard. Mr Hart reported the incident to Mr Ben Davis who is an Area Manager who was present at the store. At Mr Davis's request Mr Hart prepared a written statement immediately afterwards, which stated that he and the claimant had had a dispute about a key fob which the claimant had requested, and which Mr Hart had turned off because he thought it was broken. They had a disagreement about it in front of customers. This seems to have angered the claimant who followed Mr Hart into the warehouse shouting and swearing at Mr Hart. Mr Hart pushed the claimant away and the claimant then squared up to Mr Hart inviting him to have a fight, and the claimant said words to the effect "let's sort it outside" and pushed his forehead up against Mr Hart's face, as if to head-butt him. Mr Hart then decided to walk away.

9. This version of events which Mr Hart confirmed in his contemporaneous statement is consistent with our limited view of the CCTV evidence which we

have seen. We find that there appears to have been some contact between the two of them as their shoulders passed each other, and the claimant then ran after Mr Hart and pushed him.

10. Following Mr Hart's complaint Mr Davis immediately commenced an investigation, and he interviewed and obtained signed witness statements from the claimant and four fellow employees (which included Mr Hart). The four employees asked to remain anonymous because they were concerned about possible repercussions from the claimant. They were concerned because the claimant had worked as a doorman at his uncle's nightclub locally, which apparently had been closed down, and their perception was that the claimant's personal life and his associates might lead to a concern for staff safety.

11. We now know that Mr Hart was one of these four witnesses, as was Mr Doyle, from whom we have also heard. Mr Davis decided to suspend the claimant on full pay pending his investigation, and this was confirmed in a letter to the claimant dated 3 October 2019. He also interviewed the claimant on 3 October 2019, and the claimant accepted that he had been angry, and he admitted that he had threatened to "sort the issue" outside of working hours. Mr Davis noted that this was consistent with the other witnesses who had stated that the claimant was visibly angry and aggressive, and he concluded that the claimant had made threats towards another employee and had acted in an aggressive manner towards that employee and others. At the end of his interview with Mr Davis, the claimant complained of verbal abuse from Mr Doyle, and the fact that Mr Doyle had sworn at him, and had stated "sometimes it's hell". However, the claimant did not raise any allegation of discrimination or harassment on the grounds of his race or religion.

12. By letter dated 16 October 2019 Mr Davis the Area Manager required the claimant to attend a disciplinary hearing to answer an allegation of "actual or threatened violence towards another member of staff in store 1215 on 3 October 2019." The allegation was considered to amount to potential gross misconduct. The claimant was informed that he had the right to be accompanied by a fellow worker or trade union representative and that he would have the opportunity to state his case in reply to the allegations, and to call any evidence of his own. The claimant was provided with copies of the notes of the investigative meeting between himself and Mr Davis, and the four witness statements which were anonymized as A, B, C and D.

13. Mr Andy Mannion, from whom we have heard, is another Area Manager of the respondent. He was appointed to hear the disciplinary hearing. He considered the documents and statements which had been sent to the claimant. He was also due to review the CCTV footage with a colleague Ms Thomas, who was then head of HR. He was unable to meet with her because of traffic difficulties and so they discussed the footage over the telephone. Ms Thomas explained to Mr Mannion that it indicated that the claimant and Mr Hart had pushed each other and then the claimant could be seen squaring up very close to Mr Hart's face in an apparent attempt to head-butt him.

14. The disciplinary hearing took place on 21 October 2019. The claimant confirmed that Mr Hart spoken to him in what he called a "bossy manner" and had embarrassed in front of customers. The claimant also confirmed that he had approached Mr Hart in the warehouse, that their shoulders had banged into each other, and that he reacted and pushed Mr Hart in the side with both hands and pushed him back. Mr Mannion suggested that the CCTV footage then indicated that he had made contact with Mr Hart's face, and the claimant said that he could not remember but did not think so. The claimant accepted it was a serious incident which he could have handled differently and said that in his defence he had not made the first contact with Mr Hart. The claimant concluded by saying: "I completely understand, I deeply regret this. I have family problems with my son."

15. At no stage during this disciplinary hearing did the claimant make any allegations that he had been subjected to any race discrimination or offensive racial or other harassment in the store. In addition, the claimant had not raised any formal or informal grievance or complaint that he had been subjected to any race discrimination or offensive racial or other harassment during the five years of his employment.

16. Immediately following the hearing Mr Mannion reviewed the investigation bundle. Mr Hart confirmed in his statement that the claimant had made contact with his nose or face in the warehouse after the claimant offered to "sort it out outside". The other witnesses reported the fact that the claimant was aggressive and threatening in his behaviour towards Mr Hart. One colleague suggested that the claimant had threatened to knock out Mr Hart, and another described the claimant getting very close to Mr Hart in what looked like a head-butt, and the fourth witness confirmed that the claimant had shouted and was aggressive to Mr Hart.

17. Mr Mannion concluded that the claimant had threatened Mr Hart with violence because of a perceived slight, and that he had followed Mr Hart to the warehouse and confronted him and invited him to go outside to "sort it out". Mr Mannion concluded that this was a threat of physical violence to a colleague. Mr Manning accepted that Mr Hart had bumped into the claimant first, but this appeared to be whilst he was trying to get away from the claimant. He concluded that the claimant was the instigator and the aggressor. Mr Mannion bore in mind the claimant's regret and apology as well as his clean disciplinary record. Nonetheless he concluded that the claimant had committed gross misconduct and he decided to dismiss the claimant summarily. Mr Mannion wrote to confirm his reasons by letter dated 23 October 2019 and confirmed that he was satisfied that the claimant's actions had amounted to actual and threatened violence and therefore amounted to gross misconduct under the respondent's procedures.

18. As a result of this incident Mr Hart also faced disciplinary proceedings which resulted in the respondent issuing him with a final written warning. Mr Hart also requested to be transferred to another store.

19. The claimant was offered the right of appeal. He wrote a very brief letter on 29 October 2019 confirming that he would like to appeal on the basis that the

decision was wrong, and that he also wished to make complaints against the people who had "caused problems" for him.

20. Although the evidence was a little unclear on this point, it seems that the claimant was able to view the CCTV footage between the first disciplinary hearing before Mr Mannion (when he had not seen it), and before his appeal hearing.

21. The claimant's appeal was heard by Mrs Kate Watson, the respondent's Head of Sales, from whom we have heard. The appeal meeting took place on 11 November 2019. Mrs Watson had reviewed all of the previous documents and statements, and she had also viewed the CCTV footage. At the outset of the meeting Mrs Watson asked the claimant why he was appealing. The claimant suggested: "Since Mark Hart came to the store I have had a problem, but it is not just him. I have been receiving racist jokes and sarcasm. They call me Isis. The jokes were non-stop …" Mrs Watson went on to clarify whether or not the claimant was alleging that his experience of racist comments and jokes had led to the altercation which caused his dismissal. The claimant replied: "Not even that to be honest. My worry and problem that day was why he was humiliating me in front of customers. In the warehouse he nudged me in the shoulder without me doing anything" and "it was not me who started this, it was him". He effectively suggested that he had been provoked, and that he denied head-butting or attempting to head-butt Mr Hart.

22. Mrs Watson then went on to discuss the allegations which the claimant had raised about racist comments. He complained that Mr Doyle had called him a terrorist and/or Isis when he had supported Khabib Nurmagomedov (a Muslim fighter) in an MMA boxing match against Colin McGregor. The claimant accepted that he had not raised a complaint about this before, and that he did not wish to be the reason why someone might lose their job. He also complained that Mr Doyle had made allegations about his uncle to the effect that he was a drug dealer. He also complained that Mr Doyle looked through his wallet and had sworn at him and had called him awful things in his office. He also suggested that Mr Hart was involved in the unpleasant treatment.

23. Mrs Watson summarised the claimant's grounds of appeal to the effect that he had not committed any misconduct in the past, that the decision was too harsh, and that he should have received a warning rather than dismissal. She also noted that there were new allegations of harassment and bullying and that he had received racist comments. She asked the claimant if he had anything else to add and the claimant confirmed that he did not.

24. Following this meeting Mrs Watson asked Mr Davis to investigate the issues of racism and harassment which had now been raised by the claimant. On 13 November 2019 Mr Davis interviewed seven fellow employees at the store, and by letter dated 19 November 2019 Mrs Watson informed the claimant that she would confirm the result of his appeal after this investigation had been concluded. On 22 November 2019 the claimant then emailed Mrs Watson confirming his allegations in more detail, and this information was passed to Mr Davis who interviewed the claimant again on 2 December 2019. Two of the witnesses interviewed by Mr Davies referred to some incidents of bullying and

harassment but when questioned did not accept that this was because of race or any other discrimination. In addition, these other witnesses all denied the specific allegations which the claimant had raised, and Mr Davis concluded that the claimant's complaints were unfounded.

25. Subsequently by letter dated 3 December 2019 Mrs Watson wrote to the claimant to confirm that his appeal had been rejected. She concluded that the CCTV footage did not show that he had head-butted Mr Hart, but it did show that he had made contact with his cheek. She concluded that the claimant had requested to take the altercation outside by offering to "sort it out outside" and that this was threatening in nature. She concluded that not only did the claimant threaten violence, but he had also carried out that threat. She concluded that the CCTV footage confirmed this. She referred to the Disciplinary Procedure which included in its list of examples of gross misconduct "actual or threatened violence or physical assault on any person". She concluded that the claimant's actions had constituted gross misconduct and decided to uphold the original decision to dismiss.

26. Our findings of fact with regard to the allegations of discrimination and/or harassment are as follows. At the Case Management Preliminary Hearing on 7 October 2020 the claimant identified four specific allegations of less favourable treatment which he asserts were direct discrimination and/or harassment on the grounds of either his Iranian national origin, or his Islamic faith.

27. The claimant was consistent and at times emotional in his evidence before us to the effect that he had suffered abusive and bullying behaviour over many years, and that he had suffered this in silence because he did not wish to get his colleagues in trouble and/or because he valued his job which he was afraid to lose. His evidence to us appeared credible in this respect. During the appeal process Mr Davis investigated the claimant's specific allegations of harassment which he had raised in his email on 22 November 2019, and two employees of the seven who were interviewed mentioned in their statements that they had witnessed abusive or bullying behaviour. Nonetheless none of them corroborated any of the specific allegations raised by the claimant, nor suggested that any bullying behaviour was on the grounds of his race or religion. In addition, except for the comment about verbal abuse from Mr Doyle in his statement to Mr Davis on 3 October 2019, the claimant did not raise any complaint or grievance at the relevant times, either formally or informally, despite the fact that the respondent had procedures in place to do so.

28. We bore these points in mind in considering the claimant's allegations, but the weight of evidence was against him, for the following reasons.

29. The four specific allegations, and our findings in each case, are as follows.

30. The first allegation is that on 22 May 2017, the day after the Manchester Arena bombing, the claimant was subjected to jokes by Mr Hart and Mr West (to the effect that he was involved). Both Mr Hart and Mr West denied that this was the case, and when questioned under cross-examination firmly maintained that denial.

31. The weight of the evidence is against the claimant in this respect, and there is no contemporaneous documentary evidence to assist us either way. We therefore accept the evidence of Mr Hart and Mr West, and we find on the balance of probabilities that these comments were not made.

32. The second allegation is that on 3 June 2017, after the London Bridge attack, Mr Doyle and Mr Hart asked the claimant whether he was "part of them", meaning the attackers. Both Mr Doyle and Mr Hart denied that this was the case in their evidence before us. This evidence was not challenged by the claimant when he cross-examined them.

33. The weight of the evidence is against the claimant in this respect, and there is no contemporaneous documentary evidence to assist us either way. We therefore accept the evidence of Mr Doyle and Mr Hart in this respect, and we find on the balance of probabilities that these comments were not made.

34. The third allegation is that on 7 October 2018 after an MMA fight between Conor McGregor and Khabib Nurmagomedov (a Muslim fighter), Mr Doyle called the claimant a terrorist. In his evidence before us Mr Doyle recalled the events of that fight and it seems that Mr Doyle and the claimant had a bet on its outcome, but Mr Doyle strongly rejected the suggestion that he had called the claimant a terrorist during that conversation. Again, there is no contemporaneous documentary evidence, and no complaint was raised at the time by the claimant, which might help us to determine the issue. On balance we find that the claimant has not proven that this occurred on the balance of probabilities, and we therefore find these comments were not made.

35. Fourthly, on 11 July 2019, when tensions were high between the Royal Navy and Iranian Navy in the Gulf, comments were made by Mr West and Mr Doyle to the effect that "Allah is telling us to kill everyone" and that they were terrorists. Both Mr West and Mr Doyle denied that this was the case, and when questioned under cross-examination firmly maintained that denial.

36. The weight of the evidence is against the claimant in this respect, and there is no contemporaneous documentary evidence to assist us either way. We therefore accept the evidence of Mr West and Mr Doyle in this respect, and we find on the balance of probabilities that these comments were not made.

37. The claimant commenced the early conciliation process with ACAS on 12 December 2019 (Day A) and ACAS issued the Early Conciliation Certificate on 22 January 2020 (Day B). The claimant presented these proceedings on 23 January 2020. As noted above, there was subsequently a Case Management Preliminary Hearing on 7 October 2020, and the resulting order clarified the issues which the parties agreed were to be determined by this Tribunal.

38. Having established the above facts, we now apply the law.

39. <u>The Law:</u>

40. The reason for the dismissal was conduct which is a potentially fair reason for dismissal under section 98(2)(b) of the Employment Rights Act 1996 ("the Act").

41. We have considered section 98 (4) of the Act which provides "…. 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".

42. This is also a claim alleging discrimination on the grounds of a protected characteristic under the provisions of the Equality Act 2010 ("the EqA"). The claimant complains that the respondent has contravened a provision of part 5 (work) of the EqA. The claimant alleges direct discrimination and harassment.

43. The protected characteristics relied upon are race, and religion and belief, as set out in sections 4, 9 and 10 of the EqA.

44. As for the claim for direct discrimination, under section 13(1) of the EqA 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.

45. The definition of harassment is found in section 26 of the EqA. A person (A) harasses another (B) if A engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of violating B's dignity, or creating an intimidating, hostile, degrading, and humiliating or offensive environment for B.

46. The provisions relating to the burden of proof are to be found in section 136 of the EqA, which provides that if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred. However this does not apply if A shows that A did not contravene the provision. A reference to the court includes a reference to an employment tribunal.

47. Section 120 of the EqA confers jurisdiction on claims to employment tribunals, and section 123(1) of the EqA provides that the proceedings on a complaint within section 120 may not be brought after the end of – (a) the period of three months starting with the date of the act to which the complaint relates, or (b) such other period as the employment tribunal thinks just and equitable. Under section 123(3)(a) of the EqA conduct extending over a period is to be treated as done at the end of that period.

48. With effect from 6 May 2014 a prospective claimant must obtain an early conciliation certificate from ACAS, or have a valid exemption, before issuing employment tribunal proceedings.

49. Section 207B of the Act provides: (1) This section applies where this Act provides for it to apply for the purposes of a provision of this Act (a "relevant provision"). But it does not apply to a dispute that is (or so much of a dispute as is) a relevant dispute for the purposes of section 207A. (2) In this section - (a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and (b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section. (3) In working out when a time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted. (4) If a time limit set by a relevant provision would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period. (5) Where an employment tribunal has power under this Act to extend a time limit set by a relevant provision, the power is exercisable in relation to the time limit as extended by this section.

50. We have also considered section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and in particular section 207A(2), (referred to as "s. 207A(2)") and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures 2009 ("the ACAS Code").

51. For the discrimination claims we have considered the cases of; Igen v Wong [2005] IRLR 258 CA; Madarassy v Nomura International Plc [2007] ICR 867 CA; Nagarajan v London Regional Transport [2000] 1 AC 501; Hewage v Grampian Health Board [2012] IRLR 870 SC; London Borough of Islington v Ladele [2009] IRLR 154; Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96 CA; Reverend Canon Pemberton v Right Reverend Inwood, former acting Bishop of Southwell and Nottingham [2018] EWCA Civ 564; Robertson v Bexley Community Service [2003] IRLR 434 CA; Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640; Department of Constitutional Affairs v Jones [2008] IRLR 128 EAT; Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327 CA

52. For the unfair dismissal claim we have considered the cases of Post Office v Foley, HSBC Bank Plc (formerly Midland Bank plc) v Madden [2000] IRLR 827 CA; British Home Stores Limited v Burchell [1980] ICR 303 EAT; Iceland Frozen Foods Limited v Jones [1982] IRLR 439 EAT; Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR; Wilson v Racher [1974] ICR 428; Neary v Dean of Westminster [1999] IRLR 288; Taylor v OCS Group Ltd [2006] ICR 1602 CA; Adeshina v St George's University Hospitals NHS Foundation Trust and Ors EAT [2015] (0293/14) IDS Brief 1027. The tribunal directs itself in the light of these cases as follows.

53. Discrimination Claims:

54. The claimant's claims as presented are for direct discrimination and/or harassment on the grounds of race (his Iranian nationality) and/or religion and

belief (his Islamic faith). The claimant agreed that these are limited to the four specific allegations on 22 May 2017, 3 June 2017, 7 October 2018 and 11 July 2019 referred to above in our findings of fact.

55. With regard to the claim for direct discrimination, the claim will fail unless the claimant has been treated less favourably on the ground of his race and/or religion than an actual or hypothetical comparator was or would have been treated in circumstances which are the same or not materially different. The claimant needs to prove some evidential basis upon which it could be said that this comparator would not have suffered the same allegedly less favourable treatment as the claimant.

56. In Madarassy v Nomura International Plc Mummery LJ stated: "The Court in Igen v Wong expressly rejected the argument that it was sufficient for the claimant simply to prove facts from which the tribunal could conclude that the respondent "could have" committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an act of discrimination". The decision in Igen Ltd and Ors v Wong was also approved by the Supreme Court in Hewage v Grampian Health Board. The Court of Appeal has also confirmed that Igen Ltd and Ors v Wong and Madarassy v Nomura International Plc remain binding authority in both Ayodele v Citylink Ltd [2018] ICR 748 and Royal Mail Group Ltd v Efobi [2019] EWCA Civ 18.

57. In this case, we have rejected the four specific allegations made by the claimant, and we find that no facts have been established upon which the tribunal could conclude (in the absence of an adequate explanation from the respondent), that an act of discrimination has occurred. In these circumstances the claimant's claim of direct discrimination fails, and is hereby dismissed.

58. Harassment:

59. Turning now to the claim for harassment, A person (A) harasses another (B) if A engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of violating B's dignity, or creating an intimidating, hostile, degrading, and humiliating or offensive environment for B. The assessment of the purpose of the conduct at issue involves looking at the alleged discriminator's intentions. In deciding whether the conduct in question has the effect referred to, the tribunal must take into account the perception of B; the other circumstances of the case, and whether it is reasonable for the conduct have that effect (s26(4) EqA).

60. The Court of Appeal gave guidance on determining whether the statutory test has been met in Reverend Canon Pemberton v Right Reverend Inwood, former acting Bishop of Southwell and Nottingham: "In order to decide whether any conduct falling within subparagraph (1)(a) has either of the proscribed effects under subparagraph (1)(b), a tribunal must consider both (by reason of subsection (4)(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of

subsection (4)(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also, of course, take into account all other circumstances - subsection (4)(b). The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so.

61. In this case, we have rejected the four specific allegations made by the claimant, and on the evidence which we have seen and heard we do not accept that the claimant has established that the unwanted conduct falling within subparagraph (1)(a) (and which is relied upon the claimant) actually took place. For this reason, the claim for harassment has not been made out, and it is also hereby dismissed.

62. Discrimination Claims Out of Time:

63. The claimant commenced the early conciliation process with ACAS on 12 December 2019 (Day A) and ACAS issued the Early Conciliation Certificate on 22 January 2020 (Day B). The claimant presented these proceedings on 23 January 2020. Any event arising before 13 September 2019 is therefore out of time.

64. The claimant has not alleged that his dismissal was in any way discriminatory. Indeed he confirmed that this was not the case during the disciplinary process, and did not assert that he was provoked in a discriminatory manner. The four allegations of direct discrimination and/or harassment made by the claimant are between 22 May 2017 and 11 July 2019. Even if there were a continuing course of conduct such as to link these four allegations, the last allegation relied upon is still 11 July 2019. This was before 13 September 2019 and to the extent that the claimant's claims relate to discrimination and/or harassment, they were therefore presented out of time.

65. Despite the fact that this issue was identified at the previous case management preliminary hearing as being one which this Tribunal would have to deal with, the claimant has not given any evidence to explain why he failed to issue proceedings for these claims within time, and has not made any application to extend time on the basis that it would be just and equitable to do so.

66. It is clear from the following comments of Auld LJ in Robertson v Bexley Community Service that there is no presumption that a tribunal should exercise its discretion to extend time, and the onus is on the claimant in this regard: "It is also important to note that time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse, a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time so the exercise of discretion is the exception rather than the rule". These comments have been

supported in Department of Constitutional Affairs v Jones [2008] IRLR 128 EAT and Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327 CA.

67. Per Langstaff J in Abertawe Bro Morgannwg University Local Health Board v Morgan (at the EAT) before the Employment Tribunal will extend time under section 123(1)(b) it will expect a claimant to be able to explain firstly why the initial time period was not met and secondly why, after that initial time period expired, the claim was not brought earlier than it was.

68. The claimant has failed to do this, and accordingly we dismiss the claimant's claims for direct discrimination and/or harassment as being out of time in any event.

69. Unfair Dismissal:

70. Applying Iceland Frozen Foods Limited v Jones, the starting point should always be the words of section 98(4) themselves. In applying the section, the tribunal must consider the reasonableness of the employer's conduct, not simply whether it considers the dismissal to be fair. In judging the reasonableness of the dismissal, the tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer. In many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might take one view, and another might quite reasonably take another. The function of the tribunal is to determine in the particular circumstances of each case whether 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.

71. The correct approach is to consider together all the circumstances of the case, both substantive and procedural, and reach a conclusion in all the circumstances. Applying British Home Stores Limited v Burchell, a helpful approach in most cases of conduct dismissal is to identify three elements (as to the first of which the burden is on the employer; as to the second and third, the burden is neutral): (i) that the employer did believe the employee to have been guilty of misconduct; (ii) that the employer had in mind reasonable grounds on which to sustain that belief; and (iii) that the employer, at the stage (or any rate the final stage) at which it formed that belief on those grounds, had carried out as much investigation as was reasonable in the circumstances of the case. Applying Sainsbury's Supermarkets Ltd v Hitt, the band of reasonable responses test applies as much to the question of whether the investigation was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss.

72. In order to find gross misconduct, the tribunal must be satisfied on the balance of probabilities that there has been wilful conduct by the employee that amounts to a repudiatory breach of the employment contract, permitting the employer to accept that breach and to dismiss the employee summarily, see Wilson v Racher and the decision of Lord Jauncey in Neary v Dean of Westminster.

73. When considering the fairness of a dismissal, the Tribunal must consider the process as a whole Taylor v OCS Group Ltd. A sufficiently thorough re-hearing on appeal can cure earlier shortcomings, see Adeshina v St George's University Hospitals NHS Foundation Trust and Ors.

74. In this case we find that the respondent genuinely believed that the claimant had committed gross misconduct. The evidence of Mr Mannion and Mrs Watson on this point was unchallenged. We also find that this belief was held on reasonable grounds. The information before both Mr Mannion and Mrs Watson consisted of the CCTV footage (although Mr Mannion had just had a description of its contents); the contemporaneous evidence of Mr Hart, Mr Doyle and two other employees; and the claimant's acceptance that it was a serious matter which he could have dealt with differently; his admission that he had suggested to Mr Hart that they "sort it out outside"; and his apology for his actions. The claimant had raised no complaint before Mr Mannion of any alleged discrimination or harassment. The claimant did do so on appeal before Mrs Watson, but equally confirmed that he was not alleging that the altercation with Mr Hart was as a result of any provocation consisting of any discrimination or harassment. We find it was reasonable of both Mr Mannion and Mrs Watson to conclude that the claimant had committed gross misconduct within the definition of the Disciplinary Procedure at paragraph 2.6.4 (k) "actual or threatened violence or physical assault of any person, bullying, unlawful discrimination or harassment".

75. We have also considered at some length whether the respondent had carried out a full and fair investigation, or to put it another way whether the investigation carried out by the respondent was within the range of reasonable responses open to it when faced with these facts. Given the size and administrative resources of the respondent we have a number of concerns about the process which was adopted.

76. For the record, only two allegations of unfairness were raised by the claimant during the case management preliminary hearing and these were recorded as follows: (i) the treatment of Mark Hart was not comparable with that of the claimant in that he was not dismissed; and (ii) the respondent did not make suitable enquiries of the Deputy Manager, Thomas Doyle.

77. As for the first point, the claimant complains that he was treated less leniently than Mr Hart, who he says provoked the altercation in the first place, and he was involved in the same altercation, but he only received a final written warning. From our viewing of the CCTV footage, it does seem that the claimant is correct to suggest that the physical confrontation was started by Mr Hart in the sense that he bumped his shoulder into the claimant's shoulder as they were passing. The evidence before us did not include details of the disciplinary process relating to Mr Hart, but we do know from Mr Hart's own evidence that he received a final written warning and requested a transfer to a different shop. It is clear to us however that Mr Mannion was able to draw a distinction between the conduct of the claimant and the conduct of Mr Hart, in that he concluded that the claimant had pursued Mr Hart into the warehouse to follow-up a perceived slight, and overall had been the aggressor, whereas Mr Hart was not the aggressor or, and had ultimately walked away when the claimant

offered “to sort it out outside”. The extent of their actions was not therefore directly comparable. Mrs Watson agreed with that conclusion at the appeal stage.

78. We reject the second point, because it was clear that Mr Doyle was interviewed by the respondent and that he prepared a written statement. We find that the respondent did make reasonable enquiries of Mr Doyle.

79. The remaining points of concern which we identified are as follows.

80. The first point concerns the statements and minutes prepared by the respondent, all of which were handwritten, and in many respects and in many places are difficult to read. It would seem to us to have been far easier for all concerned, including the claimant for whom English is his third language, and for this Tribunal subsequently, for these to have been typed up in a clear format.

81. The second point concerns the redaction of the names of the four witnesses who gave their contemporaneous versions of events arising from the incident in question on 3 October 2019. It did become clear during the course of the disciplinary process that Mr Hart and Mr Doyle were two of these witnesses and they were no longer anonymized. It seems to us that the respondent may have been too ready to have accepted the suggestion that all four of them somehow felt physically threatened by the claimant or his associates, and given that the claimant was facing a disciplinary allegation relating to violence, this might have had an unfair influence on the dismissing and/or appeal officers who had to make findings as to the claimant’s conduct.

82. Thirdly, there is the matter of the CCTV footage. Mr Mannion took the decision to dismiss without having seen it (although we accept it was described to him), but the claimant had not seen it prior to the hearing which led to his dismissal. The evidence was not entirely clear on this point, but it does seem that the claimant had seen the footage before the appeal hearing. Nonetheless it would have seemed more advisable to have ensured that the claimant had been able to view the footage before his disciplinary hearing which resulted in his dismissal.

83. Nonetheless, and despite these criticisms, we find that at the time the respondent held its reasonable belief as to the claimant’s gross misconduct, it had carried out a full, fair and reasonable investigation. Mr Davis originally investigated the matter and obtained contemporaneous signed witness statements on the day of the incident in question. Mr Davis suspended the claimant on full pay, and explained why. The claimant was called to a disciplinary hearing and knew the allegations which he had to face, and he knew that they might result in his dismissal. He was afforded the right to be accompanied by a fellow employee or trade union representative, but he declined this opportunity. Notwithstanding this he had every opportunity to state his case in reply to the allegations raised. At the appeal stage Mrs Watson held a rehearing of the disciplinary allegations, which would have had the effect of curing any earlier procedural breach in any event. Mrs Watson then delayed her decision until such time as the respondent had been able to

investigate the allegations of discrimination and/or harassment which had been raised for the first time at that appeal hearing. These were investigated thoroughly, but they were not upheld and therefore did not affect Mrs Watson's decision.

84. The respondent therefore genuinely believed that the claimant had committed gross misconduct; that belief was based on reasonable grounds; and it followed such investigation as was fair and reasonable in the circumstances of the case.

85. In judging the reasonableness of the dismissal, the tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer. The function of the tribunal is to determine in the particular circumstances of each case whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. We unanimously find that on the facts of this case the claimant's dismissal was within the band of reasonable responses which was open to the respondent.

86. We therefore find that notwithstanding the size and administrative resources of this respondent, the respondent's decision to dismiss the claimant was fair and reasonable in all the circumstances of the case, and we also dismiss the claimant's unfair dismissal claim.

87. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1; the findings of fact made in relation to those issues are at paragraphs 6 to 37; a concise identification of the relevant law is at paragraphs 40 to 52; how that law has been applied to those findings in order to decide the issues is at paragraphs 54 to 86.

Employment Judge N J Roper
Date: 12 May 2021

Judgment and Reasons sent to the Parties: 18 May 2021

FOR THE TRIBUNAL OFFICE