.

EMPLOYMENT TRIBUNALS

Claimant:	And	**Respondent:**
Mr L De Zoysa		Rendall & Rittner Ltd

Heard by: CVP **on**:11-14 May 2021 and in Chambers on 11 June 2021

Before: Employment Judge Nicolle
Members: Ms T Shaah
Ms L Jones

Representation:
Claimant: Mr R Bullock, of Counsel
Respondent: Ms B Onotosho, Solicitor

JUDGMENT

1. The claims for direct sex and race discrimination fail and are dismissed.

2. The claim for victimisation on account of the protected characteristic of sex fails and is dismissed.

3. The claim for unfair dismissal succeeds but subject to the reductions under Polkey and for contributory conduct as set out in the Reasons below.

REASONS

The Hearing

1. The hearing was a remote public hearing, conducted using the cloud video platform (CVP) under Rule 46. The parties agreed to the hearing being conducted in this way.

2. In accordance with Rule 46, the Tribunal ensured that members of the public could attend and observe the hearing. This was done via a notice published on Courtserve.net. No members of the public attended the hearing.

3. The parties were able to hear what the Tribunal heard.

4. The participants were told that it is an offence to record the proceedings.

5. From a technical perspective, there were no major difficulties.

6. There was a bundle comprising approximately 260 pages. On the second morning Mr Bullock made an application for the admission of a series of additional documents. Having adjourned to consider the matter we decided that only one of these documents should be admitted.

7. On the second day of the hearing the Respondent disclosed to the Claimant CCTV footage from the Belvedere concierge early in the morning of 13 February 2019. It was not, however, possible for the Tribunal to view this footage during the hearing, but it was agreed that the Tribunal would subsequently consider the relevant extracts from this footage in its own time and revert to the parties if it had any questions arising from it.

8. The Claimant gave evidence and Michael Sheehan, who works as a concierge for the Respondent at Chelsea Harbour (Mr Sheehan) and Christopher Edrisinghe, formerly employed as a concierge by the Respondent at Chelsea Harbour (Mr Edrisinghe) gave evidence on his behalf.

9. Michael McDonagh, Senior Property Manager, (Mr McDonagh) and Susan Gadd, Development Manager at Imperial Wharf, (Ms Gadd) gave evidence on the Respondent's behalf.

10. There were several delays to the hearing. This included the Claimant being unable to connect to CVP from his smart phone on the first morning and he and Mr Bullock having to travel to a hearing room at Victory House. There was then a further 40-minute delay because of Mr Bullock having IT issues accessing documents on his laptop. There was a 45-minute delay to the commencement of the hearing on day two because of the Claimant's late arrival.

Applications

11. The Claimant and the Respondent commenced the hearing by making applications to strike out the Claim/the Response. The Tribunal considered and gave oral judgments in respect of these applications, both of which were unsuccessful. It was agreed that the pre-existing cost application made on behalf of the Respondent would be deferred until the Tribunal had determined the substantive issues. The Claimant was invited to provide details of his income, outgoings, savings and assets which he did so on 21 May 2021.

Issue arising at the conclusion of day three.

12. This relates to a comment made by Mr Bullock in response to a question he raised by way of re-examination following questions put to Mr McDonagh by the Tribunal. In response to a question by Mr Bullock as to the timing of the disciplinary hearing I intervened to state that the hearing had lasted from 15:00 to 16:05 as shown by a note of the hearing in the bundle. Mr Bullock responded by suggesting that I was in effect doing the job of Mr McDonagh.

13. At the beginning of the day four I considered it appropriate to refer to this matter and set the position out as follows. The suggestion that I was in effect stepping into a witness's shoes is potentially a serious contention.

14. It is important to put this into context. The third day started late at 10:40 because of the Claimant's late arrival. It became apparent during the hiatus before the resumption of Mr De Zoysa's evidence that Mr McDonagh would not be available the following day. Various options were discussed to include it being interposed in the Claimant's evidence, so he started giving evidence after lunch. Mr Bullock objected to this as he said it could be potentially prejudicial to the Claimant not to complete his evidence before hearing from the Respondent's witnesses. As it transpired it was not until 15:45 that Mr McDonagh took the witness stand. Mr Bullock had indicated that he would be no more than 20-30 minutes in crossing examining Mr McDonagh. As it transpired, despite several interventions from me to progress matters, his cross examination lasted from 15:57 to 17:02. There then followed questions from the Tribunal.

15. The questions I asked Mr McDonagh included his conclusion regarding the Claimant stealing time and whether he considered that he was asleep, whether any investigation was undertaken in respect of Fatma Spence, Development Manager (Ms Spence), whether the Claimant had raised a contention of race discrimination during the disciplinary hearing, whether he had raised victimisation, whether he was under any pressure from management to reach a certain decision, whether he had discussed the decision with any other managerial employee and whether he was aware of any policy or practice of the Respondent to dismiss transferring Harrods staff.

16. It is not automatic for Employment Judges to permit re-examination by a representative who has already cross examined a witness following Tribunal questions. Nevertheless, it is normally agreed to or sometimes volunteered. Nevertheless, questions must be re-examination, in other words matters arising from the Tribunal's questions. Mr Bullock first raised issues regarding the provenance and reliability of the CCTV footage. It was not immediately apparent to me that this was a matter of re-examination other than in the most tangential fashion in so far as all my questions had some degree a connection with events on the early morning of 13 February 2019.

17. I was further concerned that Mr Bullock's questions regarding the duration of the disciplinary hearing, and the veracity or quality of the notes from that hearing, were not directly arising from the questions I had asked. Whilst it could be argued that my question as to whether race and victimisation were raised by the Claimant at the hearing may give rise to a suggestion that the notes were inaccurate, I nevertheless was of the view that it had not been contended by the Claimant in his claim form or his witness evidence that he referred to race discrimination during the disciplinary hearing.

18. I was also concerned that by this time we were approaching 5:30. The Tribunal had already sat significantly beyond normal time and I was not willing to allow an extended process of further cross examination.

19. A less significant concern was raised earlier in the day when the Claimant stated that the Tribunal generally, but the Employment Judge specifically, appeared not to have fully understood what he was contending in relation to the allegation that he had been subjected to what in effect would amount to sexual harassment by Ms Spence. He said that he had made this position clear in his witness statement. I accept that in page 2 of his witness statement dated 14 January 2020 that he did say that Ms Spence in talking to him, coming close and invading his personal space and that her actions suggested that she was going to adjust his fleece zipper. I made it clear that neither in the contemporaneous email correspondence, the disciplinary hearing note and nor in the

claim form were these matters referred to. That was why questions had been put to the Claimant in cross examination and was also why I asked the question that the specific matter regarding invasion of personal space or the perception of impending physical contact had not originally been raised. Nevertheless, I corrected the position in so far as there was that suggestion made in the witness statement, albeit not going as far as actually touching the zipper more the perception of it.

Rule 50 application

20. At the beginning of proceedings on 14 May 2021 Mr Bullock made an application under Rule 50 for the anonymisation of the identify of any residents referred to during the hearing. I explained that this would not be necessary as I had already advised the parties that no names of any individual residents would be referred to during the remainder of the hearing or in the Tribunal's judgment. All parties concurred with this.

The Issues

21. The issues as set out in the case management order of Employment Judge Taylor dated 13 January 2020 are as follows:

(1) Was the Claimant subject on 13 February 2019 to the conduct alleged at paragraph 2 of his response dated 23 December 2019 to the order of Employment Judge Wade dated 9 December 2019?

This is as follows:

"She tiptoed in wearing her yoga outfit just before Valentine's Day with a camel toe (showing through her pants). I'm a happily married man.

Fatma turned up early hours on 13 January in a gym suit and yoga pants making allegations. I view this as bullying tactics to cover up the breach of my employment contract and [to make up) allegations [for my dismissal).

I've never seen a time in my life that a manager is coming into the office in an unprofessional manner, invading my personal space. This is a stitch up."

(2) Was the conduct unwanted?

(3) Did the conduct have the purpose all effect of:

(i) violating the Claimant's dignity; or
(ii) creating an intimidating, hostile, degraded, humiliating or offensive environment for the Claimant.

(4) Was the conduct:
(a) related to sex;
(b) of a sexual nature?

(5) Did the Claimant do a protected act by complaining about the alleged harassment on 27 February 2019 and at the disciplinary hearing of 21 March 2019?

(6) Was the Claimant subjected to victimisation by the manner of the handling of the investigation and disciplinary hearing and being dismissed on 10 April 2019?

(7) The Claimant describes his race as Sri Lankan Sinhalese.

(8) Was the Claimant subject to direct race discrimination by being dismissed?

(9) For the race discrimination claim the Claimant relies on the day porter, Neil Perkins (Mr Perkins), or a hypothetical comparator.

(10) Was the Claimant subject to direct sex discrimination by being dismissed?

(11) For the sex discrimination complaint, the Claimant relies on a hypothetical comparator.

(12) What was the reason for the dismissal of the Claimant? The Respondent relies on conduct.

(13) Did the Respondent have a genuine belief that the Claimant was guilty of the conduct found against him?

(14) Was any such belief formed on reasonable grounds?

(15) Did the Respondent conduct a reasonable investigation?

(16) If the Respondent failed to follow a fair procedure should compensation be reduced on the basis that the Claimant would, or might have been, dismissed had a fair procedure been followed?

(17) Should compensation be reduced on the basis that the Claimant caused or contributed to the dismissal?

Findings of Fact

The Claimant

22. The Claimant was employed as a concierge at Chelsea Harbour in Kensington and Chelsea, for which the Respondent is managing agent, between 5 November 2013 and 10 April 2019. He was employed by Harrods Limited (Harrods) and his employment transferred to the Respondent pursuant to the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) on a date unspecified in 2017.

23. The Claimant worked the night shift from 7pm to 7am with specific responsibility for concierge at the Belvedere. This is a block of luxury residential apartments within the Chelsea Harbour development.

The Respondent

24. The Respondent is a residential property managing agent. It has approximately 1900 employees at various locations.

Concierges at Chelsea Harbour

25. There are four concierges who work in shifts at the Belvedere. At the time of the events giving rise to the Claimant's dismissal this comprised the Claimant, Mr Sheehan, a white South African and another white English male. In total at Chelsea Harbour there were 16 concierges, and except for the Claimant and an Egyptian, all were white.

Relevant Documents

Claimant's Contract of Employment

26. The Claimant had an offer letter, statement of benefits and terms of conditions of employment with Harrods dated 21 October 2013. No subsequent contract was produced therefore it is assumed that these terms remained applicable.

27. The Claimant's job title was described as night porter at Chelsea Harbour. The term night porter is interchangeable with that of concierge with the latter now being the job description primarily used.

28. Section 7 of the terms and conditions, under the heading holiday, includes:

> "In addition to your annual holiday entitlement, on public or bank holidays you will be able to take the day off with pay or, if the Company requires you to work, you will be entitled to an alternative paid day off".

Respondent's Dignity at Work policy dated 1 July 2015.

29. Under the section headed Employee's Responsibility" it includes obligations on employees to:

- Treat everyone with dignity and respect; and
- Report incidents to your line manager or HR department if you think they are inappropriate.

Respondent's Disciplinary Policy dated 1 December 2015.

30. The preamble states that the Respondent's standard is based on the ACAS Code of Practice on Disciplinary and Grievance Procedures (the ACAS Code).

31. Section 2 provides examples of misconduct to include:

- Failure to follow Company policy standards and procedures; and
- Breach of the Dignity at Work standard.

32. Section 4 includes examples of gross misconduct potentially justifying summary dismissal to include:

- Stealing time from work i.e., being inactive, resting or not working your contracted hours; and
- Failing to carry out your contracted duties.

33. Section 6 deals with the invitation to the disciplinary hearing and includes:

- The employee must be provided with a written statement outlining the reason for the meeting and any output from the investigation. This statement and investigation pack must be sent or given to the employee.

Document entitled how to complete daily occurrence log.

34. The Respondent says that the concierges are required to complete a template daily occurrence log. A template appears at page 152 in the bundle. It lists various examples of events to be recorded to include deliveries, attendance of contractors, incidents, keys handed out and returned, etc.

Claimant's previous performance

35. The Claimant says that there had been no previous complaints regarding his performance. Further, he says that he had received commendation for his actions in saving two lives to include rescuing someone from the Thames. He also referred to his role in rescuing a resident from a fire.

36. The Claimant says that he perceived that the Respondent had adopted a policy of seeking to disadvantage and then dismiss those employees who had transferred to the Respondent under TUPE from Harrods.

Neil Perkins

37. We were referred to a first written warning received by Mr Perkins in a letter dated 23 July 2015 (the bundle only included the first page of the letter). The Claimant relies on Mr Perkins as a comparator in his claim for direct race discrimination. The Respondent says that Mr Perkins accepted that he had acted inappropriately, and his apology was taken as partial mitigation.

Claimant Instant Report Emails

38. The Claimant says that his approach on any significant incidents arising was to send an email to a member of management rather than necessarily recording such incidents in the daily log. He referred as an example to emails he had sent to Jason Grieve, Estate Manager (Mr Grieve) on 16, 17 and 26 July 2018.

Investigation meeting 30 August 2018

39. The Claimant attended an investigation meeting with Mr Grieve and Marc Gomes, Community Engagement Manager, on 30 August 2018. He disputes the accuracy of the note of his meeting (pages 72-85 in the bundle). He says he was not provided with this note until disclosure for this hearing. He complains that Mr Grieve recorded the meeting whilst he was not permitted to record subsequent investigatory and disciplinary meetings.

40. Mr Grieve asked the Claimant why a fire incident in one of the apartments on 24 July 2018 had not been recorded in his handover notes. He responded by saying that he verbally advised Gregory on his arrival for the day shift as to what had taken place. Mr Grieve expressed concern that the incident was not recorded on the health and safety log and explained that this should always be filled in so that everyone is always kept up to date. He emphasised that the occurrence log is part of the standard operating procedure and advised the Claimant that it needed to be filled out regardless of how minor the fire was. The Claimant admitted that it was a mistake that it was not logged and that he thought that he had notified the relevant people at the time. He simply thought that advising Gregory was enough and apologised for this mistake.

Christmas Holiday Pay

41. The Claimant complained that he was not paid double time for the shifts he worked on Christmas Day and Boxing Day in 2018. His payslip dated 28 January 2019 (page 68) shows the entirety of his overtime being paid at a time and a half whilst he says that time worked on bank holidays should have been at double the normal shift rate. He says that this had always been the case previously. He estimates the shortfall at approximately £500.

42. On 28 January 2019, the Claimant sent an email to Ms Spence regarding the failure to pay what he was anticipating for his Christmas Day and Boxing Day shifts. He said that he had clarified with Con Sweeney (Mr Sweeney) that his contract allows for double time on bank holidays, and this had remained unchanged since the commencement of his employment five years ago.

43. The respondent says that this practice was discontinued with effect from December 2018. We, nevertheless, accept the Claimant's evidence that he had an expectation that he would be paid at double the normal daily rate for Christmas Day and Boxing Day 2018. We find no clear evidence that a change to the existing practice, the existence of which was not challenged by the Respondent, had been varied and such variation had been communicated in unequivocal form to the Claimant.

Incident of 12/13 February 2019

44. The Claimant worked the night shift at the Belvedere between 7pm on 12 February and 7am on 13 February 2019.

45. Ms Spence unexpectedly arrived at the Belvedere just before 5am. Whilst she had not been due to start her shift until 9am she had arrived early with a view to going to her gym, about five minutes' walk away, before starting work. She was unable to access the block due to not being able to find her key fob. She says that she called the Belvedere phone at 05:02 but there was no answer.

46. At page 108 of the bundle there is a printout of the call details from Ms Spence's phone which shows a call of 0 seconds duration at 05:02 on 13 February 2019.

47. At 05:07 she found her fob and entered the reception area. She tried to open the lodge door however this was locked. At 05:12 the Claimant unlocked the door and said that he had been changing.

48. Pages 109 and 110 of the bundle show photographs taken by Ms Spence of the concierge at 05:07 and the Claimant's computer at 05:08. The pictures are of very poor quality, but the Respondent says, not challenged by the Claimant, is that he was not at his desk at this time.

49. The Claimant says he had temporarily left the concierge desk to go to the small kitchen to wash his cutlery, make a cup of tea, clean his armpits and put on a jumper as he was feeling cold.

50. In an email of 11:35 on 13 February 2019 from the Claimant to HR he said that he would like to make a formal complaint regarding his Christmas Bank Holiday pay being stopped by Ms Spence. He made no reference to the incident of earlier that morning.

51. The Claimant's log for the Belvedere on the night of 12/13 February 2019 shows a last entry at 03:31 (page 154 in the bundle). His record of shift occurrences (page 153) shows a radio check at 19:30 and block checks at midnight, 2am, 4am and 06:20am.

52. At 06:29 Ms Spence sent an email to the Claimant regarding what she had observed earlier that morning on arriving at the Belvedere. She said that the following points were in breach of the Respondent's policy:

- At all times as a night porter for accessibility and safety you should carry your work phone/radio with you. The Belvedere has 24-hour coverage, seven days a week.
- Your computer should never be left unlock/open and accessible – breach of data protection – GDPR. Your computer was.
- You stated that you were changing and not taking a break – however you have a further two hours before the end of your shift – therefore why are you out of your uniform?

53. At 08:49 on 13 February 2019 the Claimant responded to Ms Spence. He made the following comments:

- He had his mobile phone with him.
- He had not received a call at the time Ms Spence says she arrived at the Belvedere (05:02).
- There was no missed call on his mobile.

54. This email contained no reference to Ms Spence's attire nor any allegation that she had in any way behaved inappropriately towards the Claimant.

<u>15 February 2019</u>

55. Ms Spence sent an email to Shirleen Migwi, HR Manager (Ms Migwi) at 16:12 on 15 February 2019. This related to the Claimant's alleged behaviours on 12/13 February and included:

- GD has previously addressed the Claimant to ensure he stays in his work uniform for the entire duration of the shift – this is not being practised.
- GD has requested the Claimant in his last appraisal to ensure that he is logging in the correct format on the daily occurrences log, but unfortunately no improvement made nor are occurrences being logged except for radio and block checks.
- Hand over complete at 03:31 on the night of the incident (12 February) but nothing logged thereafter.
- CCTV footage of lift covers being carried back and forth to the porter's lodge. This has become common practice.
- Lodge doors locked while he was inside – common practice, I have had feedback that many mornings porters have arrived for hand over and the lodge is frequently locked with lift cover in lodge.
- Main landline not diverted to Belvedere porter mobile when away from the desk.
- Belvedere PC left wide open without locking the screen, leaving confidential resident database vulnerable.

Claimant's suspension

56. The Claimant was verbally informed on 18 February 2019 by Ms Spence that he had been suspended.

57. His suspension was confirmed in a letter from Ms Migwi dated 25 February 2019. He was informed that the suspension was pending investigations into the following allegations:

- Serious failure or negligence to follow company standards and processes which had the potential to cause unacceptable risk, loss or damage on 12/13 February. These relate to key handling, parcel handling, completion of hand over logs, locking lodge doors, failing to divert the main phone and leaving the company radio and computer unsecure and unattended.
- Serious failure to carry out contracted duties on 12/13 February.
- Stealing time away from work on 12/13 February i.e., being inactive, resting or sleeping.

Invitation to Investigation meeting

58. The Claimant was invited to attend a formal investigation meeting on 26 February 2019 at Imperial Wharf.

59. In an email of 08:55 on 26 February 2019 to Ms Migwi the Claimant complained that there could not be a proper investigation if he is unable to bring evidence. He referred specifically to CCTV evidence that he had previously requested.

60. At 09:15 on 26 February 2019 Ms Migwi responded by advising the Claimant that he should attend the meeting, and this would include reviewing and discussing any evidence including any CCTV. She went on to say that any footage relevant to the Respondent's concerns could be viewed on site and if a further investigation meeting should be needed further footage could be obtained.

61. In a further email from Ms Migwi to the Claimant at 15:19 on 26 February 2019 she advised that the Respondent wanted to go over things with him and part of that will be reviewing any evidence the Respondent had, including CCTV.

The Investigation Meeting on 27 February 2019

62. In an email of 05:48 on 27 February 2019 from Ms Spence to Ms Gadd she said that she would drop the CD off that morning (containing the CCTV footage for the morning of 13 February at the Belvedere). Ms Gadd cannot recall receiving this CD. However, she can recall viewing the CCTV footage. She says that it had been an inadvertent oversight not to show the CCTV to the Claimant during the meeting on 27 February. She did not consider reconvening the investigation meeting so that it could be shown to him.

63. The meeting was conducted by Ms Gadd. The Claimant was accompanied by Mr Sheehan. Faye Davies, Assistant Property Manager attended as a note taker. The Claimant disputes the accuracy of the note produced.

64. The meeting lasted from 10:15am until 11:33am. The Claimant explained his version of events on the morning of 13 February 2019. He said that he had been away from his desk for approximately ten minutes. He said that it was "very unprofessional for Ms Spence to come in wearing her yoga pants, just before Valentine's Day, and that he could even see her camel toe and he did not want that reputation, he is a happily married man".

65. In evidence he said that Ms Spence was "half naked".

66. The Claimant says that Ms Gadd sought to "cut him off". He believes that she on behalf of the Respondent was seeking to build a case against him as part of what he describes as a sting operation.

Subsequent steps taken by Ms Gadd.

67. In an email of 11:50 on 27 February 2019 to Ms Migwi, Ms Gadd said:

> "The meeting is now finished. OMG it was hard work".

68. At 13:29 on 27 February 2019 Ms Gadd sent an email to Ms Spence with 14 questions regarding the events of 13 February.

69. In an email of 08:59 on 28 February 2019 from Ms Gadd to Ms Migwi she stated:

> "I just wanted to reiterate to you again how upset and insulted I was and still am by the Claimant's comments yesterday during the investigation meeting (with regard to Ms Spence wearing her gym gear etc). Even though the insults were meant for Ms Spence, I was equally insulted. I don't think in 25 years of working have I ever encountered such demeaning behaviour. I was shaking internally and in hindsight, I guess, I should have stopped the meeting. I was so taken aback by

his comments. I have not mentioned this to Ms Spence. The Claimant can think whatever he wants to but to say it out loud is not acceptable and I am insulted. I hope I never have to speak to him again (but I will of course if need be)".

70. Under cover of an email of 18:13 on 28 February 2019 Ms Migwi sent the Claimant minutes from the previous day's investigation meeting.

71. On 4 March 2019 Ms Spence took various photos showing the Belvedere concierge and kitchen. The kitchen is clearly small, no more than eight feet long. It has a small slopping shelf/table in a corner and a stool is shown underneath. The Claimant says that the stool was not there when he was at work. The photos also show a small ledge containing two radiators.

72. There is a plant room adjacent to the kitchen which contains water tanks and pumps. It is quite large but noisy.

Invitation to Disciplinary Hearing

73. Under cover of an email from Ms Migwi of 16:44 on 12 March 2019 the Claimant was sent a letter inviting him to a disciplinary hearing. This set out the following allegations:

- Serious failure or negligence to follow Company standards and processes which had the potential to cause unacceptable risk, loss or damage during your shift on 12/13 February 2019. These relate to completion of hand over logs, locking lodge doors (health and safety), failing to divert the main phone and leaving the company radio and computer unsecure and unattended.
- Failure to carry out your contracted duties on 12/13 February 2019 and falsifying the daily occurrence log for your shift.
- Stealing time away from work on 12/13 February 2019 i.e., being inactive, resting or sleeping.
- Making inappropriate, derogatory and offensive comments about the Chelsea Harbour Development Manager during your investigation meeting on 27 February 2019 – the company considers this to be a breach of the Dignity at Work standard.

74. Ms Migwi listed various documents attached to the letter. She said that relevant CCTV footage may also be referred to at the hearing. She enclosed a copy of the Disciplinary Procedure. She advised the Claimant that if proven the allegations would amount to gross misconduct, thereby justifying his summary dismissal.

Disciplinary Hearing on 21 March 2019

75. The hearing was conducted by Mr McDonagh. Mr Sheehan and Ms Davies again attended. The meeting lasted from 15:00 to 16:05. The Claimant disputes the completeness and accuracy of the notes.

76. The Claimant was shown what the Respondent says was relevant CCTV footage.

77. In relation to the allegation regarding his having made inappropriate comments regarding Ms Spence he said that she had been invading his personal space. He said

that he had never seen a manager coming into an office in such an unprofessional manner.

78. The CCTV footage shown included Ms Spence arriving wearing what the Claimant described as a red jacket and yoga pants.

79. The Claimant contended that it was a "stich up" and that his manager was trying to desperately cover up a breach of contract in respect of his Christmas pay.

Dismissal Letter

80. For reasons he could not explain it was not until 10 April 2019 that Mr McDonagh reached his decision to dismiss the Claimant as recorded in a letter sent on his behalf by Kelly Conlin, HR Advisor (Ms Conlin). It set out the disciplinary allegations.

81. The letter referred to the Claimant's explanation that he had not used the hand over log and admitted doing extra patrols without writing these in the log. Mr McDonagh considered that failure of anyone to pick up on it was not a satisfactory justification for this to happen. He said that the Claimant had provided no adequate reason for failing to lock the screen on his computer. He said that the Claimant had expressed no remorse for making the "camel toe" comment regarding Ms Spence. He considered that this represented a failure to promote and embody the Respondent's core values.

82. In evidence Mr McDonagh said that the allegations relating to events on 13 February 2019 were the most serious and would have justified dismissal. He said that the inappropriate, derogatory and offensive comment regarding Ms Spence would not in itself have justified dismissal.

Appeal Process

83. In an email of 10 April 2019 Ms Conlin provided the Claimant with notes from the disciplinary hearing together with the outcome letter. He replied by stating that he wished to appeal what he described as this "outrageously wrong decision".

84. In a letter from Ms Conlin dated 29 April 2019 the Claimant was invited to an appeal hearing on 1 May 2019 to be conducted by David Whittle, Senior Property Manager/Team Leader.

85. The Claimant said he was unable to attend on this date and it was therefore rescheduled for 9 May 2019. The Claimant failed to attend and did not contact the Respondent to advise of the reasons why.

86. In a letter from Ms Conlin dated 10 May 2019 he was advised that if the Respondent had not heard from him by 15 May 2019 that it would consider that he had withdrawn his appeal. There was no further contact from the Claimant and no appeal hearing took place. The Claimant says that he was going through a very stressful period to include a marital breakdown.

Sex Harassment

87. Ms Gadd and Mr McDonagh denied that the Claimant alleged that he had been subject to sexual harassment by Ms Spence during the investigation and disciplinary hearing meetings. Further, there is no evidence that the Claimant raised such concerns.

88. In his Tribunal application dated 27 July 2019, whilst the Claimant referred to Ms Spence being "inappropriately attired" on the morning of 13 February 2019 he did not referred to her invading his personal space or touching his fleece zipper. The first time he referred to Ms Spence invading his personal space was in his further particulars dated 23 December 2019. It was not until his witness statement dated 14 January 2020 that he said that Ms Spence's actions suggested that she was going to adjust his fleece zipper.

89. "Camel toe" is a slang expression for a woman wearing tight fitting lower garments which have the effect that the outline of their genitalia is visible.

Race Discrimination

90. During the hearing, no specifics of alleged direct discrimination on account of race were provided and in only very general terms was it inferred, by or on behalf of the Claimant, that those former Harrods employees who had been dismissed by the Respondent were disproportionately from ethnic minorities. Mr Edrisinghe referred to the Claimant, himself (also Sinhalese Sri Lankan) and one or two others from ethnic minorities who have been dismissed by the Respondent. We heard no evidence as to the other individuals referred to and are not able to make any findings regarding Mr Edrisinghe's dismissal.

The Law

Unfair dismissal

91. Under section 98(1)(b) of the Employment Rights Act 1996 (the ERA) the employer must show that the reason falls within subsection (2) or is some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. This is the set of facts known or beliefs in the mind of the decision-maker at the time of the dismissal which causes him or her to dismiss the employee Abernethy v Mott, Hay and Anderson [1974] ICR 323, CA. A reason may come within section 98(2)(b) if it relates to the conduct of the employee. At this stage, the burden in showing the reason is on the respondent.

92. Under s98(4) the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and shall be determined in accordance with equity and the substantial merits of the case.

93. In considering whether the employer has made out a reason related to conduct, in the case of alleged misconduct, the tribunal must have regard to the test in British Home Stores v Burchell [1980] ICR 303, and the employer must show that the employer believed that the employee was guilty of the conduct. This goes to the respondent's reason. Further, the tribunal must assess (the burden here being neutral) whether the

respondent had reasonable grounds on which to sustain that belief, and whether at the stage when the respondent formed that belief on those grounds it had carried out as much investigation into the matter as was reasonable in all the circumstances. This goes to the question of the reasonableness of the dismissal as confirmed by the EAT in Sheffield Health and Social Care NHS Foundation Trust v Crabtree EAT/0331/09.

94. In considering the fairness of the dismissal, a tribunal must have regard to Iceland Frozen Foods v Jones [1982] IRLR 439 and the approach summarised in that case. The starting point should be the wording of section 98(4) of the ERA. Applying that section, the tribunal must consider the reasonableness of the employer's conduct, not simply whether the tribunal considers the dismissal to be fair. The burden is neutral. In judging the reasonableness of the employer's conduct, 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 reasonably take one view and another quite reasonably take another view. The function of the tribunal is to determine whether in the circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within that band, the dismissal is fair. If the dismissal falls outside that band, it is unfair.

95. The band of reasonable responses test applies to the investigation. If the investigation was one that was open to a reasonable employer acting reasonably, that will suffice (Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23).

96. A tribunal is entitled to find that was outside the band of reasonable responses without being accused of placing itself in the position of the employer: Newbound v Thames Water Utilities [2015] IRLR 735, CA, per Bean LJ at paragraph 61. It is not necessary, according to Court of Appeal in Shrestha v Genesis Housing Association Ltd [2015] EWCA Civ 94 extensively to investigate each line of defence advanced by an employee. That would be too narrow an approach and would add an "unwanted gloss" to the Burchill test. What is important is the reasonableness of the investigation as a whole. Further, when considering the extent of the investigation required, it is important to have regard to the extent to which underlying matters are not in dispute.

97. The Court of Appeal held in London Ambulance Service NHS Trust v Small [2009] IRLR 563 that a tribunal's focus in a complaint of unfair dismissal is not on the employee's guilt or innocence. Instead, the tribunal should confine itself to reviewing the reasonableness of the respondent's decision. In Small the tribunal had, according to the Court of Appeal, seriously strayed from its path of reviewing the fairness of the employer's handling of the dismissal. Instead, the tribunal had retried certain factual issues, substituted its own view of the facts relating to Mr Small's conduct and ultimately concluded that there were not reasonable grounds for believing that Mr Small was guilty of misconduct.

98. It is also important for the tribunal to keep in mind when considering the reasonableness of the disciplinary and dismissal process that procedural issues do not sit in a vacuum, but they must be considered together with the reason for dismissal: Taylor v OCS Group Ltd [2006] IRLR 613 (CA) and Sharkey v Lloyds Bank Plc [2015] UKEAT/0005/15. The tribunal must consider the context and gravity of any procedural

flaw identified and it is only those faults which have a meaningful impact on the decision to dismiss that are likely to affect the reasonableness of the procedure.

ACAS Code on Disciplinary and Grievance Procedures (the Code).

99. In reaching their decision, tribunals must also consider the Code. By virtue of s.207 of the Trade Union and Labour Relations (Consolidation) Act 1992, the Code is admissible in evidence, and if any provision of the Code appears to the tribunal to be relevant to any question arising in the proceedings, it shall be considered in determining that question.

Polkey reduction

100. In Software 2000 v Andrews [2007] ICR 825, EAT, Elias P summarised (at paragraph 54) the authorities on "Polkey" reductions and made the following observations:

(a) in assessing compensation for unfair dismissal, the tribunal must assess the loss flowing from that dismissal, which will normally involve an assessment of how long the employee would have been employed but for the dismissal;

(b) if the employer contends that the employee would or might have ceased to have been employed in any event had fair procedures been adopted, the tribunal must have regard to all relevant evidence, including any evidence from the employee (for example, to the effect that he or she intended to retire in the near future);

(c) there will be circumstances where the nature of the evidence for this purpose is so unreliable that the tribunal may reasonably take the view that the exercise of seeking to reconstruct what might have been so riddled with uncertainty that no sensible prediction based on the evidence can properly be made. Whether that is the position is a matter of impression and judgement for the tribunal;

(d) however, the tribunal must recognise that it should have regard to any material and reliable evidence that might assist it in fixing just and equitable compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence; and

(e) a finding that an employee would have continued in employment indefinitely on the same terms should only be made where the evidence to the contrary (i.e., that employment might have been terminated earlier) is so scant that it can effectively be ignored.

Contributory conduct and the compensatory award

101. When considering a reduction to the compensatory award, under S.123(6) ERA, the tribunal should: identify the impugned conduct, consider whether it was blameworthy, and decide, if so, whether it caused or contributed to the dismissal.

102. The conduct must have been known at the time of the dismissal: Optikinetics Ltd v Whooley [1999] ICR 984, EAT, per HHJ Peter Clark at 989A-C. It is for the tribunal alone to determine, as a matter of fact, whether the employee committed the impugned conduct and, if so, how wrongful it was: Steen v ASP Packaging [2014] ICR 56, EAT, per Langstaff P at paragraph 12.

103. There are four questions for the tribunal to consider as per Steen:

(a) what was the conduct which is said to give rise to possible contributory fault?

(b) was that conduct blameworthy, irrespective of the employer's view of the matter?

(c) did the blameworthy conduct cause or contribute to the dismissal?

(d) if so, to what extent should the award be reduced and to what extent would it be just and equitable to reduce it?

Contributory conduct and the basic award

104. Under s.122(2) of the ERA where a tribunal considers that any conduct of a claimant before the dismissal was such that it would be just and equitable to reduce, or further reduce, the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.

Sex and race discrimination and the burden of proof

105. Under s13(1) of the Equality Act 2010 (the EQA) read with s.9, direct discrimination takes place where a person treats the claimant less favourably because of the protected characteristic than that person treats or would treat others. Under s.23(1), when a comparison is made, there must be no material difference between the circumstances relating to each case.

106. In many direct discrimination cases, it is appropriate for a tribunal to consider, first, whether the claimant received less favourable treatment than the appropriate comparator and then, secondly, whether the less favourable treatment was because of the protected characteristic. However, in some cases, for example where there is only a hypothetical comparator, these questions cannot be answered without first considering the 'reason why' the claimant was treated as she/he was.

107. Under s136, if there are facts from which a tribunal could decide, in the absence of any other explanation, that a person has contravened the provision concerned, the tribunal must hold that the contravention occurred, unless A can show that he or she did not contravene the provision.

108. Guidelines on the burden of proof were set out by the Court of Appeal in Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258. The tribunal can take into account the respondent's explanation for the alleged discrimination in determining whether the claimant has established a prima facie case so as to shift the burden of proof. (Laing v Manchester City Council and others [2006] IRLR 748; Madarassy v Nomura

International plc [2007] IRLR 246, CA). The Court of Appeal in Madarassy, a case brought under the then Sex Discrimination Act 1975, held that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status (e.g., sex) and a difference in treatment. LJ Mummery stated at paragraph 56:

> "Those bare facts 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 unlawful act of discrimination."

109. Further, it is important to recognise the limits of the burden of proof provisions. As Lord Hope stated in Hewage v Grampian Health Board [2012] IRLR870. "They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other."

110. An act may be rendered discriminatory by the mental processes, conscious or nonconscious, of the alleged discriminator: Nagarajan v London Regional Transport [1999] ICR 877, HL. In such cases, the tribunal must ask itself what the reason was for the alleged discriminator's actions. If it is that the complainant possessed the protected characteristic, then direct discrimination is made out. If the reason is the protected characteristic, that answers the question of whether the claimant was treated less favourably than a hypothetical comparator; they are, in effect, two sides of the same coin: Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337, HL, per Lord Nicholls at paragraph 10.

111. It is permissible for the tribunal to answer the hypothetical comparator question by having regard to how unidentical but not wholly dissimilar cases have been treated: Chief Constable of West Yorkshire v Vento (No.1) [2001] IRLR 124, EAT, per Lindsay J at paragraph 7; approved in Shamoon, per Lord Hutton at paragraph 81.

112. A benign motive is irrelevant when considering direct discrimination: Nagarajan at 884G-885D, per Lord Nicholls. It is irrelevant whether the alleged discriminator thought the reason for the treatment was the protected characteristic, as there may be subconscious motivation: Nagarajan at 885E-H:

> "I turn to the question of subconscious motivation. All human beings have preconceptions, beliefs, attitudes and prejudices on many subjects. It is part of our make-up. Moreover, we do not always recognise our own prejudices. Many people are unable, or unwilling, to admit even to themselves that actions of theirs may be racially motivated. An employer may genuinely believe that the reason why he rejected an applicant had nothing to do with the applicant's race. After careful and thorough investigation of a claim members of an employment tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realised it at the time or not, race was the reason why he acted as he did. It goes without saying that in order to justify such an inference the tribunal must first make findings of primary fact from which the inference may properly be drawn. Conduct of this nature by an employer, when the inference is legitimately drawn, falls squarely within the language of s.1(1)(a). The employer treated the complainant less favourably on racial grounds."

113. It is not sufficient for to draw an inference of discrimination based on an "intuitive hunch" without findings of primary fact to back it: Chapman and Anor v Simon [1994] IRLR 124.

114. In determining whether a claimant has established a prima facie case, the tribunal must reach findings as to the primary facts and any circumstantial matters that it considers relevant: Anya v University of Oxford and Anor [2001] IRLR 377 (CA). Having established those facts, the tribunal must decide whether those facts are sufficient to justify an inference that discrimination has taken place.

115. Where there are multiple allegations, the tribunal should consider whether the burden of proof has shifted in relation to each one. It should not take an "across the board approach" when deciding if the burden of proof shifted in respect of all allegations: Essex County Council v Jarrett UKEAT/19/JOJ.

116. The tribunal may cast its net widely to look for facts that are consistent with discrimination and may therefore give rise to a prima facie case. The tribunal may take account of circumstantial evidence, including matters occurring before the alleged discrimination (even those outside the limitation period) and matters occurring afterwards if they are relevant. However, there must be "some nexus between the facts relied on and the discrimination complained of": Wheeler & Anor v Durham County Council [2001] EWCA Civ 844.

117. Finally, the less favourable treatment must be because of a protected characteristic and that requires the tribunal to consider the reason why the claimant was treated less favourably: Nagarajan. The tribunal needs to consider the conscious or subconscious mental processes which led the respondent to take a particular course of action in respect of the claimant and to consider whether her gender played a significant part in the treatment: CLFIS (UK) Ltd v Reynolds [2015] EWCA Civ 439.

Conclusions

118. The individual allegations in the list of issues are set out in bold below and our findings in normal font below each.

Direct sex discrimination/sexual harassment allegations

Was the Claimant subject on 13 February 2019 to the conduct alleged at paragraph 2 of his response dated 23 December 2019 to the order of Employment Judge Wade dated 9 December 2019?

This is as follows:

"She tiptoed in wearing her yoga outfit just before Valentine's Day with a camel toe [showing through her pants). I am a happily married man.

Fatma turned up early hours on 13 January in a gym suit and yoga pants making allegations. I view this as bullying tactics to cover up the breach of my employment contract and [to make up) allegations [for my dismissal).

I have never seen a time in my life that a manager is coming into the office in an unprofessional manner, invading my personal space. This is a stitch up."

119. We do not consider that the alleged inappropriate outfit worn by Ms Spence to be capable of constituting sexual harassment of the Claimant. We reach this finding for the following reasons:

a) Ms Spence was not performing her duties during her contracted hours but arrived unexpectedly early prior to going to the gym.

b) Mr McDonagh and Ms Gadd say she was always appropriately dressed.

c) It would be reasonable to expect that there would be occasions, both at work and elsewhere, where the Claimant would observe women wearing tight fitting leggings/sports attire and as such his reaction was disproportionate.

d) The evidence was that Ms Spence was wearing a jacket and yoga pants and the Claimant's contention that she was "half naked" is inconsistent with this.

120. We do not find any evidence to infer that Ms Spence invaded the Claimant's personal space or touched his fleece zipper in a way which could be considered as being of a sexual nature.

121. We consider it very significant that in the emails immediately following the alleged sexual harassment the Claimant made no reference to this and indeed in his email of 11:18 of 13 February 2019 to Ms Spence he referred to outstanding overtime pay for Christmas Day and Boxing Day.

122. After his suspension he raised no complaint that he had been sexually harassed by Ms Spence.

123. At the investigation and disciplinary meetings, he referred to what he considered to be Ms Spence's inappropriate attire rather than anything which could reasonably be construed as his being subject to sexual harassment. Whilst during the disciplinary hearing on 21 March 2019 he referred to her "invading his personal space" we do not find any basis to support an inference that this was a complaint of sexual harassment given that a perception of the invasion of personal space could be equally applicable in respect of a male or female person. It is noteworthy that his Claim Form dated 27 July 2019 made no reference to anything which could be construed as sexual harassment but at paragraph 43 simply referred to Ms Spence being "inappropriately dressed". It was only in his witness statement dated 14 January 2020 that he referred to Ms Spence by her actions suggesting she was going to adjust his fleece zipper. At the hearing this extended further to his saying that she started playing with his fleece zipper and asking, "are you warm?". We therefore consider that this element of the Claimant's claim was progressively embellished.

124. In reaching this finding we took account of the perception of the Claimant, the other circumstances of the case and whether it is reasonable for him to consider the conduct to have the effect contended. We do not consider it to be reasonable. Therefore, whilst it is possible that the Claimant's subjective perception may have been one of shock at

what he considers to be Ms Spence's inappropriate attire we do not consider objectively this to be a reasonable position.

Was the conduct unwanted?

125. Whilst we accept that the Claimant may subjectively have found Ms Spence's attire objectionable or unwanted, we do not consider that objectively his position was reasonable. If the Claimant's position were to be accepted it would create a situation where any male employee could contend that they considered the dress of female colleagues to be inappropriate, and that their subjective opinion as to appropriate female attire, would then give rise to their being a victim of sexual harassment. We consider that this would create the subjective imposition of a potentially oppressive dress code based on what some males consider to be appropriate female attire.

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

126. We find that it did not.

Was the conduct related to sex or of a sexual nature?

127. We find that it was not for the reasons as set out above.

128. We therefore do not find that the burden of proof shifts to the Respondent to rebut an allegation of sexual discrimination.

Did the Claimant do a protected act by complaining about the alleged harassment on 27 February 2019 and at the disciplinary hearing of 21 March 2019?

129. Whilst not expressly stated it is logical to infer that the protected act relied upon by the Claimant is that under S 27 (2) (d) of the EQA of making any allegation (whether or not express) that A or another person has contravened this Act.

130. We find that he did not. We find that whilst he complained about Ms Spence's "inappropriate" attire at the investigatory meeting with Ms Gadd on 27 February 2021 he did not raise a complaint of sexual harassment. The Claimant accepts that he did not use this terminology and we do not consider that the description he used regarding Ms Spence's attire is capable of being interpreted as his raising a complaint of sexual harassment. Whilst he referred in the disciplinary hearing on 21 March 2021 to her invading his personal space this cannot reasonably be inferred to be an allegation of sexual harassment as it does not necessarily relate to a difference between his and Ms Spence's gender.

131. We therefore find that the Claimant did not do a protected act.

Was the Claimant subject to victimisation by the manner of the handling of the investigation and disciplinary hearing and being dismissed on 10 April 2019?

132. In view of our finding above that there was no protected act there can be no act of victimisation.

Was the Claimant subject to direct race discrimination by being dismissed?

133. We find that he was not.

134. The Claimant produced no evidence to support an inference that his race had any bearing on the instigation of an investigation, disciplinary proceedings and ultimately his dismissal. He did not contend this to be the case during his employment. Further, at no point in the proceedings, his witness statement or in evidence did the Claimant refer to any evidence to support an inference that his race had any bearing on the actions of the Respondent.

135. The first reference to race was in the Claimant ticking the box in his ET1 but he did not provide any particulars. When asked at the Case Management Order dated 9 December 2019 to clarify the basis of his claim for race discrimination in his response dated 23 December 2019, he merely referred to his background being Sri Lankan Sinhalese. He provided no particulars.

136. Further, no particulars of his race discrimination claim were provided in his witness statement.

137. During the hearing, no specifics of alleged direct discrimination on account of race were provided and in only very general terms was it inferred, by or on behalf of the Claimant, that those former Harrods employees who had been dismissed by the Respondent were disproportionately from ethnic minorities. Mr Edrisinghe referred to the Claimant, himself (also Sinhalese Sri Lankan) and one or two others from ethnic minorities who have been dismissed by the Respondent. The Tribunal heard no evidence as to the other individuals referred to and is not able to make any findings regarding Mr Edrisinghe's dismissal. In any event the Claimant's inference was that former Harrods' employees were dismissed because their terms were more advantageous rather than because of their race.

For the race discrimination complaint, the Claimant relies on the day porter Neil Perkins or a hypothetical comparator.

138. We do not consider that Mr Perkins represents an appropriate comparator.

139. The first written warning received by Mr Perkins was in July 2015 which was three and a half years prior to the events giving rise to the Claimant's dismissal. Further, Mr Perkins was apparently remorseful for his actions which was considered by way of mitigation. The Respondent considered that the Claimant by contrast did not accept that he was guilty of any wrongdoing and then compounded the situation by making what the Respondent considered to be a derogatory comment in breach of its Dignity at Work policy regarding Ms Spence.

Was the Claimant subjected to direct sex discrimination by being dismissed as set out above?

140. We find that he was not. It is notable that other than what we have found to be an allegation relating to Ms Spence which we do not consider capable of constituting sexual

harassment that the Claimant has put forward no grounds to infer that his dismissal was an act of direct sex discrimination.

What was the reason for the dismissal of the Claimant?

141. We find that it was on the grounds of conduct. We do not accept the Claimant's assertion that his dismissal was a preordained "stitch up" in retaliation for him raising the issue of overtime payment for Christmas Day and Boxing Day and/or his seeking to protect the confidentiality of high-profile residents. Further, we reject the suggestion that Ms Spence was part of a conspiracy involving her arriving unexpectedly at the Belvedere at 05:00 on 13 February 2021 to entrap the Claimant.

142. We do not accept the Claimant's assertion that he merely pointed out that Ms Spence was "inappropriately" dressed when he used the term "camel toe". We consider this to be a relatively unusual but insulting phraseology.

Did the Respondent have a genuine belief that the Claimant was guilty of the conduct found against him?

143. We find that it did.

Was any such belief formed on reasonable grounds?

144. Whilst we consider that the Respondent had reasonable grounds to consider that the Claimant was guilty of the alleged misconduct, we nevertheless find that these grounds were not based on a reasonable investigation. It is therefore possible that if a reasonable investigation had been undertaken that the Respondent's "reasonable grounds" in relation to the allegations of his conduct in the early morning of 13 February 2019 may have changed. We do not consider that any reasonable investigation would, however, have changed the position in relation to the derogatory remarks regarding Ms Spence.

Did the Respondent conduct a reasonable investigation?

145. We find that it did not. We reach this finding for the following reasons:

146. The Claimant had a reasonable expectation based on email communications that he would be provided with the opportunity to review the relevant CCTV during the investigation meeting. The Claimant had made it clear that he considered the CCTV footage to be relevant and he wished to view it. He was not given this opportunity. We find that this was an oversight which was both unfair to the Claimant but also outside the scope of what would have constituted a reasonable investigation. If it was not available, the investigatory meeting should have been adjourned or alternatively reconvened.

147. We further find that Ms Gadd had formed an inappropriately premature view of the Claimant's version of events. Her email of 11:47 on 27 February 2019 to Ms Migwi which included "OMG – it was hard work" points to her having a predetermined view. This provides reason to infer that any subsequent investigation undertaken by her was not entirely objective given that she had clearly made a pejorative comment regarding the Claimant following the initial investigatory meeting and in particular her mindset was

disproportionately influenced by what she considered to be his insulting comment regarding Ms Spence's attire.

148. We find that Ms Gadd's investigation was limited to her email to Ms Spence of 13:29 on 27 February 2019 and that she did not interview Ms Spence. We consider that as part of a reasonable investigation she should have done so.

149. We find that the failure of Ms Gadd to properly investigate matters such as whether it would have been possible for the Claimant to have locked his computer and what the standard practice was amongst the other concierge regarding maintaining logs and recording incidents demonstrated a failure to carry out a reasonable investigation.

150. We find that it would have been reasonable, and in accordance with the Respondent's Disciplinary Policy and the ACAS Code for Ms Gadd to have produced a report summarising the investigation she had undertaken, her conclusions and the reasons upon which she had reached such conclusions. She produced no report. As such when Mr McDonagh was appointed to conduct the disciplinary hearing, he had no investigation report to rely on but solely the invitation letter to a disciplinary hearing letter dated 12 March 2019 drafted by Ms Migwi.

Was the Claimant's dismissal within the range of reasonable responses open to the Respondent?

151. Whilst not included in the list of issues we nevertheless consider it necessary to address this question. We find it was. Whilst the decision was arguably harsh it was not in our opinion outside the range of responses open to a reasonable employer given the evidence which existed.

ACAS Code

152. We find that the Respondent breached various elements of the Code. This included:

<u>Failing to draft clear allegations.</u>

153. We find that if it was being inferred, as Mr McDonagh indicated it was, that the Claimant was asleep whilst at work it should have been expressly stated. Mr McDonagh says that the Claimant was out of sight and apparently inactive for a period of approximately three hours, had been seen taking the lift curtains through the concierge to the kitchen and therefore clearly believed that he may have been asleep. However, this was not expressly stated. We find that it should have been.

<u>Not being provided with the necessary information and documentation to allow him to mount an effective defence in the disciplinary hearing.</u>

154. We find that he should have been provided with access to the relevant CCTV footage. We find the failure to do so as unacceptable. The Claimant requested this both during his employment and afterwards to include in his letter to the London Employment Tribunal and copied to the Respondent dated 14 April 2020. It was not until the second day of the hearing that Ms Onotosho said that the relevant CCTV

footage had been found. We find this to have been wholly unacceptable given that it was clearly of potential relevance and had been requested by the Claimant.

The meeting should be held without unreasonable delay whilst allowing the employee reasonable time to prepare their case.

155. We find that the invitation to the investigatory meeting with Ms Gadd sent at 1519 on 26 February 2019 for a meeting at 10 AM the following morning, at a time when he was suspended, provided him with insufficient time to properly prepare particularly given the ongoing issue regarding access to CCTV.

It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case. In some cases, this will require the holding of an investigatory meeting with the employee before proceeding to any disciplinary hearing. In others, the investigatory stage will be the collation of evidence by the employer for use at any disciplinary hearing.

156. For the reasons set out above we do not consider that the investigation undertaken by the Respondent was reasonable and therefore this constitutes a further contravention of the Code.

If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification.

157. We do not consider that the letter dated 12 March 2019 inviting the Claimant to a disciplinary hearing properly particularised the allegations against him. We find it to be apparent from Mr McDonagh's evidence that he considered that the Claimant had in all probability been asleep for a substantial period whilst he was meant to be working whereas the invitation letter referred in very ambiguous terms to "stealing time away from work i.e., being inactive, resting or sleeping". If the suspicion was that the Claimant had been asleep for a significant period, this should have been stated in the disciplinary invitation letter.

Uplift to the compensatory award because of the Respondent's failure to comply with the ACAS Code.

158. We find the Respondent's failures to have been unreasonable. Given the extent and number of failures we consider it appropriate to increase the compensatory award by the maximum figure of 25%

If the Respondent failed to follow a fair procedure should compensation be reduced on the basis that the Claimant would, or might have been dismissed, had a fair procedure been followed?

159. We consider that there would have been a reasonably high probability that the Claimant would have been dismissed in any event if the Respondent had carried out a reasonable investigation. It is self-evidently a speculative exercise to determine what

the outcome would have been. Nevertheless, having considered both the evidence which was available to the Respondent based on the limited investigation undertaken, together with the evidence which we consider would have been likely to have arisen had such a reasonable investigation been completed, we place the likelihood of dismissal at 80%. We reach this finding for the following reasons.

160. Had the Claimant been given the opportunity as part of the investigation to fully view the CCTV we consider that this would have been unlikely to change the position given that he provided no real explanation as to where he was during the time when he was not observed at the concierge desk and there was no other evidence of activity, other than to say that for some of the time he was standing rather than sitting at the concierge desk, but this would not explain why he was completely out of view.

161. The Claimant had not completed the log as required. Whilst the Respondent was deficient in not picking the Claimant up on this with sufficient regularity over the previous five years at the investigation meeting on 30 August 2018 he had been advised of this requirement and had apologised.

162. It is possible that a proper investigation would have found evidence to support the Claimant's contention that the computers were not capable of being locked but we consider that this was a relatively minor allegation in the context of the overarching suspicion that he was sleeping whilst at work.

163. The Claimant accepts that he was not actively attending to his duties for a period of at least 10 minutes. If the Claimant's position is accepted that he was merely in the kitchen to wash his cutlery, make a cup of tea, wipe his armpits, and put a fleece on it would appear surprising that he would have considered it necessary to go to the trouble of carrying the lift covers into the kitchen. This would provide grounds to infer that the Claimant may have been sleeping. We are not able to reach a finding on this but merely to find that there was evidence sufficient to raise the Respondent's suspicion that this could have been the case. This is particularly the case given the CCTV evidence providing no visible record of the Claimant at the concierge desk for circa three hours from approximately 3am on 13 February 2019 and no activity on the concierge's computer. Further, we consider it to be open to suspicion that the Claimant felt it necessary to carry the lift curtains to the kitchen so that he could sit down and eat his food rather than bringing and leaving a small cushion at work.

164. Further, whilst the evidence of Mr McDonagh was that the derogatory comments regarding Ms Spence would not have been sufficient to justify dismissal, we consider that it would have been reasonable for the Respondent to take this into account together with the other matters, subject to a reasonable investigation having been undertaken, and therefore reach a decision to dismiss.

If the Claimant was unfairly dismissed, was his dismissal to any extent caused or contributed to by his actions?

165. We consider that the Claimant contributed significantly to his dismissal. We reach this finding based on the following factors.

166. The Claimant's actions on the morning of 13 February 2019 were clearly in breach of the Respondent's procedures which at least in part had been communicated to him

and the requirement to maintain an adequate logbook. He had failed to do so. We do not find his explanation that he would raise any serious issues in emails to be consistent with the Respondent's policy and as communicated to him by Mr Grieve at the investigation meeting on 13 August 2018.

167. We consider his practice of taking the lift covers into the concierge/kitchen to be inconsistent with the expected approach and find no evidence to support this practice being undertaken by other concierge.

168. We find that the Claimant had not followed the Respondent's procedures in maintaining communication via phone on the morning of 13 February 2019, enabling access to the concierge for at least 10 minutes (and possibly longer) and thereby potentially compromising resident safety and failing to provide an adequate hand over record.

169. We are not able to make any finding as to whether the computer at the material time was capable of being locked. Nevertheless, we consider that the Respondent had reasonable grounds to believe that it would have been password protected and that it had been left unsecured for at least 10 minutes during which the confidential information of residents could have been compromised.

170. That the Claimant made what we consider to be a derogatory and unacceptable comment regarding Ms Spence. We find it was reasonable of the Respondent to consider that the Claimant's use of the term "camel toe" pertaining to Ms Spence was offensive and in breach of its Dignity at Work policy. We find that the term to be unusual and a reasonable person, acting objectively, would be likely to consider it offensive. We do not accept the Claimant's explanation that he was seeking to describe what he considered to be Ms Spence's half naked state in a polite fashion. We find that the Claimant's English to be sufficient that it would be reasonable to believe that he would have the ability to describe her attire in a less offensive manner.

171. We consider a reduction of 50% to the compensatory award would be appropriate. This is on the basis that for the reasons set out above the Claimant's dismissal was to an extent caused or contributed to by his actions and therefore we consider it would be just and equitable to reduce the award by this percentage.

Was the Claimant's conduct before the dismissal such that it would be just and equitable to reduce the basic award?

172. We also consider it would be just and equitable to reduce the basic award by 50%.

<u>Unauthorised deduction from wages</u>

173. Whilst not included in the list of issues it is nevertheless apparent that the Claimant is pursuing a claim in respect of the alleged failure by the respondent to pay him what he says was contractually agreed entitlement for the hours he worked on 25 and 26 December 2018.

174. The Claimant contends that an unauthorised deduction from his wages was made in respect of his entitlement to double pay for time worked on the Christmas and Boxing Day Bank holidays in December 2018.

175. We find that this claim was out of time. The latest date upon which the Claimant could reasonably have expected to have received payment was his monthly salary paid on 28 January 2019 and evidenced in his pay slip of that date. Further, we do not find that this act constituted a continuing act and therefore the relevant date for the purposes of initiating ACAS early conciliation was 28 January 2019. Any claim in respect of an unauthorised deduction from wages would therefore need to have been submitted by 27 April 2019 subject to the applicable extension for ACAS early conciliation. It was not until 27 June 2019 (nearly five months later and therefore substantially out of time) that he commenced early conciliation.

176. We considered whether internal complaints raised by the Claimant would have the effect of extending time. For example, his email complaining of this issue to Ms Spence on 13 February 2019. We find that it did not. There were no further communications on this issue prior to the termination of the Claimant's employment on 10 April 2019 which could have had the effect of creating a later date from an act or omission in respect of which time should be calculated or representing a continuing course of conduct.

177. Therefore, it is not strictly necessary for us to reach a finding as to whether the Claimant had a contractual entitlement to receive double pay for hours worked on Bank Holidays. We find that the Claimant's contract of employment with Harrods dated 21 October 2013 did not create a contractual right to double pay but rather refers to an alternative paid day off. We nevertheless accept the Claimant's evidence that for the previous five years of his employment he had been paid at double rate for time worked on Christmas and Boxing Day. As such, we consider that a custom or practice had developed which created a reasonable expectation for the Claimant to receive such payments.

178. We do not find that the Claimant had been given unequivocal notice by the Respondent of a change to this policy sufficient to bring it to an end. Therefore, if such a claim had been brought in time, we consider that the Claimant would have suffered an unauthorised deduction from wages pursuant to s23 of the ERA.

Final Conclusions regarding compensation and reductions to be made.

179. The Claimant's dismissal was unfair. He is therefore entitled to basic and compensatory awards. However. the compensatory award needs to be increased by 25% to reflect the uplift for the Respondent's failure to comply with the Code but then reduced first by 80% as a Polkey reduction and then a further 50% because of contributory conduct in accordance with s123(6) of the ERA.

180. The basic award of £2,500 needs to be reduced by 50% to reflect the Claimant's conduct in accordance with s122(2) of the ERA thereby given a figure of £1,250.

181. In Mr Bullock's skeleton arguments, it is stated that the Claimant seeks reinstatement or re-engagement. No evidence was given in this respect and if this claim remains outstanding notwithstanding the Tribunal's findings on contributory conduct it would need to be the subject of evidence and submissions at a remedies hearing.

182. If the parties are unable to determine the compensatory award, they should notify the Tribunal and a one-day remedy hearing will be listed.

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Employment Judge Nicolle

17 June 2021

Sent to the parties on:
18/06/2021.
For the Tribunal:

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