EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr S Lorettu	**v**	**Globe Trotter Suitcase Co Ltd**

Heard at: Watford (by CVP) **On:** 3-9 August 2021

Before: Employment Judge Manley
Mr Wharton
Mr Sagar

Interpreters: Ms Comtu, Ms Costello

Appearances
For the Claimant: In person
For the Respondent: Mr B Uduje, counsel

JUDGMENT having been sent to the parties on 16 September 2021 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction and Issues

1. The claimant brought claims for unfair dismissal, age, sexual orientation, race and disability discrimination. The issues in this case were agreed at a Preliminary Hearing in October 2020. They are as follows:-

***"Direct Age Discrimination** – s 13 EqA*

The claimant is age 32 and those who worked in his section were generally older than him. He says he was treated less favourably because he was younger than his co-workers.

1 Did the Respondent treat the Claimant less favourably by:-

a. Being told by Jaki and Gary that they could not follow his instruction because he was young?

i. From November 2018 when the claimant became a supervisor
ii. Said on numerous occasions during morning team meetings in front of the team of approximately 7 people.

iii. *They said words such as "you're just a boy" and "you are not my boss".*

b. *Being treated like a child by Chris?*

i. *Being told "shut up boy", "shut up, child"*
ii. *Saying this in front of managers including, David, Marianna and Arkaduisz.*
iii. *This occurred regularly between November 2018 and February 2019.*

c. *Not resolving his situation that he had raised with Jo Fisher, David and Marianna Bajnok.*

i. *The claimant reported the matters in (a) and (b) to his three named managers, and their response was to 'give it time'.*
ii. *Numerous reports were effectively ignored by these managers between November 2018 and February 2019.*

d. *Arkadiusz Slawikowski stating to the Claimant "Golden Boy you stole my job".*

i. *This was said in November 2018 in front of Marianna Bajnok, and later in front of team members. The claimant says that he had been 'promoted' to a newly created role of 'head of kitting area', doing the task which had been done by Arkadiusz Slawikowski as a manager, while Mr Slawikowski was moved to work on the production line.*

e. *Treating him and his team in a bad way?*

i. *In the period from November 2018 to February 2019 Arkadiusz would frequently ignore the Claimant, use his machine without his permission and alter production schedules for the day.*

ii. *Arkadiusz Slawikowski would be rude to team members, for example saying "you, bring me that" – said to 'Billyana Doncheva', or shouting at team members.*

f. *Not taking any action to stop Arkadiusz Slawikowski's behaviour towards the Claimant*

i. *The claimant in November and December 2018 says he made regular oral complaints to Marianna Bajnok. Whilst she said she passed the complaints on to Jo Fisher, no action was taken against Mr Slawikowski. Ms Bajnok simply told the claimant to wait and that 'things would settle down'.*

g. *Bullying the claimant and stopping collaborations between the sections.*

i. *Between November 2018 and February 2019, being ignored by Jack Grain, supervisor of the quality section, even when collaboration was required. Mr Grain had reported Arkadiusz Slawikowski when he had been the manager.*

ii. *Workers on the production line, which Arkadiusz Slawikowski had moved to, also failed to collaborate with the claimant and the kitting section – in particular Andy, Jason and Darren, for example hiding components which the claimant's team had delivered to the production line, then saying they had not been delivered.*

h. *Trying to build a dismissal case against the claimant.*

i. *Rachel Argon, supervisor for the leather components, who is approximately 45 years old, was close friends with Jo Fisher. She wanted the claimant's role and when he was appointed in November 2018 said he was "too young for that role". The claimant believes she wanted his management role but with the title of manager and more pay.*

2 *Was this treatment because of the claimant's age or are there facts from which an inference could be drawn that it was because of that characteristic?*

Direct Sexual Orientation Discrimination – s 13

The claimant is bi-sexual and describes himself as gay

3 *Did the Respondent treat the claimant less favourably by:*

a. *Jack Grain made adverse comments about the claimant's sexuality;*

i. *When he started at the Respondent around October 2017, saying 'this workplace is for women so it's perfect for you'.*

ii. *When Marta started in 2018, Jack walked past the claimant and Marta asking "are you talking about women's things".*

b. *In 2018 Stelita (a Romanian employee) saying that the claimant was "sick because being gay is against nature". The Claimant reported this to Rosalia Clemente and we reported it to Arkadiusz Slawikowski and Stefano; their response was that Stelita was 'joking'. They failed to investigate or speak to Stelita. The claimant was so distressed he left work for the day.*

c. *Stelita, approximately a week after the first incident, said he was "scared about his son seeing two gay men kissing or watching gay pride as they would think it was normal".*

d. *In January 2019, Darren saying that the kitting area was "just girls" and when the claimant pointed out he worked there, he said "you're not a man, you are a girl"*

e. *Around December 2018 when talking about Christmas family, Silvana and Mr and Mrs Russo excluded the claimant and told him it wasn't for him, they were discussing family. The claimant answered he had a boyfriend, and they said "no, normal family".*

Was this treatment because of the claimant's sexual orientation, or are there facts from which an inference could be drawn that it was because of that characteristic?

Race discrimination *– s 13 EqA*

The claimant is Italian.

Whilst the workforce was multicultural, the management was English. The claimant compares his treatment as an Italian to the treatment of English people.

The amended response confirms that the Respondent operates its business in two parts, one dealing with the manufacture of suitcases and the second with leather goods. It states that all employees have common terms and conditions of employment and can be moved between parts. The claimant alleges that the majority of those in the leather section are English and that non-english employees are generally in the suitcase department.

4. Indirect Race Discrimination*.*

The claimant's factual allegations are that In April 2016 those in the leather department received a £1 per hour pay rise and those in the suitcase department a 20pence per hour pay rise, and that in April 2017 again those in the leather department received £1 per hour pay rise, while those in the suitcase department get nothing.

f. *Is any complaint relating to these matters out of time?*

g. *Did the Respondent apply a PCP of giving annual pay rises in 2016 and 2017 of £1per hour to those working in the leather department?*

h. *Did this put Respondent employees who are not English at a particular disadvantage compared to English employees?*

i. *Did it put the Claimant at that disadvantage?*

j. *Can the Respondent show that it was using proportionate means to achieve a legitimate aim?*

5. Direct race discrimination:

a. *In April 2017 did Mr Crookbaine refuse the claimant's request to move to the leather department because he was not English / was Italian?*

b. *In April 2018 Mr Crookbaine, having said that he would pay the claimant an additional 50 pence per hour because he was the only person who could add initials to bespoke luggage, said he would not implement this pay rise. The Claimant therefore said that he would no longer do the initial-ing; he was required to train Robert Pilgrim, an English employee, who did then receive the additional 50 pence per hour.*

c. *In around November 2018 Jo Fisher excluded the claimant from the daily meetings for those with supervisory responsibilities in the factory, and when the claimant asked why, she told him that his language was not good enough to be there.*

d. *In around November 2018, David Crookbaine laughing at the claimant when he accidentally said "shit" instead of "sheet".*

6. *Was this treatment because of the claimant's race, or are there facts from which an inference could be drawn that it was because of that characteristic?*

7. Harassment related to race.

Two black employee's one Jamaican and one African employee were employed by the Respondent in or around April 2018. In around December 2018 Arkadiusz Slawikowski, Stfrean, and Marianna Bajnok were talking about employees on the production line, and I said they some were good, Arkadiusz Slawikowski said, "who, the monkeys". I told them they must not say this. I reported this to Jo Fisher but she said "they're adults" and she could do nothing.

a. *Did the Respondent employees named above, engage in conduct related to a relevant protected characteristic, namely refer to black employees as "monkeys", fail to desist when asked and Ms Fisher failing to deal appropriately with the report?*

b. *Did the conduct have the purpose or effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?*
c. *Was it reasonable to have that effect?*

8. Disability discrimination.

a. The claimant is disabled by reason of Asperger's/ Autism. Disability is conceded by the Respondent (though knowledge is denied).

Section 15 EqA:

b. Did the following thing(s) arise in consequence of the claimant's disability:
i. the claimant having a disconnect between how he feels and how he presents his emotions.

c. Did the respondent treat the claimant unfavourably as follows:
i. Assuming that the claimant was being aggressive when he was being suspended. This led (in part) to the unfavourable treatment of dismissal?

d. If so, has the respondent shown that treatment was a proportionate means of achieving a legitimate aim?

e. Alternatively, has the respondent shown that it did not know, and could not reasonably have been expected to know, that the claimant had the disability?

9. Unfair dismissal

a. What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")? The respondent asserts that it was a reason relating to the claimant's conduct namely breaching the social media policy, a failure to devote all of his time, attention and abilities to the business and its affairs during his core working hours, using inappropriate language, behaving in an unprofessional manner and being disruptive in the workplace by encouraging other employees to go on strike.

b. Did the respondent have a genuine belief in the Claimant's misconduct?

c. Was such a belief formed after a reasonable investigation?

d. Did the Respondent's decision to dismiss fall within the so-called 'band of reasonable responses'?

2. In summary, the claims are for unfair dismissal, age, sexual orientation, race (nationality) and disability discrimination. Although not recorded in the list of issues it was clear to the Tribunal that there was a jurisdictional question about whether some of the allegations of discrimination had been presented within the relevant time period of three months (allowing for any ACAS early conciliation). If they had not been presented in time, we would also have to consider whether it was just and equitable to extend time (unless it was argued that the alleged conduct extending over a period to

bring the complaints in time).

3. Also, it was not stated in the list of issues for unfair dismissal that the Tribunal also has to consider whether the procedure used by the respondent was a fair one bearing in mind its own procedure and the relevant ACAS Code. This is a matter which can go to the fairness or otherwise of the dismissal, as well as impacting on any compensation awarded.

Hearing

4. The hearing started with some preliminary issues that needed to be resolved. The claimant had not provided a witness statement and had mentioned there being a further witness but had no witness statements for her either. The claimant also raised an issue about the possibility of witnesses who could give evidence for whom he sought anonymity, but he was advised that this would only apply in particular circumstances of sensitivity or safety, which aspects were not present in this case. The claimant was advised by the Employment Judge that he could call witnesses who had evidence relevant to the list of issues, but we would need either a witness statement or an indication of the evidence they were likely to give.

5. As far as the claimant's evidence was concerned, we agreed that the Tribunal would consider a number of statements the claimant had made in various documents in these proceedings. These included the claim form, further particulars, his email of appeal and what he said at the grievance hearing as well as those matters set out in the list of issues. These could form the basis of his evidence in chief. We had a bundle of documents of 276 pages with some extra documents having been sent shortly before the hearing by the respondent. These included a photo of the office where some printing was said to have been done by the claimant. We were also sent a copy of a video allegedly made by the claimant on 15 April 2019 which we looked at.

6. The claimant indicated that he wished the respondent's witnesses to give their evidence first. We therefore heard from four witnesses for the respondent as follows:- Ms Arbon who was the preparations manager; Mr Wilcox who was the factory manager; Ms Fisher who was the general factory manager and Ms Driver who was the HR manager and the dismissing officer. As the claimant was unrepresented, the Tribunal sought to ensure that questions were asked of those witnesses which were necessary for the determination of the issues. Where the claimant did not ask those questions, the Tribunal asked them.

7. On the morning of the second day, the claimant produced two witness statements, one for a former work colleague, Ms Mannino, and one for himself. Although they had arrived late, the respondent took the pragmatic view that it would not object to those witness statements being admitted as evidence.

8. Whilst the claimant was giving his evidence, he was asked about a

comment he made during a grievance hearing about having written 15 letters to the respondent during his employment. He said that was correct and that those letters had made reference to the allegations he brings here about discrimination. They were not in the bundle. The Tribunal decided that it was in the interests of justice to allow the claimant time to find any copies he had of those letters referred to. After a break of over an hour, the claimant managed to produce four documents but none were relevant to these proceedings or the list of issues as identified. One handwritten letter dated September 2017 referred to bullying but made no suggestion that the allegations were connected to any protected characteristics relied upon by the claimant.

9. We concluded the evidence on day 3 and asked for written submissions from the respondent and from the claimant if he wished. He was also told he could make any submissions orally if he preferred. We asked the parties to make submissions on the list of issues and the other two matters identified - those were the time limit issue for some of the discrimination claims and the absence of an appeal against dismissal. The Tribunal deliberated on the fourth day and gave oral judgment on the fifth day.

Facts

10. These are the facts which we consider are relevant for the determination of the issues as set out above.

11. The claimant started his employment with the respondent on 14 September 2015. The respondent's factory manufactures suitcases and has a leather and a suitcase section. The claimant is Italian, has a diagnosis of Asperger's Syndrome, is gay/bisexual and was aged 32 (or 33) at the time of dismissal. The respondent is a medium sized company with about 100 employees. It has employees of many nationalities and ethnic backgrounds. The claimant's statement of terms of employment state that the handbook forms part of the employment contract and there are a number of references to the handbook in that statement. Although the claimant agreed he had signed the statement, he told us he had not seen the handbook. The Tribunal heard that it was readily available in the canteen but it appears not to have been sent to employees individually. The Tribunal cannot be sure whether the claimant has seen the handbook or not. He was certainly aware that there was a social media policy because he makes reference to it (see page 95). That handbook has a number of relevant policies. First there is a "Use of Social Networking Sites" policy (page 255) which reads as follows:

> *"Any work related issue or material that could identify an individual who is a customer or work colleague, which could adversely affect the company, customer or our relationship with any customer may not be placed on a social networking site. This means that work related matters must not be placed on any such site at any time either during or outside working hours and includes access by any computer equipment or mobile device."*

12. There is also a disciplinary process which includes examples of gross

misconduct including the following opening statement: *"However, any behaviour or negligence resulting in a fundamental breach of contractual terms that irrevocably destroys the trust and confidence necessary to continue the employment relationship will constitute gross misconduct."* There are then examples of offences which would normally be deemed as gross misconduct. It is said not to be an exhaustive list.

13. There is also a grievance procedure and a personnel harassment policy and procedure. At page 245 of the bundle, we also read what is said about pay reviews as follows: *"Pay is reviewed annually; however there is no guarantee of an automatic increase in your pay as a result of any review".*

14. All the evidence the Tribunal has heard was that the claimant was a good worker and we have seen a particularly good appraisal in October 2018. He had a clean disciplinary record.

15. He was moved to the job of head of kitting after he had had issues with a wrist injury in November 2018. Some issues then arose with people working in that department. It seems that the claimant was concerned that people in the section were not taking instructions from him and he asked for assistance with that which Ms Fisher and others gave him. The Tribunal do not accept that the claimant mentioned to anyone that there had been comments made about his age. The claimant's case before us is that various people in that department did make comments about his age. In the list of issues these were said to be comments such as "*you are just a boy*", "*you are not my boss",* "*shut up boy*" and "*shut up child*". None of this was mentioned in his email of 14 May after dismissal but he does appear to have raised it when there was a later grievance hearing. That records him as suggesting that "Chris" said: *"many times, 3 or 4 four times that I was too young and he was older than me and he couldn't take order or follow my organisation because he was more older than me".* At another point of the same hearing the claimant makes reference to "Roy": "*who think if he's older he can't work with young people*". At page 150 the claimant seemed to refer to "Jackie": "*and now I have to follow you you are young*". Another matter raised by the claimant at that meeting is somebody saying: "*Ah the golden boy*" (as in list of issues 1 d i).

16. Partly because the claimant refers to several people in the list of issues and elsewhere, the Tribunal has not heard directly from those individuals who are alleged to have made these comments. It is difficult for the Tribunal to say such comments were not made and it is possible that there was a reference to the claimant's age in the many discussions he seems to have had with those in the section. However, it is difficult to say what they meant without any other context and it is certainly the case that the claimant made no reference to them until well after his dismissal at the grievance hearing.

17. The claimant also says that comments were made about his sexual orientation. These appear at no. 3 of the list of issues. At b. and c. in that there is mention of "Stelita". The Tribunal understands this is a reference to "Stelika". There is no question that that employee left the respondent's employment in May 2017 and the claimant accepts that he may well have been wrong about the dates that he gave of 2018. The Tribunal accepts that some comments might have been made by "Stelika" to the effect as set

out in the list of issues and that they would appear to relate to the claimant's sexual orientation. They must have been made at some point before May 2017 and no issue appears to have been raised until the grievance hearing. Other matters raised as comments about sexual orientation are said to have been made in 2017 and 2018. These are less obviously discriminatory comments but there is reference to sex and family. It is right that these could relate to the claimant's sexual orientation but again it is hard to say without the larger context of any discussion whether they did amount to detrimental treatment. Again, the claimant made no attempt to complain about any of these comments until after his dismissal. The Tribunal finds that it is likely that some comments were made about sex and family matters which could well have related to the claimant's sexual orientation. The only letter the claimant could produce is a letter of September 2017 which says nothing about these matters but the letter of appeal sent in May 2019 does mention that there has been "*homophobia*".

18. On 8 April 2019 a letter was sent to all staff by the director, Mr Tsubota. In summary that letter says that the respondent had reached the difficult decision that it was unable to offer a pay increase. Staff were thanked for their hard work and "*deepest apologies*" were offered. Several staff were unhappy and on 11 April 2019 the claimant sent a letter to Ms Fisher which appears at page 74 of the bundle. Parts of this read as follows:

> *"I speak on behalf of my colleagues about our frustration for the missed increase of the salary.*
>
> *We know about the financial problem of the company but we want to be clear towards the company."*

19. It goes on:

> *"We announce the strike if any deal will be reached.*
>
> *The representative of this strike will be Salvatore Max Lorettu supported by the representance legally voted from our colleagues.*
>
> *The strike will be divided in three working days for two or three hours per day."*

20. Ms Fisher passed that letter on to Ms Driver who was the HR manager and she immediately arranged a meeting with the claimant and the two other employees, at least one of whom was an employee representative. These two other employees were "Grant" and "Mihai". Ms Driver made notes which we have seen at page 75. It was recorded that the claimant said he was "*talking for everyone in the factory*". He indicated what pay rise they expected and said that the respondent had seven days to reply or "*they would be going on strike"* and "*would take it to the newspapers*". Ms Driver is recorded as explaining that the decision that there could be no pay rise was after "*lengthy discussions*". She went on to mention the respondent was making a loss and the situation would be reviewed as soon as they could. She suggested the claimant and others got legal advice and call ACAS as she was worried "*they could mislead people in going into a strike*" and "*they were not able to strike and would face disciplinary action if they*

did". The claimant replied that he had taken legal advice, knows they can strike and "*not get sacked*". Ms Driver repeated that he was wrong and everyone needed to know that disciplinary action could follow. She repeated this after one of the other employees asked about distributing a letter. They agreed to meet again on the following Monday.

21. Ms Driver thought it might help for the director to write another letter explaining the situation and such a letter was sent, giving employees information about the financial situation and offering meetings to discuss the position. In the meantime, Ms Driver heard from Ms Fisher that she had heard from Ms Arbon that the claimant had been seen in her office (which he used sometimes to work on a laptop) printing letters for distribution to staff. She had seen the start of such a letter which is headed "*Dear Colleagues*".

22. This is likely to be the letter in the bundle at page 76 dated 12 April 2019. This informed readers about the meeting referred to above on 11 April. Amongst other statements, the claimant said he wanted to ensure them that "*everything its legal*" with a link to join Unite the Union which the claimant was a member of. He also says in the letter:

> *"During the meeting Lisa tried to scare us, she said that should be consequences for who attend the strike, but answered that the info she gave us, it was wrong because we are protected from the laws. Nobody could be fired or treated bad if we follow the legal rules".*

He went on to say he would "*become their voice*", that they could *"fight together*" and that the other two employees had set up a Facebook group. Ms Driver was concerned that there was ongoing disruption being caused by the claimant and others in work. She gave evidence, which we accept, that she walked around the factory and was aware of people talking in groups rather than working. She decided she might have to suspend the claimant and called him into another meeting on 15 April 2019.

23. Again, we have notes of that meeting (page 82). Ms Driver explained that it was an investigation meeting into whether to suspend the claimant. She said there was concern about the impact of him threatening strike action. The claimant appears to have understood that he was being suspended and asked about what impact there was. Ms Driver mentioned him printing letters and the claimant replied that he had not done it in work time. Ms Driver said he was handing out letters, stopping work to read and chatting. The claimant replied that he was still working and added: "*I am gay and autistic*" and *"I could go to the papers about you and ruin this company but I haven't*." There was also mention of a manager hearing the claimant saying to another employee that they didn't need to rush their work as there is no pay rise. The claimant replied that he didn't say that but that the employee didn't need to rush as they were being trained. After more short exchanges the claimant is recorded as saying "*suspend me, I don't care, you already made your decision. We are going on strike tomorrow*." Ms Driver recorded that the claimant was angry and raised his voice. The claimant accepts that he walked out of the meeting whilst Ms Driver was talking but denies being angry or raising his voice.

24. We accept Ms Driver's evidence that the claimant did raise his voice and we can see from the words he used that he was likely to be angry or, at the very least, agitated. The claimant left the meeting and two managers were asked to escort him out of the building. There is a dispute about what happened before the claimant left. Mr Wilcox told us that he stood in the doorway so the claimant could not go into the factory. We accept that he did not deliberately touch the claimant but there may have been some contact as the claimant was trying to push past Mr Wilcox. The claimant says he was asking to collect his medicine, but other witnesses only recall him asking for his belongings or his stuff. We accept the evidence of witnesses that the claimant was becoming increasingly agitated and he swore at Ms Fisher and said again that there was to be a strike. The claimant denies he was angry and says there must have been *"an assumption*" about him being angry and that is some way connected to his Asperger's/autism. The Tribunal finds there was no such assumption. The evidence is clear that the claimant did act in a way which appeared angry, raised his voice, swore at colleagues, threatened to go to the police and alleged an assault.

25. After the claimant had collected his things he left the premises and, at this point, he made the video recording. The Tribunal have seen that recording. The claimant is seen outside the respondent's building, mentioning the respondent company by name and two of their major customers. Managers became aware of the video because it was shown to them by other members of staff and they formed a reasonable belief that it had been placed on social media.

26. The respondent decided that there was no alternative but to suspend the claimant after this and a letter confirmed his suspension to allow an investigation following allegations of "*rude, objectionable and threatening behaviour and concerns with inciting industrial action*." The next day the claimant placed another video on TikTok (see page 188). The Tribunal has not seen what is said on the video but can see the still photos and the added text which asks people to share the video; makes reference to rights and pay rise; to managers attacking him and to his autism. There is no obvious reference in what we see there to the company or its clients.

27. Ms Driver started collecting statements from people about what they had seen during the suspension meeting and shortly afterwards. These included Ms Fisher, Ms Arbon and two other managers. She also prepared a witness statement for herself.

28. On 17 April 2019 the claimant was invited to a disciplinary hearing to be held on 25 April. The meeting was to be held with an independent consultant from Face2Face and the claimant was informed about that. Extracts of the invitation letter read as follows:

> *"1. It is alleged that you have taken part in activities which has caused the company to lose faith in your integrity, namely in relation to the breach of the social media policy. Further particulars being:*
>
> *(i) On 15/04/19, it is alleged that you published a video on*

Facebook detailing the names of clients of the company, these included Gucci and Tiffany

(ii) The above allegation resulted in bringing the company and their clients into disrepute

(iii) It is alleged that on 16/04/19 you brought the company into further disrepute by publishing comments on Facebook such as "I've been suspended from my job because I started to talk about rights and pay rise… three managers attack me."

2. *It is alleged that you have failed to devote the whole of your time, attention and abilities to the business and its affairs during your normal working hours. Further particulars being:*

   (i) On 11/04/19 it is alleged that you were seen accessing your work laptop to produce and print material threatening strike action.

   (ii) Further to the above allegation, it is alleged you then proceeded to issue this letter to colleagues when you should have been carrying out your contractual duties.

   (iii) On 15/04/19 it is alleged that you misappropriated company resources to produce a newsletter during your scheduled working time.

   (iv) It is alleged that you then proceeded to distribute this material to other employees. The above allegation caused unnecessary distraction and resulted in employees not carrying out their contractual duties.

3. *It is alleged that in April 2019, you have been encouraging unsanctioned industrial action to your fellow work colleagues by issuing letters and publishing videos on social media. This amounts to a gross breach of trust and confidence and could potentially lead to further disciplinary action within the workforce.*

4. *It is alleged that on 15/04/2019 after your investigation meeting with Lisa Driver you engaged in rude and objectionable behaviour by repeatedly trying to force your way past employees to gain access to the factory, used inappropriate language and behaved in an unprofessional manner."*

29. With that letter were copies of six witness statements, the newsletter, notes from the investigation meeting, a copy of the social media video and the letter threatening strike action. The claimant was warned that "*if the allegations are substantiated, we will then consider them to be gross misconduct under our disciplinary rules and your employment may be summarily terminated."*

30. The claimant replied in a long and detailed letter of 18 April 2019 (pages 95-99). For the most part the claimant attempted to explain his actions. He denied mentioning Gucci and Tiffany on the video and sought to explain

mentioning a strike with a reference to the word being used in bowling. He denied obstructing work and said "*when I gave the sheets to my colleagues, in was in break time, lunch time, before work*". The Tribunal noted that the claimant at the hearing appeared to deny that he had distributed this letter when he was cross-examining Ms Driver. It seems that here he does not suggest that he did not distribute the letter but takes issue with the allegation that it was in work time. The claimant denied using bad language and said that it was "*impossible"* that he had said they were to go on strike tomorrow. He raised issues about the statements he had been sent and accused some of the people of lying.

31. The disciplinary hearing was before a Mr Rudston, a consultant from Face2Face which is connected to Peninsula Business Services. He spoke at length with the claimant. The meeting was recorded and we have the transcript which was included in the case report. The hearing was between 11:32 and 01:14. In summary, the claimant said that he had spoken to the union and he showed Mr Rudston a video (page 114) which he said was on TikTok and then later said was on Facebook, TikTok and Instagram. The claimant, at this hearing, implied that this was a reference to the video of 16 April. The Tribunal find, given Mr Rudston's finding and what the Tribunal has seen, that there is a clear reference to the respondent and to the two well-known named customers, that it is a reference to 15 April video. The claimant also said that his Facebook account was private for family use but later mentioned that friends at work had access too. The claimant made reference to his autism and stated that this means he always follows rules. He gave a very long explanation about the day of his suspension saying that he started to be scared and nervous because people were aggressive to him. He talked about being grabbed by Mr Wilcox and he complained to the police. He explained why he was using the printer for work and said the letter addressed to "*Dear Colleagues*" was drafted to explain things to colleagues and explained he took medication for anxiety and that he committed all his time to work. He repeated that he was aware of the social media policy. When the claimant appeared to raise concerns about other matters, Mr Rudston told him he could raise a grievance.

32. After the meeting, Mr Rudston prepared a report indicating what documents he had read. He made findings that each of the allegations faced by the claimant were upheld summarising the basis for his conclusions. He then made recommendations, the most relevant being that the appropriate sanction was summary dismissal because the claimant's actions amounted to gross misconduct. Ms Driver read that report, discussed it with Mr Rudston and decided to accept that recommendation. The claimant was told that in a short letter (page 134) where he was also informed of his right to appeal. He was sent a copy of the case report and told that his employment would be terminated summarily on 7 May 2019.

33. The claimant replied by email of 14 May. This appears at page 136 of the bundle. At the beginning of that email, the claimant said: "*I appeal against your decision because I think it's unfair. This situation is being built to fire me. I want to explain you my points in this email.*" He then went on to mention things about the financial situation of the company, that Ms Driver and Ms Fisher had "*decided to push me away from the company because you thought I was dangerous for your business*". He raised that he had

never had disciplinary actions in "18 years" but that he started to have problems when he "*collaborated with Rachel*". He then mentioned matters of race discrimination and later makes reference to homophobia and "*discrimination for my peaceful behaviour*". He did not appear there to raise any question of age discrimination. Later in the email he returned to the question of the dismissal and said: "*You trusted the witnesses and never asked to yourself "but if they built his story because they don't like Max?".*

34. When Ms Driver received that email she believed that it contained a number of grievances and that she should look into that. She wrote a letter on 16 May inviting the claimant to attend a grievance hearing on 22 May. She summarised his issues including the claimant's allegations that he had "*suffered racism homophobia and discrimination every day*". The claimant attended a grievance meeting on that day and again we have seen the notes of what was discussed. These run between pages 138 and 156 and contain quite a lot of detail. In summary, the claimant informed Ms Driver that he had had a diagnosis of Asperger's and later said that the respondent knew about it because it was referred to in his CV (which the Tribunal has not seen) and that he had told Ms Fisher. The claimant had a prepared script and stated that he had seen people being treated differently because of their nationality. He concentrated on an issue of alleged racism several years before which is not referred to in the list of issues. The claimant raised other concerns, some of which could relate to protected characteristics but some of which have no such relationship. Some were alleged acts directed towards the claimant and some towards others. He mentioned a relatively large number of colleagues alleging he had been pushed to bully another colleague. As far as homophobia was concerned he suggested many comments over four years. He specifically referred to "Stelika". He then referred to the problems he had when he started as head of kitting which we have referred to above and for the first time suggested that this amounted to age discrimination. In this interview the claimant referred to having written 15 letters. Ms Driver asked the claimant a number of questions and appears from the note to have been very sympathetic to the claimant. At page 155 she also said this:

> *"Ok, so what we can do is obviously you have the right to appeal the decision to dismiss you and as I mentioned in my email there are two different issues to go through this which is how you feel you have been treated at the company but I also want to give you the opportunity to invite you back to discuss the reasons you feel the outcome to your disciplinary hearing that you feel was the wrong decision."*

There was then some discussion about the *"industrial tribunal*".

35. Later, Ms Driver received an email of support for the claimant from a work colleague who was one of the people the claimant had suggested she spoke to. The colleague said that she thought the dismissal was unfair. That email says nothing about any allegations concerning protected characteristics. Ms Driver had asked the claimant to send any other information he thought would help with the investigation and he sent copies of messages between himself and "Grant" stating that he had been "*pushed*" to do what he did and that he had been influenced by other people. At the Tribunal hearing, we heard from a former colleague, Rosy

Mannino, who has now been dismissed by the respondent by reason of redundancy. She also said that she felt the dismissal was unfair because others had been involved in the threats of strike action. She said she was aware of the claimant's autism but she said nothing else about the allegations of discrimination except, to a limited extent, about English people being treated differently from others.

36. Ms Driver continued to conduct an investigation speaking to twelve people including at least one other the claimant had suggested. Only one had any knowledge of a possible health condition such as Asperger's or autism although there was reference by some people Ms Driver spoke to about other health issues. None of the people Ms Driver spoke to had heard any complaints about age discrimination and the only incidence of race discrimination was about an incident not involving the claimant where someone was dismissed some years previously. There had been no reports from the claimant about homophobic comments. Ms Driver considered what she had heard from all these sources and decided that there were insufficient grounds to uphold the claimant's grievance. She wrote to tell him this between pages 186 and 187. She wrote that letter on 2 July 2019 telling him he had a right of appeal. He did not appeal the grievance outcome.

37. At some point, the claimant has claimed that the dismissal was the result of a conspiracy because Ms Arbon wanted his job. There is no basis for this belief as Ms Arbon's job was senior to the claimant's and there is no evidence to sustain any such belief.

38. There had been some communications between the claimant and Ms Driver after his dismissal, some of which appear to be without prejudice discussions. Ms Driver became aware that the claimant intended to take Employment Tribunal proceedings and he had begun his claim by 18 June 2019 having gone to ACAS on 17 June 2019. Nothing further was done about the appeal against dismissal. When Ms Driver was asked about this she said it was because the claimant had brought this Employment Tribunal claim.

The law and submissions

Unfair dismissal

39. The law which we are bound to apply in this area is set out in the Employment Rights Act 1996 (ERA) particularly Section 98. Section 98 (1) and (2) contain the potentially fair reasons for dismissal including "conduct". The burden of showing a potentially fair reason rests on the respondent.

40. As to the fairness or otherwise of the dismissal, if we are satisfied that there was such a potentially fair reason, Section 98 (4) states;-

> *"Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)-*

a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

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

41. We are also guided in our deliberations, because this is a conduct dismissal, by the leading case of British Home Stores v Burchell [1978] ICR 303 which sets out the issues which we should consider including whether the respondent had a genuine belief in the conduct complained of which was founded on a reasonable investigation and whether a fair process was followed. The investigation should be one which is fair and reasonable and the band of reasonable responses test applies to that part of the process as well as to the overall consideration of the fairness of the sanction (Sainsburys Supermarkets Limited v Hitt [2003] IRLR 23). We must also not substitute our view for that of the respondent, a point emphasised in Iceland Frozen Foods v Jones [1982] IRLR 439 (and re-affirmed in Foley v Post Office and HSBC Bank Ltd v Madden [2000] ICR *1283*). Rather, we must consider whether the dismissal fell within a range of reasonable responses.

42. We also taken into account the provisions of any relevant ACAS code, in this case, the ACAS Code of Practice1: Disciplinary and Grievance Procedures (2015). In particular, paragraphs 26 to 29 concerning the opportunity for employees to appeal, providing for appeals to be heard and for the employee to be informed in writing of the outcome.

43. The respondent asked the tribunal to consider the case of Westminster City Council v Cabaj [1996] ICR 960. That case stated that not all breaches of an agreed procedure would necessarily render the dismissal unfair. It was said that the relevance of any failure "*lies in whether that failure denied the employee the opportunity of demonstrating that the reason for his or her dismissal was not sufficient".* He also submitted that the case of Sharkey v Lloyds Bank plc [2015] UKEAT/0005/15 states that the Tribunal should not consider procedural issues in a vacuum but they should be considered alongside the reasonableness of the decision to dismiss.

Discrimination claims

44. The discrimination claims are brought under Equality Act 2010 (EQA). The relevant sections are section 13 for the direct age, sexual orientation and race discrimination claims; section 26 for the harassment related to race claim; section 19 for the indirect race discrimination claim (which was really not pursued) and section 15 for the something arising in consequence of disability claim. The tests to be applied are reflected in the list of issues above. The Tribunal's primary task is to make findings of fact and apply those facts, drawing inferences where appropriate, to the tests.

45. All discrimination claims brought need to be considered in line with the burden of proof provisions in s136 EQA. This 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"*. The burden will then shift to the respondent to show there was no discrimination. The tribunal is mindful that it is unusual for there to be clear, overt evidence of unlawful discrimination and that it should consider matters in accordance with S136 EQA. In addition, the tribunal accepts the guidance of the Court of Appeal in Igen v Wong [2005] IRLR 258. This may be considered through a staged process. We first have to make findings of primary fact and to determine whether those show less favourable treatment and a difference in the protected characteristics relied upon. The test is: are we satisfied, on the balance of probabilities, that this respondent treated this claimant less favourably than he treated or would have treated an employee of a different age, sexual orientation or nationality. When establishing whether there has been less favourable treatment, comparisons between two people must be such that the relevant circumstances are the same or not materially different.

46. At the next stage, we look to the employer for a credible, non-discriminatory explanation or reason for such less favourable treatment as has been proved. In the absence of such an explanation, proved to the tribunal's satisfaction on the balance of probabilities, the tribunal will conclude that the less favourable treatment occurred on the grounds of the applicant's protected characteristics. Where the tribunal is considering a hypothetical comparator, the stages tend to merge or become indistinguishable.

47. The claimant has also brought a claim for disability discrimination. He first has to show he was a disabled person at the material time. This is not disputed by the respondent. He then has to show, for the section15 EQA claim which he brings that the things as set out in paragraph 8 b above, arose in consequence of his disability. In this case, that there is a "disconnect between how he feels and how he presents his emotions". He then has to show facts from which the Tribunal could conclude, in the absence of any other explanation, that the respondent treated him unfavourably because of that something arising. If the claimant shows that, the Tribunal will look to the respondent for an explanation as to whether it had a proportionate means of achieving a legitimate aim and the extend of its knowledge of the disability.

48. Section 123 EQA provides that a discrimination claim may not be brought after the end of three months starting with the date of the act to which the complaint relates or such other period as the employment tribunal thinks just and equitable. This provision is very similar to that provided by the previous anti-discrimination legislation. In British Coal Corporation v Keeble 1997 IRLR 336 it was said that the discretion is as wide as that given to the civil courts by section 33 of the Limitation Act 1980. The court is required to consider the prejudice which each party would suffer as a

result of granting or refusing an extension and to have regard to all the other circumstances, in particular the length of and reasons for the delay, the extent to which the cogency of evidence is likely to be affected by delay, the extent to which the party sued has cooperated with any requests for information, the promptness with which the claimant acted once he knew of the facts giving rise to the cause of action and the steps taken by the claimant to obtain appropriate advice once he knew of the possibility of taking action. However, it is said that there is no legal requirement on a tribunal to go through such a list in every case provided of course that no significant factor has been left out of account by the tribunal or judge in exercising its discretion. Robertson v Bexley Community Centre [2003] IRLR 434 reminds tribunals that the discretion to extend time should be exercised as an exception rather than the rule.

49. The claimant said that any delay in presenting his claim was because of his mental health. He pointed to medical evidence in the bundle but there was none with respect to the period relevant for the delay April and June 2019.

Conclusions

50. The Tribunal decided to consider the unfair dismissal claim first as the discrimination allegations touch only very lightly on dismissal, there being no allegation that the dismissal itself was an act of discrimination. We look first then at the list of issues at Issue 9 which is whether the respondent has shown a potentially fair reason for dismissal. The Tribunal has decided that the respondent has shown that the reason for dismissal was the claimant's conduct. There was a combination of matters that led to the conclusion that there had been misconduct. The allegations against the claimant are for the most part supported by our findings of fact. We accept that the video the claimant made and published on social media breached the respondent's policy. Even if the claimant was not aware of the details of that policy, it should have been obvious to him that those sorts of comments about his employment and clients being published was misconduct. We have also found that he used inappropriate language and acted aggressively and that he had engaged in encouraging his colleagues to consider strike action which would have been in breach of their contracts.

51. The Tribunal is not convinced that there was any particular misconduct with the printing of letters at work as that might have taken a very short space of time. Nor can the Tribunal be sure that the claimant wasted any company time in those activities. However, we do find that he distributed the material to at least some of his colleagues. We understand that there were about 30-35 colleagues who were involved in the objections to the lack of a pay rise. Although the claimant has suggested that there was some sort of conspiracy by Ms Arbon, we have found no evidence to that effect and are still rather mystified by the claimant's belief in that aspect. The reason for dismissal was that the claimant had committed acts of misconduct and really there was no other sensible reason suggested.

52. We then turn to the question of whether the respondent had a genuine belief in the misconduct. The Tribunal finds that it did. They had the letters

from the claimant and what he said at two meetings, both of which make reference to strike action. The respondent had also witnessed his attitude at the suspension meeting and after, acting aggressively and using inappropriate language and the making of videos and use of social media. These all amount to a genuine belief in the misconduct.

53. We turn to the question of whether there was a reasonable investigation and found that the investigation was reasonable in all the circumstances. A number of people had provided statements and documents were considered as well as the claimant being spoken to at length.

54. The Tribunal does have to consider whether the procedure used by the respondent was a fair one. For the most part there was no complaint made nor is there any particular difficulty with the procedure. The claimant was sent all the relevant documents and was called to a meeting to explain his position. The allegations against him were very clearly set out. He was given an opportunity to send any information in that he wanted to.

55. The procedural difficulty really relates to the absence of an appeal hearing and outcome. The respondent faces a real problem here. Ms Driver had quite properly investigated the claimant's grievance about alleged discriminatory conduct. However, that did not include, again quite properly, his complaints about the dismissal itself. In spite of the statement that there would be a hearing about that appeal, it never occurred. The claimant's complaints were therefore never answered and the Tribunal cannot find that the fact that he had brought Tribunal proceedings is a suitable explanation. Of course, where someone brings a complaint to the Employment Tribunal that might make considering their appeal rather different than in other circumstances, but Ms Driver had dealt with the grievance and given an outcome after the Employment Tribunal claim was made and there was really no reason for not proceeding with the appeal. Although the claimant did not press this point, the Tribunal finds that it is a significant procedural defect and it leads us to the conclusion that we cannot say that the dismissal was procedurally fair. The ACAS Code and the respondent's own procedures envisage an appeal should be allowed and considered and it did not happen.

56. However, we do still need to consider whether dismissal was in the range of reasonable responses. We find that it was. This was serious misconduct and the claimant has failed to show any real understanding of the effect of his belligerent conduct on his colleagues or on his employers. His approach appears to have been to try to shift blame onto others and to seek to confuse the respondent with lengthy and obscure explanations. The dismissal is unfair only because of the lack of an appeal hearing and outcome.

57. We turning then to the discrimination claims. The Tribunal must first consider whether those issues between 1-7 which are age, race and sexual orientation discrimination can be determined. That is, have they been presented in time? The short answer is that they have not, the dates provided being either earlier than or between November 2018 and February 2019 (which was only about a failure to act). The claimant's approach to

ACAS on 17 June and the claim form presented the next day on 18 June, means that those claims have been presented out of time. The burden is on the claimant to provide evidence that it would be just and equitable to extend time. He has failed to do that. Only when asked, did he provide an explanation about his mental health but that is insufficient for our purposes. He has provided no medical evidence in relation to the time period we are examining, namely between May and June 2019. There is a clear prejudice to the respondent to have to answer out of time claims and there is no evidence that this is one of those exceptional cases where time should be extended. It is not just and equitable to extend time and there was no argument that the conduct extended over a period to bring the claim in time. Those claims cannot therefore be determined.

58. For completeness, we should say that the majority of those claims would have failed for other reasons. Those that gave us more pause for thought than the others were some of the alleged references to age and to sexual orientation, but for the reasons given we do not find, even if they had been in time, that the claimant would necessarily have succeeded in those claims. This is because there is very little evidence of the context in which they arose and we find that the claimant was unconcerned about them at the time and raised no issues.

59. The indirect race discrimination claim, set out in the list of issues at paragraph 4, is completely hopeless. The Tribunal has had no evidence whatsoever about a difference in pay or any offer of pay to the claimant and we accept that Jo Fisher did not exclude the claimant from meetings. That claim had no chance of success at all.

60. The only other discrimination claim which is arguably in time because it is connected to matters close to the dismissal is one for disability discrimination. The respondent has accepted that the claimant meets the definition of disability and we proceed on that basis although we have very limited evidence on whether it has substantial adverse effects on his normal day to day activities.

61. In any event, the claimant does not succeed on this claim because of our factual findings. Although the claimant may well experience a disconnect between how he feels and how he presents, we do not find that the respondent made any assumptions about him being aggressive in the suspension meeting and after. The claimant was aggressive and used inappropriate language. The respondent had very limited knowledge, if any, about his condition. It's response to his behaviour had nothing to do with any assumptions that they made about his Asperger's or autism. The claimant cannot succeed in his disability claim.

Remedy

62. The employment judge gave a short oral judgment. We then went on to consider remedy. I explained to the parties about how the case of Polkey v AE Dayton Services Limited [1987} UKHL 8 affected the outcome and the issue of a potential reduction for contributory conduct.

63. We heard very short evidence from Ms Driver and the claimant on this point. Ms Driver stated that she would have asked Face2Face again for a consultant to be provided for any appeal and that it would not have been Mr Rudston. The claimant stated that he would have stated, at any appeal hearing, that his dismissal was connected to discrimination, would have reminded them of his good appraisal and that the managers were lying about him.

64. We then heard submissions. In brief the respondent submits that the Polkey reduction should be 100% and, if that is not the case, a similar reduction for contributory conduct. The respondent submits it should apply to both the compensatory award and the basic award. The claimant submitted that there should be no reduction, that he would have succeeded on an appeal and that he was not blameworthy for any of the conduct.

65. The Tribunal deliberated and decided that on the evidence before it the claimant would have had no chance of overturning the decision to appeal. This is partly because he has failed to take any responsibility for any of his conduct and shown no remorse. In all the circumstances, including his insistence that managers had lied (when there is no evidence to that effect) he would not have been reinstated. We therefore reduce any compensatory award by 100%.

66. In the alternative, and if we are wrong about that, we would have reduced the compensatory award by 75% for contributory conduct. This is serious conduct which affected the trust and confidence the respondent had in the claimant.

67. Finally, we considered the basic award. We have decided to award the basic award as we do not accept that the claimant contributed to the respondent's failure to carry out an appeal. It is agreed that the gross weekly wage was £397.22, we multiply that by 3 and it therefore basic award is awarded in the sum of £1,191.66.

Employment Judge Manley

Date: …1st September 2021….

Judgment sent to the parties on
17th September 2021
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THY
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For the Tribunal office