EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondents**
Mrs F. Atif		Dolce & Gabbana UK Limited

Heard at: London Central Employment Tribunal

On: 7, 8, 9 July 2021, (5 August 2021 & 27 September 2021 in chambers)

Before: Employment Judge Adkin
Mr D Schofield
Mr J Carroll

Representations

For the Claimant: Claimant in person
For the Respondent: Mr C. Howells, Counsel

JUDGMENT

(1) The Claimant's claim of unfairly dismissal pursuant to section 98 of the Employment Rights Act 1996 is not well founded and is dismissed.

(2) The Claimant's claim of direct race discrimination brought under the Equality Act 2010 is not well founded and is dismissed.

REASONS

Procedural matters

1. This hearing was initially listed as a remote hearing by CVP but became a "hybrid" hearing in the sense that the Tribunal members were present

physically in the Tribunal building together with the Claimant, Counsel and first witness for the Respondent.

2. The other two witnesses attended remotely by CVP.

3. A number of hours were lost on the first day due to the technological problems which caused the change from remote to hybrid hearing. Unfortunately we were not able to sit on the Monday which had been allocated to the hearing. The parties cooperated in keeping to a timetable and we had submissions in writing with the parties given the opportunity to put in further submissions in response.

The Claim

4. The Claimant presented her claim on 3 June 2020.

5. An agreed list of issues is attached as an appendix to this claim.

Evidence

6. We received witness evidence from the Claimant, Ms Monica Di Ruocco the investigator, Ms Federica Bianchini the dismissing manager and Ms Elisabetta De Ciutiis who heard the appeal.

7. We received a bundle of 439 documents to which some further documents the inclusion of which was disputed by the Respondent, were added at the request of the Tribunal.

Findings of fact

Claimant's role

8. On 6 January 2014 the Claimant began employment as a Sales Assistant in the Respondent's concession in the Harrod's department store in Knightsbridge. The Claimant is Algerian and speaks Arabic. The ability to speak Arabic in her job was an advantage as many of the Respondent's customers speak Arabic as a first language.

9. On 1 February 2019 the Claimant's job title changed to Client Advisor. It is her contention that it should have changed to Senior Client Adviser corresponding to her success in the role and her seniority. This did not happen, which plainly upset the Claimant and indeed in her claim form she attributes the circumstances of her dismissal to her asking about her title.

Absences

10. At pages 183-195 Respondent has produced a list of the Claimant's paid sick absences. In every single case the Claimant took a sick day before, during or absence for other reason, e.g. days off or annual leave:

10.1. Monday 22 January 2018 during a period of other leave (including annual leave taken in lieu) from 18 January – 24 January 2018;

10.2. Friday 6 April 2018, followed by an absence 7 April – 11 April 2018;

10.3. Monday, 25 June 2018, followed by an absence 26 – 27 June 2018;

10.4. Monday, 23 July 2018, followed by another absence 24 July 2018;

10.5. Tuesday 11 December, following on from an absence on 10 December 2018;

10.6. Friday 14 December, before an absence on 15 December 2018;

10.7. Saturday, 22 December 2018, before a lieu day on Sunday 23 December;

10.8. Tuesday 5 February 2018, following on from an absence on 4 February 2019;

10.9. Thursday 16 May 2019, following on from absences on 14 – 15 May 2019;

10.10. Tuesday 4 June 2019 before absences on 5 – 6 June 2019;

10.11. Tuesday 30 July 2019 following on from an absence on 29 July 2019;

10.12. Monday, 21 October 2019, following on from an absence on 19 – 20 October;

10.13. 2 December 2019, sickness day after a holiday.

Return to work procedure

11. The Respondent's sickness absence policy provides as follows:

> "17.1.3 At or following the return to work interview, the employee's attendance record will be reviewed. Where an employee's attendance record:
>
> (a) shows that the employee has been absent through ill health, sickness or injury on more than 4 occasions or for more than 7 working days (whether cumulatively or consecutively) in any 12 month rolling period; or
>
> (b) is significantly worse than those of comparable employees; or
>
> (c) shows a pattern of absence, e.g. Mondays, Fridays or a pattern which suggests abuse of the Company sick pay qualification period;

> the Company may (at its discretion) require the employee to attend an informal meeting to discuss their attendance record or to attend a formal meeting under the procedure set out below.
>
> [emphasis added]

12. The Claimant expressed doubts about whether the return to work interviews took place at all. We have been provided with evidence of the return to work interviews which appear in the agreed bundle at page 128 through to 141. All but one forms are signed by both the Claimant and the relevant manager. It is fair to say that the detail contained within these forms is very limited and summarises the reason for absence in just a few words. We note that in both the investigation and disciplinary meetings the Claimant referred to her manager Paola Habte discussing with her an apparent pattern of absence upon her return on a number of occasions.

Career development complaint

13. On 4 July 2019 the Claimant complained to Ms Silvia Corbella that Mr Dario Rastelli, Store Director for the Harrod's concession had failed to take any action about her requests for career development.

Complaint about Ms Habte

14. On 16 October 2019 the Claimant complained to Ms Di Ruocco about her line manager Paola Habte's treatment of her, in particular by reference to the allocation of late shifts, and further that Ms Habte was making complaints about her now that she was seeking a promotion. She complained that no Arabic speakers have lasted within the team. She alleged that Ms Habte had turned the team against her. She complained about Dario Rastelli, the Store Manager who would not arrange for the Claimant to have an appointment with head office to discuss her title and his conduct which might be described as micromanagement. She was anxious to be promoted to become Senior Sales Assistant.

Leave over New Year period

15. On 19 November 2019 the Claimant requested leave, including 31 December 2019. After she was refused this request she told colleagues that she would take sick leave.

16. On 20 November 2019 the Claimant complained to Silvia Corbella, European Retail HR Manager about discrimination as a result of being placed on the shift rota for both Christmas and New Year, in circumstances where other some colleagues had been given leave for both. The email does not specify that it is discrimination relating to a particular characteristic.

17. On 22 November 2019 Ms Corbella confirmed receipt of the Claimant's complaint of 20 November, making the observation that it was a serious allegation and asking her if she wished to put this forward and on what basis. It appears that this was never responded to by the Claimant.

18. On 10 December 2019 the Claimant complained to Ms Corbella and Ms Di Ruocco about alleged discrimination by Ms Yang Finglass with the allocation of shifts during the Christmas period. She complained that Ms Finglass was using her position of power within the company unfairly and unprofessionally, giving herself and others time off. She says that over the festive season dates like Christmas Eve, Boxing Day, New Year's Eve should be distributed equally between all team members. She describes this as discrimination, but did not identify a particular protected characteristic.

19. Ms Corbella replied asking the Claimant to address her concerns about the rota to the Store Directors and to clarify the basis for her discrimination claim.

Concerns raised about Claimant's sick days

20. On 21 December 2019 Ms Julia Barnstable, Deputy Store Director emailed Ms Habte and expressed concerns about C's repeated requests about the number of sick days she had remaining, specifically that she had twice asked how many sick days she had taken and how many "she has left". Ms Habte replied a few minutes later with her own concern about the Claimant seem to believe that she should get an extra day of sickness, which she felt was a suspicious question to ask. She indicated that sickness from that date of the end of the year would be monitored.

21. Ms Barnstable replied saying "I agree it's very suspicious for someone to be asking how many sickness they 'have left' as sickness is not a leave balance to be taken in full, only as needed".

22. On 30 December 2019 Ms Habte replied, this time copying in Ms Rastelli, Ms Corbella, Ms Di Ruocco and Ms Finglass as follows:

> "Unfortunately Fadila [Claimant] called sick today, this is after she enquired in regards to her sickness as you can see from the below emails. I informed her on 26 December that she had used 6 days of sickness this year.
>
> She had been asking to have today and tomorrow off since the start of the month and the rota was change as to accommodate her request for tomorrow, it wasn't however possible to also give her today off, therefore to date sickness is highly suspicious."

23. On 4 January 2020 the Claimant returned to work.

Grievance

24. On 6 January 2020 the Claimant complained to Ms Corbella, Ms Di Ruocco and Mr Rastelli about Ms Habte's treatment of her since 4 January 2020. She reported being off sick from work since the 30/12 with very bad severe cold and fever also a cough where she felt her body was "about to collapse". She felt disappointed that no one had asked her how she was feeling when she returned to work on 4 January. She said that Ms Habte accused her of breaking the printer and would not hear her explanation. She complained about Ms Habte's general attitude, which was toward staff generally and in particular herself. He

claimed that the cold working environment in a cold stockroom had aggravated her health condition. On the following day the Claimant claimed that Ms Habte started to speak to her critically about the Claimant's complaints about the cold stockroom. She wrote that she felt belittled, shamed and very, very upset.

Investigation

25. Ms Corbella requested that the Claimant's sick absences be investigated. Ms Di Ruocco was tasked with this investigation. On 13 January 2020 Ms Di Ruocco carried out investigation meetings with three witnesses:

25.1. Ms Susan Muu who gave evidence that the Claimant had texted her on 1 January 2020 saying she had "fever and flue" and that she was really sick. She was angry and upset ("fuming") because of the New Year rota which was released on 19 November and at the end of November 2019 the Claimant had said that she was going to call in sick. She confirmed that the anonymous witness (below) was there;

25.2. Ms Finglass gave evidence that the Claimant had requested 31 December off on the belief that 1 January was the day on which double pay was paid. She said that the Claimant had asked her 3 or 4 times about how many sick paid days she had left. She had not heard herself but heard others mentioning that the Claimant would say that she was going to call in sick, including the anonymous witness (below). She confirmed that the Claimant had not originally requested 30 December as a day off. She offered the view that a few of her absences are "frequently connected with days off". When she viewed the absences she identified a pattern.

25.3. An anonymous witness, who gave evidence that the Claimant was asking how many sick pay days she has left in year, one or two weeks before 30 December. This witness said that the Claimant had complained about not having 31 December off. She said that after seeing the rota the Claimant said that she was tired of the way they treated her and that she would be calling sick 31 December, this was at the end of November. This witness also said:

> "I really love Yang and Paola and want to help Yang because she went through t[h]ough time with [the Claimant]. Probably it is because Yang got promoted. Fadila is bullying Yang in my eyes. It makes me feel sad. When Yang asks something to her, Fadila is aggressive, takes her to the back. They are her managers. When Fadila is working the corner has not got a good atmosphere and we don't work well. We are not afraid but it is a heavy atmosphere. It's not good especially for the new joiners."

26. On 14 January 2020 the Claimant attended an investigation meeting with Ms Di Ruocco. She admitted that she had taken seven days sickness the previous year including 30 December. She suggested that she had taken maybe 6 days the previous year. She said "I don't want to go out of my limit". She said "if you are sick, you are sick" a phrase that she used repeatedly throughout the internal process and the hearing in front of the Tribunal.

27. When provided with documents she acknowledged that she had taken 7 days in 2019. When confronted with the suggestion that she was deliberately taking sick days off in a pattern associated with leave for other reasons she pointed to her manager Ms Habte's pattern of absence, saying "she is the one doing it. Every time she goes on holiday or day off, she calls in sick.". She went on to say [268]:

> "…as far as I know people call in sick – general[ly] speaking – to holidays. My life and my health is very important. I don't like to calculate. You want me to confirm I did [it] in purpose. I already had this conversation with Paola many times, every time I come back from sickness. Because she is the one doing it. Every time she goes on holiday or day off, she calls in sick.
>
> I entitled to call in sick. The company gives you 7 days a year. I entitled to use them when I'm sick."

28. On 16 January 2020 the Claimant requested mediation with Ms Habte. This request was granted on 29 January 2020.

29. According to a witness statement produced at a later stage by Ms Di Ruocco, she had an informal conversation with the Store Manager Mr Dario Rastelli, who told her that he wasn't sure exactly which dates she had requested off although he remembered it was 31 December 2019. He said the communication had come through Ms Habte.

30. Ms Di Ruocco says that she had not initially intended to interview Ms Habte given that she'd been off sick at the time of some material events. Following on from her discussion with Mr Rastelli, on 28 January 2020 Ms Di Ruocco had an investigation meeting with Ms Habte the Claimant's line manager [269] who gave an opinion when asked that there was a pattern in the Claimant's sick absence. Ms Habte's evidence contained a mixture of matters which suggested guilt on the part of the Claimant and some points which tended to point the other way. It was her opinion that the Claimant had planned to take sick absence, but she acknowledged that the Claimant had in fact been coughing and sneezing from 26 December onward. She doubted that she was significantly worse on 30 December or 1 January. Her evidence was that the Claimant had asked "do I still have holidays left?", rather than mentioning sick pay as she had done in an earlier contemporaneous email.

31. As to which date the Claimant had requested off Ms Habte suggested that it was 30-31 December 2019. Ms Di Ruocco explained to her that he only remembered it was 31 December.

32. Ms Habte discussed the sickness absence of another colleague and also her recent own personal sick absence adjacent to holiday which was related to a hospital admission for surgery. Ms Habte hand wrote an addition "I didn't call sick after holidays in many years of service. Please feel free to check."

Absence of other colleagues

33. The Tribunal has been provided with the anonymised attendance records of colleagues W, X, Y and Z. The sick absences of the wider team is something that was investigated as part of the investigation, for example in the interview with Paola Habte.

34. Employee W's record from January 2018 to December 2019 shows a one day sick absence in January 2018 and unconnected to another absence; a two-day absence in November 2018 not connected to another absence; a two-day absence in May 2019, the day before a day off on a Sunday. There is one absence next to another absence. In short this does not suggest evidence of any pattern of absence.

35. Employee X's record shows a three day sick absence at the beginning of March following on from a two-day absence; a one day absence in July 2018 following on from a week of absences for other reasons; a one day sick absence following on from a day off the day before in September 2018; a three sick absence Thursday-Saturday in September 2018 and the following Monday and Tuesday, with a day off on the intervening Sunday and falling before holiday and lieu absences running from the Wednesday to the following Sunday; a sick day off on Friday 2 November 2018 falling before a two-week holiday; single day off in June 2019, unconnected to any other absence; two sick day absences in June 2019 sandwiched by leave on the Monday and Thursday of the same week; a period comprising 8 days lieu, holiday and days off, followed by 10 days sick days, followed by further 9 days holiday and lieu days in December 2019. In short there is a clear pattern in the case of this employee of taking sick absences absence adjacent to absences for other reasons. The final absence is relating to a hospital admission, but the remaining sick absences are unexplained. This employee was treated as 'long term sick' for absences in 2019.

36. Employee Y's record only runs for two months. It shows a sick day a Saturday immediately before day off on the Sunday and a single absence on Thursday, 12 December 2019. This short record does not suggest any pattern of absence.

37. Employee Z's record commenced on 1 May 2019. It shows a 4 day sick absence running immediately after a 10 day absence for holiday/lieu days in June 2019; a 3 day sick absence sandwiched between two days off in July 2019; a single unpaid sick absence in August 2019; two days unpaid sick absence in December 2019 sandwiched between 3 days off for other reasons. While this record is short, there is arguably a pattern connected to other absences, although it is notable that some of the sick absences are unpaid.

38. In conclusion, within the small team it seems purely based on the records supplied that the Claimant and two other colleagues had a pattern of taking sick absences next to absences for other reasons. It is notable however that unlike the Claimant, who took seven days' sick absence in both 2018 and 2019, none of the Claimant's colleagues did. The significance of seven days is that this was the amount of annual paid sick pay.

39. The Tribunal raised with the Respondent whether non-redacted versions of these records could be obtained, so that it was possible to understand who each of W, Y, X and Z were. The Claimant however, indicated that she did not need for this information to be released.

Disciplinary hearing

40. On 7 February 2020 the Claimant was invited to attend a disciplinary hearing.

41. On 11 February 2020 the Claimant confirmed her willingness to attend mediation with Ms Habte.

42. On 12 February 2020 the Claimant attended a disciplinary hearing . She was represented by Mr Frederick Adaga, a union representative. Ms Federica Bianchini, Global HR Manager, was hearing the disciplinary and Ms Di Ruocco the investigator was taking a note, although not according to the notes taking an active role in this hearing.

43. In the disciplinary the Claimant admitted that she had asked her manager Paola Habte regarding holidays and sickness [276]. She justified this on the basis that "it is always wrong and she makes the count wrong" [277].

44. She initially denied asking about her remaining sick days balance, but as the hearing went on she changed her position and suggested that it was the norm generally to do this, not just herself. She said "What is the problem? We always ask about it" [277]. She said that it was a normal question to ask about the number of sick days left. She said "Everyone talks about it. My colleagues mention it when they go out of Company sick pay balance." [278]. When specifically asked if colleagues had asked managers, although the Claimant was initially reluctant to spy on colleagues she said "I did hear them saying 'can you tell me how many sick allowance I have'".

45. The Claimant acknowledged that if you were to take advantage of the sick pay policy "you should feel ashamed" [279].

46. As to the operation of the sickness and absence policy and the return to work procedure, the Claimant said as follows:

> "Paola takes me on the side and asks me why I am calling sick after holidays even though when I come back I still have symptoms. But Paola accuses me and I ask her to notice my symptoms. Paola does the same."

47. The Claimant continued to suggest as she had done in the investigation meeting that Paola Habte had herself taken sick leave adjacent to holiday. Ms Bianchini tried on several occasions to pin the Claimant down to whether she was alleging that Ms Habte was actually abusing the sick leave policy herself, the Claimant declined to go that far.

48. Later on in this meeting the Claimant reiterated that she felt that she was discriminated against and treated unfairly in the allocation of the rota for Christmas 2019/New Year 2020.

49. Finally, toward the end of the meeting [286] she acknowledged that there was a pattern in sick absence, but she reiterated that she was sick.

Mediation meetings

50. On 14 February 2020 there was a mediation meeting between the Claimant and Ms Corbella. There was also a mediation session between the Claimant and Ms Habte.

Dismissal

51. On 10 March 2020 the Claimant was dismissed with immediate effect for gross conduct.

52. The Respondent concluded that that the Claimant had "systematically abused" the Sickness Absence Policy. This was based on (i) a clear and consistent pattern of sick days linked to holidays, days off or days in lieu and (ii) consistently taking 7 days sick absence each year since January 2018, corresponding to the number of days eligible for sick pay; (iii) stating to colleagues and intention to take a sick day on 31 December 2019 when a request for leave have been refused.

53. Ms Bianchini acknowledged that the sick absence on 30 December – 4 January 2020 was in fact genuine sick absence, but that did not detract from the finding that the Claimant had decided in advance to take 31 December sick at a time when she would have no reason to believe that she would be ill.

54. As to the Claimant's contention that there was widespread 'abuse' of sick pay, Ms Bianchini said that the rotas of other colleagues would be considered separately and if warranted disciplinary action taken.

55. As to the grievance raised on 6 January 2020, Ms Bianchini took account of the reference to being sick with severe cold and fever, but the remainder of this document she said would be dealt with separately by HR as part of a grievance process.

Appeal

56. On 16 March 2020 the Claimant appealed against the disciplinary outcome in a three page appeal document.

57. On 5 May 2020 the Claimant was invited to attend an appeal hearing in a letter from Ms Corbella. In the invitation to this hearing Ms Corbella indicated that matters outstanding in respect of the grievance should be dealt with at the conclusion of the disciplinary process i.e. the conclusion of the appeal.

58. The appeal hearing took place virtually by Microsoft Teams, as this occurred in the first Covid-19 pandemic lockdown in the UK. The hearing took place in two parts, one on 14 May 2020, the other on 20 May. During the appeal hearing the Claimant mentioned that she had told Ms Corbella at the conclusion of the mediation that she still wanted the grievance investigated.

59. The appeal officer was Ms Elisabetta De Ciutiis, HR Director for Retail Europe, who carried out the subsequent investigation.

60. On 4 June 2020 Ms De Ciuttiis obtained a statement from Ms Corbella.

61. The following day she obtained a statement from the investigator Ms Di Ruocco. On 12 June 2020 the Claimant was provided with copies of these statements.

62. On 26 June 2020 Ms De Ciuttiis obtained a statement from Ms Finglass.

63. On 29 June 2020 Ms De Ciuttiis interviewed Ms Habte. These statements were forwarded to the Claimant on 6 July 2020.

Claim

64. On 3 June 2020 the Claimant issued a claim with the Tribunal.

Appeal outcome

65. On 8 July 2020 the Claimant emailed Ms De Ciuttiis to complain about a delay in concluding her appeal, an alleged GDPR breach and the credibility of the additional evidence served by Ms De Ciuttiis. On the following day she submitted further grounds of appeal. Ms De Ciuttiis invited the Claimant to agree the minutes from the appeal hearing, but the Claimant declined to agree the minutes.

66. On 1 September 2020 the Claimant sent a further email to chase regarding her appeal outcome.

67. On 3 September 2020 the Claimant was provided with an appeal outcome letter in which the appeal was dismissed. In the same letter Ms De Ciuttiis dealt with the grievance by noting that during the appeal hearing the Claimant said that she had made clear to Ms Corbella that she wanted to pursue the grievance procedure when the mediation process failed. Ms de Ciutiis concluded

> "based on the existing evidence and additional information given by Silvia [Corbella] and Paola [Habte] (the latter of which I note you refute) who were both present at the mediation, I'm satisfied the right approach was taken by Federica [Bianchini]".

LAW

68. We are grateful to both parties for their opening and closing written submissions.

Unfair dismissal

69. The Respondent has the burden of showing that the sole or principal reason for dismissal related to the conduct of the employee (s.98(2)(b) ERA 1996).

70. The Tribunal must then decide whether in the circumstances the Respondent acted reasonably or unreasonably in treating that reason as a sufficient reason for dismissal (s.98(4) ERA 1996). In deciding this question the Tribunal must not substitute its own views of the facts for that of the employer.

71. The law on dismissal for misconduct is set out in a three stage test in the well-known case of *Burchell v BHS* [1978] ICR 303.

72. As to the sanction of dismissal, this was considered by the Court of Appeal in *British Leyland (UK) Ltd v Swift* [1981] IRLR 91, CA, where Lord Denning MR stated: 'The correct test is: Was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might reasonably have dismissed him, then the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which one employer might reasonably take one view: another quite reasonably take a different view.

73. In *Iceland v Jones* [1983] ICR 17 the EAT confirmed that (1) the starting point should always be the words of section 98(4) themselves; (2) in applying the section an industrial tribunal must consider the reasonableness of the employer's conduct, not simply whether the Tribunal considers the dismissal to be fair; (3) in judging the reasonableness of the employer's conduct the Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer; (4) in many (though not all) cases there is a band of reasonable responses to the employee conduct within which one employer might reasonably take one view, another quite reasonably take another, it would only be if the decision to dismiss is outside of this band that it would be unfair.

74. In *Sainsbury's v Hitt* [2002] EWCA Civ 158 the Court of Appeal held that band of reasonable responses test applies to the procedure followed by an employer as well as the substantive decision to dismiss.

Direct discrimination

75. We have considered the guidance set out in *Barton v Investec Henderson Crosthwaite Securities Ltd* [2003] ICR 1205, EAT, as approved and revised by the Court of Appeal in *Igen Ltd (formerly Leeds Careers Guidance) and ors v Wong and other cases* [2005] ICR 931, CA.

76. We have considered guidance on the burden of proof in discrimination cases, in particular as referred to by the Claimant *Nagarajan v London Regional Transport* [1999] IRLR 572, *Madarassy v Nomura International plc* [2007] IRLR 246 CA, *Ayodele v Citylink Ltd* [2017] EWCA Civ 1913. In *Hewage v Grampian Health Board* [2012] ICR 1054, SC in which Lord Hope endorsed the following guidance given by Underhill P in *Martin v Devonshires Solicitors* 2011 ICR 352, EAT:

> "'the burden of proof provisions in discrimination cases… are important in circumstances where there is room for doubt as to the

> facts necessary to establish discrimination — generally, that is, facts about the respondent's motivation… they have no bearing where the tribunal is in a position to make positive findings on the evidence one way or the other, and still less where there is no real dispute about the respondent's motivation and what is in issue is its correct characterisation in law'.

77. In *Madarassy v Nomura International plc* 2007 ICR 867 CA Lord Justice Mummery held as follows:

> "The court in Igen v. Wong expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent "could have" committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination." (para 56)

78. In *Glasgow City Council v Zafar* 1998 ICR 120, HL, Lord Browne-Wilkinson said that in the context of a discrimination claim 'the conduct of a hypothetical reasonable employer is irrelevant. The alleged discriminator may or may not be a reasonable employer. If he is not a reasonable employer he might well have treated another employee in just the same unsatisfactory way as he treated the complainant, in which case he would not have treated the complainant "less favourably".' He approved the words of Lord Morison, who delivered the judgment of the Court of Session, that 'it cannot be inferred, let alone presumed, only from the fact that an employer has acted unreasonably towards one employee, that he would have acted reasonably if he had been dealing with another in the same circumstances'. It follows that mere unreasonableness may not be enough to found an inference of discrimination.

79. Relevant to *time limits*, section 123 EqA provides:

> 123 Time limits
>
> (1) Subject to sections 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of—
>
> (a) the period of 3 months starting with the date of the act to which the complaint relates, or
>
> (b) such other period as the employment tribunal thinks just and equitable.
>
> (3) For the purposes of this section—
>
> (a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) then P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

CONCLUSIONS

Unfair dismissal

80. **(i)** 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")?

81. The Respondent asserts that it was a reason relating to the Claimant's conduct.

82. The Tribunal finds that it was conduct. In our assessment there was a clear chain of events from the Respondent becoming concerned about the Claimant's requests about her annual sick pay "left" to an investigation into her sick absences in which a pattern of absence was discovered, namely that the Claimant appeared to take seven days' sick absence per year, she had expressed an intention to take a day off for sickness over a month in advance and the absences that she did take were invariably immediately next to absences for other reasons.

83. **(ii)** If so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the respondent in all respects act within the so-called 'band of reasonable responses'?

84. We find that the dismissal was fair for the reasons given below.

Burchell criteria

85. **(iii)** As part of this process the tribunal will consider:

86. **a.** Did the respondent act reasonably in treating the conduct as sufficient to justify dismissing the claimant? In particular (below):

Belief

87. **i.** At the time of dismissal, did the respondent believe the Claimant to be guilty of misconduct?

88. We found based on the contemporaneous documents and on hearing her oral evidence that the dismissing manager Ms Bianchini did believe the Claimant to be guilty of misconduct.

Reasonable grounds

89. **ii.** At the time of dismissal, did the respondent have reasonable grounds for believing that the claimant was guilty of that misconduct?

90. We find that the following were reasonable grounds for believing that the Claimant was guilty of misconduct:

90.1. The concerns of management documented in an contemporaneous email exchange 21 December 2019-30 December 2019 – (see pages 245-246 of the agreed bundle) between Julia Barnstable, Deputy Store Manager and Paola Habte, the Claimant's line manager.

90.2. Evidence of a suspicious pattern of absences, clustered around other days off [see sick record page 183-195], in particular pages 183 and 190.

90.3. The witness evidence of the following:

90.3.1. The evidence of the anonymous witness that the Claimant stated in November she was going to call in sick [261], described as "fairly significant" by Ms Biancini;

90.3.2. The evidence of Susan Muu [262] that the Claimant stated in November that she was going to call in sick in December;

90.3.3. Ms Finglass' witness statement that she'd heard others mention that the Claimant had said she was going to call in sick and also identifying a pattern [265];

90.3.4. Mr Habte's evidence about the Claimant asking for the 'balance' of sick days.

Claimant's arguments

91. The Claimant makes three principal arguments in relation to the grounds for her guilt.

92. First, she says that there was an absence of proof that she was not actually ill.

93. It is right to say, first that in respect of her last sick absence, that the Respondent ultimately accepted that she was ill for the final absence and second that there was not medical evidence suggesting that the various earlier sick absences were not genuine. The reality is, as the Claimant knew, there was no need to obtain medical evidence for a single day absence.

94. The dismissing manager, as we find she was entitled to do, drew an inference from the pattern of absences which were in every case immediately next to

other absences, and suspiciously at a level, viewed annually, which looked as if the Claimant was seeking to maximise the amount of fully paid sick leave she was receiving under the Respondent's policy (i.e. 7 days). Put together with the evidence that the Claimant had repeatedly asked about how many sick days she had left, we find that this was sufficient to draw the inference that the Respondent's dismissing manager did.

95. The Claimant's second argument is that Ms Finglass' statement [265] contradicts the anonymous witness [261] and shows she was lying. The Tribunal is not satisfied that this has demonstrated a material inconsistency such as to entirely undermine the value of the anonymous witnesses evidence.

96. The Claimant's third argument is that Paola Habte's interview apparently contradicted the content of her email sent on 21 December 2019. We acknowledge that there is a potential inconsistency here between "her only question was "do I still have holiday left?"" and the content of an email sent on 21 December 2019 in which the Claimant's line manager wrote "She also just asked me, as she thought that she would get an extra day of sickness for whatever reason."

97. The Claimant herself during the course of the internal process admitted that she had asked about **sick days** remaining. Indeed she went as far as to allege that this was normal. Her own account supported the context of the email exchange at 246. It was open to the Respondent to accept that the Claimant had said this.

98. Our conclusion is that there were reasonable grounds for the Respondent to conclude that the Claimant was guilty of misconduct, which might amount to gross misconduct.

Reasonable investigation

99. **iii.** At the time that the respondent formed that belief on those grounds, did the respondent carry out as much investigation as was reasonable in the circumstances?

100. In her very lengthy written submissions the Claimant has made a variety of criticisms of the Respondent's investigation process.

101. First, at pages 2-3 of her closing skeleton argument, having canvassed this with all of the Respondent's witnesses in cross examination, she argues that there was a failure to investigate a breach of procedure. The Claimant asserts fairly broadly that there were breaches of procedure and that these should have been investigated.

102. We have considered carefully whether there should have been an investigation into a failure to follow 17.1.3 of the Respondent's policy i.e. carrying out a review of the attendance record for patterns at each return to work. We understand the Claimant to have cast doubt on whether these return to work interviews were carried out at all. We find, based on the documentary evidence of the interviews, that there were return to work interviews. We also find, based

Claimant's admissions in both the investigation meeting and the disciplinary meeting that Ms Habte had asked her about the pattern of absence multiple times {see pages [268][279]} that there were discussions on this topic.

103. Given those admitted facts, it is not clear to us that the operation of the attendance policy needed to be investigated, or at least that the absence of further investigation on this point meant that the procedure followed fell outside the range of reasonable responses.

104. Second, the Claimant argues that she was allowed to carry on working for a month, which suggests that her conduct cannot have been egregious or gross misconduct. Ultimately we do not consider that this itself made the decision to dismiss unfair.

105. Third the Claimant argues that the Respondent interviewed other witnesses before her and was "building a case" against her. It is the nature of a disciplinary investigation that evidence is gathered on a cumulative basis. The Tribunal did not find the order in which witnesses were being interviewed to be sinister or unfair in the circumstances of this case.

106. Fourth, the Claimant argues that it was unfair to go back through the record as far as December 2017 to consider her absence. Had this been a dismissal purely under the attendance policy with no discussion about absence at any stage before the disciplinary meeting there would be some force in this argument. That would have been an allegation made "out of the blue" from the Claimant's perspective necessitating her to explain absences going back two years, which might put her at a disadvantage. As we have found however, Ms Habte did have discussions about a pattern of absence with the Claimant on multiple occasions as the Claimant herself confirmed. Our finding is that this corresponds to the 'informal' meetings envisaged in the Respondent's policy at 17.1.3. There was no requirement to have a formal meeting or disciplinary action, but rather the Respondent had a discretion.

107. We acknowledge that a different employer might have exercised their discretion to have a formal meeting or give a warning at an earlier stage following the review of the pattern of absence at a return to work. In an ideal world that would have been done in 2018 and might have caused the Claimant to amend her ways. On the other hand, some employers, once a clear pattern of absences had been spotted might, in our view have been justified in taking disciplinary action or even dismissing had they conclude that the policy was being abused.

108. The Respondent's case on this point, as articulated in the letter of dismissal, is that this was a dismissal for gross misconduct, not a dismissal under the attendance policy. Given that this was a dismissal for gross misconduct, namely abuse of the sick absence policy and given that the Claimant had been challenged about her pattern of absences on multiple occasions by her line manager, we do not found that the process followed or the approach of the Respondent in going back two years amounted to an unreasonable investigation or fell outside of the range of reasonable responses.

109. Fifth, that the Respondent ignored the Claimant's complaints about her colleagues' pattern of absence, in particular Paola Habte. We find in fact that this was covered in the investigation meeting (see page **271**) and referred to in the letter of dismissal, where it confirmed that disciplinary action against other employees would be taken if warranted. While we acknowledge that this might raise a concern in the Claimant's mind about consistent treatment, we do not find that there was any other employee in materially the same situation as the Claimant given the specific charges found to be substantiated against her.

110. We do not find that this made the dismissal or process unfair. We have considered the consistency of treatment further in the claim of race discrimination below.

111. Sixth, the Claimant argues that her line manager Ms Habte was aware that the Claimant was genuinely ill. In respect of the final absence Ms Habte acknowledged that the Claimant had been coughing and sneezing and ultimately the Respondent did find that the Claimant was genuinely ill, to this extent they did accept what Ms Habte had said in the interview on page 271. By contrast, in respect of previous absences, Ms Habte on page 270, had identified a recurring pattern, by implication not always representing genuine sick absences. We find that the Respondent took appropriate account of Ms Habte's evidence which was nuanced and drew a clear distinction between the final absence and earlier absences. This did not make the dismissal unfair.

112. Seventh, the Respondent should have investigated earlier, before December 2017 as the Claimant argues that undermines the alleged pattern of 7 days absence each year. Even had been no pattern in 2017, we are doubtful that this would have made any difference, given the clear pattern of absence in 2018 and 2019.

113. Eighth, the Claimant argues based on WhatsApp apps of communications or the sick notes demonstrates that she only had 6 days' sick in 2019. In essence the Claimant has tried to cast doubt on the accuracy of the official sick record by suggesting that some absences are not referred to in contemporaneous WhatsApp correspondence or sick notes. In our view the Respondent, acting reasonably, was entitled to rely on the official sick record, which is the best record that there is.

114. Ninth that the Respondent was deliberately attempting to build a case to sack due to the pandemic. We absolutely reject this argument given that the genesis of the investigation occurred at a time in December 2019 weeks before it was clear that the code Covid-19 outbreak was going to lead to the lockdown and events in Europe that it subsequently did.

115. Tenth there was a background of Ms Habte "lying" about the Claimant's title. We are aware that the Claimant was upset about her title and this predated the events leading to her dismissal, but we do not find that it was connected to the sick absence issue to cause us to consider that it led to any unfairness in the process or decision to dismiss.

116. Eleventh, that attendance times were fraudulently made up. We did not accept this argument. There was data on the Claimant's work pattern from different systems, some of which represented her shifts and some of which represented actual work times. This was not to our minds evidence of fraud.

117. Twelfth, the Respondent's reliance on anonymous witness statement, the content of which she says was not true. The Tribunal noted the content of page 261 of the witness statement from the anonymous witness in which she said that she loved Yang and wanted to help her because she "went through time with time with [Claimant]". She referred to the atmosphere working with the Claimant. Given the content of this statement it is somewhat surprising that the dismissing manager referred at paragraph 5 of the dismissing letter to "I have no reason to disbelieve the evidence of this witness". It is clear from the face of the evidence that this anonymous witness had a low opinion of the Claimant and was trying to help Ms Finglass. This ought to have raised at least a question-mark or need for some scrutiny in the mind of a fair-minded investigator and decision-maker.

118. We have considered the ACAS guidance on anonymous witnesses. If a witness wishes to remain anonymous, the Acas Guide advises employers to take written statements, seek corroborative evidence, check that the person's motives are genuine, and assess the credibility and weight to be attached to their evidence. It is not entirely clear that all of this was done. We have noted however that a full written account of the witnesses evidence was taken and that in the dismissing letter there is corroboration from other evidence, including the Claimant's own evidence. The point is finely balanced. Had this been the only witness we would have had a real concern about the Respondent relying upon this evidence. Given the other corroboration, on balance however we do not accept the argument that this made the dismissal unfair.

119. Thirteenth, that the Claimant only took 2 days not 3 days off in the period 30 December 2019-1 December 2020. Given that the Respondent accepted that the Claimant was ill at this time, we do not see that this is highly significant.

120. Fourteenth, the Claimant argues that there was a failure to take a witness statement from Dario Rastelli. Ms Di Ruocco produced a statement dated 5 June 2020 giving an account of her discussion with Dario Rastelli which is perhaps a tacit acknowledgement that this discussion should have been documented earlier. Mr Rastelli's evidence was that the request for sick leave had come through Ms Habte, which is why the latter was subsequently interviewed in detail.

121. The Claimant suggests that Mr Rastelli's account of remembering that she had requested a day off on 31 December demonstrated that Ms Habte was lying.

122. It would have been better for the discussion with Mr Rastelli to be written up at an earlier stage and provided to the Claimant. We have reminded ourselves that the standard to be applied is a reasonable investigation, not the counsel of perfection. Ultimate we do not find that this point made the decision to dismiss unfair, given that (i) Ms Di Ruocco immediately put Mr Rastelli's account to Ms Habte where there was a point of difference [270], (ii) whether it was 31

December or both 30 & 31 December is not the crucial point in the case. The finding of the dismissing manager was that had been an intention to wrongly take sick leave at this time when the Claimant was rostered, although in the event it was accepted that the Claimant was genuinely ill; and (iii) this specific point was only one small piece of an overall picture based on variety of pieces of evidence of systematic abuse of sick absence going back two years. In any event, Ms Di Ruocco's statement on this point was available to the appeal officer as part of the appeal process, and to that extent we find it was capable of correcting any defect in the investigation.

123. Fifteenth, an alleged breach of the medical examination policy. The Tribunal has considered the policy at 2 July [205] – which gives the Respondent the power to subject an employee to medical examination. It is not clear to us that there was a material breach of this provision.

124. Sixteenth, an alleged failure to have an investigation meeting with Paola Habte, line manager. The Claimant says that this is a breach of the ACAS code step 4 gathering evidence. Given that there was an investigation meeting on 28 January 2020, we do not find that there was a failure to have an investigation meeting in relation to this point.

125. Finally, it is argued that the Claimant was not warned that she was at risk of dismissal. We do not accept this. In the invitation to the disciplinary hearing dated 7 February 2020, the Claimant was told that disciplinary action might include dismissal and the abuse of the Respondent's sick absence policy was given as an example of gross misconduct. We do not find that this allegation is made out.

Sanction of dismissal: range of reasonable responses

126. **iv.** Was the sanction applied by the respondent within the range of reasonable responses to the particular misconduct found of the Claimant?

127. We find that the sanction of dismissal for systematic abuse of the sick pay system is within the range of reasonable responses.

Procedure: range of reasonable responses

128. Some of the points we have considered above under the heading "reasonable investigation" might alternatively be looked at as procedural arguments stop as we have discussed above we have spent some time thinking about whether there was a breach of 17.1.3 (i.e. the requirement to consider pattern of absence at the return to work stage).

129. We accept that this was ultimately a gross misconduct dismissal, to which the attendance policy absence by absence was not the guiding policy.

130. We do not find that the procedure followed fell outside of the range of reasonable responses.

RACE DISCRIMINATION

(6) EQA, section 13: direct discrimination because of race.

131. The claimant identifies as Algerian.

Treatment complained of

132. Has that the Respondent subjected the Claimant to the following treatment:

133. **i.** Checking her sickness records and not those belonging to her colleagues or managers. We accept that at least initially the Respondent did check the Claimant's sickness records and not those belonging to colleagues and managers.

134. **ii.** Commencing a disciplinary investigation. We find that the Respondent did initiate a disciplinary investigation.

135. **iii.** Undertaking the disciplinary investigation in an inappropriate way. The Claimant relies upon the failure to investigate with Ms Habte whether the sick absence policy had been followed. She also relies on alleged breaches of the Respondent disciplinary and grievance policies and an assertion that the Respondent was fabricating statements to support her dismissal.

136. **iv.** Terminating her employment. It is a fact that the Claimant's employment was terminated.

137. **v.** Ignoring her grievance. The Claimant raised a grievance against Paola Habte to Silvia Corbella, Monica Di Ruocco, and Dario Rastelli in an email dated 6th January 2020, which the Claimant says was completely ignored even though she complained of bullying and victimisation. She says that HR should have heard her grievance before or at the same time [as the disciplinary], not just ignore it.

138. We find that some limited matters referred to in the grievance were considered in the disciplinary. There were mediations in February 2020, which we infer were in part in response to the grievance and an attempt to resolve matters. Beyond that the dismissing manager "parked" the grievance until the conclusion of the appeal by letter of 3 September 2020. This was noted in the conclusion of the appeal, but the matter not dealt with.

139. We note that the Claimant had herself twice failed to respond to Ms Corbella about matters which she appeared to be raising as grievances.

140. It is not right to say that the grievance was "ignored", given that there was a mediation. We do accept however that there is no evidence that the Respondent went on to formally conclude a grievance process following the conclusion of the disciplinary appeal.

Less favourable treatment

141. Was that treatment "less favourable treatment", i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances?

142. The Claimant relies on the following Ikram Mazouz, Francesca Nespoli, Paola Habte, Yang Finglass as comparators and/or hypothetical comparators. We have not found any of these actual comparators to be in materially similar circumstances to the Claimant. The closest comparator is employee X who did appear to have a pattern of sick absence before or after other absence over a period of time.

143. Allegation **(i) checking records** – we accept the Respondent's case on the genesis of the investigation which led to checking of the sick record. In essence the Claimant told colleagues in November a month or so before December 2019 that she was contemplating calling in sick and was asking questions about sick leave which raised suspicion. I do not find that this was less favourable treatment. Both of these matters might reasonably lead to a consideration of potential sick absence abuse.

144. Allegation **(ii) commencing disciplinary** – given the circumstances above, i.e. potential abuse, we do not find it was less favourable treatment to commence a disciplinary investigation, particularly where the pattern of absence suggested potential abuse.

145. Regarding (**iii**) **inappropriate disciplinary investigation** – the Claimant relies upon the failure to investigate with Ms Habte whether the sick absence policy had been followed. We find there were return to work interviews, evidenced by return to work documentation. We also find that Ms Habte asked the Claimant about a pattern of absence on multiple occasions. The Claimant confirmed this in both the investigation and disciplinary hearings. The Claimant relies on alleged breaches of the Respondent disciplinary and grievance policies and an assertion that the Respondent was fabricating statements to support her dismissal. Is unclear to us what the breaches of the disciplinary process are said to be beyond the point about the return to work process considered above.

146. As to fabricating statements, the burden of showing what would amount to a forgery is a high one. In any event we are not satisfied that the Claimant has shown that the various interviews which are documented in the internal process are anything other than genuine. Minor inconsistencies and the like do not suggest fabrication; on the contrary, in our experience minor inconsistencies and the like are exactly what do come feature in an investigation of this sort.

147. As to the breach of grievance policy, we accept that the Respondent did not in this case fully and formally conclude a grievance process.

148. Regarding (**iv**) **dismissal** there is no actual comparator, in that there is no other individual in the employment of the Respondent who repeatedly asked about sick absence "entitlement", threatened to take a day sick as well as having a clear pattern of taking sick absence immediately before or after other absences

over a two year period and took 7 days' absence in both years. We consider that a hypothetical comparator in those circumstances would be likely to be facing the ultimate disciplinary sanction.

149. Regarding (**v**) **ignoring grievance** there is no actual comparator with materially similar circumstances that has been drawn to the attention of the Tribunal.

150. As to how a hypothetical comparator might be treated, we have not found that the grievance was entirely ignored, but we acknowledged that the formal process was not concluded. We have considered the fact that the process of the Claimant raising grievances was somewhat protracted, going on for a period of time and that she ignored two attempts on the part of the Respondent to try to clarify the basis of what seemed to be a claim of discrimination in November and December 2019. There was the mediation. Ultimately by this stage however the Claimant was subject to a disciplinary with charges that amounted to gross misconduct which were substantiated and upheld on appeal. The backdrop to the appeal process, which took place remotely, was the Covid-19 pandemic was placing most businesses under strain from a human resources and operational perspective. While we can understand how in those circumstances the grievance may have gone by the wayside, this is still not a satisfactory outcome from the Claimant's point of view.

Because of race

151. **Issue c.** If so, was this because of the claimant's race and/or because of the protected characteristic of race more generally?

152. The Claimant's witness statement contains the following passage at paragraph 15 on page 29:

> "The structure of the company is unprofessional and incompetent which supports the Italian workers purely because of their nationality, so workers who weren't Italian and who have genuine skills and loyalty were completely ignored and rejected because they were not Italian, and specially the Arabic ones which is nationalism turned into racism. This is unacceptable and illegal behaviour, be it on a personal or a company level."

153. We do not find, based on the evidence that we have heard that employees who were not Italian were completely ignored and rejected. We acknowledge that the Claimant's comment about structure is supported in one sense anecdotally with our observation that in this case the management or HR employees were all Italian. We also accept the Claimant's evidence that there were a team of non-Italian Arabic speakers including herself who working on the shopfloor in sales roles the concession in Harrod's. Had one of the Claimant's allegations of direct race discrimination been that she had applied for a position but lost out to an Italian colleague with equivalent qualifications, this background about the structure might have been enough for us to draw an inference of possible race discrimination, or at least enough to help the Claimant to satisfy the initial burden of proof on her. That is not her claim however.

154. The Claimant's submissions on race begin at page 27 of her written submissions document. The arguments, are as follows:

154.1. that gross misconduct was a harsh decision;

154.2. that purposefully letting her go in the pandemic, without giving her the opportunity to furlough was "to destroy me financially, mentally, emotionally and physically";

154.3. that the Respondent have deliberately gone against their own policy and against the ACAS code;

154.4. that there was a illegitimate communication amongst the Respondent's witnesses during the course of the Tribunal hearing; [it should be said that this was something that the Claimant complained about during the course of the hearing and the Tribunal satisfied ourselves that this was not taking place. In any event, voluntarily Ms Di Ruocco turned off her mobile telephone for the remainder of the hearing.]

154.5. that the Respondent used her sickness to dismiss her;

154.6. delays in the appeal were discriminatory;

154.7. a comparison with comparator X who had long-term sickness into 2019 but not 2018 was discriminatory;

154.8. that timesheets had been fabricated;

154.9. that her witness statement was ignored and the Respondent instead relied upon the anonymous witness statement;

154.10. that losing store approval at Harrods for 2 years was discriminatory and unfair;

154.11. that being in the same position for over 6 years, and lying to her about her senior status was unfair and discriminatory;

154.12. that gathering statements against her was unfair and discriminatory.

155. We have considered these arguments. These are arguments why the Claimant feels that she has been badly treated. We accept that this is how she feels she has been treated. We have reminded ourselves, based on authority, that mere unreasonable behaviour is not in itself evidence of unlawful discrimination (*Zafar*).

156. We were not satisfied that there was any cogent evidence of fraud.

157. The Claimant's points about the effect of the Covid-19 pandemic appeared to ignore the fact that the material events in the disciplinary matter against her were put in train before this occurred, but in any event this was a global event that did not amount to evidence from which we could infer race discrimination against the Claimant.

158. We acknowledge the Claimant's frustration about her lack of career progression, which we find was genuinely held by her and something that she had been trying to raise. The reality though we find is, that although the Claimant felt some frustration about career development in 2019, the circumstances leading to her dismissal were because of her own misconduct in systematically abusing the sick absence policy.

159. Ultimately, we do not find that we have received evidence from which we could draw an inference that race is the reason for the Claimant's treatment. The claim of race discrimination therefore does not succeed.

Remedy Hearing

160. The provision remedy hearing listed on Friday 12 November 2021 **is not required and is cancelled**.

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Employment Judge Adkin

Date 30 September 2021

WRITTEN REASONS SENT TO THE PARTIES ON

26 Nov. 21

FOR THE TRIBUNAL OFFICE

Notes

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the Claimant (s) and respondent(s) in a case.

Appendix

List of Issues (Liability)

[Identified at the Preliminary Hearing on 11 November 2020]

Unfair dismissal

(i) 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.

(ii) If so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the respondent in all respects act within the so-called 'band of reasonable responses'?

(iii) As part of this process the tribunal will consider:
a. Did the respondent act reasonably in treating the conduct as sufficient to justify dismissing the claimant? In particular:
i. At the time of dismissal, did the respondent believe the claimant to be guilty of misconduct?
ii. At the time of dismissal, did the respondent have reasonable grounds for believing that the claimant was guilty of that misconduct?
iii. At the time that the respondent formed that belief on those grounds, did the respondent carry out as much investigation as was reasonable in the circumstances?
iv. Was the sanction applied by the respondent within the range of reasonable responses to the particular misconduct found of the Claimant?

Race discrimination

(6) EQA, section 13: direct discrimination because of race.
The claimant identifies as Algerian

(i) Has that the respondent subjected the claimant to the following treatment:
i. Checking her sickness records and not those belonging to her colleagues or managers;
ii. Commencing a disciplinary investigation;
iii. Undertaking the disciplinary investigation in an inappropriate way;
iv. Terminating her employment; and
v. Ignoring her grievance.

b. Was that treatment "less favourable treatment", i.e. did the respondent

treat the claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances? The claimant relies on the following Ikram Mazouz, Francesca Nespoli, Paola Habte, Yang Singlass as comparators and/or hypothetical comparators.

c. If so, was this because of the claimant's race and/or because of the protected characteristic of race more generally?