EMPLOYMENT TRIBUNALS

Claimant: AB

Respondent: XY

Heard at: Birmingham by CVP **On:** 22, 23, 24 and 15 March 2021 & 8 April 2021 in chambers

Before: Employment Judge Miller
Mr P Collier
Mr P Talbot

Representation
Claimant: In person
Respondent: Ms G Williams (Solicitor)

CORRECTED RESERVED JUDGMENT

1. The claimant's clam that he was subject to harassment related to race under section 26 Equality Act 2010 is unsuccessful and is dismissed

2. The claimant's claim that he was unfairly dismissed is well founded and succeeds. Remedy will be determined at a hearing on 1 July 2021. Any compensatory award made under section 123 Employment Rights Act 1996 shall be subject to a reduction of 10% for contributory conduct.

3. THE CLAIMANT'S CLAIM THAT HE WAS SUBJECT TO DIRECT DISCRIMINATION BECAUSE OF HIS RACE IS UNSUCCESSFUL AND IS DISMISSED

REASONS

Introduction

1. The claimant was employed by the respondent as a Caretaker working in its shop at Hadley. The claimant was employed from 2 March 2013 until his dismissal with effect from 11 July 2019. The claimant started early conciliation on 22 August 2019 and that finished on 3 September 2019. In a claim form presented on 5 September 2019, the claimant brought complaints of unfair dismissal and discrimination based on race and/or religion or belief.

2. Following two case management hearings before Employment Judge Flood the claimant withdrew his claims of discrimination based on religion and/or belief and they were dismissed in a judgment dated 22 May 2020.

3. In summary the claimant was dismissed, ostensibly for a reason related to his conduct, on 11 July 2019. The claimant says that that dismissal was unfair and further that the dismissal and the process leading up to it was directly discriminatory because of the claimant's nationality, being Hungarian. The claimant also said that he was subjected to a number of incidents of harassment related to his race from approximately 2016, immediately following the referendum on the decision whether or not to leave the European Union, onwards. The respondent denied the allegations of harassment and maintained that the reason for the claimant's dismissal was solely because of his conduct, unrelated to his race and was fair in all the circumstances.

The issues

4. The detailed issues were identified by Employment Judge Flood at a Case Management hearing on 21 May 2020. They are as follows:

Unfair dismissal

5. 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, so the issues to determine are:

    a. Did the respondent have a genuine belief in the claimant's guilt?

    b. Were there reasonable grounds on which to base that belief?

    c. Had the respondent carried out as much investigation as was reasonable in the circumstances

6. 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'?

7. If the claimant was unfairly dismissed and the remedy is compensation:

    a. if the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would still have been dismissed had a fair and reasonable procedure been followed? See: Polkey v AE Dayton Services Ltd [1987] UKHL 8; paragraph 54 of Software 2000 Ltd v Andrews [2007] ICR 825;

    b. would it be just and equitable to reduce the amount of the claimant's basic award because of any blameworthy or culpable conduct before

the dismissal, pursuant to ERA section 122(2); and if so to what extent?

c. did the claimant, by blameworthy or culpable actions, cause or contribute to dismissal to any extent; and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award, pursuant to ERA section 123(6)?

EQA, section 13: direct discrimination because of race

8. It is not in dispute that the respondent subjected the claimant to the following treatment:

   a. Suspended the claimant, investigated and started disciplinary proceedings against the claimant on [dates to be provided]

   b. Dismissed the claimant with effect on 11 July 2019.

9. 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 comparators: Sarah, a British employee of the respondent who worked as a cleaner and/or hypothetical comparators.

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

EQA, section 26: harassment related to race and/or religion/belief

11. Did the respondent engage in conduct as follows:

   a. In June 2016 during the week after the referendum was held on whether to leave the European Union on 23 June 2016, two employees of the respondent (identified as Jon and Paddy) allegedly said to the claimant he would need to "pack his suitcase and leave".

   b. During an argument at some point in 2017 with an employee of the respondent identified as John, the claimant was told to "Go back to where you come from".

   c. In around August/September 2018 shortly before Greg Taylor took over from Richard as manager, during a conversation between Greg Taylor, Richard and Josh, when the claimant went past, Greg Taylor allegedly said “Chop, chop Romanian man, lots of things to do" whilst the others laughed and the claimant replied "I'm a proud Hungarian".

   d. In September 2018, when a delivery was made by a Polish or Romanian driver, and the pallet came in the wrong order, Greg Taylor allegedly said "Fucking foreigners".

   e. In October 2018 when a delivery arrived and the vegetables were packed in the wrong order, Greg Taylor is alleged to have said "Fucking useless foreigners, they don't know how to pack".

   f. On 19 November 2018, a racial slur was used by [SC] towards a colleague who was with the claimant at the time when she said “What the fuck are you looking at nigger?".

g. In the first or second week of December 2018, when a driver arrived and was having difficulty backing up the truck, Greg Taylor is alleged to have said "Fucking idiot foreign driver, he doesn't know how to drive and he is working for XY".

h. In February 2019, following a discussion about problems the claimant was having with his back and ankles causing difficulties, Greg Taylor is alleged to have said "I thought you were a strong Hungarian man".

i. On 17 April 2019, Greg Taylor is alleged to have said to the claimant "Don't be a Hungarian drama queen".

12. If so was that conduct unwanted?

13. If so, did it relate to the protected characteristic of race?

14. Did the conduct have the purpose or (taking into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

15. References to Greg Taylor were in fact to the claimant's line manager, Craig Taylor.

The hearing

16. The hearing was conducted remotely by video due to the ongoing pandemic. There were a number of connection issues during the hearing but all parties were able to reconnect on each occasion and we are satisfied that the claimant and the respondent were able to participate fully in the hearing.

17. The claimant was able to speak and understand English extremely well but an interpreter, Ms Kapronczai, attended and translated particularly difficult questions, answers and concepts when requested and offered interpretation when it appeared that the possibility of misunderstanding arose. We are grateful for Ms Kapronczai's able assistance.

18. We were provided with an agreed file of documents of 191 numbered pages. The claimant produced a witness statement and gave evidence. The respondent produced witness statements from Mr Craig Taylor, the claimant's line manager from December 2017; Mr Andrew Shaw, an Area Manager and Mr Taylor's line manager; and Mr Jasper Parsons, Regional Head of Sales in the Wednesbury region and Mr Shaw's line manager. All of the respondent's witnesses also attended and gave evidence.

19. The claimant also produced a witness statement on the first day of the hearing produced by Mr Emmanuel Bonnah. Mr Bonnah was the security guard working at the Madeley XY store and referred to in paragraph 11 (f) above as the person who was the target of the alleged racial abuse by SC. This statement was dated 17 August 2019. The claimant said that he had provided it previously but he was unclear to where it had allegedly been sent. Ms Williams had not had a copy and the claimant could not produce a copy of the email sending the statement or the address to where it had been sent. As we understand it, the claimant was saying that it had been

sent to the Respondent but it was unclear that he had correctly addressed the email.

20. The respondent objected to the admission of the statement on the basis that the evidence would be unchallenged. We admitted the statement on the basis that Mr Bonnah was able to attend and give evidence, which he did, and Ms Williams cross examined him about his evidence. The respondent produced further documents in response to the statement, which was a note dated 19 August 2019 of a conversation between Mr Parsons and Lucy O'Gorman about an investigation by Mr Parsons into the allegations raised by the claimant.

21. We admitted that document as it was relevant to the issues and relevant to the content of Mr Bonnah's witness statement. The respondent also raised the prospect of calling further witnesses to answer Mr Bonnah's allegations but in the end did not make an application to do so.

22. We spent the first day of the hearing reading the witness statements and documents to which we were referred. Unfortunately, when we started the hearing to hear the claimant's evidence it appeared that he did not have access to any of the witness statements. A significant part of the first day had been unavoidably taken up with dealing with procedural and technical matters in any event so that we adjourned at 3.30 on the first day to enable the claimant to obtain copies of the statements. Consequently, the full hearing did not start until the second day of four and we were unable to reach a decision in the time available so that we have produced this reserved decision.

23. We record that hearing live evidence by video in circumstances where there were on going connection problems and entailing the assistance of an interpreter was challenging and we are grateful to everyone who attended for their assistance. We note also that although Mr AB had a copy of the file of documents, he said that they did not have page numbers. We are grateful for the helpful way in which Ms Williams conducted her questioning of the claimant and the claimant engaged with the process when both parties were faced with this additional challenge.

Findings of fact

24. The claimant started working for XY on 2 March 2013. At that time, the claimant was not managed by Mr Taylor. At all relevant times the claimant worked at the respondent's store in Telford Hadley (known as the Hadley store).

June 2016

25. The first allegation relates to June 2016, and specifically the period after the referendum about the UK leaving the EU. It is a matter of public record that that took place on 23 June 2016 and that the outcome was that the UK population voted by a margin of approximately 52% to 48% to leave the EU.

26. It is recorded in the list of issues that the claimant asserts that two employees of the respondent identified as John and Paddy said to the claimant that he would need to "pack your suitcase and leave".

27. The claimant does not mention this in his witness statement. He did mention it in his claim form, although he did not refer to John or Paddy. The

claimant did not provide any further information about this in the course of answering questions. While a witness is only required to answer the questions that they are asked, the claimant did give full and detailed responses and provided additional information throughout the course of being questioned. The claimant did not specify the precise words and he did not identify which of the two people said what.

28. Neither Mr Taylor nor Mr Shaw knew who John was. They both said that Paddy referred to a deputy store manager who had worked at the Hadley store, briefly under Mr Taylor, and left in February 2019 and moved to Scotland.

29. We are prepared to accept, on the basis of our knowledge and experience, that some people might in the period after the referendum have said unpleasant things to the claimant on the basis of his Hungarian nationality along the lines of those referred to in his claim form and described to Employment Judge Flood. However, there is no actual evidence produced by the claimant, whether in his witness statement or otherwise, about who said what to him or when. Further, there is no evidence that the claimant raised this at the time. The claimant's evidence about this allegation is just too vague and we find that the claimant has not shown on the balance of probabilities that this incident happened in the way described.

2017

30. The next allegation is that an employee of the respondent identified as John told the claimant to "go back to where you come from".

31. As referred to above, none of the respondent's witnesses were able to identify who John was. This allegation is not referred to in the claimant's witness statement and nor did it come up in the course of the claimant's oral evidence.

32. The claimant has not shown on the balance of probabilities that this incident happened in the way described.

August/September 2018

33. This allegation is that Craig Taylor allegedly said "chop, chop Romanian man, lots of things to do" while others laughed.

34. Again, this is not mentioned in the claimant's claim form although the claimant does raise the fact that he was called Romanian by the respondent's employees in the knowledge that he was in fact Hungarian. In his witness statement the claimant says "there was jokes towards my nationality by members of staff in my work place, they found it as joking calling me Romanian when they knew I'd find that offensive, I told them I am a proud Hungarian and they kept on teasing saying I was being (pussy) and that I was a big guy and why couldn't I handle these jokes".

35. Mr Taylor says in his witness statement that he did not say this and that he would never use this language to a colleague. This allegation was not put directly to Mr Taylor.

36. On balance, we prefer the evidence of Mr Taylor. Again, we accept that the claimant might well have been referred to as Romanian at times and that

clearly this would not have been appropriate or acceptable, but we have heard no direct evidence as to when or by whom.

37. Having seen and heard Mr Taylor's evidence we find, on the balance of probabilities, that Mr Taylor did not use those terms to the claimant. We note at this point that the claimant made a number of serious but wide-ranging allegations about Mr Taylor. He accused him of being a racist and of calling the claimant a liar. We understand that Mr AB found the process difficult and was conducting complicated proceedings in a language that was not his first language. However, Mr Taylor remained calm and tried, we think, to answer the claimant's questions as well as he could.

38. We are wary of drawing inferences from the demeanor of witnesses at a hearing, but Mr Taylor did not seek to be evasive and we find that he attempted to answer sometimes difficult questions to the best of his abilities.

39. We prefer the evidence of Mr Taylor about this allegation.

September/October 2018 and December 2018

40. The claimant makes a number of similar allegations in respect of things that are said to have happened in September and October 2018. His first allegation is that in September Mr Taylor allegedly said "fucking foreigners" when deliveries were made by Polish or Romanian drivers.

41. The second allegation is that in October, Mr Taylor said "Fucking useless foreigners, they don't know how to pack".

42. The third allegation is that in the first or second week of December 2018, when a driver arrived and was having difficulty backing up the truck, Mr Taylor said "Fucking idiot foreign driver, he doesn't know how to drive and he is working for XY".

43. The claimant said the respondent ought to have tried to track down the lorry drivers to substantiate his claims. The respondent's response was that the claimant had not provided sufficient detail for them to be able to identify the particular time when this was said to have happened or the drivers who might have witnessed any such incident. Mr Parsons explained that the drivers do not work directly for the respondent and that the respondent has a number of haulage contracts. We prefer the respondent's witnesses evidence that given the limited information at the claimant provided it would not have been reasonably possible to identify any lorry drivers as witnesses to the alleged incident.

44. In his witness statement the claimant said

"In the time I was working there we always had foreign drivers for delivery's to the store, from all EU countries Romania, Poland, Hungarian, Latvian and also English drivers. On many occasions the managers who were in charge of directing orders to the delivery drivers were offensive not only to me but to them i.e. if the person in charge was directing where the drivers would go he would get very upset saying (fucking foreigner's) in an angry manner and i can hear and he would come to me and say well you can speak there language so I had to deal with it. the thing is though that I can speak English too and I understand what he saying when he is speaking of (these foreigner's) in manners that I certainly understand and find very offensive. The drivers may not understand English but they can feel and

sense and i could tell too that they felt belittled. i felt hurt that i had too not say anything because my job was to do as required with a happy face and a positive attitude even although i was hurting that i couldnt speak up of what was happening around, i feel shame that i couldnt stand be heard in regards to this. this was my job and my livleyhood that pays my bills so i kept quiet and smile but inside i was feeling unequal and hurt and broke me. in my eyes no one and doesnt matter where you are from should never have to go through this. this was the worst 6 years of my life".

45. In his witness statement Mr Taylor said

"I did not say 'fucking foreigners' in or around September 2018 or say 'fucking useless foreigners' in or around October 2018. I would never use this language in front of a colleague" and

"I did not say 'Fucking idiot foreign driver, he doesn't know how to drive and he is working for XY'. I would never use this language in front of a colleague".

46. In cross-examination Mr Taylor said that these incidents did not happen. He said that he was able to communicate adequately with the lorry drivers when he needed to and did not ask the claimant translate for him. He said that the claimant interjected into the conversations he was already having.

47. We prefer the evidence of Mr Taylor in respect of these two allegations. For the reasons given above we found Mr Taylor to be a very plausible witness. The claimant's allegations in his claim form did not initially name Mr Taylor. In his witness statement he speaks about the conduct of managers and the person in charge but in respect of these particular allegations he does not name Mr Taylor. We are wholly prepared to accept that the claimant has experienced people using discriminatory language about lorry drivers and about him but we think it unlikely, on the balance of probabilities, that Mr Taylor being a store manager and working for a multinational company would habitually use such overtly discriminatory language over an apparently prolonged period without being the subject of any complaints.

48. The claimant said that he would not raise any complaints because he liked his job and he wanted to keep it (although we note that in his witness statement he says that working at XY was the worst six years of his life). This is a reasonable position to adopt, but as will become clear in relation to the incidents in 2019 the respondent did appear to have a culture where people were able to raise issues with managers without fear of inappropriate repercussions.

49. Even, therefore, if the claimant did not consider it sensible to make complaints about his manager we think that had Mr Taylor conducted himself in a way alleged someone - particularly given that the lorry drivers work for different companies - would have made a complaint. There was no evidence of any such complaint.

50. For these reasons, on the balance of probabilities we find that Mr Taylor did not make the statements as alleged.

19 November 2018

51. The next alleged incident was that “On 19 November 2018, a racial slur was used by SC towards a colleague who was with the claimant at the time when she said "What the fuck are you looking at nigger?"”.

52. This is said to have happened at the Madeley store near the claimant’s home rather than the Hadley store where the claimant worked. The claimant confirmed that he had never worked at the Madeley store. The claimant said that he had finished shopping and was talking to Mr Bonnah when he heard SC, the person who worked at the Madeley store, use the racially offensive words to Mr Bonnah.

53. Mr Bonnah is a security guard who was working in the Madeley store but he was employed by a different company than the respondent – a security firm.

54. The background to this is that SC had allegedly taken some plants from the store without paying for them. Mr Bonnah stopped her from taking the plants and as a consequence of his intervention SC was subject to disciplinary proceedings and given a written warning. It does seem likely, therefore, that there was some animosity between SC and Mr Bonnah.

55. We heard evidence from Mr Bonnah. In his witness statement he said that in December 2018 after his holiday, he was unable to be exact with the date, SC called him a “Fucking nigger”. He also said that SC was unhappy with him, we conclude for getting her into trouble, and that every time she saw him she insulted him saying things like “fuck you” and “nigger”.

56. Mr Bonnah’s statement is not very clear. He said that he did report the insults to a manager, Lucy (who we conclude is Lucy O’Gorman) but that he did not report the subsequent racist words because he had reported more than four cases previously and nothing happened.

57. In oral evidence, Mr Bonnah said that any time he was standing in the shop and SC saw him she would use racist words for him to hear.

58. There is a record of conversation between Mr Parsons and Lucy O’Gorman conducted on 23 August 2019. Mr Parsons asked Ms O’Gorman in the record of that conversation whether Mr Bonnah had raised any concerns of a racial nature to her and she said that no, the main issue was that SC thought that Mr Bonnah was watching her all the time and that Mr Bonnah was not happy with how confrontational SC would be after her disciplinary.

59. Mr Bonnah confirmed in cross-examination that he had also been subjected to racial abuse from shoplifters and that case had gone to the criminal courts. He confirmed that the store manager, Mr Morris, had gone to court instead of Mr Bonnah in order to support him.

60. Mr Bonnah also said that he did report the incident involving SC to his employers, Aspro security, but they did nothing about it.

61. The claimant said that he also reported it to Ms O’Gorman and to Mr Taylor. However, the claimant said that he did not consider himself a victim of this offence but he was using this as an example of XY having employees who are racist.

62. We find, on the balance of probabilities, that SC did use racially offensive words to Mr Bonnah. However, we accept Mr Bonnah’s evidence that this was sadly a regular feature of his life as a security guard and we find that

on the balance of probabilities he did not raise as a complaint to Ms O'Gorman, or any other manager at XY, the specific allegations of racist behaviour by SC. It is clear from the notes of Ms O'Gorman that Mr Bonnah did raise concerns about the behaviour of SC but it was also clear from his statement that his primary concern and source of his indignation was that, despite having attempted to shop lift, SC was still working at the store.

63. We also find that on the balance of probabilities the claimant did not separately raise this. There is evidence that the respondent does deal with complaints that were raised, including this one, and we think that had the claimant raised the concern there would be evidence of it. The suggestion that he raised a complaint is also inconsistent with the claimant's other evidence that he did not want to rock the boat because he liked his job.

February and April 2019

64. The final two allegations of harassment are that in February 2019, following a discussion about problems the claimant was having with his back and ankles causing difficulties, Mr Taylor is alleged to have said "I thought you were a strong Hungarian man" and on 17 April 2019, Mr Taylor is alleged to have said to the claimant "Don't be a Hungarian drama queen".

65. The claimant has not provided any direct evidence of this in his witness statement. Mr Taylor said in his witness statement

"I do not recall saying 'I thought you were a strong Hungarian man'. I am passionate about the well-being of my team. I did not say to the Claimant 'don't be a Hungarian drama queen'. I would never say this to a colleague".

66. We prefer the evidence of Mr Taylor. We accept that allegations of such directly discriminatory language are unlikely to be witnessed by third parties or documented. However, we think it likely that had these incidents occurred in the way described by the claimant to Employment Judge Flood, the claimant would have been able to set out a more detailed account in his witness statement and we think it likely that given the number of such allegations there would have been complaints made about Mr Taylor either by the claimant or someone else.

67. As referred to above, the claimant's questioning of Mr Taylor really amounted to nothing more than directly accusing him of being a racist and a liar. There were no relevant detailed factual allegations put to Mr Taylor on which he could comment, and we think that this is likely because there were no specific allegations involving Mr Taylor that could reasonably put to him.

68. We emphasise that we do not doubt the claimant's statements that he has experienced discriminatory abuse in a variety of circumstances. We have not, however, seen or heard any evidence to persuade us that Mr Taylor was responsible for any instance of racially discriminatory language towards the claimant or anybody else.

17 April 2019 kicking allegation

69. Mr Taylor says that on 17 April 2019 he was approached by new member of staff, SH, who said that the claimant had either kicked her or deliberately hit her leg with decard trolley. These are described as trolleys that are about a metre square and as tall as waist height. SH's supervisor, Ms Ball,

confirmed in her conversation with Mr Taylor on 21 August 2019 that this was on 13 April 2019, four days previously.

70. Mr Taylor took a statement from SH about what she said it happened. He records that SH said

"I was working chiller, by the ready meal section. IH walked past with a decard trolley, I felt something strike the back of my left calf/ankle, it felt like he kicked me. It hurt but I didn't react as I assumed it was an accident. About 10 minutes later he walked past again and I'm sure he kicked me intentionally again. We would need to check CCTV to make sure it wasn't the decard trolley, but either way it was intentional. I looked at him and didn't say anything as I felt intimidated. He walked away laughing."

71. Mr Taylor asked SH if she was okay and if she spoke to the person running the shift and SH said that she had not, she was a bit shocked and tried to stay away from him as he made her feel uncomfortable.

72. SH then describes a previous conversation she had with the claimant on a second shift she says

"He asked me if I had just started and where I used to work. He then said oh yes I remember your face as he used to shop there. He asked me what shift I was on, I told him, he said he does four hour short easy shifts and lounged around and does what he wants as he has worked here so long. I was a little taken aback and just got myself back to work"

73. In our view, and without anything more, this does seem like a somewhat innocuous conversation and it is difficult to know why SH felt the need to raise that at that point.

74. SH then concludes in a conversation with Mr Taylor "to make you aware I am gay and I am aware he was showing hate symbol tattoos to another new starter which makes me feel uncomfortable and anxious about any comments that may be made about this."

75. Mr Taylor then concludes the meeting by saying "I'll be notifying my area manager about this and will discuss the investigation further soon".

76. This is the full extent of the investigation into the allegations made by SH. Mr Taylor said, and the respondent's other witnesses confirmed, there was in fact no CCTV covering that area. We saw a diagram of the CCTV and we find that there was no CCTV coverage of the area where the alleged incident happened.

77. Mr Taylor said that on the same day, after speaking to SH, he was approached by MB, the other new starter referred to by SH. We set out in full the notes of Mr Taylor's conversation with MB:

"CT: I was approached by MB at the start of his shift, he asked to speak to me about a member of staff's behaviour. Can you tell me what happened?

MB: I was in the w/h, it was my second shift in store. I was approached by IH and he noticed my tattoos. He then started discussing a similar tattoo he had. He then exposed the top of his arm and shoulder and pointed to a tattoo of the swastika symbol. I was shocked as he tried to laugh that it was his country's national symbol. There are other far right symbols on him that I saw. I thought it was disgusting for someone to brazenly show it as a proud

symbol. I come from a military background so I was not impressed for that to be displayed so publicly in a company that promotes equality and the acceptance of people from different backgrounds".

CT: I apologise for this experience and will investigate this fully and inform my area manager".

78. It was not disputed that the claimant has a swastika tattoo and he told us that he had had it done about 15 years ago. We were shown a photograph of the claimant's tattoo and a diagram of various forms of swastika that the respondent had produced. It was the claimant's case that his tattoo was not of an offensive Nazi swastika, but a Buddhist swastika peace symbol. In our view, it was perfectly clear that the tattoo the claimant has accords most closely with the form of tattoo shown on the respondent's document as associated with Nazism. It is orientated clockwise and tilted at a 45 degree angle. The one identified on the respondent's document as a Buddhist symbol is orientated anti-clockwise and is vertical, not tilted. Although there are other clockwise orientated "non Nazi" symbols identified in that document, those appear much more ornate in design and none of them are tilted at a 45 degree angle.

79. The claimant's tattoo has a background which he describes as flowers but which the respondent said looked like barbed wire. We cannot say which it is, but we find that it is possible to see the background as barbed wire.

80. Mr Taylor discussed these allegations with Mr Shaw and Mr Taylor then decided to suspend the claimant. It appears that the claimant was suspended on 20 April 2019. The claimant was absent through ill health from around this time. It is not clear from what date exactly but his fit note appears to be dated 18 or 19 April 2019.

81. Mr Shaw then wrote to the claimant on 25 April 2019 confirming his suspension pending further investigations into "alleged assault and bullying behaviour".

82. The claimant did not dispute that the respondent had the right to suspend him. Mr Taylor said that the reason he decided to suspend the claimant was that he felt that a fair and thorough investigation would not be possible if the claimant remained at work.

83. Given the nature of the allegations – that the claimant had assaulted a colleague and had displayed a potentially offensive tattoo, we find that it was reasonable for Mr Taylor to suspend the claimant. At that stage the allegations were untested but there was a statement form two people from which the respondent could reasonably conclude that leaving the claimant at work during the investigation might both prejudice the investigation and, if the allegations were true, would subject other employees to unacceptable behaviour.

84. We find that Mr Taylor made the decision to suspend the claimant because he considered that the circumstances were such that the respondent's policy provided for suspension and we also find that he had reasonable grounds for believing that.

Investigation

85. On 19 June 2019 Mr Shaw wrote to the claimant requiring him to attend an investigatory meeting on 26 June 2019. The claimant attended the meeting with Mr Taylor who was accompanied by Mr Morris, the Madeley store manager, to take notes.

86. After enquiring about the claimant's well-being, as he was still off work sick, Mr Taylor asked the claimant about his working relationship with SH. He said they had a normal working relationship, there had never been any special comments, they just talked and joked around. Mr Taylor asked the claimant if he could think of any reason or any issue that had caused offence to SH and the claimant said no. Mr Taylor then put the allegations made by SH to the claimant. The claimant said "have you checked the CCTV I have never hit her once or twice. I asked no personal questions if I ever hit anyone accidentally I never and would apologise why would I lie to you. If I hit her once or twice I would have noticed and then say nothing".

87. In effect, the claimant strenuously denied hitting SH. He says he would have noticed, that it is a serious allegation and that he has never hit anyone. Mr Taylor suggested it could have been done jokingly and the claimant said he'd never done it. He said he didn't know SH that well and she never told him she had been hit at the time.

88. Mr Taylor asked the claimant if he was saying that it did not happen and the claimant said "this is not true it is bullshit it is bollocks it may have happened by mistake but second time no way".

89. Then Mr Taylor raised the issue about whether the claimant showed his tattoos to MB. He asked him what his relationship was with MB and the claimant said they talked about tattoos and showed each other their tattoos. Mr Taylor said "did he say he liked your tattoos" and the claimant responded "yes, that's what he said he even touched my hand". The claimant also said, in answer to a question from the respondent, that this incident happened at least a month prior to 17 April 2019. Mr Taylor says it was when MB started but does not provide a date and the claimant's evidence was not challenged. We therefore find that this incident between the claimant and MB happened at least a month before MB reported it.

90. In evidence, the claimant said that in fact he told Mr Taylor that MB had lifted up his shirt to see more of his tattoos. The claimant said that when the notes refer to touching his hand this is what he meant.

91. Mr Taylor then referred to the staff handbook which identifies that tattoos are permitted as long as they are not offensive. We were shown an extract from the respondent's uniform policy. This says, as far as is relevant,

    "Employees should avoid wearing anything that can be reasonably construed as inappropriate, provocative or offensive. Tattoos are permitted, however tattoos that are visible must be non-offensive and limited on the face or throat".

92. The claimant said, effectively, that he and MB had been comparing tattoos like a competition. He said that his tattoo was not a racist symbol but that it was Buddhist symbol. He referred to the fact that people have racist British symbols such as a bulldog. Mr Taylor said that MB is of Norwegian heritage, not British.

93. The claimant could not explain why MB or SH would make these allegations against him and suggested that it might be because they do not like foreigners.

94. Mr Taylor's view was that as MB and SH were both new starters at the company, and they had no reason to have any issues with the claimant, they were unlikely to have made these allegations up.

95. The claimant was also asked questions about his relationship with SH and he said that he had seen her in a shop previously and he had no issues with her or knowledge about her.

96. The claimant said in evidence that he had no knowledge at all of SH's sexuality before these proceedings and this was not disputed by the respondent.

97. Around this time, although it is not at all clear when, both SH and MB left the employment of the respondent.

98. In our view, this investigation left a great many questions unanswered. Mr Taylor said that it was not his role to challenge or investigate the accounts given by MB or SH. His role as investigating officer was really to record their statements and report them to his manager, Mr Shaw. There was, therefore, no testing of or exploring the information given by MB or SH.

99. The interview with the claimant was, however, more probing and challenging than the interviews with MB and SH were. For example when the claimant gave his account of the alleged assault on SH, Mr Taylor challenges his interpretation and picked him up on potential perceived inconsistencies in what he's saying. There was no such challenge in respect of MB or SH.

Disciplinary hearing

100. Following this investigation the matter was referred to Mr Shaw to conduct a disciplinary hearing. The claimant was invited to the disciplinary hearing and in the letter he was given the right to be accompanied by a representative.

101. The allegations in the invitation letter were

    a. Gross misconduct-threatened violence/physical assault of a colleague-where you allegedly intentionally struck an employee with your foot or decard trolley twice on 13/04/2019

    b. Gross misconduct-conduct by bringing yourself and the company to disrepute-where you allegedly showed tattoos on your body which included a symbol resembling a swastika sign causing offence whilst on shift

102. The claimant was also sent the meeting notes of the interviews conducted by Mr Taylor. The claimant attended the disciplinary hearing on 11 July 2019. He chose not to bring anyone to the meeting with him and he was informed at the outset that the outcome of the meeting could be his dismissal.

103. The same allegations were again put to the claimant. The claimant denied hitting SH. He said maybe by accident but not kicking and not on purpose. He said "why should I kick a new employee its bullshit". Effectively, the

claimant continued to deny that anything had happened with SH and again suggested that Mr Shaw check the CCTV camera. Mr Shaw put it to the claimant that SH felt intimidated by him and the claimant asked why, if that was the case, she had not raised it sooner with a manager rather than waiting as she had done.

104. Mr Shaw says in his witness statement that the claimant became very angry and aggressive in the course of the disciplinary hearing. He was standing up, standing over the claimant and pointing down at him. Mr Shaw said it was the first time in his long experience that he had felt threatened in a disciplinary hearing. We prefer Mr Shaw's evidence of his account of this meeting and find that the claimant did behave in the manner described by Mr Shaw. Mr Shaw concluded, that if he were intimidated by the claimant it was likely that a younger and more junior member of staff would be even more intimidated.

105. We are not sure that this is a reasonable conclusion to reach. Mr Shaw had made it clear to the claimant that his job was on the line and from the claimant's perspective he was being accused of things that he said he had not done. While we do not say that this excuses aggressive or intimidating behaviour, we do not think that it is necessarily possible to conclude from the conduct of a person in a disciplinary hearing how they would behave on the shop floor.

106. We note the evidence of Mr Taylor who said that he was surprised by the allegation of assault and he would not expect the claimant to do anything like this. That suggests to us that the claimant did not habitually behave in an aggressive or frightening way on the shop floor.

107. When Mr Shaw said to the claimant that he was being aggressive and that the way he is coming across could come across as aggressive or intimidating to store staff. The claimant replied that that was because he was stressed and we note that the claimant was absent from work through ill health at the time.

108. Mr Shaw then put the second allegation to the claimant. Mr Shaw said "this allegation is that MB felt very offended and disgusted by the tattoo you showed him in the warehouse. You approached him, stood talking and showing tattoos of what he believes is a swastika tattoo and he was quite offended by this". The claimant said he showed his tattoos and he said he liked them. The claimant said that no one had said anything to him before.

109. Mr Shaw said to the claimant that he started discussing tattoos with MB and the claimant lifted his sleeve and showed him his shoulder and what is believed to be a swastika. It is then recorded in the notes that the claimant did show Mr Shaw his tattoo which he described as a Buddhist symbol with flowers. He then said that he found a Union Jack flag and bulldog tattoo to be offensive and racist.

110. The claimant did not say at that point that MB lifted the claimant's sleeve – h did not correct Mr Shaw.

111. Mr Shaw then referred to the uniform policy discussed above which says that visible tattoos must not be offensive. When the claimant had shown his tattoos to MB it had been visible and MB described himself as feeling

disgusted by it. The claimant took issue with this and said that it was a racist comment.

112. Mr Shaw asked the claimant if he accepted that someone could perceive the tattoo as offensive and the claimant said yes maybe, although he went on to qualify that it meant a lot to him. He then reiterated the question-Did the claimant believe that that tattoo could be offensive to somebody and the claimant replied “yes”.

113. Finally, Mr Shaw referred to some notes from a meeting with Mr Matthewman on 17 April 2019. In that meeting, the claimant appeared to confirm that he was aware of the uniform policy. We have seen a copy of those notes in the bundle. The claimant has signed those notes but the claimant said he thought they had probably been filled in afterwards. On the balance of probabilities, we find that this meeting did take place and that the notes broadly reflect what had been discussed. There is no reason to think that the notes were retrospectively amended as suggested by the claimant.

114. Mr Shaw adjourned the meeting, spoke to HR and then informed the claimant that he was summarily dismissed for gross misconduct. He says in his witness statement that it was his belief that the claimant had struck SH deliberately and had been intimidating and bullying as he had walked away laughing on the second occasion. He also believed that MB had been offended by the claimant’s tattoo and his comments about them. Mr Shaw said that he believed the claimant was aware that people found those sorts of tattoos offensive and he should not have shown it to his colleague or made the comments he did about it being a national symbol. He says “these are sensitive issues and I felt it was massively inappropriate for the claimant behaving this way. I felt that him showing the tattoos at work was damaging to XY’s reputation”.

115. He placed weight on the fact that SH and MB had nothing to gain from their complaints about the claimant as they were both new employees.

116. We find that on the evidence before him Mr Shaw did genuinely believe that the claimant had committed both of the acts of gross misconduct that he was charged with. However, it is clear that MB and SH’s versions of events had not been scrutinised or challenged by Mr Taylor.

117. Because the respondent’s policy is that witnesses are not required to attend disciplinary hearings to have their evidence challenged and, in any event, both MB and SH had left the employ of the respondent by the time of the disciplinary hearing, Mr Shaw did not have all the evidence that he reasonably needed to come to the conclusion that the claimant was guilty of gross misconduct.

118. We find that he placed a great deal of weight on the conduct of the claimant at the disciplinary hearing. The conduct, as described by Mr Shaw, was not an appropriate way for the claimant behave, but we also find that Mr Shaw could not reasonably rely on this sort of behaviour when the claimant was off sick with stress at work, aware that he might at any moment lose his job.

119. The claimant left the room halfway through Mr Shaw telling him the decision and the reasons for it and consequently did not sign the meeting notes.

120. Mr Shaw confirmed his decision in a letter dated 19 July 2019 And set out ostensibly the same reasons for the decision as referred to above.

Appeal

121. The claimant appealed against the decision to dismiss him and the matter was referred to Mr Parsons who arranged an appeal meeting for 9 August 2019. The claimant was again given the opportunity to be accompanied at the meeting. Initially he did not bring anyone with him but on attending the meeting he asked for a colleague, Mark Brown, to attend to be his companion. The respondent postponed the meeting for half an hour or so to facilitate Mr Brown's attendance.

122. In the appeal meeting, the claimant reiterated his case. He also raised allegations of race discrimination and raised the issue relating to Mr Bonnah as discussed above. The claimant again refers to MB touching him as they were comparing tattoos but does not explicitly say that his shirt was lifted up by MB to expose his tattoos.

123. Mr Brown also noted on behalf of the claimant that he had had one previous warning before in 2016 in relation to taking goods from the bakery without paying for them but that that was both spent and unrelated to the current allegation. The claimant said that this had been a genuine oversight.

124. Mr Parsons said that after the meeting he spoke with Stuart Morris about the allegation that SC had not been dismissed for theft and that she had used racist language. The outcome of this investigation about that was that SC had been told by manager that she could take leftover stock, even though it was against company policy, so that a warning was appropriate. Mr Morris told Mr Parsons that he was unaware of the allegation of racist language and that no allegation had been made to him previously including by Mr Bonnah.

125. Mr Parsons made further enquiries with Mr Taylor and said that he wanted to understand if Mr Taylor had "engineered the complaints or if the two individuals had both independently come to him with their concerns".

126. In the course of the conversation between Mr Parsons and Mr Taylor, Mr Taylor sets out a number of allegations about the claimant that do not appear to have been put to him in the course of these disciplinary proceedings. In oral evidence, Mr Taylor said that he was shocked by the allegations against the claimant resulting in the disciplinary proceedings and would not have expected them of the claimant. In the notes of the conversation between Mr Taylor and Mr Parsons, Mr Parsons is recorded as asking whether anything had been raised to Mr Taylor about the claimant of a similar nature in the past. Mr Taylor says

    "Raised by multiple people. HJ always felt uncomfortable. ME was exactly the same. He would never listen to any feedback or direction Josh Matthewman had issues with him as well. Had run-ins with multiple people. It was disgusting at times. There was a similar issue with LOG. IH felt she had disrespected him one day when she was in store he refused to acknowledge when she tried to speak to him. He seemed to have a problem with her but did not say why-when I asked him, it was a trivial thing. That is the sort of character he is unfortunately".

127. When asked whether any of these issues had been raised with the claimant before Mr Taylor says “in conversation but without escalating. It was easier to have a conversation to try to avoid it again. He made a comment to SH that if anyone ever tried to do anything to try to manage him he would always play the race card and try to intimidate about his race. He is big on his history, he has far more knowledge than me. Would always make reference his culture and how powerful they used to be and how much land they used to have. He used to make reference to his race a lot and would say things like Hungary used to rule the world. I knew he was always hard to manage and was unruly-he would approach people make comments to anyone, even if directors that would make you cringe.”

128. Mr Taylor then confirms that he was not concerned that the claimant would “kick out” but that he would always gossip and stir. Mr Taylor goes on to say that the claimant almost tried to blackmail him in respect of an issue with another member of staff.

129. None of this information or these allegations were put to the claimant at any point during the disciplinary proceedings and the claimant was not given an opportunity to respond to them. However, regardless of whether Mr Taylor’s view of the claimant was reasonable or not, it is clear that he did have these views and is also clear that he had discussions with Mr Shaw prior to Mr Shaw’s decision to dismiss him.

130. We must conclude that these opinions formed part of the underlying basis of the investigation conducted by Mr Taylor and we think it is likely that Mr Taylor’s opinion of the claimant was communicated to Mr Shaw in the course of their conversations.

131. Mr Parsons also said that he spoke to Barbara Bell, who was managing SH at the relevant time. Ms Bell said that she recalled SH being upset towards the end of the day in question (when the claimant is alleged to have kicked her or hit her with a trolley). However, she put it down to personal issues or the stress of the job.

132. He spoke to Mr Shaw who confirmed that he considered that the claimant’s behaviour during the disciplinary hearing was an indicator of why the two new starters felt intimidated by him.

133. Mr Parsons decided to uphold the decision to dismiss the claimant and he wrote to him with that outcome in a letter dated 30 August 2019. He said that it was his view that the claimant’s tattoo was of a Nazi swastika and not a Buddhist symbol. The claimant should have been aware that some people might find this offensive and he should not have disclosed his tattoo in the workplace. He said that there was no evidence that Mr Shaw had discriminated against the claimant and he believed the decision to dismiss the claimant was reasonable.

Other matters

134. We understand that the claimant asserted, in the course of the hearing, that it was part of his character as a Hungarian to have a large character – to use expansive metaphors and figures of speech. We cannot find that this is a widespread Hungarian characteristic on the basis of the claimant’s description of himself. However, if even this were the case, we cannot

conclude that such a type of presentation is necessarily related in any way to being perceived as a bully or troublemaker.

135. It was the evidence of Mr Taylor that the claimant tended to raise his nationality and issues of race in conversations rather than anyone else. We find that, on the balance of probability, this is the case. The claimant raised this issue in the disciplinary hearing with the note taker and the contemporaneous evidence of the conversation between Mr Parsons and Mr Taylor is that the claimant had a keen interest in his nationality and history and discussed the matter regularly.

The law

Unfair dismissal

136. An employee has the right under section 94 of the Employment Rights Act 1996 (ERA) not to be unfairly dismissed. Section 98 ERA provides

> 98 General
>
> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
> (2) A reason falls within this subsection if it—
> (a) relates to the capability or qualifications of the employee for
> (b) relates to the conduct of the employee,
> (3) In subsection (2)(a)—
> (a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and
> (4) [Where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
> (b) shall be determined in accordance with equity and the substantial merits of the case.

137. In *Abernethy v Mott Hay and Anderson* [1974] IRLR 213, [1974] ICR 323, it was held that:

> "A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee'.'

138. The respondent relies on conduct as a potentially fair reason.

139. In respect of dismissals relating to conduct, in the case of British Home Stores Ltd v Burchell 1980 ICR 303, the Employment Appeal Tribunal said that employer must show that:

    a. it believed the employee guilty of misconduct
    b. it had in mind reasonable grounds upon which to sustain that belief, and
    c. at the stage at which that belief was formed on those grounds, it had carried out as much investigation into the matter as was reasonable in the circumstances.
    d. When considering whether the decision to dismiss the claimant was reasonable for the purposes of section 98 of the employment rights act rather than applying a lower sanction I am not permitted to substitute my own views of what would be an appropriate outcome.

140. In *ILEA v Gravett 1988 IRLR 497, EAT*, Mr Justice Wood (then President of the EAT) offered the following advice about the level of investigation required: 'at one extreme there will be cases where the employee is virtually caught in the act and at the other there will be situations where the issue is one of pure inference. As the scale moves towards the latter end, so the amount of inquiry and investigation which may be required, including questioning of the employee, is likely to increase.'

141. In the case of *Iceland Frozen Foods Ltd v Jones* 1983 ICR 17, EAT, the Employment Appeal Tribunal summarised this aspect of the law as follows:

    (1) the starting point should always be the words of [S.98(4)] themselves;
    (2) in applying the section [a] tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the… tribunal) consider the dismissal to be fair;
    (3) in judging the reasonableness of the employer's conduct [a] 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's conduct within which one employer might reasonably take one view, another quite reasonably take another;
    (5) the function of the… tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.'

142. If the Tribunal finds that the respondent has failed to take the steps in respect of a conduct dismissal referred to above in coming to the decision to dismiss the claimant, we are not entitled, when addressing the question of reasonableness under s 98(4) to as whether it would have made any difference if the correct steps had been taken or not. This question only becomes relevant if the claimant's claim is successful. If the tribunal considers that had different or appropriate steps been taken there was a chance that the claimant would have been dismissed, or dismissed at some point, in any event, then any award may be reduced accordingly. (*Polkey v A E Dayton Services Ltd* [1987] IRLR 503).

143. Section 122 of the ERA provides that

> Where the tribunal considers that any conduct of the complaint before the dismissal… was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly

144. Section 123 ERA provides that

> Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complaint, it shall reduce the amount of the compensatory award by such amount as it considers just and equitable having regard to that finding.

Direct discrimination

145. Section 13 of the Equality Act 2010 provides:

> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

146. By virtue of section 9 of the Equality Act 2010, race is a protected characteristic.

147. Section 23 (1) provides

> (1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.

148. We have considered the case of *Shamoon v Chief Constable of the RUC* [2003] IRLR 285 which provides, at para 110,

> "In summary, the comparator required for the purpose of the statutory definition of discrimination must be a comparator in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class".

149. Section 136 provides

> (1) This section applies to any proceedings relating to a contravention of this Act.
> (2) 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.
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision.

150. We refer to the case of *Igen Ltd v Wong* [2005] IRLR 258. That case says that the tribunal must consider all the evidence before us to determine whether the claimant has proved facts from which we could conclude that the respondent has committed the discriminatory acts complained of. We

are entitled at that stage to take account of all the evidence but must initially disregard the respondent's explanation.

151. If we are satisfied that the claimant has proven such facts, it is then for the respondent to prove that the treatment suffered by the claimant was in no sense whatsoever on the grounds of her race.

152. In *Madarassy v Nomura International* [2007] IRLR 246, the court of appeal said that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status (in this case, race) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.

153. This means that, in order for us to conclude that there has been direct discrimination, there must be something more than just unfavourable treatment and a difference in status.

Harassment

154. S 26 Equality Act 2010 says, as far as is relevant,

> (1) A person (A) harasses another (B) if—
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
> (b) the conduct has the purpose or effect of—
> (i) violating B's dignity, or
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
> (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
> (a) the perception of B;
> (b) the other circumstances of the case;
> (c) whether it is reasonable for the conduct to have that effect.

155. Subsection 5 lists the relevant protected characteristics, and they include race.

Jurisdiction

156. An employee can make a claim to the Employment Tribunal under section 120 of the EQA relating to a contravention of Part 5 of the EQA which includes section 40.

157. Section 40 EQA provides

> (1) An employer (A) must not, in relation to employment by A, harass a person (B)—
>
> (a) who is an employee of A's;
>
> (b) who has applied to A for employment.

158. This means that the alleged harassment by an employee of the respondent must be “in relation to” the claimant’s employment. The respondent referred to the case of *Chief Constable Of The Lincolnshire Police v Stubbs and others* [1999] IRLR 81. In that case the allegation related to harassment at a gathering of work colleagues at a pub. The question in that case was whether the alleged incident happened in the course of the respective persons’ employment. The EAT said:

“We concur with the findings of the industrial tribunal, that the two incidents referred to, although 'social events' away from the police station, were extensions of the workplace. Both incidents were social gatherings involving officers from work either immediately after work or for an organised leaving party. They come within the definition of course of employment, as recently interpreted by the Court of Appeal in Jones v Tower Boot Co Ltd [1997] IRLR 168 and the case of Waters v The Commissioner of Police of the Metropolis [1997] IRLR 589. It would have been different as it seems to us had the discriminatory acts occurred during a chance meeting between Mr Walker and the applicant at a supermarket, for example, but when there is a social gathering of work colleagues such as there was in this case, it is entirely appropriate for the tribunal to consider whether or not the circumstances show that what was occurring was an extension of their employment. It seems to us that each case will depend upon its own facts. The borderline may be difficult to find. It is a question of the good exercise of judgment by an industrial jury: whether a person is or is not on duty, and whether or not the conduct occurred on the employer's premises, are but two of the factors which will need to be considered. On the facts of this case, the industrial tribunal well understood that the applicant was not and could not be thought to have been socialising with Mr Walker on either of those two occasions. Indeed, it would appear from their decision, that this was the last thing that she would have been wishing to do. It seems to us that the way it was put in the Tower Boot [1997] IRLR 168 case succinctly sets out the task of the industrial tribunal:

'The tribunals are free, and are indeed bound, to interpret the ordinary, and readily understandable words 'in the course of his employment' in the sense in which every layman would understand them. This is not to say that when it comes to applying them to the infinite variety of circumstances which is liable to occur in particular instances – within or without the workplace, in or out of uniform, in or out rest-breaks – all laymen would necessarily agree as to the result. That is what their application so well suited to decision by an industrial jury. The application of the phrase will be a question of fact for each industrial tribunal to resolve, in the light of the circumstances presented to it, with a mind unclouded by any parallels sought to be drawn from the law of vicarious liability in tort.'”

159. Although the words in section 40 EQA are not exactly the same as those in the Sex Discrimination Act 1975 to which this case refers, are not identical, Ms Williams submitted that the principles are analogous and we agree. In relation, in particular therefore, to the allegation of harassment allegedly perpetrated by SC on 19 November 2018, it is a question of fact for the Tribunal as to whether the circumstances of that alleged incident were in relation to the claimant’s employment.

160. S123 EQA provides, as far as relevant,

> (1) [Subject to [[section] 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.

161. This means that where there are a number of allegations of harassment, time for bringing a claim starts to run from the date of the last allegation where they form part of a continuing course of conduct. However, if the last allegation occurred more than three months before the date the claim was presented (allowing for early conciliation) the Tribunal may not hear that claim unless it decides that it is just and equitable to do so. In *British Coal Corporation v Keeble and ors* 1997 IRLR 336, the EAT said that the Tribunal should consider the prejudice which each party would suffer as a result of the decision reached, and have regard to all the circumstances of the case, in particular:

    a. the length of, and reasons for, the delay;
    b. the extent to which the cogency of the evidence is likely to be affected by the delay;
    c. the extent to which the party sued has cooperated with any requests for information;
    d. the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action;
    e. and the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action.

162. In *Southwark London Borough Council v Afolabi* 2003 ICR 800, the Court of appeal said that the Tribunal need not adhere slavishly to the *Keeble* factors but that there are two factors which are almost always relevant when considering the exercise of any discretion whether to extend time: the length of, and reasons for, the delay; and whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh).

Conclusions

Unfair dismissal

163. The reason for the claimant's dismissal was conduct. In our view, Mr Shaw did genuinely believe that the reason for the claimant's dismissal was conduct but that decision was not taken on the basis of a fair and thorough investigation.

164. The investigation in so far as it comprised interviews with SH, MB and the claimant was not conducted in a way that a reasonable employer of the size and administrative resources of a large supermarket chain such as the respondent would do. There was no challenge or opportunity to challenge or test the evidence of MB or SH. It was simply taken at face value. Conversely the evidence of the claimant was challenged. Referring to *ILEA* above, in such a case where the evidence was unclear, a more probing investigation was, in our view, required to test the perceptions and beliefs of SH. This was particularly the case where the alleged conduct of the claimant appeared out of character, as Mr Taylor said, and where SH was unclear about what she thought had actually happened.

165. We think it likely that the investigation by Mr Taylor was influenced by his previous dealings of the claimant in his opinion of him.

166. It may well have been reasonable to take into account previous conduct of the claimant in coming to the decision to dismiss him but it was important that the claimant had the opportunity to comment on and address those allegations of his misconduct. As it was, it appears that Mr Taylor took those things into account in the way that he undertook the investigation. He also communicated those views to Mr Shaw in some way and that impression of the claimant together with the conduct of the claimant at the disciplinary hearing influenced the decision of Mr Shaw so that Mr Shaw came to the conclusion that the claimant was guilty of ongoing misconduct and bullying behaviour.

167. Further, we think that the decision to summarily dismiss was in the circumstances outside the band of reasonable responses. In the absence of being able to obtain further information from SH, as (as the respondent said) she had left the organisation, there were still significant doubts over whether the claimant had even made contact with SH and if he had whether that was intentional or accidental. To dismiss the claimant in such circumstances was simply not reasonable. A warning would have been reasonable, and all that could reasonably have been warned was for the claimant to be more careful. But that would have been an appropriate outcome.

168. We are mindful that this allegation does not stand by itself. However, as with the allegation of assault, there are simply too many unanswered questions about the interaction between MB and the claimant in respect of his tattoo. The fact that MB only appeared to have discussed the matter with Mr Taylor once he had communicated with SH and that it is not entirely clear whether he approached Mr Taylor voluntarily or was encouraged to do so calls into question the extent to which both the claimant did deliberately show the swastika tattoo to MB and the extent to which MB was genuinely offended by that. It is also relevant that MB waited at least a month between seeing the tattoo and raising it with Mr Taylor. This tends to suggest that even if MB had found it offensive, he did not consider it of itself worth raising or complaining about.

169. In respect of the tattoo, we agree that the respondent was entitled to adopt the approach it did in determining whether the tattoo was offensive or not. They considered, effectively, whether a reasonable person would reasonably consider that it was offensive. Whether one particular person did or did not find it offensive was irrelevant. Clearly it is beyond any sensible doubt that a Nazi swastika is offensive to most people for obvious reasons. Even if the tattoo the claimant had was not a Nazi swastika, but a Buddhist one, the research undertaken by the respondent indicated that the claimant's tattoo did appear to bear a resemblance to a Nazi swastika and the respondent was entitled to conclude that people might find it offensive. In fact, the claimant agreed that some people might find it offensive. The respondent was therefore entitled to treat the claimant's tattoo as "offensive" within the meaning of its policy.

170. Returning to the investigation, again in the absence of the possibility of further investigation because MB had left the respondent's employment, a warning about the tattoo seems appropriate. Even putting the two offences together, which of course the respondent did and was entitled to do, a stern warning about uniform policy together with a warning to be more careful and sensitive around new employees was really the most serious response that was within the band of reasonable responses.

171. Had Mr Taylor and Mr Shaw properly investigated and put to the claimant all the allegations about his previous conduct and had he been unable to provide a satisfactory response then, taken together with the newest allegation about the trolley or the kicking and the allegation about the tattoo, dismissal might have been within the band of reasonable responses.

172. However, as it was, the dismissal was simply not fair because the respondent took into account matters about which they did not inform the claimant and they did not give him the opportunity to comment on those matters.

173. We consider also that Mr Shaw took into account the conduct of the claimant at the disciplinary hearing. Again, this conduct was inappropriate but it was not reasonable for Mr Shaw to draw inferences about the claimant's conduct on the shop floor from his conduct in the disciplinary hearing, and it was not reasonable for Mr Shaw to rely on this behaviour as an additional reason for dismissing the claimant without at least speaking to him, or trying to speak to him, about it in the hearing: to warn him that his behaviour was either unacceptable and might lead of itself to immediate disciplinary sanctions. Mr Shaw did tell the claimant that his behaviour in the disciplinary hearing might be intimidating to people on the shop floor and he had a chance to comment on it but, having heard that the claimant was stressed and knowing he was off sick with stress it was not reasonable to draw inferences about the likely behaviour of the claimant on the shop floor from that behaviour in the disciplinary hearing.

174. For these reasons, we find that the respondent's belief that the claimant was guilty of gross misconduct was not based on an adequate investigation and the decision to dismiss him after 6 years' service on the basis of this investigation was outside the band of reasonable responses of a reasonable employer.

Contributory conduct/Polkey

175. We cannot make a deduction under Polkey as we simply do not know what the outcome would have been had the respondent conducted amore probing investigation and had the matters on which Mr Shaw relied been put to the claimant. We think that the failures in the investigation on the evidence we heard were fundamental and we cannot reasonably conclude on that basis that there was any possibility of the claimant being fairly dismissed.

176. However, we consider that it is just and equitable to reduce the amount of any compensatory award as the claimant did contribute to some extent to his own dismissal. He was intimidating at the disciplinary hearing and Mr Shaw said that it was the most alarming disciplinary hearing he had ever conducted. In behaving in this way, the claimant has contributed to Mr Shaw's decision to dismiss him. In our judgment, a reduction of 10% to any compensatory award is a just and equitable reduction. We do not consider that it would be appropriate to reduce the basic award by the same, or any, amount. The fact remains that the claimant has lost his job after 6 years' service and it is appropriate that he receives the appropriate amount of the basic award.

Harassment

177. In respect of all of the allegations of harassment except for that relating to Mr Bonnah on 19 November 2018 we have found that there was no evidence that these matters actually happened in the way alleged by the claimant. Particularly, there is no convincing evidence to support the allegations that Mr Taylor said or did any of the things alleged by the claimant. Those claims are therefore dismissed.

178. In respect of the allegation relating to Mr Bonnah, we think that on the balance of probabilities SC probably did say something discriminatory to Mr Bonnah and we are prepared to accept that that was in the hearing of the claimant.

179. However, we find that we do not have jurisdiction to hear that complaint for the following reasons

180. The claimant was not acting in the course of his employment. He was attending a branch of XY which was very close to his home. He was doing his shopping. He did not work and nor had he ever worked at that particular store. There is no relationship between the claimant's employment and the fact that he happened to be present at that store at that particular time. We have considered whether the fact that the claimant was talking to Mr Bonnah was sufficient of itself to bring the incident into section 40 EQA, but there was no evidence that the claimant even knew Mr Bonnah *because* they both worked at XY. These circumstances, in our judgement, fall outside the borderline referred to in *Chief Constable Of The Lincolnshire Police v Stubbs*.

181. In any event, this claim is very substantially out of time. The allegation was that it happened on 19 November 2018. The claimant brought his claim on 5 September 2019. He started early conciliation on 22 August 2019. The early conciliation started 6 months after the time limit for making a claim about that alleged incident and the claim was brought two weeks later.

182. The claimant did not give any good reason as to why he had not brought a claim previously. The only reason he gave was that he did not want to bring a claim while he was still employed. This might be an understandable reason, but there's nothing about the conduct of the respondent from which one could conclude that they would object to him bringing a claim or raising a complaint. The claimant provided no further evidence about any potential reasons for extending time and we decline to do so.

183. We note also that the claimant did say in oral evidence that he did not consider himself a victim in the scenario he described – he referred to the incident to demonstrate the racist culture at XY. This is not a decisive factor but having regard to the delay, the lack of explanation for it and the apparent *relative* lack of importance of this particular issue to the claimant in his overall claim compared to the impact on the respondent of being required to open up historic matters, it would not in our view be just and equitable to extend time to hear this complaint.

Direct discrimination

184. The claimant was treated unfavourably in so far as he was suspended and then dismissed. The claimant compared himself to SC. We do not consider that SC is an appropriate comparator. In fact SE was given a warning for theft as was the claimant. To that extent they were treated the same when the circumstances were very similar – both the claimant and SC were accused of theft in unclear circumstances. Both were given the benefit of the doubt and both were given warnings short of dismissal. The reason that no investigation was undertaken of SE in the aftermath of the allegations about her saying discriminatory things to Mr Bonnah was that these allegations were not reported to the respondent.

185. We conclude, however, that there is insufficient evidence to reverse the burden of proof in this case.

186. In respect of his suspension, the claimant was suspended in accordance with the respondent's policy on the basis of the reasonable belief of Mr Taylor. There is nothing at all to link this decision with the claimants' nationality or the protected characteristic of race more generally.

187. The claimant was dismissed, he was dismissed in circumstances where the stated reason for dismissal did not reflect fully the true reason for his dismissal. The discussion between Mr Parsons and Mr Taylor reflects the fact that matters other than those put to the claimant were part of the reason for his dismissal. In that conversation, Mr Taylor referred to the fact that the claimant referred to himself as Hungarian a number of times and that the claimant refers to particular Hungarian characteristics.

188. We have considered the fact that in that conversation, Mr Taylor uses the phrase "plays the race card". In our view, this phrase could be interpreted as being used to minimize allegations of racism. However, Mr Taylor is reporting what SH said – he does not appear to be using that phrase himself, or if he is, he is using it as a shorthand for expressing what SH told him. In our view, this conversation reflects Mr Taylor's genuine belief that he considered that the claimant did not at that time genuinely believe that he was or had been subject to discrimination.

189. The references o the claimant's nationality in that conversation are references to the claimant raising his nationality and associated matters regularly at work. We do not consider that they are indicative of any direct reference by any of the respondent's employees (outside of that conversation) to anything to do with the claimant's nationality or to race generally and they are not evidence of any potentially discriminatory reasons for the decision to dismiss the claimant.

190. This was the only evidence we heard that could even *potentially* link the claimant's dismissal with his protected characteristic. We do not consider that it is adequate to do so.

191. However, even if there is evidence available from which we could infer that, without further explanation, the decision to suspend and dismiss the claimant was because of his nationality, in our view the respondent has shown that the reason for the claimant's dismissal was not actually related to his race at all.

192. In our view the reason that the claimant was dismissed was because Mr Taylor and Mr Shaw had a view of the claimant as a bully and a troublemaker. This view was based on their impression of the claimant gathered over a period working with him. We think that the opinion of the claimant set out in the notes of the conversation between Mr Taylor and Mr Parsons reflects accurately Mr Taylor's view of the claimant. Namely that he *believed*, by the time of the conclusion of the investigation, that he was a bully and a troublemaker. We conclude that this was based on information given to Mr Taylor (albeit that that information was not sufficiently well challenged or scrutinised as explained above) it was not in any way related to the claimant's race.

193. For these reasons the claimant's claim of direct race discrimination is unsuccessful and is dismissed.

Employment Judge Miller
17 April 2021