EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr. M. Sacko Diarra	**v**	Louis Vuitton UK Ltd

PRELIMINARY HEARING

Heard at: London Central (CVP) **On: 21 January 2022**

Before: Employment Judge Goodman

Appearances
For the Claimant: Mr S. Liberadzki, counsel
For the Respondent: Ms. J. Coyne, counsel

JUDGMENT

1. The unfair dismissal claim is struck out under rule 37 as having no reasonable prospect of success.

2. The wrongful dismissal claim is struck out as having no prospect of success.

3. The victimisation claim is struck out as having no prospect of success.

4. The discrimination and harassment claims have little reasonable prospect of success and the claimant is ordered to **pay a deposit of £1,000 within 14 days of this Judgment being sent to the parties a**s a condition of proceeding with them. Instructions for Payment are in Appendix Two to this Judgment.

REASONS

1. This is a hearing of the respondent's application to strike out all the claims under rule 37(1) of the Employment Tribunal Rules of Procedure 2013 on the basis that they have no reasonable prospect of success. In the alternative, the tribunal is invited to make an order under rule 39 that the claimant pay a deposit as a condition of continuing with some or all of his claims, on the basis that they have little reasonable prospect of success.
2. The claimant was employed by the respondent as a stock assistant at their shop in New Bond Street from 30 April 2018 until 20 February 2021, when he was dismissed for gross misconduct. He is French, black and a Muslim.
3. He brings claims for unfair dismissal, wrongful dismissal (not being paid notice) and discrimination because of race or religion and belief. The treatment in the

discrimination claim is pleaded in the alternative as harassment. A claim of post-dismissal victimisation was added at a Case Management hearing on 2 September 2021. The respondent has amended the grounds of response to the amended claim. At that hearing a list of issues was settled by Employment Judge Burns, and it is appended to these reasons.

4. For this hearing I was provided with a bundle of 315 pages. I had also been able to view a short Snapchat video, a further version of that, and video recordings of two telephone calls made to the claimant by his supervisor on 11 January 2021. It was the Snapchat message, posted by the claimant on 9 January 2021, which started the investigation that led to his dismissal. In addition, I had read the claim form, amended grounds of response, the list of issues, and the Case Management summary, the respondent's application for the order (13 pages) and the claimant's reply (7 pages). I was not provided with witness statements, and I heard no live evidence. I was taken to a number of documents in the bundle, notably the minutes of investigation, disciplinary and appeal meetings.

5. The respondent had prepared a document entitled "undisputed factual background". The claimant said some of the content was disputed, though without identifying which areas were disputed. In view of this I have not used it.

6. The respondent's written application was detailed, and the tribunal heard a substantial oral submission as well. The claimant had prepared a written response and also made oral submissions.

Relevant Law

7. Rule 37 of the Employment Tribunal Rules of Procedure 2013 provides (emphasis added):

> (1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—
> (a) that it is scandalous or vexatious or has *no reasonable prospect of success*;

8. Rule 39 is about deposit orders (emphasis added):

> Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has *little reasonable prospect of success*, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

9. The amount of the deposit is set having regard to his ability to pay, and must not be so high as to bar him access to justice, but the real deterrent effect of a deposit order is the risk of paying costs. If at final hearing the claimant loses because of substantially the same weakness in his case as identified in the deposit order he is likely to have to pay the other party's costs.

10. Striking out under order 37 requires the tribunal to take the decision in two stages, firstly, to decide whether the ground for striking out are established, secondly, to exercise its discretion on whether striking out is appropriate - **Hasan v Tesco Stores Ltd UKEAT/ 0098/16**.

11. Applications to strike out (and for deposit orders) are decided on the basis of the pleaded case and available documents, without taking oral evidence. The tribunal should take the claimant's pleaded case at its highest – that is, assume for the purposes of the application that the claimant will be able to prove the facts stated in his claim- when deciding whether that claim has no

reasonable prospect of success. It may also take account of documents about which there is no question, to question a pleaded case which is "totally and inexplicably inconsistent with the undisputed contemporaneous documentation" – **Ezsias**. The principles are set out in **Mechkarov v Citibank NA (2016) ICR 1121.** The importance of establishing what the claimant's case is, before deciding the prosepcts of success, was emphasised in **Cox v Adecco UKEAT/0339/19.**

12. Striking out is draconian, and should not be done where there are core issues of disputed fact to be determined on hearing oral evidence – **Tayside Public Transport Company Ltd v Reilley (2012) IRLR 755**, an unfair dismissal case which involved a dispute on what instructions a bus driver had received about his route on a date when he drove his bus under a bridge, shearing the top off.
13. In discrimination cases, even more than in unfair dismissal cases, Tribunals must take great care not to strike out at a preliminary stage, before evidence has been heard, because they are often fact sensitive, and furtehr are socially important: "in this field perhaps more than any other the bias in favour of the claimant being examined on the merits or demerits of its particular facts is a matter of high public interest". The same goes for public interest disclosure cases– **Anyonwu v South Bank Students Union2001 ICR 391, Ezsaias v North Glamorgan NHS Trust 2007 EWCA Civ 330**.
14. Alongside these warnings about the care needed, tribunals are reminded that even in discrimination cases it is not required to hear evidence in cases that are bound to fail - **Malik v Birmingham City Council UKEAT/0027/19,** summarising earlier decisions.
15. Having set out the principles applying to striking out, I turn to the law relevant to the claims in these proceedings.

16. The Equality Act by section 13 prohibits direct discrimination whereby:

> 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.

17. Harassment is prohibited by section 26:

(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.

18. Victimisation is prohibited by section 27. The claimant must show he did a protected act, meaning, in outline, something alleging breach of the Equality Act, and that he was treated unfavourably because of that. The victimisation allegation in this case arises from settlement negotiations, and the tribunal was referred to **St Helens Borough Council v Derbyshire (2007 UKHL 16**, .in which, most equal

pay claimants having settled their claims, the respondent employer wrote to the remaining claimants setting out the harmful effect of the continuance of litigation on their colleagues. It was alleged this was in the nature of a threat or deterrent, and a detriment. Tribunals were told to focus on whether what occurred was a detriment, and that bearing in mind that litigation is in any case stressful, the anxiety suffered as a result of this letter was not caused by anything more than the action of the "honest and reasonable" employer trying to negotiate a settlement, so not a detriment.

19. Burden of Proof: because people rarely admit to discriminating, may not intend to discriminate, and may not even be conscious that they are discriminating, the Equality Act provides a special burden of proof. Section 136 provides:

> (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.

20. How this is to operate is discussed in **Igen v Wong (2005) ICR 931.** The burden of proof is on the claimant. Evidence of discrimination is unusual, and the tribunal can draw inferences from facts proved by a claimant. If inferences tending to show discrimination can be drawn from those facts, it is for the respondent to prove that he did not discriminate, including that the treatment is "in no sense whatsoever" because of the protected characteristic. Tribunals are to bear in mind that many of the facts required to prove any explanation are in the hands of the respondent.
21. The process is not easy. Tribunals must focus on the reason why the claimant was treated as he was, recognising that construction of a hypothetical comparator is done as an aid to identifying the reason for the treatment - **Shamoon v Royal Ulster Constabulary (2003) ICR 337. Anya v University of Oxford (2001) ICR 847** directs tribunals to find primary facts from which they can draw inferences and then look at: "the totality of those facts (including the respondent's explanations) in order to see whether it is legitimate to infer that the actual decision complained of in the originating applications were" because of a protected characteristic. There must be facts to support the conclusion that there was discrimination, not "a mere intuitive hunch". **Laing v Manchester City Council (2006) ICR 1519**, explains how once the employee has shown less favourable treatment and all material facts, the tribunal can then move to consider the respondent's explanation. There is no need to prove positively the protected characteristic was the reason for treatment, as tribunals can draw inferences in the absence of explanation – **Network Rail Infrastructure Ltd v Griffiths-Henry (2006) IRLR 88 -** but Tribunals are reminded in **Madarrassy v Nomura International Ltd 2007 ICR 867**, that the bare facts of the difference in protected characteristic and less favourable treatment is not "without more, sufficient material from which a tribunal could conclude, on balance of probabilities that the respondent" committed an act of unlawful discrimination". There must be "something more".
22. The fact that an employer has acted unfairly or unreasonably does not of itself infer discrimination: **Glasgow City Council v Zafar (1998) ICR 120.** Further, there may be unjustified reasons for an employer's actions, but if the tribunal accepts that these were the genuine reasons, and those reasons would have been applied to someone not sharing the claimant's protected characteristic, discrimination cannot be inferred from that**: Bahl v Law Society (2004) EWCA Civ 1070.**

Unfair dismissal

23. By section 98 of the Employment Rights Act 1996, the employer must establish what was the reason for dismissing, and that this is one of the potentially fair reasons, which include conduct, the stated reason in this case. Having established a potentially fair reason, the tribunal it was fair to dismiss for that reason, and, as set out in section 98 (4).

> "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."

24. The employment tribunal must not substitute its own view. It must consider whether the respondent's decision fell within a band of responses open to a reasonable employer in those circumstances - **Iceland Frozen Food v Jones [1982] IRLR 439 EAT, Post Office v Foley**, and **HSBC v Madden [2000] IRLR 827 CA** – both on the substantive decision to dismiss, and in procedural failures. The process as a whole, including the appeal, must be considered to decide whether it was fair overall -**Taylor v OCS Group [2006] ICR 1602**.
25. In conduct dismissals, tribunals must consider whether the employer genuinely believed the employee was guilty of misconduct, whether the belief was founded on reasonable grounds, including whether there had been a reasonable investigation **Burchell v British Home Stores v Burchell (1978) IRLR 379,** before deciding whether a reasonable employer would have dismissed for that reason.

Wrongful dismissal

26. This means that the employee was dismissed in breach of contract, without notice. In these claims the tribunal, rather than the employer, must find on the balance of probability whether the employee was guilty of gross misconduct justifying dismissal without notice, rather than reviewing the employer's decision, as it does in unfair dismissal claims.

Factual summary

27. On 19 December 2020 London entered into tier 4 of Covid restrictions. Residents were required to stay at home, not travel, and not stay anywhere else overnight.
28. The claimant was due to return to work on 2 January 2021. The day before, on 1 January, he contacted the employer to say that a flatmate had tested positive and he had to self-isolate the 10 days.
29. On 9 January 2021, responding to a text enquiry from his supervisor, Mr Fusco, he told his employer he had booked a test for 11 January. He added that his work phone was in a bag at his friend's house, so he might have missed an earlier call. On 11 January Mr Fusco telephoned him twice. At 14:39, the claimant's number rang out with the international dialling tone, without being answered. Mr Fusco tried again at 20:18, when the claimant's phone number rang out, this time with the UK

dialling tone, without being answered. Mr Fusco made a video recording of both calls.

30. On 12 January the claimant had a negative test result and he returned to work on 13 January.
31. In the meantime, also on 11 January, the claimant had posted a short video on Snapchat,. The video is dated 9 January, and located at St Jean de la Ruelle, in France. A number of people wearing masks are shown in a bar where music is playing. “Mama ne baisse jamais” is written on a black banner across the picture. A workmate on the Snapchat group reported this to the respondent on 11 January.
32. There was the usual return to work meeting on 13 January. The claimant said he had been informed by his flatmate on 1 January that he was Covid positive and would need to self-isolate, a period of 10 days. He had not answered the phone on 3 January because he had left his work phone at a friend’s place. He added that a second flatmate had tested positive later.
33. Mr Fusco was suspicious because of the Snapchat video and the international dialling tone, and arranged an investigation meeting later that day, with a note taker present. Reviewing the verbatim note, it shows the claimant said he had not seen for himself the message received by the flatmate, and had himself been contacted by the NHS. He had not answered the phone on 11 January (his personal phone) because, although he was at home all the time, it was not next to him. Asked about the international dialling tone, he said “sometimes it does this to me, I don’t know why”. He said a second flatmate had tested positive on 7 January, which would require 10 days isolation, so he would need to stay home from that night. He had only found that out this morning, after his own test. At the conclusion of the meeting, Mr Fusco summed up saying he thought the claimant had been abroad all the time, and there were no proofs that he had to isolate. The claimant was urged to be truthful. The claimant then said of the Snapchat, that he could put the location on it when he was not there. He was, he said: “flirting, making myself interesting”. Snapchat was not about work. As for the differing ring tones, it was his personal phone.
34. He was asked to self- isolate until 17 January (10 days from the second flatmate testing positive) and then order a test, which he would get free from the NHS. He was invited to send proof of the flatmates’ notifications, screenshots would do.
35. While at home on 15 January the claimant emailed a description of where the five other men in his house lived. He attached screenshots (in the hearing bundle) of their test results in particular the two infected flatmates Stefan (29 December test) and Patrick (7 January test), plus his own test of 12 January. His second test was booked for 18 January. The text of Stefan’s NHS notification states he must self-isolate until 5 January, “more if you still have fever at that date”. Patrick’s message from the NHS said he must self-isolate immediately for 10 days, and “members of your household must stay at home and isolate for 10 days from when your symptoms started (or from when your test was taken if you have not had symptoms)”.
36. The respondent arranged a second investigation meeting, also with a notetaker, for 19 January 2021, when the claimant returned to work after the second test. He was asked: why he didn’t see flatmate Stefan between 29 December when he got his message from the NHS, and 1 January when the claimant heard about it. While insisting they were both at home over those days, he said it was because they did not talk to each other. He did not know his isolation would end on 5 January, because he did not see Stefan’s text until Mr Fusco had asked about it. He was asked for evidence that Stefan lived in the same house, and the claimant said he

did not want to give it to him. He confirmed he had been self-isolating. He did not remember that he left his work phone at a friend's place. He got it back on the evening of 11 January. There were questions about the Snapchat post: he was asked when was the last time he was in France; the claimant did not remember when or how long for, he did not take the video on his last visit (a week in August 2020). The claimant asked in rely how they got hold of the photo, and why they had not asked all these questions of colleagues who had had to self- isolate (he named three). He was then asked if he could provide some proof that he was in his flat in the days of isolation, such as takeaway orders or receipts.

37. The claimant then supplied an undated letter from his landlord, saying Stefan lived at the same address.
38. The claimant was invited to a disciplinary meeting on 29 January, (postponed at his request to 4 February), The allegations he was to answer were: unauthorised absence from the workplace with failure to follow reporting procedures; gross misconduct in failing to disclose that he was in France when he had said that he had to self-isolate due to a flatmate testing positive for Covid, and breach of health and safety procedures by returning to work on 13 January, jeopardising the welfare of colleagues. He was warned of the risk of a finding of gross misconduct leading to dismissal. He replied challenging the evidence, saying that he had not left his room for 10 days, and had not travelled to France. He suggested that restrictions at the time would have made it difficult to travel. He wanted to know who had provided the Snapchat, and that using it was an invasion of privacy, and did not count as evidence. He attached evidence that Patrick also lived at the same address, and another letter from the landlord confirming that "due to a Covid 19 positive test at the house… (The claimant) was self isolating in accordance with current government guideline from one 121 to 11 121".
39. The disciplinary meeting on 4 February was noted, and the notes were sent to the claimant to revise. His corrected notes are those in the bundle. There were questions about the absence policy - the claimant said his manager accepted texts in lieu of the required telephone calls. There were apparently contradictory answers on when he saw the text about Stefan's test and the 5 January date. There were a lot of questions about household arrangements, and about contact with his manager, then about why he came back to work on the 13th when he had been told by Patrick he was positive on 7January. The claimant said he understood from a flatmate that one ten-day period was enough for all of them, he was asked why he relied on his flatmates for advice rather than calling his manager. They moved on to the change in dialling tone and it was put that there was a difference in the first and second calls on 11 January. The claimant insisted he was in the UK all the time. They moved on to when he was last in France. He checked the video and picture, and said he had been in France in January 2020. He had posted an old video on Snapchat in January 2021. He was asked to show the original video he had posted, and in reply said he had deleted it from his phone; it was now in the iCloud, which he could not access on his phone during the hearing, he would need his own computer. He had moved them to iCloud four days ago. Later, he said he would not share his personal video from the iCloud. He was then asked if he had any pictures he could share to show that he was in London during the time of self-isolation, and especially any pictures taken on the date he created the video, or loaded it to Snapchat. There was comparison of pictures taken in his room on 19 December and 6 January, the claimant asserting these showed he was at home in the same place on both occasions and it was pointed out that in the wall had wallpaper and in the other it was white, and there were different television stands;

this was unexplained. Next he was asked why everyone in the video shot was wearing a face mask if it was taken in January *2020*. He said it was because his sister, a nurse, had asked him to find some masks to sell. There was discussion about whether it was right for management to view social media. He was asked again about evidence of how he managed to eat during 10 days of self-isolation in London. He came back to the Snapchat pictures and said "they were old pictures that I took and put up to make a joke"

40. On 9 February the claimant returned the edited meeting notes, but did not supply dated video or pictures from iCloud or any further evidence about purchases of food and drink while self-isolating to show he was in London at the time.
41. The claimant then went sick, having slipped on ice, and had a sick note until 17 February with backache and anxiety. A further sicknote dated 15 February signed him off with "stress at work" until 15 March 2021.
42. The Respondent then offered a remote meeting to deliver the outcome of the disciplinary hearing, which the claimant refused angrily. The respondent then sent a letter dated 20 February 2021 telling him he was dismissed for gross misconduct, with the reasons set out in six pages. The allegation about failing to keep in touch while off work was not upheld. However, the allegation that he had been in France until 11 January was upheld. Travelling contrary to government quarantine and isolation put his work colleagues at risk, could be a criminal offence, and had damaged the trust and confidence placed in on him as an employee. It was also upheld that he had come to work on 13 January when he should have been self-isolating because of the second flatmate testing positive.
43. The claimant appealed. He disputed that there had to be a second ten-day period of isolation when the second flatmate tested positive, and produced a flowchart from Public Health England indicating that one 10 ten-day period would suffice from the first infection. On the other allegations, the respondent should have interviewed his landlady to check his story. He was ready now to make the iCloud data available for inspection, but private posts were in any case not acceptable as evidence. He made comparisons with how colleagues had been treated over Covid exposure, and other matters, such as not receiving a gift of perfume and being openly shouted at were now alleged as discrimination.
44. There was an appeal meeting on 12 March. It was postponed until 19 March, to allow the current sicknote to expire, then to 22 March so the claimant could have a translator present. The claimant has checked the notes of this meeting, where he was accompanied by a trade union representative. The claimant would not answer questions about his complaint about procedures followed, saying it was all in his appeal letter. He wanted to know why he had not had an answer to his questions about the evidence the respondent had on him. He did show the meeting the login page of his iCloud, and the Snapchat pictures on his phone with the date 9 January 2020 – there are photograph in the bundle. (One of them shows the black banner from the Snapchat shot, which the respondent asserts is soemthing inserted on Snapchat itself after uploading, so this cannot be the original material uploaded onto Snapchat on 9 January 2021, but a doctored photograph. This particular point was made at the preliminary hearing; it was not explored in the appeal meeting). The appeal manager did ask why it had taken so long to produce the photograph with the 2020 date on, and said the claimant replied that he had not been given the opportunity. He was also asked again about why people would be wearing face masks in France in January 2020, and gave the same answer about his sister being a nurse.

45. The appeal manager then interviewed Alessandro Fusco, who described what he had done in other similar cases, whether on exposure to Covid, or keeping in touch by phone and getting an international ring tone. He explained that unsellable fragrances will be distributed to staff on equal terms, and the claimant's gift from the recent distribution was still at work for him to collect. He denied raising his voice to the claimant. The appeal manager also interviewed Ian Gillespie, who conducted the disciplinary meeting. He had questioned him about periods of isolation of the first and second flatmate because of "inconsistencies in his stories". She then interviewed an HR representative about the claimant's request for disclosure of information.
46. The appeal manager did not allow the appeal. She found there was enough unexplained evidence to support a finding that he had in fact travelled to France. On the suggestion that he need only isolate for 10 days from 1 January for both infections, she pointed out that according to the NHS text isolation ended on 5 January, and Patrick was not notified until 7 January, so the period had to restart. She had investigated the allegations of preferential treatment for white staff. She dealt with each individually, and provided the explanations given.
47. The relevant facts on the victimisation allegation are that on 9 April 2021 the claimant went to ACAS for early conciliation, and on 26 May he presented the claim form in these proceedings. On 2 June there was a without prejudice conversation about settling the claim. The respondent has waived privilege in this. Their case is that for the sake of settlement they offered to provide the claimant with a good reference notwithstanding the gross misconduct dismissal. This offer was withdrawn when settlement was not achieved. The respondent says they have always said they will provide a standard factual reference, and that in the circumstances, offering and then withdrawing an offer to provide a good reference is not unfavourable treatment because he had alleged discrimination, but a bone fide attempt to settle the claim.

Submissions

48. The respondent submitted that on the facts the employer had good cause to be sceptical of the claimant's explanation, and to hold that he had travelled abroad in breach of Covid regulations, and that had lied about this. In January 2021 the pandemic was very serious and there were maximum restrictions in London. The respondent had good reason to be concerned for the health of staff and customers. The investigation was not unnecessary. The respondent paid staff when self-isolating, ad relied on the Guidance on the government website, and did not have access to the Public Health England chart until later. They had been very fair in the procedure, allowing the claimant every opportunity to produce evidence, to check the notes, they had adjourned hearings, and he had been represented. The respondent had conducted a thorough investigation, had reasonable grounds for their belief in misconduct, and it was a genuine belief. It was reasonable to dismiss both for lack of integrity, and for the danger to health. On the race claim, race was never mentioned until the appeal. The respondent had explanations for the comparators different treatment in isolation cases, alternatively there was no material comparison: the claimant himself was never Covid positive, and those who had tested positive were told not to attend. Some of those who tested negative were permitted to attend work when they queried whether they should stay at home. Of the allegation added at the preliminary hearing on Danilo saying he should get another job, the respondent's case is that the remark arose from him having been sent details by an agency, as he was himself looking for alternative

work, and said that the claimant should also look for other work. There was a non-discriminatory explanation of the perfume bottle incident raised on appeal. All the discrimination claims were bare of any "something more" to show that race or religion was the reason for the treatment.

49. The claimant submitted that in the discrimination case the tribunal's focus should be on the minds of decision-makers. The level of detail in the respondent's submission showed this to be a mini-trial. There are questions of fact, and on what was the prevailing guidance at the time which could only be explored properly at full trial. On the issue of whether he was in France, he had not been challenged at the appeal hearing on the pictures on his phone having been doctored, and the respondent had dismissed the appeal outcome without explanation. Whether he should have self isolated on the second occasion (for which he was sent home) he had provided adequate evidence. They had paid no heed to the letter from the landlord to the effect that he had been in London between 1-11 January. On wrongful dismissal, the claimant had shown his behaviour was not gross misconduct.

50. On discrimination, there was factual points that required exploration. The first allegation made was that a colleague had used an old photograph to post on Snapchat when he knew the claimant was not in France. This arises from the claim form, where the claimant alleged fellow employees used old Snapchat photos to give the impression he was in France in order to get him dismissed. The claimant awaited disclosure of the identity of the person revealing the Snapchat photograph to the respondent.

51. On the three comparators, one, Teresa, would give evidence that the respondent knew she had been in contact with her boyfriend the night before being tested positive, nevertheless let her to come to work instead of requiring her to self isolate, in contrast to the claimant, who was told to self-isolate and sent home. On the perfume bottle, there was a conflict of evidence on what the claimant was told about collecting it.

52. On the time point, if not part of a course of conduct, it was reasonable to extend time on the basis there was evidence the respondent was prejudiced**.**

Discussion and Conclusion
Unfair Dismissal

53. Although the tribunal has been taken to a great deal of detail about the process of investigation, the disciplinary action and the appeal process, that detail arises from contemporary notes of the meetings in versions corrected by the claimant, and comes from consideration of contemporary documents, almost all of them originating with the claimant.

54. Taking the process as a whole, including both the substance of the allegations, the process adopted, and the outcome, I find no reasonable prospects of success in the unfair dismissal claim. The investigation was triggered by two pieces of evidence which the claimant was repeatedly asked to explain, namely the dialling tones, and the Snapchat video. On the dialling tones, the claimant only suggested in general terms some machine malfunction, but in the absence of any convincing explanation, the reasonable conclusion for the employer to make is that on the first occasion the claimant was overseas (probably in France) and on the second he was in the UK. On the Snapchat video, on the face of it the respondent was right to be suspicious that the claimant had not been in London self-isolating, as he said. In the claim form the claimant seeks to suggest that this was doctored by others who

wanted to get him the sack, but as shown in the meeting notes it was the claimant himself who proposed in the investigation that he had been "flirting", doctoring the data on the photograph to suggest that he was in France on 9 January 2021 when in fact he was not. He wants to know the identity of the person who drew management's attention to the Snapchat post. The respondent is right to maintain that the person who did so should be regarded as a whistleblower, given the hazard to health and safety, or of committing a crime, of travel to France at the time, and if the claimant said he had the photograph itself on his phone, then removed it to iCloud (though an old photograph) it does not matter who referred it to the employer. It was already there to be referred. The complaints on appeal that use of the photo was a breach of privacy tends to suggest it was genuine and private, not that it was deliberately put there by someone else. The claimant was not saying someone else uploaded it to the claimant's account on Snapchat. His reluctance to show the employer the original photograph he had uploaded, which would embed the date it was taken, then saying it was deleted, then that a few days earlier it had gone to his iCloud, then saying he could not remember the iCloud password unless he was at home, when in a later meeting he had passwords on his phone, and then only producing a screenshot of his phone in the appeal hearing more than two months later, apparently showing 9 January 2020 as the date, will have reinforced, not allayed their suspicion, that it was a January 2021 photograph. His explanations of why others in the photograph are wearing masks, if it was taken in January 2020, are very implausible. Next, in January 2020 the pandemic was only a rumour from Wuhan. No restrictions were in place in Western Europe. If his nurse sister was supplying masks for sale, it is not explained why in January 2020 anyone should want to buy them, nor why the claimant might be selling them, or why a number of people in shot should be wearing them, unless it was because of Covid restrictions in France in January 2021. The only evidence he could produce to show that he was in London at the time, despite several attempts to get him to produce photographs or receipts placing him there, was a letter from his landlady briefly stating he was in residence between those dates, and it is easy to see why a reasonable employer could conclude that insufficient to establish he was in London when matched with the evidence indicating that he was in fact in France.

55. Given this reasonable conclusion based on investigating with him his whereabouts, the respondent was entitled to be concerned at what appeared to be a determinedly dishonest concealment of the truth; given his handling of valuable stock, they needed to trust him to tell the truth.

56. They were also entitled to be concerned on health and safety grounds that Covid restrictions were observed. In January 2022, when most of the population is vaccinated, and the current variant appears less serious a hazard except to the vulnerable, it is important to remember that in January 2021, when only a small group of older people had received even a first vaccination, and serious illness and death was a consequence of infection by the prevailing variant of the virus, the health of staff and customers was a genuine and serious concern. A reasonable employer could dismiss for lack of integrity - pretending to self-isolate in London, while in fact visiting France- in the fact of the evidence.

57. If the respondent had only been concerned about whether the claimant should have isolated in London for a second period of 10 days when second flatmate Patrick tested positive on 7 January, the position would be less clear, as the guidance on the website appears to have conflicted with the PHE flowchart, which by itself seems to have confirmed what the claimant said his flatmates thought was

the position. The employer's response was not capricious however: they relied on government advice, had not seen the flowchart, and also relied on the fact that even in the claimant's interpretation, counting from the date that Stefan was notified, ten days had expired before Patrick became infected. It seems likely that the argument about self isolation for a second period of 10 days arose from the respondent considering the position, in case they were wrong about France and he as in London. They did have cause for concern about the claimant's vagueness about when and what he was told by his flatmates. It is relevant context that the respondent was paying staff who were self-isolating.

58. The investigations were extremely thorough. At all stages the respondent impressed on the claimant the need to prove that they were wrong in their suspicion, evidence he did not provide. There were pauses and adjournments so he could prepare. They were entitled to take into account that his story changed as he was pressed on details. The appeal process was thorough, and the outcome reasonable. The banner point was not explored with him then, but the delay producing the shot, and the implausibility of the mask explanation, entitled the appeal manager to conclude that the claimant had not displaced a reasonable suspicion that the photo was in fact taken in France in January 2021. The employer's belief was genuine, based on reasonable grounds after reasonable investigation, and it was reasonable to dismiss for the dishonesty and cover-up, even of they were wrong about the second period of self-isolation. There is no reasonable prospect of the claimant succeeding in the claim of unfair dismissal.

Wrongful Dismissal

59. It is hard to see that there is any reasonable prospect of success in establishing that the claimant was not absent in France when he said he was self-isolating in London. The dial tones and Snapchat evidence are very strong; the exculpatory explanations late, sometimes self-contradictory, and unconvincing. The claimant's insistence that the Snapchat evidence was inadmissible because private and on social media where the employer should not have been looking suggests he knew it was true. Being absent without leave and telling untruths about it are misconduct fatally undermining the contract and entitling an employer to treat it at an end without notice.

Discrimination and Harassment

60. The discrimination and harassment case is a little different. The allegations must be taken one by one.

61. Given the facts set out in the assessment of success in unfair dismissal, it is hard to see how the respondent's explanation for the decision to dismiss in these circumstances would *not* be accepted as non-discriminatory. There are no material comparators to someone being in France when they say they were self-isolating in England.

62. Of the other allegations, the first (that a colleague posted the photo to get him into trouble) is unlikely to be made out when the claimant said he had posted the photograph itself.

63. The second allegation relates not to whether the claimant was in France, but about whether he should have come to work when a second flatmate had tested positive. It is about others being permitted to return to work when they might have been in contact, though negative themselves. It is not clear what the detriment was,

as it is not stated that this caused loss in pay. The detriment is more probably that he was disciplined for coming in on 13 January. The respondent has an explanation in their understanding of government guidance, and, when after 13 January they had seen the NHS to Stefan, that in the alternative he should have started afresh counting 10 days, as Patrick's text came after Stefan's isolation period had ended; without a detailed examination of advice and guidance, which was changing from time to time, or the precise circumstances of the comparators, it is not possible to take this further now. Suspicion that he was not in London at all, and that this was why he did not see the texts until the respondent asked to see them, may well have underlain their treatment at this point. On the only comparator case where details are available (Teresa) the circumstances are not comparable. It is not clear whether the treatment (being asked to stay at home) was less favourable. Clearly Teresa was not disciplined for coming in, but the material difference is that she had asked for guidance, and was proposing to stay at home until told to come in. Not much is knwn of the other two.

64. On a point of detail, one of the comparators on the Covid regulation compliance point is from Bangladesh, and so highly likely to be Muslim. This may weaken the argument that he was less favourably treated because of his religion.

65. On the third and fourth allegations, it is hard to see how any tribunal could not accept the respondent's explanation of the reasons why they thought they needed to investigate the Snapchat video, when taken in conjunction with the different dialling tones, and why they wanted to investigate the circumstances and reasons for self isolation against the background of reasonable suspicion that the claimant was not in London at all. On this there is no comparator, as any employer would have wanted an explanation why an employee took leave from work, saying they were self-isolating, when the evidence immediately to hand indicated were not.

66. On the perfume bottle, and the shouting, both require evidence of context to understand fully, but the respondent appears to have an explanation (if established) for the perfume bottle, and the shouting incident was witnessed by others; the claimant makes no mention of any other such hostile incident, so on his case it was a one-off incident in what appears to have been an otherwise good relationship.

67. The next allegation is about only getting two days notice of disciplinary meeting, but the respondent's policy requires any 24 hours notice, so it will be difficult to establish detriment, and it is not suggested that others got much longer notice. In any event the claimant was given an extension.

68. In the final allegation, about Danilo saying he should find another job, the respondent has a complete explanation arising from context. Whether it was harassment related to race would have to be established on the evidence – there are no documents.

69. Supposing the claimant could establish there was less favourable treatment, or harassment, in some of these incidents, what is the prospect he could also establish that the treatment was because he was black or a Muslim, or that the harassment related to being black or a Muslim? (I discount the nationality point – the comparators appear to be foreign nationals.) This s a very bare claim. The proposed comparators are not black, two of them are probably not Muslim. Other than that there is nothing from which a tribunal could draw to show some background of hostility or discrimination because of either characteristic. This is a very bare claim.

70. On the basis that some of these allegations involve more detailed evidence about the position with comparators and the timing of some of them, and that if race or religion is shown as an influence on the treatment in any incident that may possibly establish an inference that it played a part in later treatment, I am not prepared to strike out all the discrimination and harassment claims, but I do conclude that they all have little reasonable prospect of success.

Victimisation

71. The respondent's explanation is convincing. Someone who has been dismissed for gross misconduct could never expect any more than a factual reference, of the standard type stating dates of employment, the amount of sick leave taken and possibly whether or not they would re-employ. It is not alleged that the respondent's HR negotiator said the claimant would not get a factual reference, only that he would not get a "good" reference. There is nothing improper about offering a better reference in negotiating a settlement of proceedings, but only the customary factual reference of the talks break down. As talks did break down, there is no detriment. This claim is dismissed as having no reasonable prospect of success.

Deposit Order
Ability to pay

72. At the conclusion of submissions, before reserving judgement, I invited the claimant to offer evidence of his ability to pay. I was sent three months' bank statements for accounts at Halifax, Lloyds (the latter at a different London address) and Monzo, this last is used mainly for making small payments. He also has a Paypal Account and with Revolut, for which no statements were produced. The claimant says he has not worked since being dismissed. He has been buying and selling football clothes online over Christmas. He estimated his profit on the trading at £5,000 in December, then suggested that some of his trading reflected buying and selling for friends. He said he sometimes sent money to his parents, and that his sister in France sends him money, but there were no payments or receipts for these remittances on any of the accounts I was shown. I was told his sister is paying for his legal representation.
73. I asked if he had been in receipt of state benefits. I was told he had been refused benefit since February 2021 on the basis that he had never been registered as paying tax, further, his application for leave to remain in the United Kingdom has been turned down because he cannot show he has been resident here for the last two years. It appears that although the respondent was deducting tax and national insurance and, they say, paying the money to HMRC using the national insurance number supplied by him on a handwritten form in the bundle, HMRC has no record of that. The only possible discrepancy noted is that his title is stated on the handwritten form as Ms rather than Mr. I was told this problem had been discussed at the previous hearing when the claimant, then unprepresented, was told that it was a matter between himself and HMRC. I have only added, now that the claimant has both a solicitor and counsel to advise him, that if he believes the respondent deducted money statutory deductions from his wages but did not pay it on his account to HMRC, there may be a claim of unauthorised deductions from wages; otherwise there is likely to be some administrative error which he

should explore with HMRC. He has been provided with P60s and P45 as evidence of payments. These should assist HMRC in identifying him.

74. I conclude that the claimant has some ability to pay, although the extent of his means is obscure.

75. I have to conclude whether, given there is little reasonable prospect of success in the remaining Equality act claims, I should make a deposit order and if so in what amount. These are fact-based claims involving a number of other employees, that will require several days of evidence and cross-examination over a range of different subject matter, including what Covid restrictions were in place at the time and what rules applied about two infections in the same household, whether some of the perfume was set aside for the claimant and if not, why not, the shouting, and Danilo's remark. The tribunal will have to review personal records for the claimant and the comparators, and find out whether people who are not black or Muslim and who appear to have been untruthful about their genuine whereabouts when away from work and not on leave have not been subject to investigation, as well as examining the dismissal and appeal process in detail. There is a risk that these allegations are made speculatively, and put the respondent to considerable expense, and it is right that the claimant should be allowed to proceed with them, but also right that he should have to pay a deposit so that he appreciates the seriousness of the process, and to potentially compensate the respondent if he does fail in his claims.

76. I conclude that it is proportionate to the time and costs and prospect of success to make a deposit order, especially bearing in mind the overriding objective to have regard to cost, delay and what is proportionate. The claimant is ordered to pay a deposit of £1,000 to proceed with the discrimination and harassment claims.

77. Perhaps the claimant will use this as an opportunity to consider his real prospects of success, and whether it is worth pressing on, given the risk of paying what may be very substantial costs if he does not succeed.

Employment Judge Goodman

Date: 4th Feb 2022

JUDGMENT and REASONS SENT to the PARTIES ON

04/02/2022.

FOR THE TRIBUNAL OFFICE

APPENDIX ONE

List of Issues

Unfair Dismissal

1.What was the reason for the Claimant's dismissal and was it a fair reason under section 98(2) ERA 1996?

The Respondent relies on the Claimant's conduct: behaving in a dishonest and unprofessional manner, failing to disclose to the Respondent that he was in France during a time where he had advised that he was required to self-isolate due to a flat mate testing positive for COVID-19; and/or breaching Health and Safety Procedures by returning to the Respondent's store on 13 January 2021, following a return from France on 11 January 2021 and thereby ignoring Government and NHS Guidance to isolate, and jeopardizing the welfare of his colleagues.

2.If so, was the dismissal fair or unfair in all the circumstances, including a determination of whether:

a.The Respondent believed that the Claimant had committed misconduct in paragraph 2 above?
b.Whether the Respondent had reasonable grounds for its belief?
c.Whether the Respondent had carried out as much investigation as was reasonable at the time it formed its belief?

The tribunal will consider whether the dismissal fell within the range of reasonable responses of a reasonable employer.

Notice pay

3.The Respondent did not pay the Claimant notice pay.

4.Did the Claimant commit gross misconduct and thereby breach his employment contract and entitle the Respondent to terminate his employment without notice?

Direct discrimination (section 13 EA 2010 –race/religion)

5.Did any of the following matters occur as alleged by the Claimant:

a. A fellow employee/s used the Claimant's old snapchat media posts to create an impression that he was in France in order to get him dismissed?
b. The respondent permitted its employees other than the Claimant to work in its workplace when they had tested positive for COVID-19?
c. It is accepted that Alessandro Fusco (Operations Manager) initiated an investigation into the Claimant's conduct in relation to snapchat media which showed the Claimant as being present in France dated January 2021. Was this investigation unnecessary in the circumstances?
d. It is accepted that Mr Fusco (Operations Manager) initiated an investigation against the Claimant in relation to the Claimant's attendance in

work when one if his flat mates have tested positive for Covid-19. Was this investigation "not needed"?

e. It is accepted that Mr Fusco sent the Claimant home between the dates of 13-17 January 2020? Was this so that the Claimant would self-isolate following COVID-19 exposure and/or ensure that the Respondent's employees were not exposed to COVID-19, in accordance with Government Guidelines? Was the Claimant not employed for that period of time?
f. Did Mr Fusco instruct another employee, Shreyash Bhattarai, not to give the Claimant a bottle of perfume?
g. Did Mr Fusco shout at the Claimant on 19 January 2021, following the meeting that took place, words to the effect "Don't talk to me / I do not want to speak to you now / it is not a good moment"? If so, was this for no reason? NB the claimant says that Zois Glenis was present.
h. It is accepted that the Respondent gave the Claimant 2 days' notice of the disciplinary hearing (between 27 and 29 January 2021). Was this in accordance with the 24 hours' notice in the Respondent's Employee Handbook? Did the Respondent rearrange the same Disciplinary Hearing at the Claimant's request to 5 February 2021and thereby provide 9 days' notice?
i. Did another employee, Daniolo Dezant, tell the Claimant to find another job during a conversation that took place in the stock room in October / November 2020, while Mr Dezant was looking at jobs on the computer? The claimant alleges that when he asked Mr Dezant why he wanted him to find another job, Mr Dezant told him it would be better for him.

6.If so, were any of the above actions at paragraph 8 less favourable treatment of the Claimant?

7.If so, was each or any action enacted because of the Claimant's race or nationality (French / black)or religion (Islam)?The claimant relies on hypothetical comparators and/or the following comparators:

•Theresa De los Reyes, a client adviser who is Italian and believed not to be a Muslim who the claimant says was asked to come into work in October 2020 when her partner was positive for Covid-19

•C Clementini, a senior client adviser who is Italian and believed not to be a Muslim who the claimant says was working despite testing positive for Covid in December 2020

•Benito Solar, a client adviser, who is Spanish and believed not to be a Muslim who the claimant says was workingin December 2020 despite testing positive for Covid-19

•Mushed Miah, a senior stock controller who is Bangladeshi [religion unknown] who the claimant says came back from quarantine in November2020 without undertaking a Covid test –-does know religion

Harassment (related to race / religion EA, section 26)

8.Did the respondent engage in the conduct outlined in paragraph 5above.

9.If so, was that conduct unwanted?

10.If so, did it relate to the protected characteristics of race and/or religion?

11.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?

Victimisation (EA section 27)

12.It is accepted that the claimant did a protected act i.e. initiating the early conciliation process in connection with and subsequently presenting his claim of discrimination to the tribunal

13.Did Amina Maleck, the respondent's HR Director, tell the claimant on 3 June 2021 that the respondent would not give him a good reference?

If so, was this a detriment?

15. If so, was this because the claimant did a protected act?

Jurisdiction

16. If upheld, did each of the actions of the Respondent complained of in paragraph 8 above take place within the primary time limit in section 123 EA 2010 as adjusted by the early conciliation process, and where relevant taking into account that section 123(3)(a) says that conduct extending over a period is to be treated as done at the end of the period?

17. If not, is it just and equitable to extend time to hear that complaint under section 123(1)(b) EA 2010?

APPENDIX TWO

NOTE ACCOMPANYING DEPOSIT ORDER
Employment Tribunals Rules of Procedure 2013

1. The Tribunal has made an order (a "deposit order") requiring a party to pay a deposit as a condition of being permitted to continue to advance the allegations or arguments specified in the order.

2. If that party persists in advancing that complaint or response, a Tribunal may make an award of costs or preparation time against that party. That party could then lose their deposit.

What happens if you do not pay the deposit?

3. If the deposit is not paid the complaint or response to which the order relates will be struck out on the date specified in the order.

When to pay the deposit?

4. The party against whom the deposit order has been made must pay the deposit by the date specified in the order.

5. If the deposit is not paid within that time, the complaint or response to which the order relates will be struck out.

What happens to the deposit?

6. If the Tribunal later decides the specific allegation or argument against the party which paid the deposit for substantially the reasons given in the deposit order, that party shall be treated as having acted unreasonably, unless the contrary is shown, and the deposit shall be paid to the other party (or, if there is more than one, to such party or parties as the Tribunal orders). If a costs or preparation time order is made against the party which paid the deposit, the deposit will go towards the payment of that order. Otherwise, the deposit will be refunded.

How to pay the deposit?

7. Payment of the deposit must be made by cheque or postal order only, made payable to HMCTS. Payments CANNOT be made in cash.

8. Payment should be accompanied by the tear-off slip below or should identify the Case Number and the name of the party paying the deposit.

9. Payment must be made to the address on the tear-off slip below.

10. An acknowledgment of payment will not be issued, unless requested.

Enquiries

11. Enquiries relating to the case should be made to the Tribunal office dealing with the case.

12. Enquiries relating to the deposit should be referred to the address on the tear-off slip below or by telephone on 0117 976 3033. The PHR Administration Team will only discuss the deposit with the party that has been ordered to pay the deposit. If you are

not the party that has been ordered to pay the deposit you will need to contact the Tribunal office dealing with the case.

✂----------

DEPOSIT ORDER

To: **HMCTS Finance Support Centre**
Temple Quay House
2 The Square
Bristol
BS1 6DG

Case Number _____

Name of party _____

I enclose a cheque/postal order (*delete as appropriate*) for £_____

Please write the Case Number on the back of the cheque or postal order