EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT	**v**	**RESPONDENT**
Ms R Noel		Martin McColl Limited

Heard at: London South Employment Tribunal **On:** 4, 5, 6, 7 and 8 April 2022

Before: Employment Judge Hyams-Parish
Members: Ms S Evans and Dr Chacko

Representation
For the Claimant: Mr Maduforo, Solicitor.
For the Respondent: Mr McFarlane, Consultant.

JUDGMENT

It is the **unanimous** Judgment of the Employment Tribunal that:

(a) The claim of unfair dismissal is well founded and succeeds.

(b) The claim of wrongful dismissal is well founded and succeeds.

(c) The Tribunal does not have jurisdiction to hear the race discrimination claims that are alleged to have occurred before 14 July 2020 because they have been presented to the Employment Tribunal outside the permitted time limits and it is not just and equitable to extend the time limits.

(d) The remaining claims of racial harassment and direct discrimination fail and are dismissed.

REASONS

A. CLAIMS AND ISSUES

1. By a claim form presented to the Employment Tribunal on 14 October 2020, the claimant brings the following claims against the respondent:

   (a) Unfair dismissal (s.98 Employment Rights Act 1996 ("ERA")).

   (b) Wrongful dismissal.

   (c) Direct race discrimination (s.13 Equality Act ("EQA")).

   (d) Racial harassment (s.26 EQA).

2. It was agreed that the questions which the Tribunal needed to answer in order to determine the claims are those set out in the list of issues in the Appendix to this judgment.

B. THE HEARING

3. The tribunal spent the morning of the first day reading witness statements and relevant documents in the document bundle which extended to 290 pages. Evidence commenced on the afternoon of the first day and continued until the afternoon of the third day. The parties gave their closing submissions at the end of the third day and the Tribunal gave its decision on the fourth day.

4. The following witnesses gave evidence at the hearing, in addition to the claimant:

   (a) Mr Jordan Heron, Dismissing Manager.

   (b) Mr John Tookey, Appeal Manager.

   (c) Ms Charlie Covington, Store Manager.

   (d) Mr James Coomber, Regional Manager.

   (e) Ms Rebecca Copping, HR Business Partner

5. These written reasons are provided at the request of the claimant.

C. BACKGROUND FINDINGS OF FACT

6. The Tribunal decided all the findings referred to below on the balance of probabilities, having considered all of the evidence given by witnesses during the hearing, together with documents referred to by them. Any failure to

mention any specific part of the evidence should not be taken as an indication that the Tribunal failed to consider it. The Tribunal has only made those findings of fact necessary for it to determine claims brought by the claimant. It has not been necessary to determine every fact in dispute where it is not relevant to the issues between the parties.

7. Until she was summarily dismissed for gross misconduct on 24 August 2020, the claimant was employed by the respondent as a sales assistant. She commenced her employment on 12 January 2017 and therefore had been employed for three years and seven months.

8. The Respondent is a national retailer, operating convenience stores throughout the UK, selling newspapers, magazines, confectionary, drinks, alcohol and a range of foods. It employs approximately 20,000 employees. The claimant worked at the respondent's store in Blackheath.

9. The Tribunal was shown two contracts of employment for the claimant: one signed and dated July 2017 and the other signed and dated in May 2020. The claimant said there was a third contract, which was the first one she signed when joining the company in January 2017. The Tribunal did not have sight of this contract. The main difference between the two contracts seen by the Tribunal was that the claimant's working hours per week were different.

10. Under the termination and notice provisions, the claimant was entitled to receive one week's notice for each full year of service. The respondent reserved a right in the contract to terminate employment "*without notice in the event of gross misconduct*".

11. For each shift there was a sales assistant together with either a branch manager or supervisor. Employees worked shifts which were either between 6am and 2pm or between 2pm and 10pm.

12. The store where the claimant worked had a downstairs area where the offices, warehouse and staffroom were located. The sales assistant worked almost exclusively on the shop floor whilst the supervisor or manager would work downstairs, but would assist on the shop floor when necessary.

13. The claimant worked for a number of different managers during her employment. At the time of her dismissal she was managed by Charlie Covington. Ms Covington began managing the Blackheath store with effect from 24 July 2019. Some time prior to that, from approximately late 2017 to mid-2018, the claimant was managed by a Mr Ian Baker.

14. The claimant said in evidence that when Mr Baker became the manager, he instructed that postage stamps be kept inside the till rather than on the desk. Whilst a payment in cash would trigger the opening of the till, a card payment did not. Mr Baker therefore instructed the claimant and others to use a 10p carrier bag to open the till by scanning the bar code. This would of course

register a fictional 10p sale. However, whilst 10p was not put into the till, a bag was not given away, so in effect there was no loss.

15. On the morning of 17 July 2020, the claimant was at work and was serving at the till. There were two tills: the second one was spare in the event that a second person was needed to assist serving customers. However, sales assistants had access to both tills.

16. The claimant said that she served a schoolboy on till two. She said she took a bag containing 20 £1 coins from till two as they were needed in till one. The claimant alleged that Ms Covington had deliberately left till one short of coins. She closed till two.

17. The claimant then served a customer on till one, placed the coins in the till and took a £20 note out. She closed till one but could not put the £20 note into till two because the till was not open.

18. She left the £20 note by the till for six minutes whilst she waited to see if a customer came into the store and needed to be served, thereby allowing her to open the till. No customer came in and therefore in order to place the £20 note in to the till, she scanned a 10p bag in order to open it.

19. When asked in evidence why she did not ask Ms Covington to open the till, she gave different answers. First she suggested Ms Covington would be too busy; she later suggested that she wanted to maintain distance between her and Ms Covington. The claimant knew she should have asked Ms Covington to open the till but chose not to do so because relations between them were not good. By that stage the claimant was making regular complaints about what she perceived to be Ms Covington's behaviour towards her.

20. This transaction was picked up by Ms Covington during one of her regular audits. She said that 10p bag sales raised a red flag because generally no one bought 10p bags. She discovered what had happened by looking at the CCTV and passed the matter on to Jackie Allen to investigate. Whilst it did not come out directly in evidence, the Tribunal concluded that Ms Covington passed it on to Ms Allen to deal with as she did not want to get involved in the investigation and preferred to keep a distance between her and the claimant. That said, during the subsequent investigation meeting held on 20 July 2020, Ms Covington attended the meeting as note taker. The investigation was conducted by Ms Allen.

21. During the investigation, the claimant gave an explanation of what she did. Indeed there was very little, if any, dispute between the claimant and the respondent as to what happened. At the end of the meeting, the claimant was suspended.

22. By letter dated 20 July 2020, the respondent wrote to the claimant confirming the suspension, whilst at the same time inviting her to a disciplinary hearing on 28 July 2020. That letter said:

> ***You are required to attend a disciplinary hearing in McColl's, 20 Tranquil Vale, Blackheath, London,SE3 0AX on 28/07/20 at 15:00. The purpose of the hearing is to consider an allegation of gross misconduct against you, namely that....***
>
> ***After an investigation into till cash losses you were seen on CCTV and Till audits on 17/07/20 removing money from the tills and swapping cash between till 1 and till 2 during which there are points where you leave cash unsecure next to the till.***
>
> ***You have been seen on CCTV and till audits falsely processing a carrier bag 10p sale without a customer present or any money being taken, it is alleged you did this in order to open the till draw and swap cash between tills, this would cause cash loss and is a serious breach of the till policy.***

23. The disciplinary hearing proceeded as planned, on 28 July 2020. The hearing was chaired by Jordan Heron, then a senior branch manager. Another branch manager, Oliver Williams, attended to take notes, albeit the notes were not in the bundle and the Tribunal did not see them.

24. At the end of the hearing, Mr Heron adjourned in order to consider his decision. He resumed the hearing after a break and informed the claimant that she was to be dismissed without notice for gross misconduct. His letter confirming the decision gave his reasons as follows [sic]:

> ***You have admitted to removing cash from the till whilst the store was trading and leaving the cash unsecured next to the till, you claim you did this as you needed change and you were too busy to call Charlie (Store manager) for change, You have denied seeing the till policy although you have signed to say you have read a copy in your contract and have completed the induction tests where you confirm you knew where the handbook containing the policy was located, furthermore the policy is printed and displayed in 2 locations in the staff room and office.***
>
> ***You have confirmed that you know the correct procedure for obtaining change however you took it upon yourself to disregard the correct procedure. I am therefore satisfied you breached cash handling procedures and knew the correct process.***
>
> ***You have admitted to processing a fake 10p sale through the till to open the till draw. You claim you did this as you needed change and you were too busy to call Charlie (Store manager) for change, You have denied seeing the till policy although you have signed to say you have read a copy in your contract and have completed the induction tests where you confirm you knew where the handbook containing the policy was located, furthermore the policy is printed and displayed in 2 locations in the staff room and office.***
>
> ***You also claim you were given permission by a previous manager to process fake 10p carrier bag sales however there is no evidence of this and this is a breach of the till policy.***

> ***I am therefore satisfied you made a serious breach of the till policy and knew the correct process.***
>
> ***In reaching my decision I have taken into account your conduct record and length of service and have considered whether a lesser sanction would have been appropriate.***
>
> ***I consider your actions to be Gross Misconduct and having considered all alternatives I have decided to take the severest sanction an employer can take against an employee and to summarily dismiss you with effect from 28/07/20. You are not entitled to notice pay. I will arrange for your P45 to be forwarded to you in due course.***
>
> ***You have the right to appeal against my decision. This should be made in writing, addressed to Carly Ramsay, McColl's House, Ashwells Road, Brentwood, Essex, CM15 9ST within 5 working days from the receipt of this letter, stating your reasons for the appeal.***

25. The claimant said in evidence that she disputed what are said to be her comments or admissions in the above letter.

26. The claimant appealed against her dismissal. This appeal was heard by Area Manager, John Tookey. It was conducted as a review rather than a rehearing. The appeal was dismissed.

D. LEGAL PRINCIPLES

Unfair dismissal

27. The law relating to the right not to be unfairly dismissed is set out in s.98 ERA. Section 98 ERA states:

> ***(1) In determining….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 performing work of the kind which he was employed by the employer to do,***
>
> ***(b) relates to the conduct of the employee,***
>
> ***(c) is that the employee was redundant, or***
>
> ***(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.***

> ***(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.***

28. What is clear from the above is that there are two parts to establishing whether someone has been unfairly dismissed. Firstly, the Tribunal must consider whether the employer has proved the reason for dismissal. Secondly, the Tribunal must consider whether the employer acted fairly in treating that reason as the reason for dismissal. For this second part, neither party bears the burden alone of proving or disproving fairness: it is a neutral burden shared by both parties.

29. The burden of proof on employers to prove the reason for dismissal is not a heavy one. The employer does not have to prove that the reason actually justified the dismissal because that is a matter for the Tribunal to assess when considering the question of fairness.

30. In a conduct case, it was established in ***British Home Stores v Burchell [1980] ICR 303 EAT*** that a dismissal for misconduct will only be fair if, at the time of the dismissal:

- the employer believed the employee to be guilty of misconduct;
- the employer had reasonable grounds for believing that the employee was guilty of that misconduct; and
- at the time it held that belief, it had carried out as much investigation as was reasonable.

31. In ***Iceland Frozen Foods Ltd v Jones [1983] ICR 17 EAT***, it was said that the function of the Employment Tribunal in an unfair dismissal case is to decide whether in the particular circumstances 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. In ***Sainsburys Supermarket Ltd v Hitt [2003] ICR 111 CA*** it was said that the band of reasonable responses applies to both the procedures adopted by the employer, as well as the dismissal itself.

32. Importantly, in ***London Ambulance NHS Trust v Small [2009] IRLR 563 CA*** the court warned that when determining the issue of liability, a Tribunal should confine its consideration of the facts to those found by the employer at the time

of the dismissal. It should be careful *not to substitute its own view* for that of the employer regarding the reasonableness of the dismissal for misconduct. It is therefore irrelevant whether or not the Tribunal would have dismissed the employee, or investigated things differently, if it had been in the employer's shoes: the Tribunal must not "*substitute its view*" for that of the employer.

33. In a gross misconduct case, a Tribunal must consider both the character of the conduct and whether it was reasonable for the employer to regard that conduct as gross misconduct on the facts of the case. Here, the employer's rules and policies are important because a particular rule which makes clear that a certain type of behaviour is likely to be categorised as gross misconduct, may make it reasonable for the employer to dismiss for such behaviour.

34. If an unfair dismissal complaint is well founded, remedy is determined by sections 112 onwards of the ERA. Where re-employment is not sought, compensation is awarded by means of a basic and compensatory award.

35. Section 123(1) provides that the compensatory award can be reduced if the Tribunal considers that a fair procedure might have led to the same result, even if that would have taken longer (***Polkey v A E Dayton Services Limited [1988] ICR 142***.

36. The basic award is a mathematical formula determined by s.119 ERA. Under section 122(2) it can be reduced because of the employee's conduct:

> ***Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) 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.***

37. A reduction to the compensatory award is primarily governed by section 123(6) as follows:

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

38. The leading authority on deductions for contributory fault under section 123(6) remains the decision of the Court of Appeal in ***Nelson v British Broadcasting Corporation (No. 2) [1980] ICR 111***. It said that the Tribunal must be satisfied that the relevant action by the Claimant was culpable or blameworthy, that it caused or contributed to the dismissal, and that it would be just and equitable to reduce the award.

Wrongful dismissal

39. In wrongful dismissal cases, employers typically rely on serious or gross misconduct by the employee to justify summary dismissal. But it is important

to remember that the underlying legal test to be applied by a Tribunal is whether there has been a fundamental or repudiatory breach of contract by the employee entitling the employer to treat the contract as at an end.

40. The Tribunal's function when considering a claim of wrongful dismissal is very different to that of an unfair dismissal claim. In a wrongful dismissal case, the Tribunal does not look at the employer's actions and decide whether it was reasonable for the employer to treat the claimant's conduct as a repudiatory breach of contract. The Tribunal itself has to be satisfied that the claimant did, on the balance of probabilities, commit a repudiatory breach of contract.

41. Where an employer dismisses for a breakdown in trust and confidence, that is in essence a reliance on a breach of the implied duty not to "*without reasonable and proper cause"* conduct oneself in a manner likely to destroy or seriously damage the relationship of trust and confidence between employer and employee; ***Malik v Bank of Credit and Commerce International SA [1997] I.C.R. 606***.

Direct discrimination (s.13 EQA)

42. Section 39(2) EQA states that an employer must not discriminate against an employee by dismissing him or her, or subjecting him or her to any other detriment.

43. Section 13 EQA prohibits direct discrimination and states the following:

> ***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.***

44. The focus in direct discrimination cases must always be on the primary question "*Why did the Respondent treat the Claimant in this way?*" Put another way, "*What was the Respondent's conscious or subconscious reason for treating the Claimant less favourably?*" It is well established law that a respondent's motive is irrelevant and that the protected characteristic need not be the sole or even principal reason for the treatment as long as it is a significant influence or an effective cause of the treatment.

45. The provisions relating to the burden of proof are set out at s.136(2) and (3) of EQA which state:

> ***(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.***

46. It is for the claimant to prove facts from which the Tribunal could conclude, in the absence of any evidence from the respondent, that the respondent

committed an act of discrimination. Only if that burden is discharged would it then be for the respondent to prove that the reason for the treatment of the claimant was not in any sense whatsoever because of a protected characteristic. Therefore, it is clear that the burden of proof shifts onto the respondent only if the claimant satisfies the Tribunal that there is a 'prima facie' case of discrimination. This will usually be based upon inferences of discrimination drawn from the primary facts and circumstances found by the Tribunal to have been proved on the balance of probabilities. Such inferences are crucial in discrimination cases given the unlikelihood of there being direct, overt and decisive evidence that a claimant has been treated less favourably because of a protected characteristic.

47. Notwithstanding what is said above, in ***Laing v Manchester City Council and another 2006 ICR 1519, EAT***, the point was made that it might be sensible for a tribunal to go straight to the second stage… where the employee is seeking to compare his treatment with a hypothetical employee. In such cases the question where there is such a comparator — whether there is a prima facie case — is in practice often inextricably linked to the issue of what is the explanation for the treatment.

Harassment (s.26 EQA)

48. Section 26 EQA defines harassment as follows: -

> ***(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.***

49. There are three essential elements of a harassment claim under s.26(1):

- unwanted conduct
- related to disability

- which had the *purpose* or *effect* of (i) violating the claimant's dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant (the "proscribed environment").

50. When considering "effect", the Tribunal must consider the claimant's perception; the circumstances of the case; and whether it is reasonable for the conduct to have that effect: s.26(4). Establishing reasonableness is essential: ***Pemberton v Inwood [2018] EWCA Civ 564.***

Time limits (s.123 EQA)

51. Section 123 EQA deals with time limits for bringing discrimination claims in the employment tribunal and states the following:

> ***(1) [Subject to [sections 140A and 140B] on a complaint within section 120 may not be brought after the end of—***
>
> ***(a) the period of 3 months starting with the date of the act to which the complaint relates, or***
>
> ***(b) such other period as the employment tribunal thinks just and equitable.***
>
> ***……***
>
> ***(3) For the purposes of this section—***
>
> ***(a) conduct extending over a period is to be treated as done at the end of the period;***
>
> ***(b) failure to do something is to be treated as occurring when the person in question decided on it.***
>
> ***(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—***
>
> ***(a) when P does an act inconsistent with doing it, or***
>
> ***(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.***

52. Where there is a series of distinct acts, the time limit begins to run when each act is completed, whereas if there is continuing discrimination, time only begins to run when the last act is completed. Where an employer operates a discriminatory regime, rule, practice or principle, then such a practice will amount to an act extending over a period. In ***Commissioner of Police of the Metropolis v Hendricks 2003 ICR 530, CA*** the Court of Appeal made it clear that it is not appropriate for employment tribunals to take too literal an approach to the question of what amounts to 'continuing acts' by focusing on whether the concepts of 'policy, rule, scheme, regime or practice' fit the facts of the particular case. Those concepts are merely examples of when an act extends over a period and should not be treated as a complete and

constricting statement of the indicia of '*an act extending over a period*'. The court said the focus should always be on the substance of the claimant's allegations.

53. In ***Lyfar v Brighton and Sussex University Hospitals Trust 2006 EWCA Civ 1548, CA*** the claimant brought 17 complaints of race discrimination against the employer concerning the way in which it had investigated complaints of bullying and harassment made against her by a colleague. At a pre-hearing review, the employment tribunal decided that L's complaints about the employer's internal investigation and the subsequent disciplinary hearing (although these were, in themselves, continuing acts of discrimination) were not linked to later complaints she had made about her manager's actions after the disciplinary hearing and the employer's handling of her grievance. As a result, the events giving rise to the 17 complaints were not part of one continuing act of discrimination, meaning that many of the earlier complaints were time-barred. The Court of Appeal upheld the tribunal's decision on the particular facts of the case. However, in reaching its decision, the Court clarified that the correct test in determining whether there is a continuing act of discrimination is that set out in Hendricks. Thus tribunals should look at the substance of the complaints in question — as opposed to the existence of a policy or regime — and determine whether they can be said to be part of one continuing act by the employer.

54. In ***British Coal Corporation v Keeble [1997] IRLR 336*** the court gave guidance on the factors which may be taken into account when deciding whether it is just and equitable to extend time, quoting the factors set out in s.33(3) Limitation Act 1980. These include:

- The length of, and reasons for, the delay.
- The extent to which the cogency of the evidence is likely to be affected by the delay.
- The extent to which the party sued had co-operated with any requests for information.
- The promptness with which the claimant acted once they knew of the possibility of taking action.
- The steps taken by the claimant to obtain appropriate professional advice once they knew of the possibility of taking action.

55. Decisions since then have stressed that employment tribunals need not stick slavishly to these factors. Furthermore, whilst the reasons for any delay in presenting a claim need to be considered carefully by a tribunal, a crucial part of this exercise is considering the balance of prejudice between the parties, which means that the tribunal must weigh up the relative hardship caused to either party by extending the time limits.

56. Whilst employment tribunals have a wide discretion to allow an extension of time under the "*just and equitable*" test, the Court of Appeal said in ***Robertson v Bexley Community Centre t/a Leisure Link 2003 IRLR 434, CA***, that "*there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse, a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time so the exercise of the discretion is the exception rather than the rule*." The onus is therefore on the claimant to convince the tribunal that it is just and equitable to extend the time limit. However, this does not mean that exceptional circumstances are required before the time limit can be *extended on just and equitable grounds. The law simply requires that an extension of time should be just and equitable.*

E. ANALYSIS, CONCLUSIONS AND ASSOCIATED FINDINGS OF FACT

57. The Tribunal turned to each of the claims, applying the legal principles to the facts, in order to reach a decision.

Unfair dismissal

Has the Respondent proved a potentially fair reason to dismiss the Claimant?

58. The Tribunal was satisfied that the reason the respondent dismissed the claimant was because of misconduct and that such belief was genuinely held.

Did the Respondent genuinely believe the Claimant to be guilty of misconduct?

Was that belief based on reasonable grounds?

At the time of forming that belief, had the Respondent carried out as much investigation as was reasonable in the circumstances?

Did the dismissal fall within the range of reasonable responses open for the Respondent to take?

Was it reasonable for the employer to regard the Claimants conduct as gross misconduct on the facts of the case?

59. The Tribunal accepted the respondent's evidence that it genuinely believed that what the claimant did was contrary to company procedure and was not permitted. However, the Tribunal did not accept that (i) the decision to treat the conduct as gross misconduct; or (ii) the decision to dismiss the claimant, fell within the band of reasonable responses open for an employer to take. The Tribunal reached that conclusion for the following reasons:

- The respondent could point to no concrete provision in a policy or procedure which prohibited the conduct the claimant was dismissed for.

The Tribunal was shown a till policy in the bundle which did not mention the breach alleged against the claimant and said simply that a failure to follow the policy "*may result in disciplinary action up to and including dismissal*". In his evidence, Mr Heron couldn't be clear whether the policy in the bundle was even the correct policy, yet he was unable to identify the particular provisions in the policy he supposedly looked at, which justified dismissal.

- Mr Heron failed to investigate the claimant's claims that she had been told that the procedure she followed was allowed. He failed to properly investigate what training she had been given and he failed to interview the claimant's line manager to ascertain precisely what she might have told the claimant about the correct procedures to follow. Mr Heron could have interviewed other employees to ascertain their understanding of the procedures but he failed to do so. Indeed the Tribunal concluded that the investigation was wholly inadequate and fell significantly short of what a reasonable employer would have done.

- Whilst well-intentioned, Mr Heron gave insufficient, or any, consideration to the claimant's clean disciplinary record. Further, whilst he gave evidence that he had dismissed others for similar matters, it became clear when he was asked to describe those other matters, that they involved some form of theft, dishonesty or loss to the company. The heavy handed approach adopted by Mr Heron, when looked at against the facts of this case, was one which the Tribunal concluded a reasonable employer would not have taken. His actions therefore fell outside the band of reasonable responses. In reaching its above conclusions, the Tribunal was careful not to substitute its view for Mr Heron's but rather from the eyes of what a reasonable employer would have done.

Was the dismissal procedurally fair? Did the Respondent breach the ACAS code of practice (if applicable)?

60. The Tribunal could find no procedural breaches that rendered the dismissal unfair. It could see no difficulty in not dealing with the grievance prior to the disciplinary matter, in circumstances where the claimant did not inform Mr Heron of the third, and by far the lengthier of the grievances, until after he had given his outcome. The decision to deal with them separately was not an unreasonable approach. The ACAS code suggests that an employer may wish to suspend a disciplinary process but it is not obliged to do so. The Tribunal concluded that the unfairness with the dismissal was substantive rather than procedural.

If the dismissal was unfair, should any award be reduced on account of Polkey or contributory fault?

61. The Tribunal gave careful consideration to what would have happened but for the above failures. Had the claimant been treated fairly, she would have

remained in her role, but it was impossible to say for how long. It was therefore far too speculative to make a *Polkey* reduction.

62. As far as contribution is concerned, the Tribunal concluded that there was an element of blameworthy conduct on the part of the claimant. She should have involved Ms Covington. She could have avoided disciplinary action. She must shoulder some blame, but the Tribunal concluded it must also be on the low side. The Tribunal concluded that contributory fault should be limited to 20% of both the basic and compensatory awards.

Wrongful dismissal

63. The respondent's defence to wrongful dismissal claim rests on the provision in the claimant's contract of employment which states the respondent "*reserves the right to dismiss without notice in the event of gross misconduct*". The contract itself does not define gross misconduct: the only definition can be found in the disciplinary policy which includes deliberate breach of rules for dealing with stock or money. There is nothing that states that a breach of the till policy is gross misconduct, just that a breach may result in disciplinary action up to and including dismissal.

64. Bearing in mind the wrongful dismissal is a contractual claim and the respondent's ability to treat the contract as at an end relies on their being a repudiatory breach of contract by the employee, the Tribunal concluded that gross misconduct as defined in the respondent's policy simply could not apply to any breach of rules for dealing with stock or money, however minor or regardless of the circumstances. The general understanding of employers and employees is that, absent gross misconduct or gross negligence, an employee will be entitled to notice. Clauses in employment contracts must not be interpreted in a way which extends the rights of an employer, contrary to that general understanding. Applying normal principles of employment law, the claimant's breach must be serious and wilful, or grossly negligent. The claimant's breach was not such a (repudiatory) breach and therefore her summary dismissal by the respondent was wrongful.

Race discrimination

(i) Time limits

65. The Tribunal concluded that any allegations which occurred before 14 July 2020, were on the face of them, out of time as they were more than three months old. Of the 18 allegations, only four of them were alleged to have occurred *after* 14 July 2020 and are therefore in time. They were:

65.1. On 17 July 2020, Ms Covington deliberately refused to leave change in Till 1 not leaving change in the till.

65.2. On 20 July 2020, James Coomber suspended the claimant.

65.3. On or about 22 July 2020, Ms Copping failed to deal with the claimant's grievances.

65.4. On 29 July 2020, Mr Heron dismissed the claimant.

66. The Tribunal looked at these four allegations in the context of certain other allegations against the respondent, despite them being out of time, because they provided context. The Tribunal took the view that Ms Covington, against whom many serious allegations were made, was a credible and honest witness. She gave clear answers to questions which were internally and externally consistent. The Tribunal did not accept as fact the allegations made against her. It struggled with the fact that whilst extremely offensive comments are alleged to have been made by Ms Covington, the clearly racially offensive comments do not appear in the many colleague support notes which record complaints raised by the claimant. Neither did the claimant complain about them. The claimant suggested in her evidence that she didn't want to risk her job and the Tribunal concluded that what this meant was that she did not want to "*rock the boat*". However, that is not consistent with the clear picture painted by the documents which shows that the claimant had raised complaints of race discrimination previously, and mentioned bringing proceedings. Mr Coomber said that he received a lot of contact from the claimant; had the offensive remarks been made, the Tribunal concluded that the claimant would not have hesitated about raising them with Mr Coomber as she had done on many occasions.

67. What also struck the Tribunal was how the claimant often misinterpreted a set of facts and reached the conclusion that she had suffered some form of discrimination, but with little or no evidence. One example is the promotion, where she assumed discrimination despite the fact that she did not even apply for the position despite the supervisor posts being advertised. The second was the picture of the dog, which was actually posted to illustrate a surprised reaction. It might have been ill-judged or inappropriate to have placed that picture on a group WhatsApp chat, but the Tribunal did not accept it amounted to discrimination.

68. Turning then to the four allegations.

Suspension

69. It was Jackie Allen who decided to suspend the claimant. That is the sole allegation against Ms Allen. There was no evidence from which the Tribunal could conclude that the decision to suspend the claimant was related to race or because of race, in circumstances where the respondent genuinely believed that the claimant had committed an act of misconduct. It was suggested that Ms Covington influenced Ms Allen in that decision but the Tribunal was not satisfied that there was the evidence to support that assertion.

Failing to deal with grievances

70. The Tribunal concluded that the respondent did not fail to deal with the claimant's grievances. They might not have addressed them in a formal setting, but if one considers that the purpose of a grievance procedure is to address complaints or concerns raised by employees, the Tribunal accepted that the respondent did address many of these complaints. Indeed it was never made clear to this Tribunal which of the complaints raised in the claimant's grievance were not dealt with or addressed. Certainly from looking at the support notes, many of them were addressed. Where they were not, the Tribunal concluded that the respondent believed that they had dealt with the complaints, in circumstances where it was clear that the claimant was continually raising complaints with the respondent. It was not unreasonable for the respondent to take the view that they should not have to duplicate what had been done. Therefore this allegation failed partly because there was no failure and partly because the respondent's decisions in relation to how they should be dealt with had nothing to do with race. It was neither harassment or direct discrimination.

Dismissal

71. The Tribunal noted that it was not put to Mr Heron that his decision to dismiss was because of race. Whilst the Tribunal had been critical of his decision to dismiss the claimant, and found the dismissal to be unfair, that did not automatically lead to the conclusion that the dismissal was also discriminatory. There was no evidence from which the Tribunal felt able to conclude that the decision to dismiss was because of, or related to, the claimant's race. For this reason, that claim fails.

Refusing to leave change in till one

72. The Tribunal was not satisfied that there was a deliberate refusal to leave change in till one. It simply made no sense for Ms Covington to do so. The Tribunal preferred Ms Covington's clear evidence that she did not leave insufficient float in till one. To do so would have left her open to criticism and potential disciplinary action by her line managers.

73. As the Tribunal found no acts of discrimination to be in time, the four allegations which post dated 14 July 2020 having been decided against the claimant, the Tribunal concluded that there could be no continuing act. However, even if those four allegations, or any of them, had been found in the claimant's favour, the Tribunal concluded that there was insufficient nexus or connection between those and the allegations which pre-dated 14 July 2020 for the Tribunal to be satisfied that there was a continuing act. They were discrete complaints, involving different people, albeit the same persons were named in more than one allegation, but with little similarity in terms of the nature of those complaints.

74. The Tribunal then considered whether it was just and equitable to extend time. However, the Tribunal concluded that there was no good reason why the

claims could not have been brought sooner. It was clear from the support notes that the claimant was raising complaints of discrimination and had raised the possibility of bringing legal proceedings. Looking at the balance of prejudice, it was clear that there was greater prejudice to the respondent because of the difficulty they faced in securing evidence to defend the claims, with employees having left the organisation, and the difficulties caused by having to recall or remember events due to the delay. It was for the claimant to convince the Tribunal that it was just and equitable to extend time. The Tribunal was not satisfied that it was.

75. As the Tribunal did not have jurisdiction to determine the discrimination claims, it did not go on to make findings about them, save for the incidents described above.

76. In summary, therefore, the discrimination claims fail. The unfair dismissal and wrongful dismissal claims succeed.

Employment Judge Hyams-Parish
28 April 2022

APPENDIX
LIST OF ISSUES

1. Time limits (s.123 EQA)

1.1 What was the date of the/each discriminatory act?

1.2 Was the conduct by the Respondent part of a continuing act ending on the date of the final act?

1.3 If so, what was that final act and when did it occur?

1.4 Whichever date at 1.1 or 1.3 is applicable, was the claim form presented within the applicable time limit?

1.5 If not, is it just and equitable to extend time?

2. Unfair dismissal (s.98 ERA)

2.1 Has the Respondent proved a potentially fair reason to dismiss the Claimant?

2.2 The reason relied on by the Respondent is misconduct.

2.3 Did the Respondent genuinely believe the Claimant to be guilty of misconduct?

2.4 Was that belief based on reasonable grounds?

2.5 At the time for forming that belief, had the Respondent carried out as much investigation as was reasonable in the circumstances?

2.6 Was the dismissal procedurally fair? Did the Respondent breach the ACAS code of practice (if applicable)?

2.7 Was it reasonable for the employer to regard the Claimants conduct as gross misconduct on the facts of the case?

2.8 Did the dismissal fall within the range of reasonable responses open for the Respondent to take?

2.9 If the dismissal was unfair, should any award be reduced on account of Polkey or contributory fault?

3. Direct discrimination (s.13 EQA)

3.1 Did the Respondent treat the Claimant less favourably than it treated, or would have treated, others?

3.2 The less favourable treatment relied on by the Claimant are as follows:-

(i) The claimant's supervisor, Farhana, unilaterally reduced the claimant's hours by 8 hours a week for a 15 month period between 27 April 2018 and July 2019. The Claimant lost 8 working hours per week for 15 months.

(ii) On 27 April 2018, Farhana falsely accused the Claimant of theft, saying to her "*you steal because you are African*" but also calling the claimant "*stupid*" and saying to her "*you smell*" in front of customers

(iii) On 1 January 2019, whilst at work, the Claimant received a phone call from her doctor at Great Ormond Street requesting that the Claimant proceed with her son to the hospital immediately. In order to verify that the call was from a doctor, the Claimant requested the doctor to speak with Farhana as the supervisor to allow the Claimant to leave work immediately, Farhana refused to do so and refused to allow the Claimant to take her son to the hospital. The Claimant left the store without permission and proceeded to the hospital.

(iv) On 1 January 2019, following a kidney transplant operation on her son and her son needed to remain in hospital for more than a month, the Claimant sent a text message on the Respondent's WhatsApp group from the hospital, that she would be unable to come into work the next day due to her son recovering from an operation. Farhana and Chris who was a supervisor bullied the Claimant to return to work by sending messages on the WhatsApp Group. Chris is white. The Claimant's social worker witnessed this incident.

(v) Throughout the month of July 2019, Farhana required the Claimant to work on shift days that the Claimant does not work due to caring for her recovering son and attending post-transplant hospital appointments. Specifically, Farhana required the Claimant to work on 28 and 29 July 2019 from 5pm – 10pm, when Farhana was aware that the Claimant only worked mornings and did not work on Tuesdays, being post-transplant appointment days. Farhana reported the Claimant to Jordan Heron for not coming to work without notifying him of the reason. The reason being that the Claimant could not come to work because of her son. Farhana required the claimant to work on days that were not her normal shift days.

(vi) On 19 August 2019, Chris posted a dog on the Respondent's WhatsApp immediately after the Claimant had agreed to swap

working days with Franky. The dog depicts the Claimant as it was unrelated and irrelevant to the work swap messages. Chris is white.

(vii) In March 2020, Charlotte consistently and deliberately prevented the Claimant access to the staff shelf, by blocking off the way to the shelf whenever the Claimant wanted to put her handbag there. The Claimant resorted to using the staff room instead.

(viii) On 24 April 2020, Charlotte told a delivery driver whilst the Claimant was present and directly listening that, the Claimant was "*stupid and need to adjust a little bit as someone that just came from Africa to get used to the British system*"

(ix) On the same date, Charlotte told the Claimant that "*you smell from the armpits*" and that "*you steal because black people steal*".

(x) On 7 and 11 May 2020, Charlotte gave more working hours to Fanky, Sherilee and Laurel who recently started work, but refused the Claimant's request for more working hours. Charlotte promoted Oliver and Chris to supervisors, leaving out the Claimant even though the Claimant started working in the store before both of them. The Claimant compares herself to Fanky, Sherilee, Laurel Oliver and Chris are all white.

(xi) On 25 May 2020, the Claimant posted a photo of a pizza that was not written off in the store on the Respondent's group WhatsApp to notify others. Charlotte was furious with the Claimant and warned only the Claimant not to post anything on the group WhatsApp.

(xii) On 18 June 2020, Charlotte called the Claimant "*stupid and confused*". The Claimant then sent a message to James Comber. James Comer then telephoned the shop and Charlotte came over to the Claimant while he was still on the phone and Charlotte shouted at the Claimant and told the Claimant to, "*pick your bag and leave the shop and never come back again*".

(xiii) On 3 July 2020, Charlotte called the Claimant towards the end of her shift and said, "*I am going to be strict with you*". To action the words, Charlotte re-arranged deliveries to Mondays and Fridays, which were the days the Claimant worked. It was a deliberate act to overwork and to frustrate the Claimant during her shifts. The Claimant felt like a slave.

(xiv) On 17 July 2020, Charlotte deliberately refused to leave change in Till 1, which the Claimant used, but to till 2. The purpose was to frustrate the Claimant. Charlotte's action precipitated the Claimant to swap change between tills that lead to the Claimant being suspended by Charlotte and subsequently dismissed.

(xv) The respondent suspended the Claimant.

(xvi) The Claimant was so bullied by Farhana and Charlotte that the Claimant had too many colleague support forms in her file. On 3 February 2020, Charlotte told the Claimant she had too many colleague support forms. These support forms are direct result of Farhana deliberately reporting the Claimant to Charlotte and Charlotte requiring the Claimant to sign colleague support forms when there was no need to do so. Some of the incidents did not occur but the Claimant was bullied to sign the forms. One of which was an allegation that, in March 2020, it was said on the respondent's WhatsApp group that the Claimant said a negative thing about Charlotte. Charlotte confirmed that there was nothing negative on the WhatsApp group.

(xvii) The respondent failed to deal with the claimant's grievances.

(xviii) The respondent dismissed the Claimant.

3.3 The Claimant relies on actual comparators for allegation but otherwise she relies on hypothetical comparators.

3.4 If the respondent treated the claimant less favourably, was such less favourable treatment because of the claimant's race?

4. Harassment (s.26 EQA)

4.1 Did the Respondent engage in unwanted conduct?

4.2 The unwanted conduct relied on by the Claimant is the same as the less favourable treatment for the direct discrimination claims.

4.3 Was the above unwanted conduct related to a relevant protected characteristic?

4.4 Did the unwanted have the ***purpose*** of violating the Claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

4.5 If it did not have that purpose, did it have that ***effect***, taking into account the perception of the Claimant, the circumstances of the case, and whether it was reasonable for the conduct to have had that effect?

5. Wrongful dismissal

5.1 Was the respondent contractually entitled to dismiss the claimant without notice?