EMPLOYMENT TRIBUNALS

Claimant: **Mr T Simpson**

Respondent: **Burberry Ltd**

Heard at: **East London Hearing Centre**

On: **6, 7, 8, 12 October 2021**
In chambers 9 November 2021

Before: **Employment Judge JONES**
Members: **Mr P Quinn**
Mr M Wood

Representation

Claimant: Mr Downey (counsel)
Respondent: Mr B. Gray (counsel)

RESERVED JUDGMENT

The unanimous judgement of the Employment Tribunal is that:-

(1) The claimant was fairly dismissed.

(2) The complaint of unfair dismissal fails and is dismissed.

(3) The complaint of race discrimination fails and is dismissed.

REASONS

1. This was the claimant's complaint of unfair dismissal and direct race discrimination. The respondent resisted the claim.

2. The Tribunal had the following evidence in this hearing.

Evidence

3. The Tribunal heard from the claimant in evidence and from the respondent, the Tribunal heard from Carl Coston, Global Investigations Manager who conducted the investigation; Monica Ptak, Employee Relations Business Manager, who advised the disciplinary hearing manager; and Amy Walsh, district manager for Northern UK and Ireland, who heard the claimant's appeal against dismissal.

4. The Tribunal had signed witness statements from all who attended to give evidence.

5. At the start of the hearing, the Respondent applied for an order under Rule 50 of the Employment Tribunals Rules of Procedure 2013 to restrict the public disclosure of the name of one of its employees who is referred to in the case papers. This person was another manager who worked at the Chatham Place store with the claimant and was also one of the claimant's comparators. He was not a party to these proceedings. It was submitted that there is no public interest in him being referred to by name in the hearing and that his Article 8 interests were engaged. The respondent submitted that a Rule 50 order would not prevent him being referred to in the hearing, along with any other comparative details that the claimant may wish to refer. Such an order would maintain the principle of open justice. The claimant submitted that he reserved his right to oppose such an order if as the hearing progresses, he wishes to refer to the individual by name or considered that it is necessary, in the interest of justice to do so.

6. The Tribunal considered Rule 50 and the case the respondent referred to - *Tyu v ILA SPA Ltd* UKEAT/0236/20/VP, in which it was held that an employment tribunal must balance the Article 8 rights to privacy of a person named in a case in which they are not a party but against whom strong allegations are made in the hearing; against Article 10 and the common law expectation of open justice. In that case it was held to be appropriate to make the rule 50 order.

7. After due consideration, the Tribunal granted the respondent the order. Full reasons for doing so were given to the parties in court and are not repeated in these reasons. The individual manager is referred to in this judgment as AB.

8. The Tribunal apologises to the parties for the delay in the promulgation of this judgment and reasons. This was due to the pressure of work on the judge arising from the pandemic.

Issues

9. There was an agreed list of issues in this case. It was accepted that the claimant was summarily dismissed. The issues are set out below in the judgment section of these reasons.

Findings of Fact

10. The Tribunal made the following findings of fact from the evidence in the hearing. The Tribunal has only made findings on the facts necessary to determine the issues in the case.

11. The claimant began working with the respondent in 2005. At the time of the events in this claim, the claimant was working as a department manager in the Chatham Place store, in Hackney, East London. The claimant is black and describes his ethnicity as Black British.

12. The respondent is a global retailer of luxury goods including clothing, footwear, bags and outerwear. As one of the its employees, the claimant was able to take advantage of the respondent's employee discount scheme which he could use to purchase Burberry products. The rate of discount varied depending on the level of employee. At the time, the claimant's discount level was 50%. We had copies of two versions of the employee discount policy in the bundle of documents. Generally, the policy allows staff to purchase products at discounted rates. The policy is widely communicated and circulated to all employees.

13. We had two versions of the policy in the hearing bundle. As the claimant began his employment in 2005, both were applicable. The earlier version, on page 109 was last updated in October 2016. The global version of the employee discount scheme on page 148 of the hearing bundle was produced in April 2019. Most of the paragraphs are identical between the two versions. Under the heading *'who can use my employee discount'*, it stated that the employee discount is a valuable benefit and as such is provided only for the employee's personal use, or for the use of:

- the employee's immediate family, and
- as a personal gift from the employee to someone else for which they are not reimbursed.

14. The following relationships were recognised as immediate family members: spouse/partner, parent/step-parents, siblings/step-siblings, and children/stepchildren. The following conditions were put on the use of the discount for immediate family: -The employee must personally purchase the item using their employee discount, the employee may then be reimbursed by the immediate family member for the purchases made on their behalf. Immediate family members must not re-sell or gift Burberry products to others. It is the Burberry employee's responsibility to make immediate family members aware of the policy rules. Employees were asked to note that no other relatives could be recognised as immediate family members, which meant that they would not be entitled to reimburse the employee for product purchase on their behalf.

15. The policy also stated the following:

> *'product purchased using the employee discount must not be resold under any circumstances. In addition, an employee must not supply any third-party with Burberry product where it is known (or reasonably should be known) that it is likely to be resold. Employees must also not receive goods or any other form of consideration in exchange for purchasing product using the employee discount.'*

The policy stated that a failure to comply with any of it is considered a breach which could result in disciplinary action up to and including dismissal. The employee discount may be withheld during a disciplinary investigation, or for a period of time as an outcome of disciplinary action.

16. The policy stated that employees must not purchase more than five items of the same product code in any one transaction and that they must not spend more than their annual discount spend limit, which applies each financial year. It was the employee's responsibility to ensure that they familiarised themselves with their discount spend limit each year and that it was not exceeded.

17. The policy advised employees that if they have any questions at all regarding it, they should speak to their line manager or HR representative for further guidance.

18. The conduct allegation which the claimant faced in the disciplinary proceedings was of engaging in parallel trading. A parallel trader is an individual who purchases high-value items at a discounted price and resell these items at a higher price. Mr Coston's unchallenged evidence was that items that are purchased by parallel traders in the UK are often exported back to their country of origin where the same product is usually higher in price due to local taxes. Parallel trading, in the discount abuse context, involves an employee using their discount to purchase Burberry products at a lower price then providing them to parallel traders who in turn re-sell them. If employees buy products and re-sell them via websites such as Facebook and eBay, this is also considered parallel trade by the respondent. The respondent's discount policy prohibits re-selling Burberry products or purchasing Burberry products and passing them to 3rd parties for the purpose of re-selling; both of which are considered forms of parallel trading. The respondent considered parallel training to be one of the more serious breaches of its discount policy because it believes that the existence of parallel trading devalues the company's brand and the luxury brand sector as a whole.

19. At the time that the claimant purchased items on 9 January 2019, the claimant had been employed by the respondent for 14 years. Given his length of service, we find it likely that the claimant was familiar with the respondent's discount policy. In the hearing, the claimant accepted that he was familiar with the policy. The claimant was also a manager of a department within the outlet store.

20. The respondent has a dedicated Brand Protection Team who work on identifying parallel traders to protect the brand. They do so by continuously monitoring parallel trading webpages. If they identify potential cases of discount abuse, this is referred to the respondent's Asset and Profit Protection (APP) team for investigation. The Brand Protection Team (BPT) use an external data mining tool called IntelliQ to run searches on items identified on parallel trading websites and gather information relating to the items being re-sold. IntelliQ operates by taking the data from the point of sale, collating it and translating it into something readable. When conducting searches on parallel trading websites, the BPT normally choose '*unique'* items to focus on and identify who has purchased them. When the respondent refers to an item as '*unique'*, it means that it had a limited production, a specific pattern relevant to the season of production or design at the time and usually has clear identifiable features.

21. Mr Coston told us that every product sold by Burberry has a unique, unit number connected to the garment referred to as the 'SKU'. The BPT have extensive experience in checking items for authenticity and are experts in identifying genuine Burberry product online, including the SKU. The BPT will also crosscheck a combination of different SKUs into IntelliQ to identify which customer has purchased the exact combination of items which are listed.

22. On 3 and 9 January 2019, the claimant purchased Burberry items online using his employee discount. The claimant purchased a total of fifteen items in those two transactions, both using the employee discount. After the discount was applied the value of one transaction was £1,470, while that of the second transaction was £775.

23. One of the members of the respondent's BPT, Tony Yau, had been monitoring a particular parallel trading page on Facebook called WKHelpBuy site. As part of this monitoring, Tony carried out various combination searches using the IntelliQ software to identify the items listed on the WKHelpBuy site to trace how they got there. On 26 February 2019, Mr Yau identified products for sale on the WKHelpBuy site, all of which the IntelliQ software indicated had been purchased by one purchaser. Further searches revealed that the purchaser was the claimant. We had the results of that search in the bundle at page 225, which we find is a genuine document. The IntelliQ system identified the claimant from the SKUs of his purchases and his customer number. Once the IntelliQ search identified the claimant as the person who had recently purchased this combination of items, Tony Yau cross-checked the claimant's customer profile and sales history and confirmed that the claimant had purchased all these items. On the same day, Mr Yau emailed Carl Coston, the respondent's global investigations manager within the APP team to alert him about what he had found. He included screenshots of the items for sale on the WKHelpBuy Facebook pages. Tony Yau speaks Chinese and was therefore able to read the Facebook pages, which were written in Chinese and confirm that these items were being offered for sale.

24. The screenshots sent to Mr Coston on 26 February were in the hearing bundle at pages 214 and 216. The items highlighted in orange were those identified as the claimant's purchases. We were given pages 216A and 214A by the respondent during the course of the hearing, both of which show additional items that the claimant had not purchased. But his purchases were also on there. On page 1062, we find the timestamps for the screenshots taken at 26 February 2019, which shows that they were taken at 3.17pm, within seconds of each other. The thumbnails by the timestamps show that the screenshots that were printed out were pages 214, 215 and 216.

25. In February 2019 the APP team were conducting other investigations relating to discount abuse and parallel trading at the Chatham Place outlet store and in connection with the WKHelpBuy site. This meant that Mr Coston took no action on this referral from Tony Yau until a few months later, in April 2019.

26. On 16 April 2019, Mr Coston asked Mr Yau to send him updated screenshots showing the items that was still available on the WKHelpBuy site. The updated screenshots can be seen on pages 218 and 219. The combination of items highlighted in cyan had been identified as being purchased by claimant. There was an error on page 218 in that one of the items highlighted had not been purchased by the claimant so that was updated and the correct highlighting is as shown on page 217.

27. Mr Yau made no recommendation when he forwarded information to Mr Coston. He made no allegation against the claimant. It was not part of the claimant's case in the hearing that Tony Yau knew him or knew his ethnic or racial origin. Mr Yau raised a concern which we find arose from these searches. The concern was that the products the claimant purchased were now being advertised for sale on a well-known parallel trading website.

28. Before he met with the claimant, Mr Coston noted from the BPT's investigations that it looked like all 15 items purchased by the claimant in January were listed on the WKHelpBuy site. Some of the items were *unique* items, according to the definition set out above. The IntelliQ searches confirmed that although these items had been sold as single items at various outlets, the only customer in the world who had purchased the exact same combination of products was the claimant. The respondent also carried out checks on stock-take and shrink figures, which show losses within the store and across the country to see whether it was possible that the items found their way to the WKHelpBuy site by way of theft and/or poor administration. Those checks revealed that there were no losses relating to this combination of products.

29. Mr Coston decided that there was sufficient evidence to warrant further investigation. The BPT had been aware of the WKHelpBuy site since 2016 and that they had a history of selling items bought by the respondent's employees using their employee discount. The APP team believed that the WKHelpBuy site operated from a location around 15 – 20 minutes away from the store. It was not unusual for parallel traders to locate their business near to a store as this would make it easy for them to target employees to persuade them to use their employee discount to purchase items which would then be sold on their site.

30. The respondent was also aware that these items were not old stock and had not come from an outlet. They were first offered for sale on the WKHelpBuy site in February.

31. We had a copy of the respondent's APP investigations policy in the tribunal bundle. That stated that investigations must only be initiated based on sound evidence or credible suspicion. Investigators were told that they should never investigate anyone because of age, race, religion, sex, sexual orientation, being pregnant, disability, being married or being or becoming a transsexual person. Investigations should only be conducted where credible information is provided relating to an issue or concern, where theft or fraud is indicated as a possibility from the information received, or where the issue is misuse of the discount scheme.

32. Once he had the information from Mr Yau, the next step was for Mr Coston to hold an investigation meeting with the claimant. It was not the respondent's practice to pre-announce to employees that they would be attending a store to hold an investigation meeting. There was a very real risk that doing so would cause someone who had been working with a parallel trader to collude with them to take items off their site or to take some other action to frustrate the investigation. Before he went to the store Mr Coston printed off the claimant's spend history on IntelliQ, the screenshots from the WKHelpBuy site, together with a summary of the claimant's recent orders. He prepared a draft of the investigation executive summary that he wanted to discuss with the claimant.

33. Mr Coston's evidence was that from his experience, the respondent would not usually show someone in an investigation, the parallel trading site online as those operating the site would frequently remove the items for sale as soon as they become aware that their contact/supplier in the respondent is being investigated. That is why they conduct investigations and disciplinary hearings based on screenshots taken at the time the items are located on the site.

34. Mr Coston's intention in attending the Chatham Place store to meet with the claimant was to investigate breaches of the discount policy, specifically in relation to parallel trading. From the BPT's investigations it appeared that there had been items purchased by the claimant using the employee discount scheme, which had then ended up being advertised for sale on a parallel trading site. The purpose of the investigation was to fact-find and to give the claimant an opportunity to state his case in response to the information the respondent had in its possession. Mr Coston told us in the hearing that he had been wrong in the past and was therefore interested to hear the claimant's explanations as to how the items he purchased ended up on the WKHelpBuy site.

35. Mr Coston attended the store to meet with the claimant on 18 April 2019. The store manager informed the claimant that someone from APP wanted to see him in the office and that he did not know why. The claimant went into the office and Mr Coston introduced himself and stated that he had come to conduct an investigation into a possible breach of the respondent's discount policy. That claimant told us in the hearing that Mr Coston never told him why he was there but paragraph 13 of the claimant's

witness statement confirmed that Mr Coston had informed him of his reason for being there. This is also what was recorded in the minutes. We find that at the start of the meeting, the claimant was told that the purpose of Mr Coston's visit was to investigate a breach of the employee discount policy.

36. Mr Coston asked the claimant questions to ascertain his understanding of the employee discount policy. From his answers, it was clear that he understood it. Mr Coston explained the role of the APP team and how they identified the WKHelpBuy site as being run by parallel traders. The claimant tentatively confirmed his purchases in January but was unable to confirm the value of each order. Mr Coston presented the claimant with the evidence in the form of the printouts already referred to and explained that the claimant was the only person to have purchased this particular mix of products, which had ended up on the WKHelpBuy site. The claimant stated that he had purchased these items as gifts for a friend and his sister. He stated that he was shocked that they had ended up on the WKHelpBuy site.

37. They discussed the items the claimant purchased and the mismatch in sizes. For example, there was an item that was size XXL and two coats, sizes 6 and 8. It was remarkable that all 15 items that the claimant purchased were on the WKHelpBuy site at the same time and that the items were worth over £2,000 before the application of the discount, which was commensurate with claimant's monthly salary.

38. Mr Coston also asked the claimant about his spending history in general and whether he had been contacted by a parallel trader in 2016 as there appeared to have been a marked increase in his spending at that time. The claimant stated that he was unable to comment as it was a long time ago. It is likely that Mr Coston was forceful in his questioning of the claimant and at one point he told the claimant to tell the truth about knowing a parallel trading site.

39. At the end of the meeting, Mr Coston informed the claimant that his case would be referred to HR for further action. He told the claimant that any disciplinary action taken by the respondent could result in his dismissal. The notes were read out to the claimant and he added a few more points. He then signed the minutes as a true representation of what was said in the meeting. The claimant was assured that not even his managers knew of the contents of their conversation and that it was totally confidential. Any queries he had about the process could be referred either to Mr Coston or to HR.

40. The claimant was informed that his employee discount was suspended. The respondent wrote to the claimant on the same day to confirm that his employee discount would be suspended which meant that he would not be able to use it at any Burberry stores, outlet stores or online. The claimant continued working.

41. Mr Coston finalised the investigation executive summary and sent it to HR with the supporting documents. We find it likely that in line with the procedure, he informed his senior manager of the outcome of the investigation. By sending the report to Claire White in HR, Mr Coston was indicating that he believed that there was a case for the claimant to answer.

42. On the same day, Claire White sent an email to the store to identify a manager who would be able to conduct a disciplinary hearing after the investigation meeting had concluded. She was sent the managers' work schedule to see which manager would be available. We find that even before an investigation is completed, it would be prudent of an HR officer in a busy business to identify possible managers who can conduct a disciplinary hearing, if this is recommended at the end of the investigation. This does not signify that the end of the process has been already determined. If the investigation

comes to a conclusion that no further action should be taken then the manager would not be required but if further action is recommended and the manager is needed, they would already have space in their diaries to conduct the disciplinary and the process can continue without much further delay. The investigation notes record that the meeting began 1.30pm and the correspondence between Ms White and the store discussing the managers schedule and who would be available to chair the hearing took place around 4pm, all on the same day. Ms White asked Steve Ibrahim to chair the disciplinary hearing as he was the store manager at the time and it was the respondent's normal procedure for the store manager to do so. Also, he had only recently joined the store and had little contact with the claimant prior to this process.

43. Ms White also had suspension letters drafted and ready on 17 April, so that they were there, if required. Again, we find that in doing so she was being efficient. She was not pre-empting the outcome of the investigation. She was clearly an efficient and organised HR advisor.

44. Mr Coston sent his investigation executive summary and supporting documents to Claire White on 23 April.

45. The claimant made contact with Claire White before he received the invite to the disciplinary hearing. They spoke on or around 25 April. From the email on 261 we find that the claimant asked for the following: -

- Copies of all documents, letters, records, emails that relate to him
- Copies of all HR and APP policies, procedures and guidelines relating to investigations
- A copy of the minutes of the investigation meeting, which he signed, and for copies of all letters, records and emails that related to him that was in the respondent's possession.

46. On 29 April the respondent wrote to the claimant to invite him to a disciplinary hearing. The reason for the meeting was to discuss the following allegation:

> *"it is alleged that a number of Burberry products purchased on your online Burberry.com account have been collectively listed for sale on a Facebook account called WKHelpBuy with an increased price. The same combination of items purchased had not been purchased by any other customers collectively within the time frame."*

47. The claimant was informed that the respondent took this misconduct seriously and if proven, it could be viewed as misconduct and result in summary dismissal. The claimant was told that Steve Ibrahim, store manager would conduct the disciplinary hearing and that he would be accompanied by Claire White. There would also be a separate notetaker present. The disciplinary hearing was fixed for 1 May 2019. The claimant was informed that he had the right to be accompanied by a trade union representative or colleague and that his colleague would be permitted to address the meeting and to confer with him but not to answer questions on his behalf. He was to inform the respondent of the name of his companion beforehand.

48. The letter contained copies of the respondent's employee discount policy, the disciplinary policy, the investigation notes from the claimant's meeting with Mr Coston and the copy the claimant signed. Copies of the claimant's transaction search and account history, the screenshots of the WKHelpBuy site and the discount suspension letter. The letter also informed the claimant that he could bring bank and credit card statements to the disciplinary hearing as part of his supporting documentation.

49. On the same day, 29 April, the claimant wrote to Mr Ibrahim to inform him that he considered that he had not had sufficient notice of the meeting or the information that he requested from Ms White a few days earlier, which meant that the meeting could not go ahead on 1 May. He asked Mr Ibrahim a series of questions and forwarded the email that he had sent the previous day to Ms White. As 28 April was a Sunday, the respondent had insufficient time to respond to his letter before it sent out the invitation letter on 29 April.

50. In that letter the claimant asked why the disciplinary meeting was happening and what it was about.

51. The claimant stated that he wanted all these documents so that he could give them to his representative. He also stated that his representative would need 10 working days to look over everything and then a further 5 days to set a meeting date.

52. The claimant reported sick to the respondent with stress and depression. He sent in a sick certificate on 8 May which signed him off from 30 April – 21 May 2019. The claimant was reminded of the respondent's employee helpline which he could use for support.

53. On 30 April, Ms White replied to the claimant. She confirmed that as she had been out of the office on Friday, this was the first opportunity she had to respond to his email of Sunday. There had not been a delay in dealing with its contents. She reminded the claimant that he had already been sent all the evidence that he requested and which the respondent had. He had been sent the transactional account/purchase history, the notes taken at his investigation meeting, evidence of the items as seen on the WKHelpBuy Facebook site.

54. She pointed out that the invitation letter set out the reason for the disciplinary hearing and the allegation that would be considered. The respondent wanted to ask the claimant questions in relation to the items he purchased in January using its Employee Discount Policy; which were subsequently offered for sale on the WKHelpBuy Facebook site in February. The claimant had already been provided with the typewritten investigation meeting notes with the letter inviting him to the disciplinary hearing. In this letter Ms White enclosed the handwritten notes from that meeting.

55. She ended the letter by asking the claimant to let the respondent know when he could attend the disciplinary hearing so that it could be rearranged and reminded him of his right to be accompanied.

56. The claimant's disciplinary hearing was rescheduled on another occasion, due to him being off sick and his representative not being available. When the meeting was rescheduled the respondent wrote to the claimant to again send him details of the allegation against him, to enclose copies of all the relevant documents, including the investigation meeting notes – typed and handwritten, the copies of the transaction search and his account history, copies of the two online transactions he did in January 2019, the screenshot of the WKHelpBuy Facebook pages showing the 15 items for sale and the letter confirming that his employee discount had been suspended. In each letter the claimant was reminded of his right to be accompanied.

57. The meeting was fixed for 3 June 2019. On 30 May the claimant contacted Ms White with a list of queries and raising additional concerns about the investigation process. Ms White Monika Ptak, the respondent's Employee Relations Manager, within its Business Services Team for assistance in dealing with the claimant's queries as it was unusual for an employee, having been sent all the information that the claimant had, to request this much and this type of information before the disciplinary hearing. The claimant asked questions such as the date of the investigation report, how Mr Coston

came into possession of the information about the matter he was investigating, details of when the items on the WKHelpBuy site were first seen on there, why the claimant's purchase history was discussed at the investigation meeting, whether the minute taker at the investigation meeting was a trained note-taker and why the clamant was not shown the pictures of the items on the site rather than the screenshots.

58. The claimant complained that the respondent failed to conduct a return to work meeting with him on 22 May when he returned to work, until that afternoon and also that while on the sales floor that day he was confronted with colleagues telling him that they had heard that he was away because he was under investigation for parallel trading and that another colleague, AB, had been dismissed for parallel trading. He believed that a senior manager in the team had been responsible for divulging that information to staff. The claimant complained of a breach in confidentiality. The claimant expected to have the answers to all these questions and the information requested before the meeting that was scheduled for 3 June.

59. In order to address the issues that the claimant raised in the letter, Claire White would have to investigate the allegations against the senior manager breaching confidentiality at the store. She would also have to check the information already provided to the claimant to see what was missing. The claimant had asked questions which could have been asked at the disciplinary hearing such as the date of the investigation report or the reason why his purchase history had been discussed in the investigation meeting but was not the subject of the disciplinary hearing. Ms White met with Ms Ptak to try to address the claimant's queries. They decided that given the time it would take her to do so and to formulate a response to the claimant, it would not be possible for the disciplinary hearing to go ahead as planned on 3 June. They decided to re-schedule the disciplinary hearing again and Ms White wrote to the claimant on 31 May to inform him. The claimant was unhappy about that and replied to tell her so. The meeting was rescheduled for 6 June.

60. He stated in his email that the questions in his email of 30 May were simply to make the respondent aware of the questions that were going to be raised at the meeting on 3 June. We find that there was no indication in the letter of 30 May that the questions raised in it were to give the respondent an indication of the questions to come at the disciplinary hearing. They were questions that the claimant wanted answers to and it was reasonable for the respondent to consider it appropriate to postpone the disciplinary hearing while they gathered the information requested. It was reasonable for the respondent to expect that if these were a list of questions that the claimant wanted answered at the disciplinary hearing that he would have said so in the email. 30 May 2019 was a Thursday. The disciplinary hearing was scheduled for Monday 3 June. The respondent would have had to provide the information requested to the claimant on the following day, Friday 31 May, in order for the hearing to proceed on Monday 3 June or to expect weekday staff to work on the weekend, to do so. The respondent decided that this was not possible or reasonable and instead, postponed the disciplinary hearing.

61. Although the claimant stated that the questions in the email of 30 May were simply to highlight to the respondent matters that he wanted to raise at the disciplinary hearing, he then wrote to Ms White on 4 June complaining that the respondent still had not responded to his various queries, and set them out again. In that letter the claimant stated that he wanted a written response to his queries before the meeting on 6 June.

62. Ms White confirmed in her email of the same day that she had conducted an investigation into his allegation regarding breach of confidentiality at the store and that she was confident that there had not been such a breach by anyone involved in his process. If she thought that this had happened, she would have taken appropriate action. We find that in conducting her investigation, Ms White spoke to Mr Ibrahim about this as well as to the store's general manager and the assistant general manager.

63. Around this same time as the claimant's investigation, the respondent was also conducting investigations about parallel trading in relation to other staff at the claimant's store. We heard about the respondent's investigation of one of the claimant's colleagues, who we referred to in the hearing as AB, who was a black male manager, also at Chatham Place. During his disciplinary hearing on 1 May 2019, he confessed to being involved with parallel trading and resigned his employment with the respondent. He admitted that he had been *'kind of abusing the system'*. He had not been dismissed. This raised concerns for the respondent that parallel traders were focussed on the employees at that store and the management took the opportunity to remind staff of the workings of the employee discount scheme and the dangers of getting involved with parallel traders. It is possible that junior staff in the office speculated and drew conclusions about the claimant's absence after they were reminded of the dangers of parallel trading by their senior manager.

64. On 4 June, Mr Ibrahim and Ms White spoke to Mr Coston about his investigation. They wanted to check with him about the claimant's requests for information and to obtain some clarification on aspects of the investigation so that they could address all of the claimant's concerns. It was appropriate for Mr Ibrahim to speak to Mr Coston as Mr Coston was not going to be at the disciplinary hearing and Mr Ibrahim wanted to be sure he had answers to any of the questions that the claimant might ask and that he fully understood the investigation process. In an email Mr Coston provided Mr Ibrahim with more details on the BPT and APP investigation process and how it worked, along with mapping the claimant's purchases in January 2019 against the items in the WKHelpBuy screenshots.

65. On 7 June Mr Coston provided information to Ms White on the exact date that the investigation executive was drafted as this was one of the claimant's questions in the 30 May email. On 11 June he provided Ms White with information to enable her to answer to another of the claimant's questions.

66. The claimant's representative could not attend on 6 June so the disciplinary hearing was re-arranged for 14 June. Mr Ibrahim wrote to the claimant on 6 June to invite him to that meeting. That letter was the same as the earlier invitations.

67. On 7 June, having completed her investigations, Ms White wrote to the claimant to provide him with answers to each of the questions he had asked her in the letter of 5 June which repeated the contents of the letter sent on 30 May. As it was unusual for the respondent to get this many detailed queries before a disciplinary hearing, Ms White decided to check the answers with Ms Ptak to make sure that she had covered everything, before sending it off to the claimant. We find that Ms White answered all the claimant's questions and provided him with extensive information in answer to each of the questions he raised in his correspondence.

68. In the hearing during cross-examination, the claimant reluctantly accepted that in her correspondence, Ms White gave him answers to the questions he raised but he stated that her answers were not satisfactory or that they were a response but not an answer, or that they were not as full as he would have liked. The claimant also objected to the possibility that the person chairing the disciplinary hearing would have the option of conducting further investigation into the allegations against him, or his defence; after the meeting. The claimant believed that the respondent should know everything and have all the information before inviting him to a disciplinary hearing. The respondent disagreed. They wanted Mr Ibrahim to have the option, if the claimant raised something in his defence of the allegation or if something else came up in the disciplinary hearing, to conduct further enquiries before coming to a decision on the outcome of the disciplinary hearing.

69. Ms White drafted an agenda for the disciplinary hearing and some suggested questions to guide Mr Ibrahim in what needed to be covered. She also advised him to

use his own questions. It would have been clear to Mr Ibrahim that he was in charge of the conduct of the disciplinary hearing and its outcome.

70. On 13 June the claimant wrote to Ms White with questions on the answers provided in her email of 7 June. In this email the claimant was really expressing his unhappiness about being brought to a disciplinary hearing but he expressed it as a request for further information and complaints that his queries had not been responded to fully. For example, he had asked in his email of 30 May for the date on which the APP report was written. He also asked for if the minute taker at the investigation meeting was a trained and qualified professional as she was undertaking a serious task and he did not agree with the minutes produced from that meeting. These questions were repeated in the email of 4 June.

71. In her response on 7 June, Ms White told the claimant that the report had been sent to her by Mr Coston on Tuesday 23 April 2019, arriving by email into her inbox at 9.41am. Mr Coston told her that there was no date on the report as he submitted to her as soon as it was written. It would be reasonable to conclude from those details that the report was written between 18 – 23 April. The claimant knew that his interview with Mr Coston happened on Thursday 18 April 2019. In answer to the second question, the respondent informed the claimant in the letter of 7 June of the name of the notetaker, her length of service with the respondent, her experience in notetaking and the process of production of the minutes.

72. The claimant had therefore been provided with answers to those and all the other questions. In his email on 13 June, he repeats his concern that no date was written on the executive investigation report. It was a fact that there was no date on the report. It was not clear to the Tribunal how the claimant considered that repeating the question would have brought a different answer. If he had an issue with the fact that there was no date on the report this would have been something to raise at the disciplinary hearing but we could see no benefit to continually repeating it in letters to HR beforehand. Similarly, in relation to the notetaker, he asked again in the 13 June email, for confirmation of her qualifications as a notetaker, the last training date and proof of training delivered by the respondent. It was not clear whether the claimant had read the respondent's responses fully. The respondent had not stated that the notetaker had a qualification in notetaking so there would be no qualification information to provide to him. Even if she had a qualification, the claimant's real issue was that he did not agree the accuracy of the notes she produced. It was not clear to the Tribunal why the claimant chose to repeat the question when it had been answered. The claimant had the option of attending the disciplinary hearing and contesting the accuracy of the minutes.

73. One change that the respondent did agree to make to the minutes of the investigation meeting was where it had been noted that the claimant *'initially confirmed that he was unaware'* of the parallel trading site. Mr Coston agreed that the claimant never admitted knowing of the trading site and so it was inaccurate to note it as '*initially'* as it never changed. The word '*initially'* was removed from the minutes.

74. Another of the questions the claimant repeated in his emails was a question about the possible outcomes of the disciplinary hearing. The first invitation letter dated 29 April told him that the allegation he faced could be viewed as gross misconduct which could lead to disciplinary action being taken, up to and including dismissal without notice. The claimant was provided with copies of the respondent's disciplinary policy which set out the procedure to be followed whenever there is an allegation of misconduct. We had the 2007 and 2017 versions of the disciplinary policy. The 2017 version of the disciplinary policy included *'Abuse of Employee Discount Policy'* and '*serious or persistent breaches of Burberry procedures and policies'* as possible gross misconduct offences. The claimant had the opportunity to look at the policies and procedures in preparation for the disciplinary hearing.

75. We find that Ms White answered the claimant's questions in her email of 7 June and that she answered them again in her response dated 21 June 2019.

76. The disciplinary hearing went ahead on 14 June. The claimant attended with a work colleague and Mr Ibrahim was accompanied by Ms White who attended remotely as she was based in the respondent's Leeds office. There was also a notetaker present.

77. Although we did not hear from Mr Ibrahim as he was no longer employed by the respondent at the time of the Tribunal hearing; we did have Ms Ptak's live evidence, copies of the minutes taken at the hearing and copies of contemporaneous email correspondence from which we made these findings.

78. At the start of the meeting, the claimant was reassured that if he raised any points for clarification, which were not directly connected to the allegations under discussion; Mr Ibrahim would make a note of those and look into them after the meeting.

79. Mr Ibrahim began the meeting by asking the claimant questions to confirm that he understood the terms of the respondent's Employee Discount Policy. They discussed parallel traders and how they operate. They then discussed the items that the claimant had purchased in the online transactions in January 2019. The claimant stated that the items had been bought for a friend and for his sister. He stated that the items purchased for his friend were gifts that his friend had selected. The claimant confirmed that he had not received any payment for the items. He informed Mr Ibrahim that he had known his friend from schooldays. The claimant was informed that the specific mix of the items that he purchased all ended up being offered for sale on the WKHelpBuy web page. Although he had been advised that he could bring his bank and credit card statements to the disciplinary hearing to support his case, the claimant did not do so. In the Tribunal hearing he said that he chose not to do so as he had done nothing wrong.

80. It was at this point in the meeting that the claimant stated that he wanted to wait until he had answers to the questions that he sent to Ms White the previous day, before answering any more questions. Ms White offered to give him the answers orally but he refused. He stated that he wanted them in writing. The claimant confirmed that he bought a mixture of sizes for his friend and for his sister and that he did not know where the items had ended up. He was only able to confirm that he had made the purchases as requested. He stated that some of the items had gone to Barbados. He had not questioned why his friend had asked him to buy items in different sizes or clothes for a different gender. For example, he confirmed that he bought two women's raincoats – sizes 6 and 8 for his male friend and an item size XXXL for his sister. He had not questioned why his friend required so many different sizes. When he was asked why his friend wanted 2 women's raincoats, he answered '*he wanted them',* which was unhelpful. When asked whether he could confirm what happened to the items he stated that all he could confirm was that he made a purchase for his friend and had not questioned why he wanted the different sizes. The claimant was reminded that when he uses his staff discount it is his responsibility to find out what happens to the items he purchases. He had also purchased men's items for his sister. The claimant refused to answer the question whether his friend was involved with the WKHelpBuy site and had uploaded the items on there until he had an answer from Claire White to his latest letter.

81. Mr Ibrahim was clear in the meeting that under the respondent's Employee Discount Policy gifts must be purchased for the person they are bought for and cannot be gifted on. He also pointed out that it is an employee's responsibility to ensure that they know what happens to items purchased using their discount. The claimant admitted that other than the rucksack, he did not know who the items purchased for his sister were for. The claimant confirmed that all the items in the orders had been delivered to his home address and that he had not given anyone else his log in details. His sister and his friend had collected the items from his house. He explained that he had not received money from either of them for the items.

82. There was a short adjournment during which Mr Ibrahim sought Ms White's advice on how to proceed as the claimant was not answering some of his questions. When the hearing resumed, the claimant asked whether he could bring some of the items he had retrieved, into the hearing room. The respondent agreed. The claimant returned with 6 items, 4 of which looked like they were part of the claimant's online purchases in January. Mr Ibrahim stated that the respondent would verify the items and the claimant agreed that the respondent could keep them to do so. We find it unlikely that the items could be verified just by looking at them in the disciplinary hearing. The respondent identifies items of stock by more than just the way they look. It is likely that the SKUs would need to be checked and other details checked before the respondent could be certain that they were the items that the claimant had purchased. The claimant stated that he spoke to his friend and to his sister and asked them to give him any items that they had and this was all they gave him. When asked he stated that he had not asked them where the remaining items were.

83. Mr Ibrahim informed the claimant that he would adjourn the disciplinary hearing to allow Claire White to respond to the claimant's latest letter. The intention was to resume the disciplinary hearing during the following week.

84. A few hours after the end of the meeting the claimant asked to leave work early as he was feeling unwell. He also asked if he could take away the 6 items that he had brought into the disciplinary hearing. Mr Ibrahim again asked if he could leave them with the respondent for verification but the claimant stated that he did not want to do so and that he wanted to take them back. The claimant left the store to make a telephone call, returned and took the items away.

85. Mr Coston's evidence was that parallel traders would often lend the employee some of the items that had been placed on the site and had yet to be sold, so that they could take them to an investigation meeting or disciplinary hearing to disprove any allegation that those items were in the possession of parallel traders. However, the employee would then need to return the items to the parallel trader at the conclusion of disciplinary hearing or investigation meeting.

86. The claimant was off sick from 15 June 2019. The claimant made a written complaint about the way in which his disciplinary case was conducted and specifically, in relation to the correspondence conducted by Ms White. He questioned her professionalism and alleged that she had given '*harsh'* responses to questions, all of which had contributed to him being signed off with depression. Stacey Heywood, who was a senior manager within the respondent's Employee Services considered the claimant's complaint and responded on 18 June. She did not uphold the claimant's complaints about Ms White and confirmed that she considered that Claire White had conducted herself in a professional and timely manner throughout her involvement in it. The respondent also refused to change the HR advisor dealing with the claimant's case.

87. Ms White prepared a comprehensive response to the claimant's letter of 13 June, repeating some of the information that she had already put in earlier responses and giving additional detail. She asked Mr Coston for assistance in responding to some of the questions. She gathered all her responses from the earlier letters and put them all in this letter, with more details, and sent all 12 pages to the claimant on 21 June 2019.

88. The claimant was invited to a re-convened disciplinary hearing on 24 June. The claimant was unable to attend due to sickness. He called in on the day to notify the respondent. He self-certified for the period 25 June – 8 July. The claimant was further signed off work until 30 July. On 9 July the claimant wrote to Claire White to ask for a new hearing date to be set and accused her of failing to provide him with the relevant information that would prove his innocence. It was not clear to the Tribunal what information he was referring to here. The claimant alleged that the situation was

causing him stress and that he would be seeking the information he wanted from the Information Commissioner's Office.

89. Ms Ptak discussed the claimant's latest email with Ms White. She was satisfied that Ms White had given the claimant a full and thorough response to his questions.

90. The claimant was invited to a reconvened disciplinary hearing on 12 July. The claimant's representative was unavailable on that date.

91. On 10 July 2019, the claimant raised a grievance with Fred Stierlin, VP, HR Burberry Business Services concerning a number of issues. The main points were that in addition to complaints that the ongoing disciplinary process was a witch-hunt, the claimant also grieved about his belief that he had always been overlooked when it came to managerial positions in the store and what he considered to be a breach of confidentiality about his disciplinary process as colleagues in the store told him that they had heard that he was under investigation for parallel trading. They also told him that AB had been sacked for the same matter.

92. Mr Stierlin responded on 23 July to inform the claimant that any issues he had with the disciplinary process were best kept within that process. The issues he raised under the headings: *management opportunities* and *breach of confidentiality* would be investigated and addressed by the employee relations team. A different HR advisor was asked to support the grievance process.

93. The re-convened disciplinary hearing was re-scheduled for 16 August. As Claire White was away on leave, Ms Ptak attended the hearing as HR by telephone, to support Mr Ibrahim. The claimant attended in person without a representative. The claimant was content to proceed with the meeting without a representative. However, at the outset of the meeting the claimant said:

> '*I would like to say that I am not wanting to answer any further questions, I just want a decision'.*

94. We find from the note produced by Ms Ptak and the minutes, that Mr Ibrahim continued by recapping the first part of the disciplinary hearing that happened on 14 June. He then asked the claimant to confirm that he had received written answers to the questions he asked. The claimant confirmed that he had. Mr Ibrahim indicated that he had further questions to ask. He wanted to get further clarification from the claimant as to how the 15 items he admitted he purchased from the respondent's website in January had ended up being offered for sale on the WKHelpBuy site. He asked the claimant whether he could provide an explanation for that now. He told the claimant that he had a process to follow and he made it clear to the claimant that if he refused to take any further part in the meeting, the decision would be made based on the information already provided. The claimant confirmed that he did not have anything further to add and that he did not consider that he had received the answers to his questions so he did not want to answer any other questions.

95. Mr Ibrahim confirmed that as far as he knew, the only information he was aware that the respondent did not give the claimant was information about the Global spend relating to the items in his January 2019 purchases. The respondent considered that the claimant did not need this information to answer questions about how his purchases ended up on the WKHelpBuy Facebook page. The claimant agreed that this was one of the items that he had not been given and stated that there were other questions relating directly to him that had not been answered. The minutes show that when Mr Ibrahim asked the claimant whether he could tell him what was missing, the claimant did not respond. Later in the meeting the claimant stated that the questions were not answered '*correctly'*. As already stated above, in the Tribunal hearing the claimant confirmed that

he had got answers to his questions but referred to them as '*responses'* and not answers. He did not tell us what was missing from the information Ms White provided. It was clear that he did not agree with the respondent's position but that is not the same as him not being provided with answers to his questions.

96. As the claimant continued to refuse to participate in the hearing, Mr Ibrahim adjourned to consider his decision. The adjournment was for about 1.5 hours. During that time, we find from Ms Ptak's evidence that Mr Ibrahim reviewed the notes of the earlier part of the disciplinary hearing to see what the claimant had said about the allegation he faced. He reviewed the executive investigation summary, the WKHelpBuy screenshots and all other relevant evidence. Mr Ibrahim talked through his thoughts in relation to the investigation, whether to uphold the allegation against the claimant and if so, what the appropriate sanction should be. He concluded that based on the BPT and APP investigations, there was no other employee or customer worldwide who had purchased the same combination of items as the claimant in January 2019. All of the items purchased by the claimant using his employee discount in the two transactions in January 2019 had ended up being advertised for sale the WKHelpBuy site shortly after purchase. No other customer had bought that combination of items. Mr Ibrahim noted that the claimant had not had a satisfactory explanation as to how that could have happened.

97. There was also the issue of the particular mix of items purchased by the claimant, in terms of product type and size. The respondent wanted to delve further into the respondent's explanation of his purchases given that the claimant stated that he had purchased these items for his sister and a male friend. Mr Ibrahim concluded that the range of sizes and types of items could not have been for the claimant's sister or his friend to wear themselves. He concluded that the claimant had been unable to give a reason for the purchases and lastly, that the claimant's purchasing habits had changed over a few years which, in the respondent's experience, usually indicated an approach by parallel traders.

98. Mr Ibrahim then considered what was the appropriate sanction for the claimant's gross misconduct.

99. Mr Ibrahim considered that the respondent had conducted a thorough investigation and concluded that there was sufficient evidence to support the belief that the claimant had purchased the items using his Burberry employee discount knowing that they would be resold and that he accepted reimbursement for the items. When the meeting resumed, he informed the claimant of this and that he believed that the claimant had knowingly participated in a parallel trading activity which was a serious breach of the respondent's employee discount policy. Mr Ibrahim informed the claimant that he considered that he had committed gross misconduct.

100. The respondent's decision was set out in detail in a letter to the claimant dated 2 September. The claimant had been informed of the decision at the end of the meeting on 16 August. Mr Ibrahim considered that the appropriate sanction for gross misconduct was summary dismissal. In coming to this decision, he considered the impact of the claimant's actions on the Burberry brand and that the claimant could no longer be trusted to work in the company. The claimant had not provided any mitigation or any explanations that could lessen the sanction. Mr Ibrahim decided that given all of those circumstances, the most appropriate sanction was summary dismissal.

101. The letter confirmed that the claimant's employment terminated on 16 August 2019. He was informed in the meeting of his right of appeal and that was confirmed in the letter. He had to indicate whether he wanted to appeal by writing to Claire White within 7 days of receipt of the letter. He would need to give the reasons for appealing.

102. The claimant's grievance meeting happened on 19 August. The claimant attended the meeting on his own and it was chaired by Lorraine Woletz, one of the respondent's senior operations managers. There was also HR support. In that meeting, the claimant expanded on his allegation that he had been overlooked for promotion opportunities within Burberry. The minutes of the meeting show that the claimant did not make any reference to his race as being a reason for the lack of promotion opportunities at the respondent. He had every opportunity in that meeting to raise all his concerns.

103. In the grievance meeting, the claimant also provided more detail on his allegation of breach of confidentiality during his investigation. He clarified that he was being investigated around the same time as another manager at the store. We find it likely that this was AB. He stated that AB had resigned during the investigation and that following his resignation, a manager at the store had told members of staff that that AB had left the business because of parallel trading and reminded staff about the terms of the policy. He confirmed that he had been off sick at the same time and on his return to work, colleagues asked him whether he had been off for the same reason. This was different to the complaint that he put to the respondent which was that staff had been told that he was being investigated for parallel trading.

104. The claimant also raised in the grievance meeting his belief that he was not supported while he was off sick during the investigation and that his manager knew about the issues in the investigation, when Mr Coston had told him that he was not. The claimant considered that his manager should not have been aware.

105. On 30 August, Ms Woletz wrote to the claimant with the outcome of his grievance. In the letter she addressed the claimant's allegations that he had been passed over for management opportunities and his complaint about breach of confidentiality. In relation to the first matter, she considered that in September 2017, the claimant's move from menswear to ladieswear as a supervisor was an opportunity for him to prove his capabilities and to show that he was ready for more responsibilities. She expected that given his position as a supervisor, the claimant would have been more proactive in chasing up details of any plans that the respondent had for his development and raising his hand to achieve what he wanted. Progression was a two-way process. She was satisfied that the management of the store had assessed the situation with regards to promoting internal staff as opposed to bringing in external candidates, based on the needs of the business and chosen what they considered at the time was the right fit for the store. She did not uphold this part of the grievance.

106. Secondly, she looked into the claimant's complaint about breach of confidentiality. She provided more details of Ms White's investigation. Ms White found out that a manager at the store had briefed the team to reinforce the respondent's employee discount policy and how it was important to be in control of the spending cap. This happened around the same time as AB left the business and it is was likely that some of the team assumed that the team brief related to AB and that was the reason why he left. When the claimant returned to work in June, there was gossip going around the store. The claimant was asked whether he was in the same situation as AB. The senior managers at the store confirmed that they were absolutely sure that they had not discussed the claimant's case with anyone, not even the rest of the management team. The claimant's direct line manager, Jack, had been aware of his case but that was because the respondent had to deliver some paperwork to him as it included an invite to a formal meeting. As Mr Ibrahim was not at work that day, the paperwork was sent to Jack because he was the most senior member of the team at work. He needed to print it off and hand it to the claimant. He did so and even though he may have seen parts of the documents when doing so, the claimant agreed in the grievance meeting that apart from delivering the paperwork to him on that occasion, Jack had kept out of his case. Ms Woletz was satisfied that at no point was confidentiality breached at the store in relation to the claimant.

107. Ms Ptak corrected the spelling of a name in the letter but otherwise we find that the letter contains Ms Woletz's findings from her investigation of the claimant's grievance. She did not uphold his grievance. The claimant did not refer to his race or discrimination in his grievance and consequently, the grievance outcome did not refer to race or to discrimination.

108. The claimant was unhappy with the grievance outcome and asked whether it was possible to continue the process. He was sent a copy of the grievance policy and advised that as he was no longer an employee, the grievance process had now been exhausted.

109. There was some correspondence between the claimant and Monica Ptak about the respondent's disciplinary appeal process. The claimant wanted a definite time within which the respondent would let him have a decision on his appeal. Ms Ptak confirmed that the letter confirming his dismissal contained all the relevant information as well as the timeframe for submitting his appeal. He had 7 days in which to submit his appeal in writing. The respondent supplied the claimant with copies of all the policies that applied.

110. On 3 September the claimant began the ACAS early conciliation process. This process ended on 3 October.

111. On 9 September, the claimant submitted his appeal against dismissal. The claimant set out 33 points of appeal and ended the letter by stating that he was not going to add or provide any more information at this stage of the appeal process.

112. In a letter dated 19 September, the respondent invited the claimant to an appeal hearing on 30 September. He was informed that Amy Walsh, one of the respondent's district managers would conduct his appeal. The claimant was advised of his right to be accompanied.

113. In an email dated 27 September, Ms Walsh wrote to the claimant to tell him that it would not have been possible for the respondent to give him a definite date on which he would get the outcome to his appeal. It was not the respondent's practice to do so. Also, she wanted to give herself the opportunity after discussing the appeal with him, to consider whether she needed to investigate anything further or whether she had all the information she needed to make her decision. The claimant was advised that the notetaker would be attending the appeal hearing remotely.

114. Also, on 27 September 2019 the claimant started and completed a second early conciliation process.

115. In an email dated 28 September, the claimant expressed his unhappiness with Ms Walsh's position. Although the respondent had previously sent him a copy of the disciplinary policy which included an outline of the appeals process, the claimant continued to ask to be sent a copy of the respondent's guidance and policy on appeals. Although the role of HR at appeal hearings had been explained to him in an earlier email, he continued to ask for more details of the nature of support that the HR support person would be giving and exactly how that would be done. It would be difficult for anyone to give that level of detail before a meeting. It is likely that the exact nature of support given would depend on what is said in the meeting and what issues arise. In her response of 30 September, Ms Walsh repeated the respondent's position on all these points. The claimant was now in possession of all the documents, policies and procedures that existed on appeals, knew who would be at the appeal hearing and the roles that they would play. He knew the subject of the appeal hearing since it was his appeal against dismissal. He also knew who would be conducting the meeting and he should have known what he wanted to say to Ms Walsh to get her to reverse Mr Ibrahim's decision to terminate his employment, if that was the outcome he wanted.

116. The claimant replied later in the day on 30 September to say that he felt that the information he had requested had not been provided. He did not identify what was missing. He also stated that he did not agree with Ms Walsh's statement that she might need to investigate further matters after hearing his appeal. He stated that he looked forward to receiving her decision. This was an indication that he expected the appeal hearing to go ahead without him. Ms Walsh waited 30 minutes in the appeal meeting to see if the claimant would attend as she wanted to give the claimant the opportunity to participate in the process. The claimant did not attend.

117. We find that Ms Walsh considered the claimant's appeal. She instructed Alice, the HR advisor assigned to assist her, to make enquiries of Claire White to check some of the issues the claimant raised in his appeal. We saw emails confirming the enquiries that were made.

118. On 17 October, Ms Walsh wrote to the claimant to inform him of the outcome of his appeal against dismissal. In her letter she went through all 33 points that the claimant made in his appeal letter. We find that over 6 pages Ms Walsh discussed and responded to each point that the claimant raised in his appeal. Her decision on his appeal was to uphold the original decision. The claimant's dismissal was confirmed.

119. The claimant wrote to Ms Ptak on 28 October to ask further questions on his payslips and whether she had discussed his case with any of the respondent's employees or senior management. Ms Ptak responded to inform the claimant where he could find his payslips. She also informed him that as the disciplinary and grievance processes had been exhausted, she would not be engaging in any further correspondence with him in relation to them.

120. During the hearing the claimant gave evidence that during his employment, he was aware that the wife of one of the respondent's senior executives, Marco Gentile, came into the Chatham Place store and used her husband's employee discount to purchase some items, although Mr Gentile was not present. He contended that this was also a breach of the respondent's employee discount policy but no action had been taken by the respondent against Mr Gentile. The claimant's case was that this was a fact that supported his complaint of race discrimination. This was not a matter that the claimant raised during the disciplinary process. We find that no complaint was ever made to HR by the store manager or the claimant about Mr Gentile's wife's purchases. The respondent investigated this allegation for the hearing and Ms Ptak's evidence was that Mr Gentile had never been accused of breaching the respondent's employee discount policy. In addition, if this incident did occur, the items Mr Gentile's wife purchased were never offered for sale on a parallel trading site.

121. The claimant issued his ET1 on 14 December 2019.

Law

122. In considering the facts above, the Tribunal applied the following law:

Unfair Dismissal

123. It was the claimant's case that there had been inadequate investigation into the allegations against him, that he was not provided with the evidence that would allow him to respond to the allegation and that the respondent had insufficient evidence to conclude that he had committed misconduct. He also alleged that his dismissal was related to his race. Those submissions were resisted by the respondent.

124. Firstly, the tribunal is concerned with the question of determining the reason for the employee's dismissal and whether it is one of the reasons set out in section 98 (2) of the Employment Rights Act 1996. The burden is on the respondent to show the reason for dismissal. The reason for dismissal is the set of facts known by the employer or beliefs held by him at the time, which cause him to dismiss the employee. (*Abernathy v Mott Hay & Anderson* [1974] IRLR 213). It would be the reason which motivated the dismissing manager. Even if the employer is mistaken in his beliefs, the employer's subjective belief is sufficient to establish a reason for dismissal.

125. The law on unfair dismissal is set out in section 98 of the Employment Rights Act 1996. We discussed the well-known case of *BHS v Burchell* [1978] IRLR 379 EAT, in which the court set out a three-stage test that employers must follow in reaching a decision that the employee had committed the alleged acts of misconduct and that it was reasonable to dismiss them for it. The employer must show as follows: – (a) he believed the employee was guilty of misconduct; (b) he had in his mind reasonable grounds which could sustain that belief, and (c) at the stage at which he formed that belief on those grounds, he had carried out as much investigation into the matter as was reasonable in the circumstances.

126. That means that the employer does not need to have conclusive direct proof beyond reasonable doubt, of the employee's misconduct but a genuine and reasonable belief of it which it came to by way of a reasonable investigation. The employer must have conducted *'as much investigation into the matter as was reasonable in all the circumstances'* (*BHS V Burchell).*

127. The claimant in this case focussed most of his attention on the investigation. The tribunal reminds itself that the standard is whether a reasonable employer could adopt the approach taken. The process must be viewed as a whole and any alleged deficiencies in the process can be remedied by subsequent stages (*Taylor v OCS Group Ltd* [2006] IRLR 613). The respondent submitted that an employer is not obliged to investigate every line of defence advanced by an employee in detail where it reasonably concludes that the employee engaged in misconduct based on the nature of the specific transactions themselves and the implausibility of the employee's account. *(Shrestha v Genesis Housing Association* [2015] IRLR 399.

128. The Tribunal considered the case of *Clark v Civil Aviation Authority* [1991] IRLR 412 where in obiter comments the court set out as part of general principles governing disciplinary hearing procedures that the employee should be informed of the allegation or allegations made against them, given an indication of the evidence whether in statement or other form or by recording of witnesses; allowed either by themselves or through their representative to ask questions, and have the opportunity to call evidence and explain/argue their case.

129. The *ACAS Code of Practice on Disciplinary and Grievance Procedures* (2015) (the *Code*) contains requirements, that the employer inform the employee of the basis of the problem and give them an opportunity to put their case in response before any decisions are made, as basic elements of fairness (Para 4). Another is that employers should carry out any necessary investigations, to establish the facts of the case.

130. The *Code* further provides that:

> *"9. If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification.*
>
> *10. The notification should also give details of the time and venue for the disciplinary meeting and advise the employee of their right to be accompanied at the meeting.*
>
> *11. The meeting should be held without unreasonable delay whilst allowing the employee reasonable time to prepare their case.*
>
> *12. Employers and employees (and their companions) should make every effort to attend the meeting. At the meeting the employer should explain the complaint against the employee and go through the evidence that has been gathered. The employee should be allowed to set out their case and answer any allegations that have been made…*
>
> *26. Where an employee feels that disciplinary action taken against them is wrong or unjust they should appeal against the decision. Appeals should be heard without unreasonable delay and ideally at an agreed time and place. Employees should let employers know the grounds for their appeal in writing…*
>
> *29. Employees should be informed in writing of the results of the appeal hearing as soon as possible."*

131. The tribunal would next consider whether dismissal was a reasonable outcome of this process.

132. If the Tribunal concludes from the evidence that the stages outlined above have been followed, then it must decide whether, taking into account all relevant circumstances, including the size of the employer's undertaking and the substantial merits of the case, that the employer acted reasonably in treating the misconduct as a sufficient reason to summarily dismiss the employee. In determining this, the tribunal has to be mindful not to substitute its own views for that of the employer. The onus is on the employer to establish that there was a fair reason for the employee's dismissal such as gross misconduct, which is relied on in this case. The tribunal must ask itself whether what occurred fell within the *'range of reasonable responses'* of a reasonable employer.

133. In the case of *Iceland Frozen Foods v Jones* [1982] IRLR 439, Mr Justice Browne-Wilkinson summarised the law as follows*:*

> *"….in law the correct approach for the tribunal to adopt in answering the questions posed by section 98(4) ERA is as follows: (1) the starting point should always be the words of section 98(4) themselves; (2) in applying the section the tribunal must consider the reasonableness of the*

> *employer's conduct, not simply whether they (members of the tribunal) consider the dismissal to be fair; (3) in judging the reasonableness of the employer's conduct, the tribunal must not substitute its decision as to what was the right course to adopt for that of the employer (4) in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, and another quite reasonably take another; (5) the function of the …tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses a reasonable employer might adopted. If the dismissal falls within the band the dismissal was fair; if the dismissal falls outside the band it is unfair."*

134. The claimant also alleges that the respondent treated him differently to its chief executive, Marco Gentile, who he alleged had committed a similar offence to him.

135. In considering this part of his case, the tribunal was aware of the law in the case of *Hadjioannou v Coral Casinos Ltd* [1981] IRLR 352. Inconsistent decision-making by an employer can make a dismissal unfair. If an employer treats two employees in a similar position differently, that could be evidence of inconsistent treatment and give rise to a conclusion of unfairness. In *Hadjioannou*, the court held that although an employer should consider how previous similar situations have been dealt with, the allegedly similar situations must truly be similar. Waterhouse J also stated:

> *'It is only in the limited circumstances that we have indicated that the argument is likely to be relevant, and there will not be many cases in which the evidence supports the proposition that there are other cases which are truly similar, or sufficiently similar, to afford an adequate basis for the argument. The danger of the argument is that a tribunal may be led away from a proper consideration of the issues raised by [s 98(4) of the Employment Rights Act]. The emphasis in that section is upon the particular circumstances of the individual employee's case. It would be most regrettable if tribunals or employers were to be encouraged to adopt rules of thumb, or codes, for dealing with industrial relations problems and, in particular, issues arising when dismissal is being considered. It is of the highest importance that flexibility should be retained, and we hope that nothing that we say in the course of our judgment will encourage employers or tribunals to think that a tariff approach to industrial misconduct is appropriate. One has only to consider for a moment the dangers of the tariff approach in other spheres of the law to realise how inappropriate it would be to import it into this particular legislation"."*

<u>Wrongful dismissal</u>

136. The claimant was dismissed summarily on 16 August 2019. His complaint is that he was wrongfully dismissed and that he was entitled to contractual notice pay.

137. In determining a complaint of wrongful dismissal, the tribunal must decide whether the employer has proved that the claimant actually committed

gross misconduct. That it actually occurred. It is only in those circumstances that an employer is entitled to dismiss an employee in breach of contract i.e. without giving the requisite contractual notice.

138. The question in a wrongful dismissal claim is not whether the outcome was fair. Questions of fairness are only relevant to the unfair dismissal complaint.

Race Discrimination

139. The claimant is a Black British person. It was his case that he was the subject of a witch-hunt investigation and that he was dismissed either mainly or solely on the basis of his race.

140. Under section 13 of the Equality Act 2010 (EqA), less favourable treatment on the grounds of race is direct race discrimination. In the hearing the claimant compared himself with Marco Gentile whose wife he alleged had also breached the employee discount policy but who had not been dismissed from his post as the respondent's chief executive. He alleged that this was because Mr Gentile was white and he was black. In the list of issues, the claimant named everyone involved with his case as his comparator.

141. Section 23(1) EqA states that on a comparison of cases for the purposes of section 13, there must be no material difference between the circumstances relating to each case. In this case the claimant relied on an actual comparator, Mr Gentile.

142. The claimant also submitted that the difference in treatment would entitle the tribunal to conclude that the dismissal contravened the EqA.

143. The claimant also seemed to submit in the hearing that because both he and AB were black and were disciplined for parallel trading, that was evidence that their race was a factor in the decision to take disciplinary action/dismiss them for this offence.

144. Section 136 of the EqA states that:

> *"if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred [but] if A is able to show that it did not contravene the provision then this would not apply."*

145. There is a substantial volume of case law that seeks to provide guidance on the concept of the "shifting burden of proof". It was dealt with most authoritatively in the case of *Igen v Wong* [2005] IRLR and confirmed in subsequent cases including *Madarassay v Nomura International Plc* [2007] IRLR 246.

146. In the case of *Laing v Manchester City Council* (EAT) ICR 1519 the EAT spelt out how the burden of proof provisions should work in practice:

> *"First, the onus is on the complainant to prove facts from which a finding of discrimination, absent an explanation can be found. Second, by contrast, once the complainant lays that factual foundation, the burden shifts to the employer to give an explanation. The latter suggests that the employer must seek to rebut the inference of discrimination by showing why he has acted as he has. That explanation must be adequate, which as the courts have frequently had cause to say does not mean that it should be reasonable or sensible but simply that it must be sufficient to satisfy the tribunal that the reason had nothing to do with race."*

147. In the same case tribunals were cautioned against taking a mechanistic approach to the proof of discrimination by reference to the law in following the guidance set out above. In essence, the claimant must prove facts from which the tribunal could conclude, in the absence of an adequate explanation, that the Respondent had committed an unlawful act of discrimination against the complainant. The tribunal can consider all evidence before it in coming to the conclusion as to whether or not a claimant has made a prima facie case of discrimination (see also *Madarassay v Nomura International Plc* [2007] IRLR 246).

148. In every case the tribunal has to determine the reason why the claimant was treated as s/he was. As Lord Nicholls put it in *Nagarajan v London Regional Transport* [1999] IRLR 572: *"this is the crucial question*". It was also his observation that in most cases this will call for some consideration of the mental processes (conscious or subconscious) of the alleged discriminator. If the tribunal is satisfied that the prohibited ground is one of the reasons for the treatment then that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it is significant in the sense of being more than trivial.

149. As Elias J stated in the case of *Laing* in some cases it is still appropriate to go right to the heart of the question of whether or not race or ethnic origin was the reason for the treatment.

> *"The focus of the tribunal's analysis must at all times be the question whether or not they can properly and fairly infer race discrimination. If they are satisfied that the reason given by the employer is a genuine one and does not disclose either conscious or unconscious racial discrimination, then that is the end of the matter. It is not improper for a tribunal to say, in effect, 'there is a nice question as to whether or not the burden has shifted, but we are satisfied here that, even if it has, the employer has given a fully adequate explanation as to why he behaved as he did and it has nothing to do with race'. Whilst ….it will usually be desirable for a tribunal to go through the two stages suggested in Igen, it is not necessarily an error in law to fail to do so."*

Applying law to facts

150. In this section of the decision the Tribunal will consider the issues in the case as listed in the revised list of issues. We will apply the relevant law to the facts set out above and give our decision in relation to each issue.

Decision on the items in the list of issues

Unfair Dismissal

151. What was the reason for dismissal?

152. We did not hear from the dismisser, Mr Ibrahim in live evidence. However, we had the letter of dismissal and we heard from Ms Ptak who supported him throughout the disciplinary process and supported the HR advisor, Claire White. We had the minutes of the disciplinary meetings and we had Ms Ptak's summary of their discussion in which he explained his reasons for the claimant's dismissal.

153. It is this Tribunal's decision that Mr Ibrahim dismissed the claimant because he believed that the claimant purchased the items to be resold and that he participated in parallel trading. There was likely to have been a wide-ranging discussion during the first part of the disciplinary hearing on 14 June and in the investigation. The respondent was entitled to ask questions and put information to the claimant so that it could understand what happened and so that it could draw conclusions from his answers along with the documentary evidence in its possession.

154. It is this Tribunal's judgment that the claimant was not dismissed because he bought items for his sister or for his friend. The information that started the investigation was the discovery of the items on sale on the WKHelpBuy site. The breach of the policy which the respondent considered to be gross misconduct was that the items that the claimant bought with his employee discount were being offered for sale on the WKHelpBuy Facebook site. This was in breach of the employee discount policy. WKHelpBuy is a parallel trading site and parallel trading and being involved in parallel trading were serious misconduct issues for the respondent.

155. The respondent had a clear employee discount policy which stated that immediate family members such as the claimant's sister, may not re-sell or gift Burberry products to others. It is our judgment that the same applied to third parties who were not related to employees, such as the claimant's friend.

156. Mr Ibrahim dismissed the claimant because he believed that the claimant had breached the employee discount policy by purchasing items which he knew were going to end up on the WKHelpBuy Facebook site. He believed that the claimant knew that they were going to be parallel traded or could reasonably be expected to know that they would be resold. This was gross misconduct.

157. It is our judgment that this was the reason for the claimant's dismissal.

Did the respondent have a potentially fair reason for dismissal? Had the respondent complied with all three elements of BHS v Burchell?

158. The respondent carried out a fair and reasonable investigation. It is our judgment that Tony Yau did not know the claimant. There were no facts proved from which we could conclude that there was a witch-hunt against the claimant. We were not given any evidence from which such a conclusion could be drawn.

159. The respondent's BPT conduct regular searches of well-known parallel trading sites using the IntelliQ system. In February 2019, Mr Yau spotted items of sale that were unique Burberry items. They were described as unique as they fitted the definition set out in the findings above. He cross-referred those items to sales, the SKUs and identified 15 items purchased by the claimant in January 2019. The items purchased by the claimant in January ended up on the parallel trading site in February. That was sound evidence and credible suspicion from which the respondent could start an investigation. Under the APP investigations policy there had to be credible information suggesting misuse of the employee discount scheme to warrant an investigation and in our judgment, the results of the IntelliQ search and the cross-reference to the sales and employee account information was credible information. In those circumstances, it was appropriate and reasonable for the respondent to begin an investigation into the claimant at that time.

160. That information was sent to the APP team to conduct an investigation. Mr Coston was not able to investigate this until April as he was busy with other investigations. In our judgment, the claimant was told the reason for Mr Coston's visit to the store. He was given an opportunity to comment on the evidence gathered by the respondent at the start of the investigation. He was given the screenshots. He was given the printout of his employee discount account to check his purchases over the years. The claimant did not dispute that items matching the same description as those he purchased in January, appeared on WKHelpBuy a month later, in February. He did not need to see those items on a screen to be able to understand the allegation against him. He understood the allegation from the screenshots. His case was that he was not the only person to have purchased these items.

161. At the investigation meeting, Mr Coston gave the claimant the opportunity to comment on the screenshots. He was given the opportunity to give his version of events. This was taken down and passed to HR. It is likely that Mr Coston was forceful in the investigation meeting as he wanted to test the claimant's explanation of how the items that he purchased using his employee discount ended up on the parallel trading site. Mr Coston decided that there was a case to answer, which is why he sent the paperwork to the HR team.

162. What difference is made by the claimant's correspondence with Claire White between April and August 2019? In this Tribunal's judgment, Ms White answered the claimant's questions and did so on more than one occasion. The claimant was provided with sufficient information to be able to understand the allegation that he faced. He was given copies of all the relevant information early on in the process. He had copies of the respondent's disciplinary procedures and he knew that he had the right to be accompanied to the disciplinary hearing. He was given reasonable notice of the disciplinary hearing.

163. The disciplinary hearing was re-scheduled on one occasion as the respondent reasonably believed that the claimant required the answers to his questions before attending the hearing. It transpired that he wanted the meeting to go ahead but that was not clear from the letter and so it was not unreasonable for Ms White to have thought so.

164. The claimant was inconsistent in the way he dealt with the internal disciplinary proceedings. After the first postponement of the disciplinary hearing, the claimant was unhappy and stated that the email on 30 May was to give the respondent an indication of the answers he wanted during the disciplinary hearing scheduled for 3 June. There was nothing in the email that would have given the respondent that indication. He then changed his mind and wrote to Ms White on 4 June to say that he wanted answers to what were essentially the same questions before the hearing, which was now re-fixed for 6 June.

165. The claimant asked for things that had already been produced or could be easily determined from the documents. For example, one of the repeated questions was for information on the possible outcomes of the disciplinary hearing. The invitation letter informed him of the allegation that was going to be considered and that if it were found to be gross misconduct, he could be dismissed. He had been sent a copy of the disciplinary procedure so he could see the possible sanctions outlined in it. The respondent could not say anymore before the hearing as that would be pre-empting the result. It would depend on what was said and what conclusion Mr Ibrahim came to. Other questions he asked were either not relevant or were things that the respondent would not be able to produce. For instance, the respondent was not operating the WKHelpBuy site and so would not be able to provide information on what date the items were uploaded on to the site. All it could do was provide the screenshots to show when they were first seen there. As the respondent monitors the site and other parallel trading sites on a regular basis, it is likely that when these items were seen in February, they had recently been uploaded. The respondent could have shown the claimant the items on a screen or copies of the screenshots. It chose to use screenshots because of the very real possibility that as soon as someone involved in parallel trading becomes aware that they are being investigated, the items are taken off the site, which would probably be the end of the investigation. The screenshots gave the claimant sufficient information to be able to respond to the allegations he faced. In our judgment, the screenshots showed actual items for sale. They were not photos of items on sale in the store or from stock photos.

166. The only item it was agreed that had not been provided was the copy of the global sales figures for the 15 items. However, it is our judgment that the respondent agreed that these items had been sold as single items at various places around the world. The allegation was never that he was the only person to have purchased these items. The allegation was that this particular combination of items appeared together on a parallel trading site, being offered for sale, approximately one month after he purchased them. It was not clear to the Tribunal how the global sales figures would have assisted in the disciplinary process. The claimant did not provide an explanation that showed how those figures were relevant.

167. The respondent re-scheduled the disciplinary hearing to give the claimant sufficient time to be able to consider the documents and to gather his witnesses and evidence to respond to the allegations he faced. He had the opportunity to ask his friend and his sister to come to the disciplinary hearing to assist him in proving to the respondent that he had not been involved in parallel trading and that the items had indeed been purchased as gifts for them. He was advised that he could attend with documents such as bank and credit card statements that could support his defence to the allegation – that he had purchased these items as gifts. He chose not to do so.

168. In the hearing the claimant agreed that he had been given answers to his questions but stated that they were responses, rather than full answers. This was unhelpful and uncooperative. Questions about the notetaker's qualifications were unnecessary to enable him to dispute that accuracy of the minutes of the investigation meeting. He could simply have disputed the accuracy of the minutes and continued with the process. His insistence in continuing to ask this question and similar questions delayed the disciplinary hearing. Ms White investigated the issue of confidentiality and reported back to him the results of her investigation. It is our judgment that the claimant received full answers to all the questions he raised during the disciplinary process.

169. Ms White wrote to the claimant on 21 June, providing even more detailed answers to all the claimant's questions. It is our judgment that there was nothing further that the claimant required in order to understand the allegations that he faced and to be able to respond to them.

170. At the disciplinary hearing, the respondent presented evidence that he was the only person in the world who purchased that combination of items in January, which were then identified by the IntelliQ system as the same items listed for sale on the WKHelpBuy site in February. The respondent needed the claimant to answer how those items ended up on the WKHelpBuy site and he failed to provide that explanation. The claimant's defence to the allegation was that he had purchased the items for his sister and his friend. It was appropriate for the respondent to challenge him on that because of the variety of sizes, number and total cost of the items. The variety of sizes meant that it was unlikely that all those items would be worn by his sister and his friend. The claimant knew from the terms of the employee discount policy that the discount was provided only for his personal use or for the use of his immediate family or as a personal gift from him to someone else. If he is gifting items to his friend when it is reasonable for him to conclude, based on the sizes and the fact that some items were sold as women's clothing, that his friend was unlikely to wear them. it was appropriate that he should take responsibility for that. His case was that he purchased two ladies' coats for his male friend, sizes 6 and 8. He purchased an item of men's clothing for his sister and an item size XXXL. It was appropriate for the respondent to challenge him on those explanations. The respondent did not consider that explanation to be plausible, which in our judgment was a reasonable response. The respondent also questioned the claimant's explanation that these were gifts for which he did not receive any money. They queried whether someone would gift items that totalled a retail value of nearly £3,000 to a friend and a sister without it being a special occasion or significant birthday or some other event for either of them. In the circumstances, those were appropriate challenges to his explanations and lines of enquiry within the disciplinary process.

171. The claimant indicated in the Tribunal hearing and in his correspondence that the fact that Mr Ibrahim stated that he might need to ask further questions at the hearing was unfair to him and tainted the process. In our judgment, it was appropriate for the respondent to allow the decision maker to have the option to conduct further investigations/queries from the representations that the claimant and his representative make at the disciplinary hearing. We would expect the claimant to want the respondent to fully understand his explanation, which may have entailed asking him further questions. it was not clear to us why he considered the possibility of further questions to be unfair, even before they had been asked.

172. In the circumstances, it is our judgment that the respondent did all it could to investigate the allegation against the claimant and to answer the claimant's questions about the allegations and about the process. It is also our judgment that the respondent had conducted a reasonable investigation into the allegation that the claimant had used his employee discount to purchase items that he knew were or were likely to be put up for sale on a parallel trading website.

173. The respondent had not conducted itself unreasonably in seeking to proceed with the disciplinary hearing after it had been postponed on numerous occasions. Mr Ibrahim conducted a fair hearing and gave the claimant every opportunity to explain his position. He asked him questions to allow him to explain. He tried to give him further opportunity on 16 August to explain how the items he purchased ended up on the parallel trading Facebook site. It was also reasonable to ask the claimant questions to explore his account and his credibility. Mr Ibrahim, with the support of Ms White and Ms Ptak, outlined the allegation against the claimant and went through the evidence, giving him opportunity to comment, as required by the ACAS Code.

174. In this Tribunal's judgment, the respondent conducted a fair and reasonable appeal process. Although the claimant chose not to attend the appeal hearing, Ms Walsh considered his appeal and went through all his points in her outcome letter.

175. It was not reasonable for the claimant to expect Ms Walsh to commit to a timeframe for providing an outcome to the appeal process before she had even heard

the appeal. The claimant raised 33 points of appeal and it was possible that even more may have come out at the appeal hearing. It was fair and reasonable for Ms Walsh to allow herself the option to conduct further enquiries, to ask HR for advice, to speak to Mr Ibrahim and/or Mr Coston about anything the claimant raised in the appeal; rather than make a promise to come back to him with a decision by a certain day which she may not be able to keep. The ACAS Code does not require appeals to be heard within a specific time frame but only that they should be heard without unreasonable delay.

176. The appeal hearing was on 30 September and the result was sent to the claimant on 17 October. In our judgment, the appeal was addressed fully and was done within a reasonable time. The outcome was thorough and Ms Walsh reached conclusions that were reasonable and were open to her.

177. In this Tribunal's judgment, the respondent genuinely believed that the claimant had committed gross misconduct. Mr Ibrahim believed that the claimant had committed gross misconduct and that belief was based on the reasonable investigation conducted by Mr Coston and the whole disciplinary process conducted by Mr Ibrahim and Ms Walsh. The whole process was reasonable. It is appropriate for the respondent to take into account anything that came up in the disciplinary or appeal hearings. Those are all part of the investigative process.

178. In this Tribunal's judgment, the respondent adopted a reasonable procedure in the conduct of the investigation and the disciplinary procedure. The respondent gave the claimant ample opportunity to engage with the process, to provide evidence to support his defence of the allegations and to provide mitigation, if that was appropriate. The process began in April, he had all the answers, information and evidence in his possession earlier but definitely before the first part of the disciplinary hearing in June; and the disciplinary hearing did not conclude until August. This was not a rushed process and was a very transparent process.

179. We were not persuaded that it was reasonable for the respondent to ignore the facts that came out of the investigation as stated above and begin an investigation into a hypothetical situation for which they had no concrete evidence. At the hearing the claimant put forward different scenarios to respond to the allegation that he was involved in parallel trading. He did not put those forward to the respondent in the disciplinary process, when he had every opportunity to do so. He could have done so in the investigation meeting, in the two parts of the disciplinary meetings in June and August meeting and at the appeal meeting on 30 September. The evidence was that the claimant had purchased these items with his employee discount and all the items ended up being offered for sale in a parallel trading site soon after. It was open to the respondent to reject the claimant's explanations about his purchases as gifts for his sister and his friend as those explanations were implausible, inconsistent and therefore not credible. It was open to the respondent to conclude that it was more likely that the claimant bought the items for the purpose of parallel trading and sold them on to a parallel trader. The respondent did not need to have evidence of an actual sale in order to reach that conclusion. It was entitled to reach that conclusion from the surrounding facts.

Was dismissal an appropriate sanction?

180. The claimant had been an employee for 14 years. It was reasonable for the respondent to believe that over that period of time he had become familiar with the employee discount scheme and knew how it worked. It was not a new policy and he was able to explain it to the managers conducting the disciplinary policy. The policy made it quite clear that if you breached it – you could be dismissed.

181. It was not the claimant's case during the internal procedure that he did not understand the policy.

182. The respondent considers that parallel trading devalues its luxury brand as customers may decide that they do not need to pay the asking price for items if they can buy them from parallel traders for less. It is appropriate that as a commercial enterprise the respondent is able to protect its brand. The employee discount policy is known to staff. It is not a secret. All the members of staff that gave evidence at the hearing were familiar with the policy and how it worked. The claimant was able to explain it to the managers during the disciplinary process.

183. The claimant refused to accept that he had breached the policy. The respondent questioned his credibility as the explanation that he gave for what happened to his purchases was disbelieved and rejected. This undermined the respondent's trust in him. His length of service meant that he had been loyal to the business but also meant that the respondent had a reasonable expectation that he would maintain the policy.

184. The respondent came to a decision that this was not a matter of training or the claimant's lack of knowledge of the policy or a misunderstanding but a deliberate breach. The disciplinary policy listed abuse of the employee discount policy as an example of gross misconduct.

185. In those circumstances, it is our judgment that this was a fair dismissal and the decision to dismiss the claimant for gross misconduct was within the band of reasonable responses open to the respondent as his employer.

186. The claimant was fairly dismissed and his complaint of unfair dismissal is dismissed.

187. The claimant compared himself to Mr Gentile in relation to the dismissal as well as under the allegation of race discrimination which is addressed below.

188. In order to be able to compare whether the respondent treated the claimant unfairly in comparison to how it treated Mr Gentile, they would need to be in the same or very similar circumstances.

189. There was no complaint against Mr Gentile. There was no evidence that anything his wife purchased with his employee discount ever ended up being offered for sale on a parallel trading site. That is a significant difference between their situations.

190. The respondent would still have the discretion to treat them differently if it decided that there were different circumstances which warranted different treatment. However, it is our judgment that Mr Gentile's conduct, even if his wife had used the employee discount inappropriately, was not truly parallel to the claimant's conduct. Therefore, the claimant cannot compare himself with Mr Gentile.

191. The claimant's circumstances were substantially different from Mr Gentile in that he purchased items worth over £3,000 retail value, using his employee discount, which ended up being offered for sale on a parallel trading site. The claimant's explanation was inadequate and implausible and together with all the other factors, led the respondent to conclude (as set out in the letter of dismissal), that the claimant had purchased the items using his discount knowing that they would or may be resold or passed on to individuals not entitled to receive them under the discount policy and that he accepted reimbursement for them.

Wrongful dismissal

Was the claimant in repudiatory breach of contract? Was he in material breach of the respondent's employee discount policy? Was it gross misconduct?

192. It is this Tribunal's judgment that the respondent has proved that the claimant purchased the items in January 2019 that were later offered for sale on the WKHelpBuy

Facebook site in February 2019. Although there were other items on the page from which the screenshots were taken, the items that the claimant purchased were all offered for sale there, together. The SKUs of the items matched the items that the claimant purchased. They were not just items that looked like the ones he purchased. The respondent proved that they actually were the ones that he purchased.

193. It is immaterial that there were other items from other stores also on offer on the WKHelpBuy site. It is likely that parallel traders offer items from other brands for sale. That does not detract from the fact that the items the claimant purchased were also on offer on the page. The claimant was the only person, worldwide, to have purchased that particular mix of items in January 2019. The number of unique items meant that they were identifiable.

194. The claimant's explanations of his purchases were implausible. It was implausible that he had bought items totalling a value of around £3,000 for his sister and his friend for no particular reason. He could not remember the value when asked in the investigation meeting. It was implausible that he had purchased such a wide variety of goods for a friend and had not questioned why that friend would need for example, 2 women's raincoats, sizes 6 and 8. The claimant would have known that he had to ensure that the goods were not going to be sold on. It was implausible that he bought a large size item and an item of men's' clothing, for his sister without knowing that they were going to be sold on. It was highly unlikely that those items were bought for the personal use of his sister and his friend, which they would need to be if he was using the discount scheme correctly.

195. The claimant had no explanation of how the items he purchased in January 2019 were later being offered for sale on the WKHelpBuy Facebook site in February 2019. Although his case was that he purchased the items as gifts for his sister and his friend, he was only able bring 6 items to the disciplinary hearing and would not leave them in the store to be properly verified as the same items. It is reasonable for the respondent o conclude that what happened here was in accordance with Mr Coston's experience that parallel traders would often loan items back to their employee contact so that they could use them in any disciplinary process as proof that they have not been parallel traded and then return them. If the items had been retained by the claimant's sister and his friend as gifts then it should have been simple to get them back for the disciplinary hearing. The claimant stated that there was only one item that he knew for certain had been sent to Barbados as a gift. If his explanation had been true, the rest should have been available to bring to the disciplinary meeting.

196. Taking all of the above into account, it is our judgment, that the claimant was in material breach of the respondent's employee discount policy when he purchased these items for the purpose of parallel trading or knowing that they would or may be resold or passed to individuals not entitled to receive them under the employee discount policy. The claimant committed gross misconduct. The respondent was entitled to dismiss him without notice.

197. The claimant had worked for many years for the respondent, which meant that it was reasonable to assume that he was familiar with the policy and how it operated. The claimant breached the policy when he made this purchase and handed the items over to someone who uploaded them to the WKHelpBuy Facebook site or for the purpose of parallel trading.

198. The complaint of wrongful dismissal fails and is dismissed.

<u>Race Discrimination</u>

199. The claimant is a black British man. The claimant did not complain of race discrimination during the investigation and disciplinary process. Also, we note that he

did not include a complaint of race discrimination in his grievance about a failure to be promoted to management.

200. In the hearing, it was significant that no questions were put to any of the respondent's witnesses that they had treated the claimant in the way they had, that he had been investigated, dismissed or that his appeal had failed because of his race.

201. No evidence of the claimant's race being part of the decision to discipline him or dismiss him was put before the Tribunal. The claimant referred to race when he addressed his case about the difference in treatment between him and Mr Marco Gentile.

202. There was no evidence that either Tony Yau or Carl Coston knew the claimant or his ethnicity before the investigation was launched. It is clear that the investigation was triggered from the results of the IntelliQ search which threw up the claimant's name as the person who had purchased the items that were later seen all together offered for sale on the WKHelpBuy site. The search started from the items for sale on the site and then identified that they were authentic Burberry products and then that it was the claimant who had purchased them.

203. The claimant referred to two comparators in support of his complaint of race discrimination:

AB

204. The claimant's case was that he and AB were two black British men at the Chatham Place store and that they had both been targeted for parallel trading and dismissed for it. This was not true. It was true that both the claimant and AB are black British men. However, unlike the claimant, during his disciplinary hearing, AB confessed to being in breach of the employee discount policy and being involved in parallel trading. He resigned his employment. He was not dismissed. This makes his situation different from the claimant. The respondent had not done anything to AB apart from conducting what was likely to have been a legitimate investigation into suspected misconduct. When faced with the evidence of his involvement in parallel trading, AB accepted that he had committed misconduct and faced the consequences of his actions. We did not have anything before us that suggested that this was related to his race.

205. It is our judgment that AB was not a valid comparator for the claimant's case as there was a material difference between him and the claimant as he was not dismissed.

Marco Gentile

206. Mr Gentile was the respondent's chief executive. It was the claimant's case that Mr Gentile's wife came into the Chatham Place store and purchased items using her husband's employee discount. The respondent had not had an opportunity conduct an investigation into this allegation because it was not something that the claimant or any of his colleagues raised at the time and he did not raise it in the disciplinary process. No allegation had been made to the respondent's APP team or HR that Mr Gentile had breached the discount policy.

207. There was no allegation from the claimant that the items that Mr Gentile's wife purchased ever ended up on a parallel trading website.

208. The respondent also did not know the details of the purchase by Mrs Gentile at the store. It was not known, for example, if she used a credit card held jointly with Mr Gentile to make the purchase.

209. But even without knowing all the details, it is this Tribunal's judgment that there is a very real and material difference between the misconduct done by the claimant and that allegedly done by Mr Gentile. The claimant had done parallel trading or bought items knowing that they would or were likely to be resold/passed to individuals not entitled to receive them and Mr Gentile had allegedly allowed his wife to use his employee discount to buy items in the store. The items the claimant purchased ended up on a parallel trading site. The items Mr Gentile's partner purchased had not ended up on a parallel trading site.

210. Under section 23(1) EqA, someone is an appropriate comparator if there is no material difference between them and the claimant's circumstances. It is our judgment that there is a significant difference between the claimant and Mr Gentile. The most serious part of the claimant's misconduct was the part involving the parallel traders. That is what was likely to damage the respondent's brand. That is the part of the policy which is really clear – the items must not be sold on. That is also the part of the employee discount policy that the claimant breached and was the reason for his dismissal.

211. It is our judgment that AB and Marco Gentile are not appropriate comparators in this case. They are instructive as they lead the Tribunal to conclude that when the respondent has evidence that there may be a breach of its employee discount policy, it takes the matter seriously and investigates it and conducts a disciplinary hearing, if there is evidence to support it. The evidence shows that the employee is likely to get an opportunity to defend themselves against the allegation, no matter what their ethnicity or racial origin.

212. It is our judgment that the claimant has failed to prove facts from which we could infer that he was treated less favourably because of his race in the investigation and disciplinary process and in the decision to dismiss him summarily from his employment.

213. The claimant was not subject to less favourable treatment on the grounds of his race.

214. The complaint of race discrimination fails and is dismissed.

Judgment

215. The claimant was fairly dismissed.

216. The complaint of unfair dismissal fails and is dismissed.

217. The claimant has failed to prove any facts from which the Tribunal can infer that he was discriminated against on the grounds of his race. The complaint of race discrimination fails and is dismissed.

218. The claimant's complaints all fail and are dismissed.

Employment Judge Jones

19 April 2022