EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Vernon Morton	**v**	**Asda Stores Ltd**
Heard at: Watford		**On**: 19 – 25 April 2022

Before: Employment Judge Bedeau
Members: Mrs I Sood
Dr B von Maydell

Representation
For the Claimant: In person
For the Respondent: Ms J Duane, counsel

JUDGMENT having been sent to the parties on 5 May 2022 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

1. In a claim form presented to the tribunal on 22 September 2020, the claimant claims that he was unfairly dismissed by the respondent and had been the victim of direct race discrimination.

2. In the response presented to the tribunal on 26 November 2020, the claims are denied. The respondent avers that the claimant was dismissed for gross misconduct, in that, he had engaged in an inappropriate conversation with a minor who was a customer of the store where he worked. The young girl complained about his behaviour. There was a reasonable investigation, and he was dismissed. Dismissal fell within the range of reasonable responses. Alternatively, if he was unfairly dismissed there should be no compensation because of his conduct.

The issues

3. On 29 July 2021, at a preliminary hearing held in private before Employment Jude George, the claimant clarified that his race discrimination claims relying on the respondent's application of its policy on the treatment of vulnerable employees working during the Covid-19 pandemic.

4. The case concerns the behaviour of the claimant outside of his immediate place of work and whether his conduct impacted on the respondent? In addition, whether he had been racially discriminated by the respondent?

5. The issues are clearly set out in the case management summary which is included in the joint bundle of documents. They are set out in paragraph 7 of the summary and are replicated below as follows:-

"Unfair dismissal

7.1. What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")? The respondent asserts that it was a reason relating to the claimant's conduct or, alternatively, some other substantial reason, pursuant to section 98(1)(b) ERA?.

7.2. If so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the respondent in all respects act within the so-called 'band of reasonable responses'? This will require the Tribunal to consider the following questions,

7.2.1. Did the Respondent form a genuine belief that the Claimant was guilty of misconduct?

7.2.2. Did the Respondent have reasonable grounds for that belief?

7.2.3. Did the Respondent form that belief based on a reasonable investigation in all the circumstances?

7.2.4. Did the Respondent follow a fair procedure when dismissing the Claimant?

7.3. The Claimant asserts that his dismissal was unfair for the reasons set out at section 8.2 of his Claim Form and explained at the preliminary hearing. In particular, because

7.3.1. At the time of the alleged misconduct he was in the position of a member of the public; not wearing his name badge or uniform such as would identify him as a member of Asda staff;

7.3.2. The complainant was also in the position of a member of the public and not an Asda customer as alleged;

7.3.3. The allegation against him is not one specified in the disciplinary handbook;

7.3.4. According to the respondent's handbook, the allegation of bringing the company into disrepute is not dismissible for a first offence;

7.3.5. The disciplinary manager referred the claimant to allegations of illegal activity (including acts outside work) but was unable to specify the illegality alleged;

7.3.6. The documents relied upon by the respondent were not signed or dated;

7.3.7. The claimant was not given the opportunity to put questions to the complainant or of witnesses who did not sign their statements;

7.3.8. The respondent did not ask sufficient questions of the complainant because they did not ask her why she did not ask him to go away or why she had recorded the conversation – they made assumptions;

7.3.9. An alleged covert video recording of the claimant was circulated in breach of Data Protected rules;

7.3.10. In reaching the decision to dismiss, the respondent relied upon audio/video recordings of the alleged conduct which were recorded without his consent, which were partial (and therefore an incomplete record of the conversation) and in circumstances where the respondent did not disclose the recordings themselves to the claimant but only the transcripts.

7.3.11. The reason for the claimant's suspension was not communicated to him in writing, in breach of policy and was not explained to him verbally;

7.3.12. The complaint was made about one month after the incident.

7.4. If the Respondent failed to follow a fair procedure, can the Respondent show that following a fair procedure would have made no difference to the decision to dismiss?

Remedy for unfair dismissal

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

7.5.1. if the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would still have been dismissed had a fair and reasonable procedure been followed ? See: Polkey v AE Dayton Services Ltd [1987] UKHL 8; paragraph 54 of Software 2000 Ltd v Andrews [2007] ICR 825; [W Devis & Sons Ltd v Atkins [1977] 3 All ER 40; Crédit Agricole Corporate and Investment Bank v Wardle [2011] IRLR 604];

7.5.2. would it be just and equitable to reduce the amount of the claimant's basic award because of any blameworthy or culpable conduct before the dismissal, pursuant to ERA section 122(2); and if so to what extent?

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

EQA, section 13: direct discrimination because of race

7.6. Has the respondent subjected the claimant to the following treatment:

7.6.1. On 30 March 2020, when the claimant informed him that he was Type 2 diabetic on his return to work following a period of absence from work because of self-isolation due to his son's symptoms of COVID-19, did Mr Ken McCorriston fail to update the claimant on the NHS guidance on vulnerable and extremely vulnerable colleagues and the company response to the policy? Did Mr McCorriston fail to tell the claimant that he was entitled to isolate at home until the end of July on full pay?

7.6.2. In early part of April 2020 when claimant informed Mr McCorriston that his wife had been advised by NHS England to shield as extremely vulnerable - and therefore the claimant should have been permitted under R policy to shield as well – did Mr McCorriston say "You cannot do this to me, I have no one. You have to come to work." Did Mr McCorriston fail to tell the claimant to go home and stay at home until further notice (in accordance with policy) but instead changed the subject to the possibility of redundancies which the claimant found wholly inappropriate and threatening?

7.6.3. On a Sunday in early April 2020, did Mr McCorriston deliberately schedule the claimant to be the sole duty manager for a shift 8am to 7pm which meant that he could not do reduced hours?

7.6.4. Did the area manager, Tim Sparrow, and Tracy Peddie, the regional HR manager, who were present at the Feltham store every Monday, failed to intervene and ensure that the claimant was sent home to shield, in accordance with the respondent's policy?

7.6.5. Disciplinary action; and

7.6.6. Dismissal.

7.7. The claimant argues that the failure on the part of the respondent to permit him to shield was a continuing act because there was a continuing obligation until August 2020 to permit him to shield.

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

7.8.1. The claimant relies on the following comparators in relation to the alleged failure to permit shielding: the grocery manager, Diana Leinasare - who is white; Laura Iacabut, the Acting George and GM manager – who is white; the George and GM Manager, Quaiser Shaffi who is Asian and/or hypothetical comparators.

7.8.2. The claimant relies upon the following comparators in relation to the disciplinary action and dismissal: Jenny Galitis, the customer services manager (see para.12 of Further and Better Particulars of Claim) and Quaiser Shaffi, then deputy Store Manager (see para.13 of the Further and Better particulars) and/or hypothetical comparators. The claimant argues that the above are relevant examples of different treatment where the outcome of disciplinary action was not dismissal despite the original

offence or misconduct being far worse than that which the claimant was accused of.

7.9. If so, was this because of the claimant's race and/or because of the protected characteristic of race more generally? The claimant is black and compares his treatment to that of comparators who are not black.

Remedy

7.10. If the claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy and in particular, if the claimant is awarded compensation and/or damages, will decide how much should be awarded. Specific remedy issues that may arise and that have not already been mentioned include:

7.10.1. if it is possible that the claimant would still have been dismissed at some relevant stage even if there had been no discrimination, what reduction, if any, should be made to any award as a result?

7.10.2. did the respondent unreasonably fail to comply with a relevant ACAS Code of Practice, if so, would it be just and equitable in all the circumstances to increase any [compensatory] award, and if so, by what percentage, up to a maximum of 25%, pursuant to section 207A of the Trade Union & Labour Relations (Consolidation) Act 1992 ("section 207A")?

7.10.3. did the claimant unreasonably fail to comply with a relevant ACAS Code of Practice, if so, would it be just and equitable in all the circumstances to decrease any [compensatory] award, and if so, by what percentage, up to a maximum of 25%, pursuant to section 207A of the Trade Union & Labour Relations (Consolidation) Act 1992 ("section 207A")?

7.10.4. The respondent argues that the claimant unreasonably failed to exhaust the respondent's internal disciplinary procedure before submitting his claim form. The claimant alleges that he submitted an appeal against dismissal to the respondent at their registered address." (pages 36-46 of the joint bundle)

The evidence

6. The tribunal heard evidence from the claimant.

7. On behalf of the respondent evidence was given by: Ms Tracey Louise Peddie, former Senior Manager of People, North London and Essex, now General Store Manager, working at Sheerwater Superstore; and Mr Michael Mark Achilleos, General Store Manager, Dagenham Superstore.

8. The tribunal, of its own motion, called by way of a witness order, Mr Chris Good, former General Store Manager, Watford Supercentre.

9. In addition to the oral evidence, the tribunal was referred to a joint bundle of documents comprising of 293 pages. Further documents were adduced during the course of the hearing, one being from the claimant which is a June 2020 disciplinary policy, and the other being a detail report covering shifts undertaken which was produced by the respondent.

Findings of fact

10. Having considered the oral and documentary evidence, the tribunal made findings of fact.

11. The respondent is a major retail company employing around 140,000 people and has 600 stores in the United Kingdom.

12. In its disciplinary policy of April 2019, it states that acts committed outside of work including taking part in illegal activities, a conviction of a criminal offence where the offence or act has an adverse bearing on the colleague's suitability for the job or makes the colleague unacceptable to other colleagues and customers, are listed as an example of gross misconduct. (135)

13. The June 2020 policy document, produced by the claimant, who stated that that policy was the document to which the disciplinary hearing manager followed, it states, as an example of gross misconduct:

> "General breach of company standards (eg failure to comply with a reasonable management request/serious negligence/acts committed outside of work including taking part in illegal activities." (C1, page 3)

14. We find that both provisions refer to allegations of gross misconduct and cover what could be considered as activities not within the employee's contractual hours. That is important because the claimant asserts that the 2019 provision should not have applied to him. We find, however, that in relation to both policies, there is the standard statement that the list of examples of gross misconduct is not exhaustive.

15. The claimant commenced employment with the respondent on 22 November 2010, as a Night Trading Manager, at the respondent's Park Royal Store. He describes his race as black. With effect from 24 July 2016, he was appointed Deputy Store Manager, and at all material times pertinent to the issues in this case, he was the Deputy Sore Manager of the respondent's superstore in Southgate, London.

16. In relation to his medical condition, we have been referred to two reports by an Occupational Health Nurse, one dated 2 May 2014, which states that the claimant reported that he had high blood pressure in February 2013, and with diabetes in March 2014. His blood pressure was stable with medication, but his diabetes had been unstable and was prescribed medication by his doctor. There is then a general statement about diabetes and how it occurs, and in relation to management advice, it states:

> "Vernon is fit to be at work, however due to his condition being unstable, it is likely his current shift work is a contributory factor. Therefore, I advise he is moved onto the day shift for at least the next six months and following this if required a review by Occupational Health."

17. No further Occupational Health review was required at the time.

18. In the later report on 28 May 2014, it states that the claimant had been recently diagnosed with non-insulin dependent diabetes and the management advice was that it would be beneficial for him to work on day

shifts until his condition became more stable. It states that from the OH advisor's understanding, during the day there were more managers to cover, therefore, he would be able to have a break when required. We find that this recommendation was followed by the respondent. (156)

The incident with AM – a 15 year old girl on 17 July 2020

19. On 21 August 2020, at or around 7pm, Mr Paul Moore, Shift Scan Operator, was approached by a 15-year-old girl, whom he recognised as a regular customer at the store. She will be referred to as "AM". AM asked Mr Moore whether he could identify someone whom she had recorded on her mobile phone. On viewing the recording, Mr Moore was able to identify the person as the claimant. AM then said to Mr Moore that the claimant had followed her down the high street from the store and asked her for her phone number. At that point Mr Moore decided to speak to Ms Pat Rumsley, Section Leader, and invited her to talk to AM, which Ms Rumsley did privately.

20. AM explained to Ms Rumsley that a worker had followed her asking her questions and showed Ms Rumsley the recordings she had taken on her mobile phone. Ms Rumsley also recognised the person as the claimant and asked her manager, Ms Laura Iacobut, to join them. From Ms Rumsley's written, undated account, she wrote the following:

> "Me and my manager asked the girl in more detail what happened. First she showed us the video I couldn't hear really clear because I was on the shop floor. But I saw Vernon talking with the young girl and follow her to Southgate Station on the videos. We asked her if she is ok and if her parents know about the situation. She said that her dad passed away and her mum was sick so she does all the shopping for her regularly in Asda and she was waiting for her brother to return home as he was away. She said her mum knew. We asked her name and she gave her name. I then kept asking her if she was ok. She said that she has been scared to come in because of him being in the store. My manager said he is not in tonight and we asked her if she lives far away but she said that she is living in Southgate and she was ok to go home but we offer to take her home. Then my manager took her phone number as I have it as well. She send it the video around 10pm that day then I text her and asked if she get home safely and how she is feeling or if there is anything else that I can do. She said that she is ok and I said to her is there anything that I could do to call me or text me. The next day I text her when did this happen and what time and she text me back with the time and date, 17 July 2020 at 1pm. When I was sitting with her and my manager she said that she was scared when the colleague on the video was making reference to her religion and her age and she said about him saying to put his phone number as a girl's name on her phone so mum and brother would not know. My manager and I we discussed about phone our general store manager my manager called him but he didn't answer. She went home and I carried on with my duties. I did not discus with anyone else apart with Laura and Paul about this situation." (176-178)

21. Ms Iacobut also wrote a statement, which is undated and unsigned by her. She gave an account confirming the account given by Ms Rumsley. She stated that she was the Duty Manager and that Mr Rumsley had brought to her attention, at about 7pm, a report of the incident involving the claimant and AM. She decided to contact her line manager, Mr Ken McCorriston, General Store Manager, about the situation, giving an account of AM's

family circumstances. (167-168)

The claimant's suspension

22. Mr McCorriston then carried out a suspension risk assessment on 22 August 2020 and recommenced that the claimant be transferred to the respondent's Hatfield Store. As it was an allegation of sexual harassment, he ascribed the level of risk as being high. He spoke to the claimant who did not want to transfer to Hatfield but requested that he be given one week's leave which was approved by Mr McCorriston.

23. At some point, prior to 27 August 2020, a statement was taken from AM and who gave a detailed account of the conversation between her and the claimant. The claimant sought to challenge the statements obtained including the statement from AM but what she stated, the claimant had made several of admissions to and in the Tribunal's view the respondent was entitled to rely on the content of her statement, in particular, the age of AM being 15 years old at the time. AM wrote:

> "On 17 July 2020 I was just doing my shopping and when I go out someone calling hey stranger on the right of the store outside. All the time I have just one headphone on my ear and I heard with the other one. I didn't turn round I continued to walk out of the park and he was following me saying "where have you been I did not see you for a while" I looked surprised because I did not know him. He was saying he was on his break and is going to KFC but he never stopped and continued to walk with me. He removed his badge. He was saying "I don't want anyone to know my name". He was asking about where I was from and I am mixed because of my skin colour. He continued to follow me and he goes weirder. He was asking my age when I first met. He was saying "You will turn 16 next year you need to be 18" saying that a couple of times. He was asking if I drink alcohol No because I am underage. He said I was drinking at your age I am watching Netflix are you watching over 18 on Netflix. He was telling me about his [unclear] because he have convertor on. He was showing me picture with his COR. Then we go further down where his Santander and I told him that I will go to take a bus. He was saying why I was taking he bus and to come back to Asda and he will take me home. I said No. He asked me twice and I said no. I am sure. After he walked away. After he came back to me. I was thinking he is going away but he was coming back and asking me if I want to be his friend, nothing sexual, just friendship. No I didn't feel comfortable because of my age difference and I don't know you. He was saying age doesn't mean anything, I enjoy talking to you. You don't enjoy I said no because I don't know you. My mum and my brother will know because they will go through my phone. He said how they know you can save me as a girl name and they wouldn't know. I said I still don't feel comfortable because I don't know you. He said OK just think about it and will see you when I meet you. After he went away.
>
> I videoed him because at the beginning I was thinking is a general conversation by a local but he was following me and I was feeling threatened. Was weird for me when he was saying that I am beautiful and I should be 18. Was weird for me that he was saying I am beautiful and he was trying to get me back at his car. He was saying is nothing sexual but because he was asking my phone number and to put him with a girl's name on my phone maybe later he wanted that.
>
> On the station he was saying that he want first to be my mentor. He made me confused for the moment but after still didn't want to give it to him."

24. The above are what she recalled of the conversation she had with the claimant. (157-162)

The investigation

25. Mr Michael Mark Achilleos, General Store Manager, Dagenham Superstore, met the claimant on 27 August 2020, who was accompanied by Mr Olu Toyimbo, Deputy Store Manager, at the respondent's Beckton store. Notes were taken of the meeting which were produced by the respondent as part of the bundle of documents. We have read the notes. Various salient points are summarised in Mr Achilleos's written statement, at paragraph 16, which we adopt as part of our findings of fact. At the start of the meeting he informed the claimant that this was an investigation into an allegation from a customer regarding his alleged unwanted conduct outside of the store on 17 July 2020. The claimant confirmed that a conversation did take place on that date with a customer outside the store but he had not seen the customer before the conversation. It was a two-way conversation. He confirmed that he spoke to her from outside the store to Southgate Tube Station. He admitted asking her for her phone number. He stated that she had said to him that people would go through her phone. At that point he said he asked her how old she was and she replied that she was 15 years old. His response was, "I wish you were 18". At which point he ended the conversation. He then admitted that he had seen her since the conversation numerous times in the store but did not approach her as she was a minor. He subsequently stated that he had seen her in the store before and recognised her before the interaction outside on 17 July. He claimed that he said, "Hello" to her and she responded. He was unaware that she had been shopping in the store that day. He questioned why the incident had been raised as the conversation was a month earlier, to which Mr Achilleos explained that the store had been notified of the conversation on 21 August. The claimant replied that it was not strange to approach a customer and engage in a conversation. It was part of his culture. He said that he took his Asda name badge off whenever he went on his break. He claimed that he initially told her that he was going to KFC for his lunch break but subsequently walked past the shop to the tube station and continued the conversation with her. He was asked to explain why he had behaved in that way instead of going to the KFC store. He replied that it was because there was no activity inside KFC and believed it was shut. He then claimed that he could not remember removing his Asda name badge after he had started the conversation with AM and denied that he had said he did not want anyone to know his name.

26. He was shown the videos by Mr Achilleos which were taken by AM. It was put to him that it was clear from the videos that he was aware of AM's age. He admitted asking her if they could be friends and advised her on how to hide his number on her phone after being made aware of her age. After being told that she was 15 years old, he commented that she was beautiful and said he wished she was 18. He admitted that it was inappropriate to make that remark after he knew he was speaking to a minor. He offered her a lift home from the store due to worries about Covid-19 and did not expect her to take up his offer. He said that he could have ended the conversation at any point and that AM could also have done that. She was clearly, he asserted, not shy as had taken the video footage.

27. Mr Achilleos said that AM had said, on three occasions, no and to his phone number being taken. The claimant admitted that commenting on a person's looks would not be appropriate while in the store, but the incident did not take place inside the store.

28. When asked if he thought there was anything wrong with approaching an underage stranger and engaging in conversation including asking to be their friend and offering them a lift home, the claimant responded by saying that he did not think there was anything wrong behaving in that way. He maintained that the incident had nothing to do with the respondent. It was put to him that AM was a regular customer who had just finished her shopping at the store and that he approached her outside of the store while on his lunchbreak and wearing his Asda name badge and that was why AM complained to the store.

29. There was then an adjournment for Mr Achilleos to consider the evidence, make findings and come to a conclusion before reconvening.

30. After the adjournment Mr Achilleos read his findings to the claimant and to Mr Toyimbo. He decided that there was a case for the claimant to answer as he had engaged in an unwanted conversation with a female customer who was a minor at the time. In addition, he, Mr Achilleos did not believe that the claimant's behaviour aligned with the respondent's statement of ethics and beliefs which managers, like the claimant, as a Deputy Store Manager, have a responsibility to uphold.

31. In Mr Achilleos' risk assessment, he determined that the allegation was a high risk, that is, unwanted conduct with a minor. There was video evidence, and no previous allegations of similar behaviour. The risk of seeing the source of the allegation in the store, in other words AM, Mr Achilleos assessed as high. (173)

32. He then wrote:

> "The allegations could be seen as grooming a minor and have now been reported to the police. There is a high risk of reputation damage if we have allowed him to continue to stay in the business whilst being investigated."

33. He stated that the claimant should not be transferred to work at another store and was verbally suspended by Mr Achilleos on full pay pending the outcome of disciplinary proceedings.

34. What should have followed should have been a letter confirming the claimant's suspension but that was not sent by Mr Achilleos or by anyone on Mr Achilleos's behalf. During his evidence before this Tribunal he admitted that that was an oversight.

<u>The disciplinary hearing</u>

35. The claimant was invited, on 4 September 2020, by Mr Chris Good, General Store Manager, Watford, to a disciplinary hearing initially scheduled to take place on 9 September but was later re-scheduled for the 11th. It is clear to the Tribunal that in the invitation letter sent to the claimant, he was made aware of the allegations he faced. Mr Good wrote the following:

> "At the hearing you will be asked to respond to the allegation that on 17 July 2020 you approached an Asda customer during your lunchbreak and engaged in conversation. During this conversation you became aware that the customer was under the age of 16, yet you continued to engage in an inappropriate conversation for a sustained period. During this conversation you offered to walk with the under-age female customer back to the store and give her a lift home and suggested putting your phone number in her phone under a female's name.
>
> This is a breach of our company policy, specifically, an allegation of an act outside of work that has an adverse bearing on the colleague's suitability for the job or makes the colleague unacceptable to other colleagues and customers; additionally, unwanted conduct that has the purpose or effect of violating a person's dignity." (203)

36. The claimant was also informed that one possible consequence of a finding of gross misconduct may be his summary dismissal. An account was given of the purpose of the disciplinary hearing. Attached to the letter were: the statements by AM, Ms Iacobut, and Ms Rumsley; the video transcripts; and a copy of the notes of the investigation meeting with the claimant. He was also informed of his right to be accompanied at the disciplinary hearing.

37. The hearing lasted six hours and was chaired by Mr Good. Ms Dorata Szoskak, People Business Partner, was also present who took notes and assisted Mr Good. There were adjournments during the meeting. We find that a lot was said in that time, including the claimant's account of the incident, his view of the allegations, and his concerns about the evidence against him.

38. The meeting was summarised by Mr Good in his witness statement in paragraphs 19 to 20. What he wrote we have adopted as his account accords with the meeting notes. He stated that the claimant had admitted that the conversation with AM was wrong but was not connected with Asda. He did not have his name badge on him, and was a member of the public at the time of the incident. He admitted that once he knew of AM's age, he should have ended the conversation. He had never seen AM before the incident, and she did not ask him to stop the conversation. He did not believe that the allegation fell under the respondent's disciplinary policy, and did not receive a letter confirming his suspension. He asked why the store's close-circuit television recording had not been viewed to check whether he was wearing his name badge.

39. After hearing his account and after considering the evidence before him, Mr Good adjourned the meeting for about three hours, from 1.48pm to 4.50pm. We find that it was not a straightforward decision-making exercise for him and he did not rush to come to a conclusion. He told the Tribunal that during the adjournment he reviewed the evidence and formed a genuine belief that the allegations against the claimant were well- founded, that on 17 July, during his lunch break, he approached an Asda customer and engaged in a conversation. He became aware of AM being under the age of 16 years yet continued his inappropriate conversation for a sustained period. Whilst at the bus stop he offered to walk AM back to the store to give her a lift home. He suggested hiding his phone number in her phone under a female's name. He told AM that she was beautiful and wished she was 18. In AM's view, he was working at the store and she did not suggest

otherwise.

40. Mr Good considered the video evidence of the claimant engaging in an inappropriate conversation with a 15 year old girl during his lunch break. He also took into account what the claimant said, that AM did not ask him to stop the conversation, but Mr Good was aware that, at the end of AM's recording, she clearly stated, on more than one occasion, that she was scared and that she had been followed by the claimant from the store. Although the claimant said that a letter confirming his suspension was not sent to him, Mr Good was clear that he had been told verbally that he was being suspended on full pay. (163)

41. In relation to CCTV evidence the claimant wanted Mr Good to view which, he believed would show that he was not wearing his name badge when he was on his lunch break, Mr Good's view was that the footage was only available for 31 days and that whether the claimant had his name badge on or not, did not have any bearing on his overall decision as AM associated him with the store and, as an employee of the respondent, she had made a complaint against him. It was not that he was a complete stranger.

42. Mr Good also took into account the claimant's assertion that Ms Rumsley should have excluded herself from the conversation when the complaint was made. Mr Good agreed and said that he would feed that back to the store. He took into account what the claimant said that the statements by AM and Ms Iacobut were not dated nor signed and were on incorrect forms. Again Mr Good agreed stated that he would feed it back to the store as a recommendation. The matters, however, did not change the facts of what happened.

43. After considering the evidence and his findings, Mr Good's conclusion was that the claimant's behaviour amounted gross misconduct as he was engaged in an inappropriate conversation with a 15 year old girl during his lunch break.

44. He also took into account mitigating factors: such as the claimant's length of service with Asda; his employment record; his concern that the video recordings were taken surreptitiously without his knowledge or consent; and that he had not been given copies of several clips. Mr Good decided that the most appropriate sanction was summary dismissal which fell within the range of reasonable responses.

45. Mr Good's reasoning is in his witness statement, paragraph 28 to 31, which we have accepted. He wrote:

> "28. The main reason why I decided that summary dismissal was the appropriate sanction was that both a breach of an act outside of work that has an adverse bearing on a colleague's suitability for their job or makes the colleague unacceptable to other colleagues or customers and unwanted conduct that has the purpose or effect of violating a person's dignity were deemed to be gross misconduct offences for which summary dismissal is the appropriate sanction.
>
> 29. I did not consider a lesser sanction (such as a warning) was appropriate given the severity of the claimant's actions.
>
> 30. Given the impact that dismissal from employment can have on

> someone's life, I did not (and would never) take such a decision lightly. I took the decision extremely seriously and gave it a lot of thought. However, I felt that the claimant's conduct was so serious that summary dismissal was the only appropriate sanction.
>
> 31. I reconvened the hearing and advised the claimant of my decision and that his last day of employment was 14 September 2020."

46. The letter confirming the claimant's dismissal was sent to him dated 14 September 2020, by Mr Good. In it he informed the claimant of his right of appeal and that should he wish to do so, he should write to someone by the name of Dibya Das, People Business Partner, within seven days of receipt of the dismissal letter. (228-231)

47. The claimant in answer to a question put to him by the Tribunal, acknowledged that it was unacceptable to have asked AM, a minor, to hide his mobile phone number under a female's name in her phone's contacts list.

The appeal

48. The claimant told the Tribunal that he contacted ACAS after he was dismissed and was informed that should he fail to pursue an appeal then in assessing compensation it was likely to adversely affect it. After his discussion, he said he sent in his grounds of appeal letter. That letter, he produced, is dated 16 September 2020, and it is useful to note a number of matters in relation to it.

49. Firstly, the notification to ACAS is dated 18 September 2020 but the appeal letter was purportedly sent two days earlier prior to his alleged conversation with ACAS. Secondly, the letter is not addressed to the place of work of Mr Good who had sent the letter confirming the claimant's dismissal with his place of work at the top. It was sent to the respondent's offices in Leeds. Thirdly, the offices in Leeds played no part in the disciplinary proceedings, and there was no correspondence from the Leeds office to him. The fourth matter is that he did not challenge the respondent's delay in arranging for an appeal hearing either in writing or by phone. It was also not referred to in his claim form, and was not raised during the preliminary hearing held by Employment Judge George.

50. He also made a lengthy witness statement, and significantly absent it were any references to the respondent not holding an appeal hearing. The respondent's contention is that the grounds of appeal letter was not sent.

51. We have come to the conclusion, having considered the evidence, that that letter was not sent to the respondent on 18 September 2020. Hence there was no appeal hearing.

Race discrimination

52. We come to the evidence in relation to the race discrimination claims. There are four matters cited in the Case Management Summary and Orders by Employment Judge George at the preliminary hearing held on 29 April 2021. In relation to the first allegation of direct race discrimination, the claimant's case is that on 30 March 2020, after he returned to work

following two weeks' leave because of his son's Covid-19 condition, there was a return to work interview with Mr McCorriston who did not tell him that he was entitled to isolate until the end of July 2020, on full pay. We did not receive any medical evidence from the claimant that he was classed as extremely vulnerable at that time in March 2020. The only evidence was that those who were allowed to shield were only allowed to do so for a period of two weeks, not until July 2020 on full pay.

53. The assertion that Mr McCorriston was under a duty to inform him that he should isolate, we do not accept. He had access to the respondent's guidance on Covid via the intranet. These were described as huddle notes. The claimant, in our view, as Deputy Store Manager, would himself have had to deal with other members of staff who were seeking advice in relation to their position, in particular, whether they should be isolating at home or return to work. He knew about his position having access to the various guides produced by the respondent. We find that he was not entitled to isolate until July 2020. There are no findings upon which this Tribunal could decide that he has overcome the first limb of the burden of proof test that he had suffered less favourable treatment because of his race or race.

54. The second part of his race discrimination claim is the assertion that in early April 2020, he informed Mr McCorriston that his wife was advised by NHS to shield as she was classed as extremely vulnerable. He said that he had given Mr McCorriston a document in support of his wife's medical condition. That document was not produced before this Tribunal, nor was a copy of it. The claimant went on to say that Mr McCorriston reportedly said: "You cannot do this to me, I have no-one. You have to come to work." The assertion here is that Mr McCorriston failed to tell him to go home to isolate and later in the conversation changed the subject to the possibility of redundancies. There is, we find, no evidence that the claimant was forced to work in early April 2020, the day of the incident that he made reference to in this second race discrimination claim. Certainly, he had been off work because of his son's condition for a period of 10 days which does not indicate, on the part of Mr McCorriston, that he was reluctant to accommodate the claimant's concerns but, as we have found, the claimant had access to the respondent's system on the guidance when dealing with Covid.

55. Ms Tracey Louise Peddie, General Store Manager, gave evidence on how the respondent dealt with the Covid-19 pandemic, which was a very difficult and unique situation for it affecting this country and countries around the world. Employees were absent due to illness, were isolating, and some were on leave. She told the Tribunal that although several of the respondent's employees were considered to be extremely vulnerable but did not have the virus, they turned up for work. Those who came within the provisions of the NHS guide to self-isolate, the respondent had no difficulty with as they were allowed to do so. If the claimant had raised a genuine reason to self-isolate, as far as she was concerned, it would have been considered favourably as it was possible for him to work from home. She told us of a Deputy Manager in Dagenham who should have been isolating but did not have the virus, that person agreed to work nights to avoid contact with customers.

56. Apart from his bold statements of alleged discriminatory treatment, the

claimant has to produce evidence from other witnesses, documentary evidence, in support of his contention that, in similar circumstances, a white Deputy Store Manager, would have been treated more favourably. There was no evidence from which facts could be found leading this Tribunal to conclude that he had satisfied the first limb of the burden of proof test, that is, he had been treated less favourably because of race or because of his race.

57. In relation to the assertion that Mr McCorriston discussed redundancies, although he was not called as a witness, there was no documentary evidence to suggest that in or around April 2020, the respondent was contemplating engaging in a redundancy exercise. Far from it. It seems from Ms Peddie's evidence, that the respondent wanted to have more of its staff at work, if that was possible. We, therefore, do not accept what the claimant alleged that Mr McCorriston spoke to him about redundancies.

58. In relation to the third matter, here the claimant asserts that on Sunday 19 April 2020, Mr McCorriston deliberately scheduled him to be the sole duty manager for a shift working 8am to 7pm which meant that he could not do reduced hours. We were provided with the Punch detail reports, work schedules. The claimant worked on 19 April, he said 7am and finished at 7.35pm. We find that he was not the sole manager on duty on that shift. The other person was Ms Janni Galitis, Checkout Manager, and she started work at 8am in the morning on that day and by all accounts worked her full shift. As the claimant's shift was long, he was entitled to have his breaks. We, therefore, do not accept his contention that he was the sole duty manager on that shift. The facts do not support his case. He has not established less favourable treatment on grounds of his race or race.

59. In relation to the final part of his direct race discrimination claim, he made reference to Mr Tim Sparrow, Regional Area, and to Ms Peddie, whom he alleged, failed to ensure that from March to April 2020, he could shield from home. As already found, the Tribunal did not have the medical evidence of his wife's condition as being extremely vulnerable and there was no evidence that the claimant asked either Mr Sparrow or Ms Peddie that he should isolate at home. He had access to the information produced by the respondent in relation to the Covid pandemic. There was no evidence he informed Ms Peddie of his wife's vulnerability and that he had to isolate. Ms Peddie, in evidence, came across as quite accommodating. If he had spoken to her about the medical need for him to isolate, we are satisfied that his request would have been accommodated. It is difficult for Mr Sparrow and Ms Peddie, based on the phrasing of this allegation, to know the particular medical circumstances and family circumstances, of each member of staff under their remit, and to approach them to inform them whether or not they should be isolating. Again, this claim lacks facts from which this Tribunal could decide that the claimant had been treated less favourably because of his race or race.

60. The claimant at no point during his employment history with the respondent, raised the issue of his treatment being on grounds of his race or race, and that includes during the disciplinary process and the decision to dismiss. In relation to both of those matters which are also part of his direct race discrimination claim, we are satisfied that "real reason" the disciplinary

procedures were invoked was because of the complaint raised by AM. We are further satisfied that the decision to dismiss him was made by Mr Good unrelated to the his race or to race but had everything to do with his inappropriate conversation with a 15 year old girl.

61. We have come to the conclusion that there are no facts of less favourable treatment because of race in relation to the disciplinary process and the decision to dismiss the claimant.

Comparators

62. Finally, the claimant made reference to a number of comparators: Ms Diana Leinasare, Grocery Manager, white, who was suffering from asthma. The claimant asserts that she was allowed to shield but we find that this was not a case where she was relying on the vulnerability of a close family member. In her case, she was suffering from a serious condition which, if she caught the virus, was going to have a serious adverse impact on her. She was asthmatic at the time. The claimant was not asthmatic and is relying on his wife's condition. Ms Leinasare is not an appropriate comparator.

63. He then relies to Ms Laura Iacobut, George and General Store Manager, white. She had a child who was suffering from a heart condition and needed her care. Her circumstances were materially different from those of the claimant's. There was no suggestion that the claimant's wife was unable to care for herself.

64. He then made reference to a Mr Quaiser Shaffi, Deputy Store Manager, Ruislip store, who is Asian. He stated that he had a criminal conviction but in the Tribunal's view reference to a conviction is irrelevant. Even if the claimant relies on the conviction it makes Mr Shaffi not an appropriate comparator as the claimant does not have a conviction. Mr Shaffi, however, is asthmatic and the claimant is not but is a type 2 diabetic which did not entitle him to be placed in the extremely vulnerable category at that time. Covid-19 affects a person's breathing and immune system.

65. The claimant next made reference to Ms Sherriff, Store Manager, Walthamstow, who suffers from type 1 diabetes. The Tribunal did not know much about her particular circumstances. We do not have the documentary evidence but if she is type 1 diabetic, she is likely to be insulin dependent and her immune system is unlikely to be the same as that of the claimant's but much lower. However, we did not have sufficient evidence to make any appropriate findings of fact.

66. Another comparator is Mr Shanta Kumar, Store Manager, Ponders End, whom the claimant said was shielding as he suffers from diabetes. We were not given evidence of his circumstances, therefore, were unable to make any material findings of fact.

67. The claimant also relied on Ms Jenny Galitis, Customer Service Manager, as a comparator. In her case a customer wanted to change eggs in a box and Ms Galitis intervened. He, the customer, then attempted to take a photograph of her but she covered her face. The claimant asserted that Ms Galitis in fact assaulted the customer and that she and Mr Shaffi should have been dismissed. We have not seen any documentary evidence in

relation to Ms Galitis having assaulted a customer nor have we heard oral evidence corroborating the claimant's statement. We have read her account of the incident and an assault is not referred to. In any event, there is no evidence that the customer was a minor or that Ms Galitis had engaged in an inappropriate conversation with that customer.

68. In relation to Mr Shaffi's conviction, the claimant said that is was for an act of terrorism for which he had been sentenced to 15 years, but we are satisfied that the respondent knew of Mr Shaffi's background and considered him a suitable person to be taken on as an employee and be internally trained, eventually to take on the position of Store Manager. He was not considered a threat to anyone and those were the reasons why he remained in the respondent's employment. There was no allegation that Mr Shaffi had engaged in an inappropriate conversation with a minor.

69. Even if those two individuals are used as evidence of inconsistent treatment, it has been stated, in a number of appeal judgments that if an employee is relying on instances of inconsistent treatment, those other cases must be in "parallel" to their case. The Tribunal must have before it relevant evidence in relation to those individuals' circumstances to draw a conclusion as to whether their cases are comparable and that the treatment of the claimant was not consistent with the favourable treatment afforded to them by the respondent. That was not the position here. We did not have sufficient evidence in respect of Mr Shaffi's and Ms Galitis's particular circumstances for us to say that these two cases are parallel to the claimant's.

70. Finally, we considered the out of time points. The Tribunal's view is there is an arguable case for the claimant to establish that the various incidents he relies on are linked from March to his dismissal. The key person in question is Mr McCorriston which bring the previous assertions in time with the dismissal. The Tribunal, however, has concluded that the claimant had not discharged the burden put on him of establishing less favourable treatment because of race.

Submissions

71. We have taken into account the submissions by the claimant who repeated the points he put during the disciplinary proceedings and before us in relation to his unfair dismissal and direct race discrimination claims.

72. We also heard submissions from Ms Duane, counsel on behalf of the respondent, who submitted that the potentially fair reasons for the claimant's dismissal, was conduct. A reasonable investigation followed. The claimant gave his account of what happened during the investigation and the disciplinary proceedings. Having considered all the evidence, Mr Good genuinely believed, on reasonable grounds, in the claimant's guilt. He considered a sanction short of dismissal but there was the risk of AM coming into contact with the claimant or a repeat of his behaviour. The claimant did not show any remorse. Dismissal was within the range of reasonable responses. The direct race discrimination claim cannot be supported on the limited evidence available to the Tribunal. All claims should be dismissed.

The law

73. Section 98(1) Employment Rights Act 1996 ("ERA"), provides that it is for the employer to show what was the reason for dismissing the employee. Dismissal on grounds of conduct is a potentially fair reason, s.98(2)(b). Whether the dismissal is fair or unfair having regard to the reason shown by the employer, the tribunal must have regard to the provisions of s.98(4) which provides:

> "Where the employer has fulfilled the requirements of subsection (1), and the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) -
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employees undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case."

74. In the case of British Homes Stores v Burchell [1980] ICR 303, the EAT's judgment was approved in the Court of Appeal case of Weddel & Co Ltd v Tepper [1980] ICR 286. The following must be established:

a. First, whether the respondent had a genuine belief that the misconduct that each employee was alleged to have committed had occurred and had been perpetrated by that employee,

b. Second whether that genuine belief was based on reasonable grounds,

c. Third, whether a reasonable investigation had been carried out,

75. Finally, in the event that the above are established, was the decision to dismiss reasonable in all the circumstances of the case. Was the decision to dismiss within the band of reasonable responses?

76. The charge against the employee must be precisely framed Strouthos v London Underground [2004] IRLR 636.

77. Even if gross misconduct is found, summary dismissal does not automatically follow. The employer must consider the question of what is a reasonable sanction in the circumstances Brito-Babapulle v Ealing Hospital NHS Trust [2013] IRLR 854.

78. The Tribunal must consider whether the employer had acted in a manner a reasonable employer might have acted, Iceland Frozen Foods Ltd v Jones [1982] IRLR 439 EAT. The assessment of reasonableness under section 98(4) is thus a matter in respect of which there is no formal burden of proof. It is a matter of assessment for the Tribunal.

79. It is not the role of the Tribunal to put itself in the position of the reasonable employer, Sheffield Health and Social Care NHS Trust v Crabtree UKEAT/0331/09/ZT, and London Ambulance Service NHS Trust v Small 2009 EWCA Civ 220. In the Crabtree case, His Honour Judge Peter Clark,

held that the question "Did the employer have a genuine belief in the misconduct alleged?" goes to the reason for the dismissal and that the burden of showing a potentially fair reason rests with the employer. Reasonable grounds for the belief based on a reasonable investigation, go to the question of reasonableness under s.98(4) ERA 1996. See also Secretary of State v Lown [2016] IRLR 22, a judgment of the EAT.

80. The range of reasonable responses test applies to the investigation as it does to the decision to dismiss for misconduct, Sainsbury's supermarket Ltd v Hitt [2003] ICR 111 CA.

81. In the case of Taylor v OCS Group Ltd [2006] ICR 1602 CA, it was held that what matters is not whether the appeal was by way of a rehearing or review but whether the disciplinary process was overall fair.

82. The seriousness of the conduct is a matter for the employer, Tayeh v Barchester Healthcare Ltd [2013] IRLR 387 CA.

83. The Court of Appeal acknowledged that employment tribunals are entitled to find whether dismissal was outside the range of reasonable responses without being accused of placing itself in the position of being the reasonable employer or of adopting a substitution mindset. In Bowater-v-Northwest London Hospitals NHS Trust [2011] IRLR 331, a case where the claimant, a senior staff nurse who assisted in restraining a patient who was suffering from an epileptic seizure by sitting astride him to enable the doctor to administer an injection, had said, “It’s been a few months since I have been in this position with a man underneath me” was the subject of disciplinary proceedings six weeks later. She was dismissed for, firstly, using an inappropriate and unacceptable method or restraint and, secondly, for the comment made. The employment tribunal found, by a majority, that her dismissal was unfair. The EAT disagreed. The Court of Appeal, overturned the EAT judgment, see the judgment of Stanley Burnton LJ, paragraph 13. See also Newbound v Thames Water Utilities Ltd [2015] EWCA Civ 677, in which the Court of Appeal held that the tribunal is required to consider section 98(4) ERA 1996, when considering the fairness of the dismissal.

84. The level of inquiry the employer is required to conduct into the employee’s alleged misconduct will depend on the particular circumstances including the nature and gravity of the case, the state of the evidence and the potential consequences of an adverse finding to the employee. “At the one extreme there will be cases where the employee is virtually caught in the act and at the other there will be situations where the issue is one of pure inference. As the scale moves towards the latter end, so the amount of inquiry and investigation which may be required, including the questioning of the employee, is likely to increase.”, Wood J, President of the EAT, ILEA v Gravett [1988] IRLR 497.

85. In relation to acts committed outside of working hours or away from the place of work, in the case of Thompson v Alloa Motor Co Ltd [1983] IRLR 403, the EAT, Lord McDonald, held that conduct within the meaning of section 98(2)b means “actings of such a nature, whether done in the course of employment or outwith it, that reflect in some way upon the employer-employee relationship”, paragraph 5.

86. In Hadjioannou-v-Coral Casinos Ltd [1981] IRLR 352, the EAT held, Waterhouse J,

> "We should add, however, as counsel has urged upon us, that industrial tribunal would be wise to scrutinise arguments based on disparity with particular care. 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 the proper consideration of the issues raised by section 53(3) of the Act of 1978. The emphasis in that section is upon the particular circumstances of 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 tribunal is to think that a tariff approach to industrial misconduct is appropriate. …"

87. In that case the EAT adopted counsel's argument that the disparity argument becomes more relevant "in truly parallel circumstances" where the claimant is dismissed and the other is given a lesser penalty.

88. Under section 13, Equality Act 2010, "EqA", direct discrimination is defined:

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

89. The protected characteristics are set out in section 4 EqA and includes race and sex.

90. Section 23, provides for a comparison by reference to circumstances in a direct discrimination complaint:

> "There must be no material difference between the circumstances relating to each case."

91. Section 136 EqA is the burden of proof provision. It provides:

> "(1) This section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provisions concerned, the court must hold that the contravention occurred."
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision."

92. In the Supreme Court case of Hewage v Grampian Health Board [2012] ICR 1054, it was held that the tribunal is entitled, under the shifting burden of proof, to draw an inference of prima facie race and sex discrimination and then go on to uphold the claims on the basis that the employer had failed to provide a non-discriminatory explanation. When considering whether a prima facie case of discrimination has been established, a tribunal must assume there is no adequate explanation for the treatment in question. While the statutory burden of proof provisions have an important role to play where there is room for doubt as to the facts, they do not apply where the

tribunal is in a position to make positive findings on the evidence one way or the other.

93. In Madarassy v Nomura International plc [2007IRLR 246, CA, the Court of Appeal approved the dicta in Igen Ltd v Wong [2005] IRLR 258. In Madarassy, the claimant alleged sex discrimination, victimisation, and unfair dismissal. She was employed as a senior banker. Two months after passing her probationary period she informed the respondent that she was pregnant. During the redundancy exercise in the following year, she did not score highly in the selection process and was dismissed. She made 33 separate allegations. The employment tribunal dismissed all except one on the failure to carry out a pregnancy risk assessment. The EAT allowed her appeal but only in relation to two grounds. The issue before the Court of Appeal was the burden of proof applied by the employment tribunal.

94. The Court held that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status, for example, sex and a difference in treatment. Those bare facts only indicated a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.

95. The Court then went on to give a helpful guide, "Could conclude" or "could decide", must mean that any reasonable tribunal could properly conclude from all the evidence before it. This will include evidence adduced by the claimant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent in testing the complaint subject only to the statutory absence of an adequate explanation at this stage. The tribunal would need to consider all the evidence relevant to the discrimination complaint, such as evidence as to whether the acts complained of occurred at all; evidence as to the actual comparators relied on by the claimant to prove less favourable treatment; evidence as to whether the comparisons being made by the claimant is like with like, and available evidence of the reasons for the differential treatment.

96. The Court went on to hold that although the burden of proof involved a two-stage analysis of the evidence, it does not expressly or impliedly prevent the tribunal at the first stage from the hearing, accepting, or drawing inferences from evidence adduced by the respondent disputing and rebutting the claimant's evidence of discrimination. The respondent may adduce in evidence at the first stage to show that the acts which are alleged to be discriminatory never happened; or that, if they did, they were not less favourable treatment of the claimant; or that the comparators chosen by the claimant or the situations with which comparisons are made are not truly like the claimant or the situation of the claimant; or that, even if there has been less favourable treatment of the claimant, it was not because of a protected characteristic, such as, age, race, disability, sex, religion or belief, sexual orientation or pregnancy. Such evidence from the respondent could, if accepted by the tribunal, be relevant as showing that, contrary to the claimant's allegations of discrimination, there is nothing in the evidence from which the tribunal could properly infer a prima facie case of discrimination.

97. Once the claimant establishes a prima facie case of discrimination, the burden shifts to the respondent to show, on the balance of probabilities, that its treatment of the claimant was not because of the protected characteristic, for example, either race, sex, religion or belief, sexual orientation, pregnancy, or gender reassignment.

98. The employer's reason for the treatment of the claimant does not need to be laudable or reasonable in order to be non-discriminatory. In the case of B-v-A [2007] IRLR 576, the EAT held that a solicitor who dismissed his assistant with whom he was having a relationship upon discovering her apparent infidelity, did not discriminate on the ground of sex. The tribunal's finding that the reason for dismissal was his jealous reaction to the claimant's apparent infidelity could not lead to the legal conclusion that the dismissal occurred because she was a woman.

99. The tribunal could pass the first stage of the burden of proof and go straight to the reason for the treatment. If, from the evidence, it is patently clear that the reason for the treatment is non-discriminatory, it may not be necessary to consider whether the claimant has established a prima facie case, particularly where he or she relies on a hypothetical comparator. This approach may apply in a case where the employer had repeatedly warned the claimant about drinking and dismissed him for doing so. It would be difficult for the claimant to assert that his dismissal was because of his protected characteristic, such as race, age, or sex. This was approved by Lord Nicholls in Shamoon-v-Chief Constable of the Royal Ulster Constabulary [2003] ICR 337, judgment of the House of Lords.

100. The claimant has to prove that the act occurred and, if so, did it amounted to less favourable treatment because of the protected characteristic?, Ayodele v Citilink Ltd [2017] EWCA Civ 1913. This was reaffirmed by the Supreme Court in the case of Royal Mail Group ltd v Efobi 2021 UKSC 33, Lord Leggatt.

101. Unreasonable conduct does not amount to discrimination, Bahl v Law Society [2004] IRLR 799.

Conclusion

Unfair dismissal

73. In relation to the unfair dismissal claim, the claimant was dismissed according to Mr Good's letter of dismissal on 14 September 2020, for engaging in an inappropriate conversation with a minor. That gave rise to his suitability as Deputy Store Manager. His behaviour, taken objectively, amounted to harassment of a young girl and the start of a grooming process. He was in a senior position and in a position of trust.

74. There was the risk, if the claimant was given a written warning whether final or not, that AM may come into contact with him again.

75. The respondent, we find, engaged in a reasonable investigation. The claimant raised issues about statements being unsigned and about whether

Ms Rumsley should have been involved. These individuals all referred to the circumstances in which AM disclosed the complaint and what she alleged had occurred. It is important what AM wrote and the extent of the claimant's admissions in relation to the subject matter of the conversation between her and him. He was given the opportunity to put forward his case and he did. He initially denied seeing AM in the store but later resiled from that statement. The investigation meeting lasted several hours and he was accompanied by a deputy store manager. He was also given the opportunity of addressing specifically the allegations during the disciplinary hearing. We are satisfied the respondent did engage in a reasonable investigation.

76. Were there facts Mr Good relied on in support of his conclusion that the allegation had been proved? We find that there were. There was no evidence that he was in any way not motivated by any ill-will towards the claimant, certainly not the claimant's race. The claimant had not established he had an ulterior motive in dismissing him. Mr Good gave his reasons why he concluded that dismissal fell within the range of reasonable responses. He took into account mitigating circumstances, the claimant's length of service and disciplinary record but there was no other reasonable options available other than tom dismiss the claimant. We do not put ourselves in the position of being the reasonable employer, but we are required to consider s.98(4) of the Employment Rights Act, Newbound Court of Appeal. While an employer may have, on the same evidence, taken a course of action that involved the claimant not being dismissed, another may agree that this was so serious that dismissal is the only possible outcome. All that we can say, applying section 98(4), is that dismissal was not outside the range of reasonable responses.

77. The claimant argued that he was not at work at the time of the conversation, but we have regard to the case of Thompson, in that, his actions reflected on the respondent. He was in a position of trust, was wearing his uniform, and according to AM was displaying his work badge. For a Deputy Store Manager to speak to a 15 year old girl about hiding his number in her phone under a female name. To be told her age and to then say that he wished she was 18 years old, and to offer her a lift home, were actions and behaviours which impacted on the respondent as AM believed that he worked at the store as she had seen him there and after she left the store, he followed her. The respondent was entitled to treat him as representing the store at the time.

78. In relation to inconsistent treatment, the cases relied, as we have found and concluded, are not in parallel with the circumstances of the claimant's, Hadjioannou. Accordingly, the claimant's unfair dismissal claim is not well-founded and is dismissed.

Direct race discrimination

79. In relation to the elements which form the claimant's direct race discrimination claims, we considered the comparators and concluded that they are not appropriate as their circumstances are materially different from the claimant's. Further, the claimant had made a number of assertions unsupported by evidence. The Tribunal is required, at the first stage of the

burden of proof test, to consider all relevant evidence including the evidence by the respondent, in determining whether the claimant has established less favourable treatment because of race, Madarassy. The onus is on him to establish less favourable treatment, Efobi, UK Supreme Court.

80. In relation to the disciplinary proceedings and the claimant's dismissal, the "real reason" why he was subjected to that process and outcome, was the complaint by AM, unprompted by the respondent, and the finding that he was engaged in an inappropriate conversation with a 15 year old girl.

81. His direct race discrimination claims are not well-founded and are dismissed.

_____

Employment Judge Bedeau
21 October 2022
Date: ……

Judgment sent to the parties on

24 October 2022

For the Tribunal office