



# EMPLOYMENT TRIBUNALS

BETWEEN

**Claimant**

**AND**

**Respondents**

Mr Michael Antoine

John Lewis Plc

**Heard at:** London Central Employment Tribunal

**On:** 4, 5, 6, 9 January 2023

**Before:** Employment Judge Adkin (sitting alone)

## Representations

**For the Claimant:** Claimant in person

**For the Respondent:** Ms S Clarke, Counsel

## JUDGMENT

- (1) The Respondent unlawfully deducted 3 hours' overtime at a rate of £9.27. The Respondent shall pay the Claimant the sum of **£27.81**, subject to deductions for income tax and national insurance.
- (2) The Respondent shall pay the Claimant's accrued but untaken annual leave in the sum of **£509.13**, subject to deductions for income tax and national insurance.
- (3) The claim of unfair dismissal brought pursuant to section 94 of the Employment Rights Act 1996 is not well founded and is dismissed.

# REASONS

## Procedural matters

1. The parties attended on the first three days of the hearing in person physically in the London Central Employment Tribunal at Victory House.
2. By a written application dated 7 December 2022 the Claimant applied to amend his claim. For reasons given orally that application was refused.
3. The Claimant's application to rely on new documents made by him by email date 4 January 2023, was not opposed by the Respondent and this application was granted, resulting in the production of an agreed "Additional Bundle" of 34 Pages.
4. The Claimant's application to adjourn the hearing to enable evidence from Ms Audrie Mbala, decided at the conclusion of the evidence on day 3 of the hearing was refused for reasons given orally. I considered Ms Mbala's witness statement. That this was however not accepted unopposed by the Respondent. In brief the points of dispute between Ms Mbala and Mr Chana I find were peripheral and were not central to the matters I had to consider as part of the claim of unfair dismissal.
5. On each day of the hearing we commenced at 11:00. This was an adjustment for the Claimant's benefit, agreed at an earlier hearing.
6. On the third and fourth days of the hearing we proceeded as a hybrid hearing. On the third day of the hearing this was to accommodate one of the Respondent's witnesses Mrs Nerys Swaby giving evidence remotely.
7. On the fourth day we had a hybrid hearing as a result of the Claimant emailing the Tribunal that he had a sore throat and was feeling unwell. Having submitted written submissions at Mon 09/01/2023 01:23, Mr Antoine did not attend the tribunal hearing, but was sufficiently well initially to join a video hearing. At about 11:30, as Ms Clark was close to the conclusion of her oral submissions, Mr Antoine said that he was not well enough to continue. He was content for me to make decision based on what I had heard. I was keen to give him the opportunity to say anything further should he wish to do so. Accordingly we adjourned, on the basis that I would reserve my decision and received any further submissions that he wished to make by 12:00 noon on 10 January 2023, unless he wished to ask for more time. This was confirmed by letter sent under cover of a letter dated 09 January 2023 12:09. On 12 January 2023 15:55 the Claimant provided further submissions.

## Evidence

8. I received the following evidence:
  - 8.1. An 800 page bundle (electronic);

- 8.2. An additional bundle, 34 pages (hard copy);
- 8.3. GP statements of fitness for work on 10 & 18 August 2020 (loose hard copies);
- 8.4. Claimant's witness evidence:
  - 8.4.1. His own Witness Statement;
  - 8.4.2. Statement of Ms Audrie Mbala;
- 8.5. Respondent's witness evidence:
  - 8.5.1. Jamie Chana, Assistant Branch Manager;
  - 8.5.2. Jared Hughes, Branch Manager;
  - 8.5.3. Nicola Morrison, Assistant Team Manager & disciplinary investigator;
  - 8.5.4. Nigel Towse, Manager;
  - 8.5.5. Nerys Swaby, Department Manager, People Service Centre.
9. At the Claimant's request a bundle of documents created for an earlier Preliminary Hearing in August which dealt with the Claimant's alleged disability was made available to me. This had some 353 pages. Section D of that bundle (from page 232 – 337) contained medical records and the Claimant's disability impact statement.

## The Claim

10. The Claimant presented his claim on 17 September 2021.
11. An agreed list of issues is attached as an appendix to this claim.
12. The Respondent produced a chronology and cast list.

## LAW

### Dismissal for conduct

13. The law on dismissal for misconduct is set out in a three stage test in the well-known case of *Burchell v British Home Stores* [1978] ICR 303, namely (i) did the respondent believe the claimant to be guilty of misconduct; (ii) at the time of dismissal did the respondent have reasonable grounds for believing the claimant was guilty of that misconduct and (iii) at the time that the respondent formed that belief on those grounds, did the respondent carry out as much investigation as was reasonable in the circumstances?.
14. As to the sanction of dismissal, this was considered by the Court of Appeal in *British Leyland (UK) Ltd v Swift* [1981] IRLR 91, CA, where Lord Denning MR stated: 'The correct test is: Was it reasonable for the employers to dismiss him?'

If no reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might reasonably have dismissed him, then the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which one employer might reasonably take one view: another quite reasonably take a different view.

15. In *Iceland v Jones* [1983] ICR 17 the EAT confirmed that (1) the starting point should always be the words of section 98(4) themselves; (2) in applying the section an industrial tribunal must consider the reasonableness of the employer's conduct, not simply whether the Tribunal considers 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 conduct within which one employer might reasonably take one view, another quite reasonably take another, it would only be if the decision to dismiss is outside of this band that it would be unfair.
16. There is a limit to the amount of investigation reasonably required where the misconduct is admitted — *Royal Society for the Protection of Birds v Croucher* 1984 ICR 604, EAT.
17. In *Sainsbury's v Hitt* [2002] EWCA Civ 158 the Court of Appeal held that band of reasonable responses test applies to the procedure followed by an employer as well as the substantive decision to dismiss.

#### Previous warnings

18. A Tribunal would not ordinarily look behind an earlier disciplinary warning provided it was issued in good faith and not manifestly inappropriate (*Stein v Associated Dairies* [1982] IRLR 447).

#### Inconsistency of sanction

19. In *Hadjioannou v Coral Casinos Ltd* 1981 IRLR 352, EAT the Employment Appeal Tribunal recognised the importance of consistency of treatment but placed more emphasis on the employer's ability to be flexible in such matters. On the facts of that particular case it was found that there had been no evidence of inconsistent treatment. The EAT accepted the argument that a complaint of unreasonableness by an employee based on inconsistency of treatment would only be relevant in limited circumstances:
  - 19.1. where employees have been led by an employer to believe that certain conduct will not lead to dismissal;
  - 19.2. where evidence of other cases being dealt with more leniently supports a complaint that the reason stated for dismissal by the employer was not the real reason;

- 19.3. where decisions made by an employer in truly parallel circumstances indicate that it was not reasonable for the employer to dismiss. (Summary from *IDS Employment Law Handbook*)

## FINDINGS OF FACT

### Background

20. On 26 November 2018 the Claimant Mr Antoine commenced employment as a Supermarket Assistant at Waitrose working 11 hours per week. At the time material to this claim he worked at the Edgware Road branch. The Claimant says that "technically speaking" he was a supervisor (CSA). It does not appear that this was either the contractual position, nor was it reflected by his level of pay.
21. On 16 March 2019 Mr Antoine was issued with First Written Warning for 12 months for excessive levels of absence by a Team Manager Ms W. Mensah.
22. On 11 July 2019 Mr Antoine was given a file note for being late for work on 3 occasions.
23. On 22 August 2019 the matter of Mr Antoine's absence was again raised with him (19.3% absence) and recorded on his file.
24. On 30 September 2019 Mr Antoine raised an issue about how his Line Manager and Team Manager treated him. He was advised of the grievance procedure.
25. On 14 November 2019 Mr Antoine completed overtime, but did not receive payment until January 2020 as it was not processed until after the cut off point for payroll on 16 November 2019.
26. On 28 December 2019 and 2 January 2020 Mr Antoine did not attend work and failed to make contact with his manager to advise that he would not be attending work.

### Grievance

27. On 1 February 2020 Mr Antoine raised a grievance regarding a flexible work request, a disciplinary sanction he had been issued with, missing overtime pay from October/November among other issues. In this grievance he stated that 'in October I covered for a supervisor...it took until January to get paid for covering this annoyed me so I decided at the time not bother going in until I got paid'.
28. On 27 February 2020 Mr Antoine attended grievance meeting with Jared Hughes, the branch manager.

### First written warning

29. In 3 March 2020 Mr Antoine attended a disciplinary hearing (chaired by Kevin Kelly) regarding failure to follow absence reporting procedures. He explained

that he was annoyed about his overtime pay and so 'wasn't in the mood to speak to the branch'.

30. As a result of that disciplinary, Mr Antoine issued was with a first written warning for failure to comply with sickness absence procedure to remain on his file for 12 months and the improvement expected was no further acts of misconduct. This resulted in an “underperformance” grading for 12 months.
31. The following month, April 2020, Mr Antoine appealed the warning [143]. Mr Antoine explained that whilst he felt that the outcome was 'alright' he felt that the situation was caused by the managers not doing their job properly and 'there is only so much you can allow management to ignore...before you have to take further measures to get your point across'.
32. On 9 April 2020 there was a Grievance outcome from Jared Hughes- partially upheld, in that the flexible working request took too long to determine and that the Claimant had not been paid for working on 14 November 2019 until January 2020.

#### Appeal against first written warning

33. On 30 April 2020 there was appeal meeting regarding first written warning. During this meeting Mr Antoine explained that he had taken two days of unauthorised absence to compensate him for additional hours he had worked and not been paid for. He said that he took the time off because he had repeatedly reminded his managers about this and they had not rectified the situation quickly enough.
34. There was an outcome to this appeal on 15 May 2020. The appeal was not upheld by Richard McVeigh. It was explained to Mr Antoine that the overtime hours had been input after the December pay cut-off date. Mr Antoine was offered a pay advance but he had declined. No evidence to suggest process had not been followed and Mr Antoine accepted that the warning was fair.
35. On 6 June 2020 Mr Antoine raised grievance challenging first written warning.

#### Accident

36. On 3 July 2020 Mr Antoine reported that he had suffered accident at work when delivery cage fell on his head. This was recorded by Mr Chana at the time as follows:

“Michael was pulling a cheese cage off the delivery from the back door when the cage being pulled nearly toppled over. The steepness of the slope of the tail lift caused the cage to nearly hit Michaels head”

37. The Claimant highlighted during the course of the hearing that this recorded note by the use of the word ‘nearly’ seems to suggest that no accident took place at all, which is contrary to his account, and underlines Mr Chana’s poor view of him. Mr Chana on the other hand says that he produced that this recorded note on the day of the accident and got the Claimant to check it.

38. There are or will be separate proceedings in a claim of personal injury brought in the civil courts. It is not necessary for the determination of the Claimant's employment law claims to make a finding as to whether the Claimant actually sustained an injury or not on 3 July, and if so how the accident occurred. That is not relevant to my findings as to the claim of unfair dismissal, and I would not wish to trespass on the findings of fact that the relevant civil court judge may need to make.
39. On 8 August 2020 an automated system message sent Mr Antoine a reminder that mandatory training overdue, specifically: baler, coffee machine black & white, moving cardboard and plastic bales, tail lift deliveries.

Sick absence

40. Mr Antoine attended his GP on 10 August 2020 and was signed off for "arm pain and neck and spine pain and leg pain if lifts/stretches" as "maybe fit for work" with the comment "pain is worse if moves suddenly. Can refer to physio if not easing".
41. The following week on 18 August 2020 Mr Antoine was signed off entirely i.e. "you are not fit for work", with identical comments for the reason for absence and in the comments section as on 10 August. It is not entirely clear why there is a change in the medical advice given the circumstances seem identical.
42. The Claimant's GP signed him off on 6 October 2020 until 11 December 2020.

Grievance outcome

43. Miles Beasley provided an outcome to the grievance regarding the first written warning by a letter dated 9 October 2020. Mr Beasley concluded that the first written warning given was appropriate, and that it was his view that it would have been within policy to have provided a sterner sanction. However some recommendations were made regarding recording of overtime.

Management of the Claimant's return to work

44. On 19 December 2020 the Claimant attended a Fit to Work meeting with Shariar Vicky.
45. On 22 December 2020 Mr Antoine had further meeting with Mr Vicky to discuss what tasks Mr Antoine could perform on his return to work.
46. On 13 January 2021 Mr Antoine's GP produced a sick note which stated that he requires amended duties for 6 months, to avoid lifting, pulling or pushing heavy loads.

Grievance re: FWR

47. On 27 January 2021 Mr Antoine raised a further grievance about Praba Yogendran (Customer Service Associate), his flexible working request and failure to pay overtime of 3 hours from July 2020.

48. On 3 February 2021 Mr Antoine provided a sick note citing ongoing pain and headaches and shoulder pain follow an injury at work in 2020, signing him off from 1 February 2020 until 15 February 2021.

Refusal to carry out manual handling training

49. On 25 February 2021 Mr Antoine attended an informal meeting with team manager Nicola Morrison to discuss why he was refusing to complete his Multimedia training. Mr Antoine confirmed in the meeting that he was refusing to carry out his multimedia training because of the “situation” happened on July 3, 2020, i.e. the alleged accident, and also because he had already done it in 2018. He confirmed when he was asked that he was refusing to complete it. When Ms Morrison pointed out that he had suffered an accident and therefore it might be advisable to keep on top of multimedia training, especially handling. In response to this comment the Claimant said:

“I get the logic but you failed to provide it before.”

50. Also 25 February 2021 Frankie Taylor, a Team Manager spoke with Mr Antoine regarding compulsory training, Mr Antoine said he did it in 2018 and was not doing it again. Mr Antoine was then presented with a suspension letter and it was explained that if he refused to do the training, he would be suspended. Mr Antoine then agreed to do the training. Mr Antoine agreed during the hearing before me that he had a good relationship Taylor.

Refusal to do ‘put backs’

51. On 2 March 2021 there was an incident where Mr Antoine refused to do 'put backs' (explained below) which had been requested by Praba CSA (meaning supervisor) and Jamie Chana (Branch Manager).
52. 04 March 2021 Mr Antoine went on sickness absence

Investigation re: ‘put backs’

53. On 11 March 2021 Ms Morrison held an investigation meeting regarding the incident on 2 March 2021. It seems that three colleagues had complained about the fact that the Claimant was chatting to a security guard rather than staying at the “Welcome desk” which was his station. The Claimant left the desk to clear up a spillage of alcoholic drinks to help customers. He spoke to a security guard on his version of events on four occasions. At 9:30 p.m. he was told by Jamie Chana to stay at the welcome desk.
54. The Claimant was asked to help with some “put backs”, this means putting items which have been moved by customers back into the correct place in-store. He was asked by a colleague Kavita, at the request of Praba. He refused to do put backs. When she asked for reason for this refusal, the Claimant replied that he did not need to give a reason.
55. At this stage Mr Chana at off became involved and asked if the Claimant could do put backs. The Claimant said no “because you told to stay at [the] desk and I have a headache”. He pointed out that Mr Chana was contradicting himself.

56. As to his headache, Mr Antoine said that at the start of his shift he was fine but then got worse. When asked whether he was well enough to be work at the point when he refused Mr Chana's request, he said it was not something that he could answer.
57. During the meeting Mr Antoine used inappropriate language e.g. regarding Mr Chana
  - 57.1. "He likes to talk shit really";
  - 57.2. "I don't like him";
  - 57.3. "He talks shit".
58. Regarding the conversation he said "I really don't care how I came across".
59. As to expectations of him he wanted to talk about expectations of managers and refused to answer what expectations that should be of himself.
60. Regarding a colleague Praba he say "she is lazy and make everyone else do all the shit she doesn't want to". When he was asked how he treated her he said "I don't care".
61. When he was told that the matter would be passed forward to a disciplinary he said "well I won't be going to it". When he was asked to read the notes of the meeting he confirmed that he refused.

#### Disciplinary hearing

62. On 16 March 2021 Jared Hughes (JH), the Branch Manager invited Mr Antoine to disciplinary hearing on 23 March 2032 to consider allegations of:
  - 62.1. Failure to follow reasonable manager requests (refusing to carry out training on manual handling leading to suspension; refusing to do "put backs")
  - 62.2. Inappropriate behaviour;
  - 62.3. Inappropriate language (swearing about managers in an investigation meeting on 11 March 2021);
  - 62.4. Breach of first written warning dated 3 March 2020.
63. There was a certain amount of email to and fro between the Claimant and Mr Hughes. The Claimant objected to Mr Hughes hearing the matter. Ultimately this disciplinary hearing was rescheduled to 19 April and was heard by Andy Faulker, a branch manager from a store in a different part of London (Greenwich).

Grievance

64. On 7 April 2021 Ms Perry provided Mr Antoine with an outcome to his grievance. The grievance was not upheld.
65. On 13 April 2021 Mr Antoine appealed the grievance outcome.

Rescheduled disciplinary hearing

66. On Andy Faulkner (AF) held a disciplinary hearing using Google meet (video) 29 April 2021 to deal with allegations as set out in the letter by Mr Hughes.
67. The Claimant was provided with the following documents:
  - 67.1. Notes of interview 25 February (interview with Claimant's regarding his refusal to complete manual handling training);
  - 67.2. Notes of interview 26 February (interview with Frankie Taylor regarding Claimant's refusal to complete training);
  - 67.3. Notes of interview 11 March 2021 (investigation meeting with Claimant re: 3 March incident in which the Claimant used inappropriate language);
  - 67.4. First written warning dated 3 March 2021.
68. At the disciplinary hearing the Claimant said that he could not look at computer screens for long periods as this gave him headaches, although he admitted that he had not told anyone previously about those. Mr Antoine accepted that he had refused to carry out training, saying he would rather do it at home.
69. Mr Antoine accepted that he refused to do put backs when asked. He attributed this to having to clean spillages which had an impact on his health condition due to the bending down.
70. He justified saying that Mr Channa lied by saying that he "lies a lot and bends the truth" and further alleged that Mr Channa used foul language to a colleague in front of customers.

Dismissal

71. At the conclusion of the meeting on 26 April 2021, Mr Faulkner summarily dismissed Mr Antoine.

Disciplinary appeal

72. Mr Antoine appealed the decision to dismiss him on 30 April 2021.
73. In summary the Claimant's appeal was that he did not trust managers and felt that Jared Hughes had unfairly influenced Andrew Faulkner, the manager who dismissed him. He wrote:

"When told there was evidence of why I don't trust managers the disciplinary manager acknowledged however ignored it saying it didn't have anything to do with this when it did, he acted unprofessional as well got the meeting notes these are paraphrasing a few things and on clear printer paper and doesn't say exactly what I said I did email concerns beforehand to Jared's manager regarding having him find a different manager to sit the disciplinary as it would be a conflict of interest and that is what is seems to me to be.

From my point of view it looks like Jared had spoken to him before leading Andy to side with him before anything even began, which is why I said I didn't want him to have anything to do with this, also in the meeting he made a statement that sounded a lot like like a part of the outcome of my grievance which again no notes regarding that particular thing had been provided beforehand or even after the outcome.

Also I would like to inform my grievance is in the appeal stage and majority of the reasonings why I don't trust or have issues with management has been provided in that so it links with this dismissal appeal I'm doing."

#### Grievance appeal outcome

74. On 4 March 2021 there was an outcome to the grievance appeal outcome from Annie Mihell, who dismissed the various elements of his grievance.

#### Disciplinary appeal meeting

75. The disciplinary appeal meeting was chaired by Nigel Towse on 25 March 2021.
76. As part of the disciplinary appeal investigation Mr Towse interviewed: Andy Faulkner, Jared Hughes, Annie Mihel and Nicola Morrison.

#### Disciplinary appeal outcome

77. By a letter dated 6 June 2021 Mr Towse dismissed the appeal against the dismissal.

#### Claim to Tribunal

78. On 20 July 2021 Mr Antoine initiated the ACAS Early Conciliation process and a certificate was issued on 1 August.
79. On 17 September 2021 Mr Antoine issued a claim.
80. On 18-19 August 2022 at a Preliminary Hearing Employment Judge Glennie gave judgment striking out the complaints of disability discrimination.

## Submissions

81. I received a skeleton argument dated 21 December 2022 of 11 pages from Ms Clarke for the Respondent. She supplemented this very briefly with oral submissions on the final day of the hearing before the Claimant was toO unwell to continue.
82. The Claimant produced a written submission of three pages of close type on the morning of 9 January 2023. This was structured into a critique of the following individuals: Jared Hughes, Jamie Chana, Nicola Morrison, Hodo Dahir and Velpreba Yogendra. He contends that in the case of the first four of these individuals it was clear that their jobs were at stake and that they would collude with each other to dismiss him. He does not make any express criticism either of the dismissing manager Mr Faulkner appeal manager Mr Towse. Indeed put no criticism to Mr Towse during the latter's oral evidence of the Tribunal.
83. I have considered the Claimant's further submissions dated 12 January 2023.
84. He argues that the 12 month final written warning given on 3 March 2020 and expired on 2 March 2021.

## CONCLUSIONS

### UNFAIR DISMISSAL

#### 1. What was the reason or principal reason for dismissal?

85. The reason for dismissal was conduct which is a potential fair reason for dismissal.

#### 2. The respondent says the reason was conduct. The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.

86. The Respondent's dismissing manager Mr Andy Faulkner did not give evidence. I am reliant on contemporaneous documentary evidence of the evidence he considered and the notes of the disciplinary meeting.
87. In this case, to a fairly unusual degree the Claimant was not disputing the conduct alleged in the disciplinary process. In the circumstances I find it overwhelmingly likely that Mr Faulkner did believe that the Claimant was guilty of the conduct alleged, in particular because Mr Antoine admitted it.

#### 3. If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating it as a sufficient reason for dismissal?

##### a. Did the respondent have reasonable grounds for that belief

88. Taking each of the allegations in turn:

- 88.1. Refusal to undergo training – there is the evidence of the interview of the Claimant with Ms Morrison as well as Frankie Taylor’s evidence. This was an allegation that the Claimant did not deny, but rather tried to justify his behaviour. It is worth noting that although the Claimant did not have a dignity good relationship with Ms Morrison he did not have a problem with Frank Taylor.
- 88.2. Inappropriate behaviour, specifically refusal to “put back” goods on 2 March 2021. Again the Claimant did not deny this, which was discussed with him in an investigatory interview.
- 88.3. Swearing – the Claimant’s foul language was documented in a meeting note, which he does not seriously dispute. He did not take the opportunity to check the note. The Claimant’s case on this is that other colleagues swore. In other words he does not deny the allegation.

b. At the time the belief was formed the respondent had carried out a reasonable investigation

89. Given the Claimant’s admissions in this case, following authority (e.g. Croucher v RSPB), there was a limit to how much investigation needed to be done.
90. I considered whether it was appropriate that Nicola Morrison was the investigator, as there might be some doubts as to whether she approached the matter with an open mind. It seems from both her account and that of the Claimant that the two of them did not have a particularly good relationship. Having considered this, the crucial point is that Ms Morrison was not a decision-maker.
91. The Claimant himself did not criticise the way that she conducted her investigation. This was a case in which the Claimant substantially admitted the allegations put to him. I did not come to the conclusion that in some way Ms Morrison’s views about the Claimant made the process unfair.

c. Did the respondent otherwise acted in a procedurally fair manner

92. The disciplinary hearing was quite short, and the investigation on the cursory side although I note that that is not criticised by the Claimant.
93. The Claimant’s contention is that the dismissing manager Mr Faulkner had been influenced by the management in his branch. In his written submission he suggests that there was collusion amongst managers in his branch and that Mr Hughes as branch manager somehow influenced Mr Faulkner.
94. This is not based on any direct evidence but a feeling that he and his union representative apparently had.
95. I find it likely that the Claimant did not have a particularly good reputation with the management of the Edgware branch. Some of them plainly regarded him as a somewhat disruptive employee. That is not the same as suggesting that they colluded to influence a dismissal against him. Indeed what appears to have happened is that a series of actions by the Claimant, which he admits

took place, were documented and treated as the basis for a disciplinary investigation.

96. In his witness statement Mr Hughes says he does not recall whether he spoke to Mr Faulkner before the disciplinary hearing. He said if he did so it would have been a brief handover call to make him aware of the basic facts. In his oral evidence he mentioned that it was not or would not be a detailed discussion since he was handing over the hearing aspect. I find on the balance of probabilities that Mr Hughes and Mr Faulkner had a brief handover conversation by telephone. I accept Mr Hughes' oral evidence that he was no more or less friendly with Mr Faulkner than he was with 16-17 other branch managers in the London area. I take account of the fact that Edgware Road and Greenwich are not immediately adjacent geographies. My impression is that they were acquainted with one another as colleagues rather than being friends.
97. It is quite conceivable that Mr Hughes expressed a view about the Claimant. I do not have an evidential basis to conclude that Mr Hughes applied any sort of pressure to Mr Faulkner to make a particular decision as to disciplinary outcome. The Claimant's case on this point is really conjecture. What I do not detect in the paperwork relating to Mr Faulkner's involvement is some particular preconceived notion or a conclusion that does not follow from the evidence that he had been provided with such as to leave me to infer that improper pressure had been applied to him. I deal with sanction below, but I did not come to the conclusion that the sanction was manifestly inappropriate such as to suggest that such pressure being applied was likely.
98. The appeal process appears to me to be more thorough and slightly better structured and documented.

d. Was dismissal within the range of reasonable responses.

Inconsistency

99. The Claimant contends that his treatment was different to Mr Chana, whom he alleges, partly in reliance on the written evidence of Mr Mbala, would swear and suffered no disciplinary consequence.
100. Mr Chana's evidence was to the effect that he was professional at all times and he absolutely denies having made comments about colleagues or having made rude comments to Mr Vicky, another manager who was a friend of his. Without needing to be specific about the detail, some of Ms Mbala's witness statement had a ring of truth about it. Most workplaces have an element of banter or joking around between colleagues from time to time.
101. It is not necessary for the purposes of this claim however for me to decide the specific allegations contained within Ms Mbala's statement. This was the reason that I did not adjourn the remainder of the hearing in order to hear live evidence from her. Even if I accepted every point in her statement about Mr Chana, I would not see that this that this placed him in an equivalent position

to the Claimant. Swearing was only one allegation among the three made about the Claimant.

102. I did consider whether, following *Hadjioannou* it might be argued that the Claimant had been led to believe that swearing was acceptable by others swearing in the workplace. If this had been the only allegation leading to dismissal, I would have had a significant concern. It was however part of three allegations of misconduct against a background where the Claimant was already on a written warning.
103. Mr Chana has not been accused of in effect insubordination, refusing reasonable management requests or swearing about managers in the context of an investigation meeting that was being formally minuted. There is no evidence that he had a live written warning on file. There are few parallels with the Claimant's case, let alone a truly parallel circumstance such as to raise a question about inconsistency of treatment. This is not a case of inconsistent treatment such as to raise a question about the fairness of the dismissal.

#### Severity of sanction

104. As to the severity of dismissal as a sanction, in my assessment it would have been outside of the range of reasonable responses to have dismissed the Claimant for any one of the individual allegations. The incidents on 25 February and 2 March might be described as insubordination, but not gross insubordination. Swearing in a meeting about managers, without being challenged about it by a manager, in itself would perhaps be unlikely to merit dismissal from a reasonable employer.
105. What I must do however is look at the overall picture. The Claimant was already on a first written warning. The Claimant argues that the earlier warning expired on 2 March 2021. He refused to carry out training on 25 February and then on 2 March itself he refused to do the put backs. In other words, given that these refusals was treated as an act of misconduct, he had committed two acts of misconduct within the currency of the earlier warning.
106. Cumulatively his conduct amounted to repeatedly being disrespectful to managers and other colleagues and failing to follow reasonable instructions. Looking at the overall picture, he was it seems picking battles within managers. It may be that he felt disgruntled as a result of sustaining an injury. Even if that is the case, it does not obviously amount to a justification for his conduct.
107. I have reminded myself that it is not my role to consider what sanction I would have given were I to be in Mr Faulkner's shoes. The Tribunal must not substitute its own view in cases of unfair dismissal. I have considered the range of reasonable responses.
108. Some employers faced with the evidence given to Mr Faulkner might have taken the view that a final written warning was the appropriate way to escalate through the disciplinary policy, given that the Claimant was on a first written warning. This would have signalled that management were not prepared to

tolerate this kind of behaviour and might have given him the opportunity to improve his conduct.

109. Might some employers, acting reasonably, have taken a harder line and dismissed? My conclusion is that some employers acting reasonably might reasonably have dismissed in these circumstances.
110. It follows that dismissal was within the range of reasonable responses and that the claim of unfair dismissal does not succeed.

Remedy for unfair dismissal

111. Given my finding on unfair dismissal it is not necessary to consider remedy.

**Holiday Pay claim**

112. The claim for holiday pay/unpaid annual leave has been conceded in terms set out in the order above.

**Unlawful deductions from wages**

113. The claimant for unlawful deductions in relation to 3 hours overtime

Employment Judge Adkin

Date 25 January 2023

WRITTEN REASONS SENT TO THE PARTIES ON

.25/01/2023

FOR THE TRIBUNAL OFFICE

Notes

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at [www.gov.uk/employment-tribunal-decisions](http://www.gov.uk/employment-tribunal-decisions) shortly after a copy has been sent to the Claimant (s) and respondent(s) in a case.

Where reasons for decisions were given orally either party may request written reasons within 14 days of the date that this judgment is sent to the parties.

APPENDIX: LIST OF ISSUES

**Unfair dismissal**

1. What was the reason or principal reason for dismissal?
2. The respondent says the reason was conduct. The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.
3. If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating it as a sufficient reason for dismissal?
  - a. Did the respondent have reasonable grounds for that belief
  - b. At the time the belief was formed the respondent had carried out a reasonable investigation
  - c. Did the respondent otherwise acted in a procedurally fair manner
  - d. Was dismissal within the range of reasonable responses.

Remedy for unfair dismissal

4. What financial losses has the dismissal caused the claimant?
5. Has the claimant taken reasonable steps to replace his lost earnings, for example by looking for another job?
6. If not, for what period of loss should he be compensated?
7. Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed? If so, should compensation be reduced and by how much?
8. Did the respondent or the claimant unreasonably fail to comply with ACAS Code of Practice on Disciplinary and Grievance Procedures by failing to investigate properly? The points the claimant has raised about alleged collusion, conflicts of interest and targeting him are fairness points that he can raise separately in any event.
9. If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion up to 25%?
10. If the claimant was unfairly dismissed, did he cause or contribute to his dismissal by blameworthy conduct?
11. If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?
12. Does the statutory cap of 52 weeks' pay or £86,444 apply?
13. What basic award is payable to the claimant, if any?
14. Would it be just and equitable to reduce the basic award because the claimant's conduct before dismissal? If so, to what extent?

[Discrimination claim dismissed]

Holiday Pay claim

38. The claimant's case is that his final pay slip said "details not displayed" and he requires confirmation that he was paid his full amount of holiday for his final leave year and seeks payment of any amount due.

39. The claimant says he did not take all his annual leave for 2020/2021 because he was off sick and he is owed holiday pay for this.

Time limits - Unlawful deductions from wages

40. Has the claim for unlawful deductions from wages been presented within the 3 month time limit

41. If not, was it reasonably practicable for the claimant to present the claim in time.

42. If not, was the claim presented within such further period as the Tribunal considers reasonable?

Unlawful deductions

43. Has the respondent paid the claimant in full for any overtime done in around May/June 2020?

44. How much is the claimant owed?

Remedy for Holiday Pay and Unauthorised Deductions

45. How much should the claimant be awarded for holiday pay and overtime.