EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr George Ferguson-Haizel	**v**	**Tesco Stores Limited**

Heard at: Watford **On**: 6 - 10 February 2023

Before: Employment Judge Clarke KC
Ms M Harris (Non-Legal Member)
Ms S Hamil (Non-Legal Member)

Appearances

For the Claimant: In person
For the Respondent: Mr H Zovidavi (Counsel)

JUDGMENT

1. The claims for unfair dismissal, automatic unfair dismissal (section 103A of the Employment Rights Act 1996), direct race discrimination and victimisation, being the only claims brought by the claimant which were not previously struck out, are each dismissed.

REASONS

1. The claimant presented a first claim to the Employment Tribunal in August 2020 alleging age, race and sex discrimination and claiming holiday pay and unpaid wages. That claim was dismissed on withdrawal on 19 October 2020 and reconsideration of that judgment was refused on 31 December 2020.

2. The present claim was commenced 13 November 2020. It repeated many of the claims previously dismissed. Those claims were then struck out by Employment Judge Fraser following a hearing on 17 September 2021. That left an inter-related group of claims to be decided at this hearing. The claims all focus on the claimant's dismissal on 17 August 2020, which dismissal is admitted.

   2.1 At a preliminary hearing on 24 May 2022, Employment Judge R Lewis listed the issues arising from those claims which alleged:

1. Unfair dismissal
2. Automatic unfair dismissal – the principal reason being his making of protected disclosures according to the claimant
3. Direct race discrimination – the treatment relied upon being the dismissal
4. Victimisation following protected acts said to have taken place in February 2018 and May 2020. The less favourable treatment being his dismissal.

Preliminary issues

3. Before hearing evidence, the Tribunal was asked to deal with two preliminary issues, one relating to the comparators relied upon by the claimant and the other to the contents of his witness statement.

   Comparators

4. At the preliminary hearing before Employment Judge Lewis, the Judge had been referred by the claimant to certain comparators upon which he intended to rely. The Judge indicated that these did not appear to be comparators of the kind required, as the circumstances surrounding the ways the alleged comparators were treated were very different from what the claimant alleged had happened to him. By his case management Orders, the Judge gave the claimant the opportunity to suggest further comparators, having explained the law to him in simple terms. He also explained how the claimant might rely on a hypothetical comparator.

5. The claimant subsequently provided some written details of further alleged comparators which he largely repeated in his witness statement. The respondent's concern was that, despite requests, the claimant had provided very little detail of the comparators and the incidents he relied upon in respect of them. Further, they noted that such particulars as the claimant had given appeared to conflict, for example, persons he had previously identified as female had changed gender to male and it was unclear who was the comparator and who were the other alleged participants in the incidents to which he referred.

6. Before considering what the claimant had said about comparators in his witness statement, we explained to the claimant the nature of a relevant comparator in his case and the role of a hypothetical comparator. In particular, we explained that as he was claiming that his behaviour had been treated less favourably than the behaviour of others had been we needed to know who he was referring to as having been treated differently, by whom and in what circumstances. We noted that in his case a comparator might be a white colleague who had made racially offensive comments which had been reported to management who had not disciplined that colleague, or had treated him or her more leniently. From his responses we were satisfied that the claimant understood what was required.

7. We then sought further clarity from the claimant as to the comparators he relied upon. Unfortunately, his explanations of the accounts he had given in respect of his comparators and what had happened to them found in paragraph 64-68 of his witness statement made matters more confused.

8. We took the claimant carefully through all of his particulars of the alleged comparators.

9. As to "comparator 1", the claimant's narrative reads as follows:

   "Comparator 1, a white colleague, shouted abuse at an Asian work colleague, [who is then identified by name]. He behaved aggressively towards her, and the claimant had to step in between Peter and [the identified person] to calm the situation. [The identified person] broke down in tears at this assault, claimant offered comfort and support to [her] then asked a fellow co-worker [also named] to assist her as she went into the ladies' toilets to try and compose herself".

10. In response to a letter from the respondent, the comparator was identified as a male we shall identify as X. On being questioned by us, the claimant told us both that the abuser was X and that he was a manager. Asked who this incident was reported to and what had been done, he repeated that X was a manager. He could not explain what, if anything, had been done by anyone to report his incident.

11. We were struck by an apparent lack of any recall of the incident in any detail when answering our questions. He did not recall in what way X had abused the Asian colleague, when this was, or who this had been reported to.

12. As regards comparator 2, what he said is in two parts and his suggestion was that the whole narrative related to one comparator.

13. The first part of the narrative reads:

    "A white colleague (comparator 2) while looking at a black colleague's ([who he named]) family pictures stated; "don't all black people look shit in photographs". The white male was offered the rest of the day off and continued to work unsanctioned. This comparator is Y."

14. On being asked by us to explain this paragraph, the claimant maintained that the comparator for this incident was Y, a female. That was also the person he had identified as the comparator when asked by the respondent.

15. We then turned to the second incident as regards this person, comparator 2, which reads:

    "A sales representative referred to black pigmy racists which the claimant found extremely offensive as did the other sales representative who was present. C reported this to CS who did not act on my complaint."

On being asked for the name of the sales representative by the respondent, the claimant replied by saying “this comparator is [a person we will refer to as Z].”

16. Y is female but the comparator identified in the first part of the comparator 2 narrative is said to be male. We wondered whether both parts of the narrative were intended to relate to Z. We asked the claimant to confirm the identity of the sales representative in the second part of the narrative relating to this comparator. He told us that it was Z. He confirmed that C was a reference to himself. We asked him to identify the manager referred to as “CS” he told us that this was Z. When it was pointed out to him that Z could not be both the sales representative and CS, he paused for a long period and then said he himself was CS. When it was pointed out that he could not be both C and CS he reverted to saying that CS was Z. Asked again for the identity of the sales representative relied upon as the comparator, being the person who made the ‘black pigmy racist’ statement, he said this was also Z. None of this appeared to us to make sense, furthermore we formed the view that the claimant was not recalling events, but trying to work out what he needed to say to establish his case.

17. Comparator 3 was identified as K (a woman) but the narrative states that the person who was abusive to another employee was male. This incident was said to have been reported to NP (whom the claimant could not identify) and K’s role was completely unclear.

18. We understood the respondent’s reasons for bringing these matters to our attention. We accepted that investigating these alleged comparators would be almost impossible giving the limited and conflicting material provided. We note, in that context, that no dates had been provided, despite them being requested, for any of them.

19. Ultimately, the respondent did not press us in any way to limit the claimant’s reliance on these comparators and we did not do so. It was accepted by the respondent that the claimant could give evidence of the matters in those paragraphs of the witness statement and that the respondent would, in due course, comment on that evidence. We reminded ourselves (and the claimant) that there remained the hypothetical comparator.

20. We shall in due course record our views as to the claimant’s credibility. In light of those views and the confused explanations with regard to his comparators, we did not feel able to rely on what he said in these regards. In order for us to rely on these persons as comparators (or upon the evidence in these regards as evidence to help us to consider how to frame the hypothetical comparator and how such a person would have been treated), we would need to be satisfied on the balance of probabilities that what he said was done by these people was as he suggests, and that they were not disciplined despite the comparator’s conduct having been brought to the attention of the appropriate managers. We cannot be so satisfied.

Witness Statement

21. The claimant's witness statement comprised 233 paragraphs over 37 single spaced typed pages. Much of it contained submissions of law (sometimes in relation to claims he does not bring or in relation to claims dismissed or struck out). We went through it with him. We pointed out the reasons why particular sections either did not amount to evidence or dealt with claims struck out or which were never part of his case.

22. Following this, all save the paragraphs referred to below were struck out, although it was explained that much of the material could be relied upon in submissions in due course. Indeed, that turned out to be the case. The nature of a witness statement having been explained to the claimant and the whole statement having been gone through with him paragraph by paragraph, the claimant did not resist the striking out of the parts in question.

23. Where during that review the claimant contended a paragraph contained fact, we allowed those paragraphs to remain save where this was obviously not the case.

24. In the circumstances his witness statement comprised paragraphs 1, 2, 9, 14 to 32, 41 to 51, 64 to 68, 77, 94, 95, 99, 103, 106, 107, 123 to 127, 152, 165 to 182, 183 (to the words "… African origins"), 184 to 194, 200 to 208 and 233.

Witnesses

25. We heard evidence from the claimant and on behalf of the respondent from three store managers, Abira Thavarajah, Clinton Winn and Rachel Alexander. We shall record our comments on the evidence given by the respondent's witnesses in due course. However, this is an appropriate moment to summarise our views on the claimant as a witness.

26. We found many aspects of the claimant's evidence to be unsatisfactory. He disagreed with the contents of contemporaneous documents (some of which he had signed at the time) where they did not accord with his present case and changed his evidence from time to time when he realised that what he was saying led him into difficulties. Several examples appear in our findings of fact below.

27. We note two examples here, in both cases the details appear in context below:

    27.1 The claimant said that he had not told his Trade Union by telephone on 18 May first that he had been told on that day at 09:00am of a meeting to take place at 09:30am and, secondly, that he was unaware of the subject matter of that meeting. When it was pointed out to him that a note disclosed by him made by his Trade Union of that conversation said exactly that, he said that this note (that he hitherto maintained to be accurate) was wrong. The Trade Union's notes of meetings were disclosed to the claimant by his Union. This followed the making by him

of a subject access request, which led the Union to supply him with its records.

27.2 He maintained that the notes of the first appeal hearing and its resumption some days later were inaccurate in many material respects. This was despite the fact that his Trade Union representative had signed both and that he had signed the latter set. In his closing submissions, he maintained that the first set were a fabrication (which he later said meant that they had inaccurate passages added) and that the second set was a complete fabrication. We note that in accordance to the case that he runs, adding material to the first set of notes is not really the issue, it is his case that the first set of notes omits a great deal of what he said. He could not explain why both he and his Trade Union representative would have signed each page of sets of notes which were very seriously inaccurate.

Findings of fact

28. In February 2018 the claimant raised a complaint of bullying by three colleagues. None is one of those who later complained against him in August 2019. Contemporaneous documents suggest that he later stated that he had made the complaint in 2018 because he had been called to an investigatory meeting after complaints against him by those he then accused and that he did not want to take the matter further. The claimant disputes this, suggesting that the contemporaneous documents which record that are "fakes". We accept that those involved in the disciplinary process with which we are concerned either knew nothing of this complaint (Mr Winn) or understood from those documents and from what they were told (Ms Alexander) that the complaint had been withdrawn by the claimant in the circumstances described. In any event, looking at this matter in the light of his evidence generally, we are satisfied that the complaint was withdrawn in the circumstances which the contemporaneous documents suggest.

29. In August 2019, three fellow workers made a written complaint to their People Partner who covered the London Colney Store where they worked. A fourth supported their complaints in writing some few days later. They complained that the claimant was repeatedly disrespectful, intimidating and aggressive towards them. His conduct related specifically, they said, to their being "foreigners". He was alleged to have said things to them like "you don't know anything, you do a donkey job, you are a foreigner." He was said to have criticised their written and spoken English, to have asked if they had British passports, if they came in a lorry and questioned "how you Asian people" had been let into the country.

30. None of the complainants were either white or identified as black as the claimant does, as being of black African heritage. The claimant described them as Asian but could not be more specific and the respondent considered them simply as non-white persons, but did not otherwise investigate their ethnic backgrounds in the context of this disciplinary process.

31. These were very serious allegations on their face and we note with concern that the process that led to the claimant's summary dismissal for his conduct towards them did not conclude until 19 August 2020. That is a little over a year after the original complaint. Whilst the claimant's attitude certainly delayed matters and the covid pandemic played its part, this is an unacceptable period for such an investigation and disciplinary process to take place for so large an organisation. We will return to comment on this at the end of these reasons.

32. The store manager at the Grove Hill store, Ms Thavarajah, was asked to investigate the matter. She did not know the claimant and we note that Ms Thavarajah is a person of colour.

33. She interviewed three of the complainants, another manager interviewed the fourth and supplied her with a statement. The statements revealed an alleged pattern of racist comments and confrontational and disruptive behaviour. Sometimes this was against the particular complainant being interviewed and sometimes against others, but witnessed by that complainant. An altercation involving racist language by the claimant which intensified when he was challenged appeared to have triggered the making of the complaint.

34. Ms Thavarajah invited the claimant to a meeting on 28 October 2019. He only worked one four-hour shift each week, the shift on a Monday morning, and the respondent's policy is to hold such meetings during that person's working hours. He was invited to a meeting at the St Albans' store as this was the only room available. The one in London Colney was considered too small. He himself lived in St Albans.

35. The letter inviting the claimant to the investigatory meeting was on the note paper of Ms Thavarajah's own store, but it was clearly addressed to the claimant and referred (albeit in general terms) to the conduct complained of. It also alerted him to the right to be accompanied. The letter was sent recorded delivery and the claimant received it. He told us that as he knew no one at the store in question, he decided to ignore it. We note that whilst he gave this explanation in his appeal against dismissal, to us (and in some contemporaneous documents) he said that he ignored it as it did not give details of how to get to St Albans. In fact, the venue was a short bus ride from his home.

36. The letter supplied the complainant with both the telephone number and email address of Ms Thavarajah and the letter asked him to contact her to confirm his attendance and the name of any representatives. It also offered to arrange an appropriate representative if he needed her to do so. The claimant did not contact her.

37. There then followed a sequence of four further invitation letters, all in similar form to the first, but advising the claiming that Ms Thavarajah could decide how to proceed without hearing from him if he did not attend a meeting with her:

1. The letter of 29 October 2019.
This letter was sent using the London Colney branch's note paper as the claimant had told his store manager that he did not attend the October meeting as he did not think the letter related to him because it came from another branch. The claimant failed to attend the meeting scheduled for 04 November referred to in the letter. He made no contact with Ms Thavarajah.

2. The letter of 05 November 2019.
This letter invited the claimant to a meeting on 25 November. Again, he failed to attend. Shorty prior to the meeting he told his manager that he would not attend because he did not know Ms Thavarajah. Unfortunately, that message did not get to her until after the meeting. The claimant also questioned why the meeting was not being held at the London Colney store.

3. The 29 November letter
This letter invited the claimant to a meeting at London Colney on 09 December 2019. A shift leader at the London Colney store tried to hand to the claimant this letter but he refused to take it. We reject the claimant's assertion that the note of the shift leader to this effect is a fabrication. Here, as elsewhere, his evidence was confused. He initially told us that he did take the letter and did not attend as the meeting was to be at St Albans. When it was pointed out that it was to be at London Colney, he said that this was wrong, and it was to be at St Albans. He could not explain why the letter referred to a meeting at London Colney, or how he knew of the venue.

4. In January 2020, a further letter was prepared and taken to London Colney by a manager from a neighbouring store. The claimant refused to take it or read it. The claimant said he would not do anything until the respondent admitted that it was at fault in sending the first invitation from the wrong address.

38. We conclude that the claimant was aware the nature of the complaints against him and was doing all that he could to avoid any investigation into them.

39. The claimant was absent on leave on many of the Mondays in January and February 2020 when he would otherwise have worked. On 4 May, Vicki Young, a People Partner, spoke to the claimant at London Colney and urged him to meet with Ms Thavarajah. Ms Young told him that if he would not participate in the investigation he might be suspended. He accused the respondent of being racist and of bullying him. He said that he refused to attend any investigatory meeting.

40. This is an appropriate point to note that in various documents and before us, the claimant has alleged that the respondent does not allow people of colour to progress in the organisation. Save that he says that he himself was rejected when he applied for an apprenticeship, he gave no details of the respondent's conduct on which he relied to support this proposition. We note that two of the senior managers who gave evidence before us (Ms Thavarajah and Ms Alexander) were themselves women of colour.

41. A further invitation letter was then sent on 12 May 2020 for a meeting with Ms Thavarajah at London Colney on 18 May. Like the first letter, it asked the claimant to contact Ms Thavarajah "upon receipt of this letter to confirm your attendance and the name of your chosen representative (or if you need me to arrange a trade union representative for you)". The letter was sent to the claimant by email and by post.

42. The claimant did attend the meeting on 18 May, however, the meeting made no progress towards hearing the claimant's response to the complaints against him. On entering the meeting, the claimant demanded to know where his Trade Union representative was. He was shouting and refused to participate in the meeting without a Trade Union representative. He claimed then (and before us) that the respondent had the responsibility to provide him with a representative and that the Trade Union had told him this. In fact, as part of his disclosure, he provided a letter written to him by his Union which stated the opposite. Although he did not suggest it to Ms Thavarajah in cross examination, he later stated she had denied him Trade Union representation saying that he did not need representation as he was going to be dismissed. We are satisfied that she said no such thing.

43. In cross examination, the claimant suggested that he had asked his Trade Union to provide a representative for the meeting on 18 May but he was told to speak to his manager. He said initially that he did not ask her to obtain a representative for him but later told us that he did. At his request, his Trade Union has provided all of their notes of his dealings with them and these have been disclosed. It is clear that they were meticulous in recording all of those dealings. There is no record prior to 18 May of his seeking representation for that meeting and on 18 May his telephone call to the Trade Union, as noted by them, proceeded on the basis that he had unexpectedly been asked to attend a meeting the subject matter if which he was unaware.

44. On 18 May, the claimant was, on request, supplied with the company's duty telephone to call his Trade Union. He was pacing up and down outside the meeting room shouting at his Trade Union representative on the telephone and at Ms Thavarajah and her note taker. He falsely told the Union that at 09:00am that day he had been summoned to a meeting to take place at 09:30am, that he was unaware what this meeting was for and that he needed Trade Union representation as a result. His attempts to deny that this is what Ms Thavarajah heard him say to the Trade Union are completely undermined by the Union's note of the conversation which says exactly that.

45. At 09:23, that is seven minutes before his shift was to end, he left the premises without telling Ms Thavarajah that this was his intention.

46. In the light of his behaviour on 18 May, and in relation to not attending earlier meetings, Ms Thavarajah decided to suspend the claimant on the basis that he was refusing to participate in the investigation. Whether or not that was an appropriate response to his conduct, and whether or not it would have been more appropriate to have suspended him at a far earlier stage are not matters

before us. We are, however, satisfied that his suspension had nothing whatsoever to do with his race.

47. On 20 May, the claimant made a complaint against Ms Thavarajah and her note taker, as well as against the People Manager, Vicki Young and his store manager. He complained of the sending of letters on another branch's note paper and the failure to provide him with a Trade Union representative for 18 May meeting. He noted that there was a further meeting to take place on 01 June and that he intended to seek Trade Union representation.

48. Ms Thavarajah felt that the claimant's behaviour towards her was unacceptable. She felt intimidated and felt it wrong to continue in the process. As a result of the claimant's behaviour and the complaint which he raised, it was decided that someone from the human resources team should take over the investigation, hence that meeting scheduled for 1 June was postponed.

49. A People Manager, Mr Petrides, then took over the investigation. Mr Petrides wished to meet with the claimant. The claimant tried to avoid meeting other than at London Colney, despite the respondent offering to pay for a taxi so that the meeting could take place in a larger room. We note that this was all taking place against the background of covid lockdowns. The claimant expressed concerns that the taxi could have an accident. The claimant also said that he would not look at letters unless delivered whilst he was at work between 05:30 – 09:30 on a Monday morning. His Trade Union organiser described this as unreasonable and the claimant as very argumentative and aggressive in his dealings with her. She is a black African woman, and the claimant does not accuse her of racism. We conclude that the claimant was still doing all that he could to avoid this matter being properly investigated and progressed.

50. The claimant and Mr Petrides eventually met on 06 July 2020. Copies of the original statements taken at the start of the process were given to the claimant to read and those original statements were read out in so far as they were handwritten. We reject the claimant's contention, raised for the first time when he was cross examined, that all he saw at this meeting was the second page of the first complaint letter which is a page which contained only the names and signatures of the three individuals who initially complained. As the notes, which he and his Trade Union representative both signed, make clear, he was taken to the allegations and knew what was alleged against him. His only comment was to say that he could not recall any of the incidents described.

51. It was at this stage that Mr Petrides re-interviewed three of the complainants, the fourth had left the respondent's employment. We consider this step to have been sensible given the passage of time and that he himself had met with none of them. We reject the claimant's contention that this second set of interviews was in some way fatal to the fairness to the whole process. The complainants maintained their stories. Mr Petrides took detailed notes, and these were typed up and were provided to the claimant in due course. These were shown to the claimant at a further meeting on 03 August 2020 at which Mr Petrides presented his finding that there was a case to go to a disciplinary hearing. Mr Petrides' conclusions were contained in a detailed written report

which he read to the claimant and the representative. The claimant refused to sign the notes of this meeting, but he suggested no corrections and his representative did sign them.

52. The claimant's response was to seek to appeal against Mr Petrides' decision. The two-page appeal document does not deal with the substance of the complaints made against him, but makes very general allegations of sexism and racism over his entire employment career and makes comments about inequalities within Tesco and more generally. He also complained that his May 2020 complaint had not been dealt with noting that he had complained of aspects of Ms Thavarajah's conduct of the investigation. The claimant was told that he could not appeal against Mr Petrides' decision. We regard this purported appeal as a further instance of the claimant seeking to delay dealing with the complaints against him.

53. Mr Winn, an experienced store manager of some twenty years, was asked to conduct the disciplinary hearing, he did not know the claimant but had conducted several disciplinary hearings over the last ten years of his employment, including ones dealing with allegations of race discrimination. He had dismissed staff for the use of racist language and behaviour.

54. The letter of 13 August inviting the claimant to a meeting on 17 August provided a short summary of the allegations against the claimant, but was accompanied by copies of Mr Petrides' report and the statements taken from the complainants. It warned of the risk of dismissal for the conduct alleged, which the claimant said to us that he accepted to amount to a very serious misconduct.

55. That meeting lasted about one hour twenty minutes and the claimant began by claiming he had been bullied and harassed. Mr Winn tried to get him to deal with the allegations, but he repeatedly refused to engage with them. On the first occasion that Mr Winn did this, the claimant said he objected. Mr Winn reminded him that if he would not engage then he would have to deal with the matter on the material already before him. The claimant then accused him of racism. After a short adjournment, Mr Winn tried again. This time, the claimant said he did not know what was alleged against him as he could not read the documents. His Trade Union representative reminded him that these had been read to him at the meeting with Mr Petrides, we also note that the more recent statements (with which he had been supplied by the letter above) are typed.

56. When Mr Winn next tried to get the claimant to engage with the complaints, he demanded an adjournment and started to make a telephone call. He was on this call for some ten minutes before Mr Winn decided he had little choice but to adjourn. When the meeting resumed some thirty-five minutes later, the claimant still would not engage with the complaints. He complained of Mr Petrides' investigation, calling it incomplete. He accused Mr Winn of refusing to let him speak and he said that the allegations did not amount to misconduct. We are satisfied that Mr Winn made every effort to get the claimant to speak about the allegations, but he would not, and we note that

the claimant now accepts that the allegations did amount to very serious misconduct, contrary to what he said then.

57. The claimant says that he did engage with the allegations at the meeting with Mr Winn and that he set out a detailed defence handing to Mr Winn a large number of documents. We accept that he had a pile of documents with him in the meeting and that he occasionally looked at one or waved it making a point, but he handed none of them to Mr Winn.

58. The notes, which he refused to sign, do not show that he did hand over documents and his Trade Union representative signed those notes. We also accept that to maintain social distancing, the meeting took place in a large room with Mr Winn at one end and the claimant at the other, some fifty metres away. The claimant's description of him handing documents to someone sitting just across from him is not accurate. Furthermore, one document he alleged to have read to Mr Winn (and handed over) post-dated the meeting. Others, as Mr Winn noted when they were shown to him in cross examination, would have little or no relevance even if they had been produced, such as correspondence dealing with the claimant's desire for a career break of a year, it being granted and his demand then to be returned to his old shift some two months into the career break.

59. Once again, we consider that the claimant was refusing to deal with the complaints and behaving in an aggressive and threatening manner in order to delay matters or to cause the respondent to decide that it could not take the matter further.

60. The outcome of Mr Winn's disciplinary process was that the claimant was summarily dismissed. A letter setting out Mr Winn's reasoning was sent to the claimant on 19 August 2020. He found that the claimant had behaved as alleged by the complainants and saw some parallels to how the claimant was alleged to have behaved in August 2019 and before, and how he behaved in the disciplinary meeting. He considered the allegations to amount to misconduct and to merit summary dismissal. He did not consider there to be any significant mitigation. He considered lesser penalties, but rejected them as inappropriate. He was unaware of the February 2019 complaint; he was aware of the existence of the May 2020 complaint but understood that it was being dealt with by others. He did not take that complaint into account.

61. There were two versions of the dismissal letter supplied to the claimant. The first is almost identical to the opening paragraphs of the second but it does not give the detailed reasons for the decision summarily to dismiss the claimant. Both were signed by Mr Winn and were sent two days apart. Mr Winn could not explain why two versions were produced, but we accept his evidence that the second version recorded his views. The first letter was sent on the day of the meeting itself and we note that the meeting concluded with the claimant demanding he be given a letter confirming his dismissal there and then. We speculate that this was done and then somebody must have told Mr Winn that he needed to record his reasons in writing to the claimant even though he had given them orally and they were recorded briefly on an internal Tesco form.

62. Meanwhile, on 17 August, the claimant raised a further complaint against Ms Young albeit that the substance of the complaint concerned Mr Petrides' investigation. Again, the claimant made generalised comments about racism but did not deal with the allegations against him. It appears to us that this largely duplicated the failed attempt to appeal against Mr Petrides' decision to send the matter into the disciplinary process. We consider it to be a further attempt by the claimant to delay the process or to prevent it from continuing.

63. The claimant appealed against the decision to dismiss him. His appeal letter raised twenty-eight points. The principal focus appears to be a series of alleged procedural defects in the investigation starting with the sending of a letter on the note paper of another branch. Very little was said about the allegations against him. His contention, which he repeated before us, was the complainants were people of the same background and that he was black and, hence, they must have discriminated against him.

64. The appeal was heard by Ms Alexander. She is a very experienced store manager trained to the highest level within Tesco's own procedures so she can deal with disciplinary matters up director level. She is a person of colour and both her notes of her hearing and evidence before us showed her careful attention to detail and determination to understand and deal with everything put to her.

65. Her appeal hearing took place on 28 September 2020 over a period just short of three hours. The claimant was accompanied by the same Trade Union representative who had accompanied him at the disciplinary hearing before Mr Winn. He was calm in this hearing and did engage a little more with the complaints against him by repeating his point about the complainants discriminating against him because they were all of the same broad ethnic background adding that they spoke the same language. This was not a rehearing of the case, but Ms Alexander did look at the documents which the claimant had by now obtained from his Trade Union.

66. Ms Alexander adjourned the hearing in order to look at the documents that the claimant had produced and to consider the complaints that he said that he had made in the past. She learned that the February 2018 complaint had been withdrawn as was recorded in contemporaneous documentation and that the May 2020 complaint was ongoing and concerned the conduct of the investigation, amongst other things, all of which points the claimant has raised on appeal to her. She did not consider that these matters, or the documents produced from the Trade Union, suggested that the disciplinary decision had been wrong.

67. The appeal hearing reconvened on 06 October. The claimant was asked to read and sign the notes of the first hearing session with which he had been supplied. He says that he refused to sign them because they were inaccurate in that they omitted much of what he had said and references to documents he had produced. In closing submissions, he first told us that the minutes were fabricated and later said that passages had been added to them. He told us that he made his reason for not signing these notes clear on the day in some detail.

68. The notes of this resumed hearing contain no such detail. Indeed, they record him as saying that he would neither read nor sign the notes until he had heard the outcome of his appeal. He did sign these notes of the second part of the meeting and his Trade Union representative signed the notes of both of the meetings. We find both sets of notes accurately to reflect the content of those meetings. We note that when making his closing submissions, he told us that he believed these notes to have been fabricated in their entirety when trying to explain why he would sign something that he considered so inaccurate.

69. Ms Alexander dealt with the claimant's twenty-eight points under four headings, these were: (1) Timings and the length of time for investigation being too long, (2) Having no recollection of having made offensive comments, (3) Unfair investigation hearing, this relating to the investigation not being fully complete and new evidence (the Trade Union documents) not being considered, and (4) Unfair treatment throughout the investigation and the disciplinary process.

70. She dealt with each of those four heads in detail in her three-page written decision. In short, she considered that Mr Winn had a sound basis for finding that the claimant acted as complained of and that this was plainly gross misconduct meriting summary dismissal. The conduct of the investigation was found to be fair, and she found that the new documents did not provide a basis for suggesting otherwise.

<u>Submissions</u>

71. The respondent made brief submissions, counsel contended that the unfair dismissal claim (and in particular the reason for dismissal) lay at the heart of this case. He contended that it was plain and obvious that the reason for dismissal was the claimant's conduct in relation to the complainants that this was gross misconduct, that it had been properly investigated (so as to satisfy the <u>Burchell</u> tests) and that dismissal for such conduct lay within the band of reasonable responses. He contended that the ACAS code, upon which the claimant laid great stress, had been satisfied.

72. On that basis he contended that the claims for 'ordinary' or automatic unfair dismissal must fail and so must the claims for direct race discrimination and victimisation. Even if there were protected disclosures or protected acts, as alleged by the claimant, the reason for dismissal was wholly unrelated to them.

73. The claimant provided a forty-seven-page set of closing submissions. It dealt with the law relating to the four heads of claim on which he relied and much else besides, including the law relating to strike outs and Rule 52 and harassment. The summary of the law on each of the four heads of claim went far beyond the matters relevant to the claims before us.

74. Periodically, the claimant summarised his submissions in respect of factual disputes in this case over those forty-seven pages. These he enlarged upon

orally. We have tried to record the significant assertions of fact and arguments in relation to them when summarising our findings of fact.

75. The claimant cited numerous authorities, many of which were irrelevant to his claim. As regards most of the others, the points he sought to make were uncontroversial. For example, he helpfully set out the definition of what is a “reason” for dismissal in Abernethy v Mott, Hay and Anderson [1974] [ICRC23] and the three-fold test or guidance found in the decision of British Home Stores Limited v Burchell [1978] [IRLR379].

76. In oral submissions, the claimant recognised that the various factual disputes between the parties lay at the heart of this case and his oral submissions concentrated entirely upon them.

The Law

77. The claimant is an employee of the respondent with the qualifying service required to bring an unfair dismissal claim. We must find what was the reason for dismissal and whether it was one of the statutorily permissible reasons for a fair dismissal found in section 98(2) of the Employment Rights Act 1996. Conduct, the reason relied upon by the respondent, is one of the statutorily permissible reasons. The reason for a dismissal is the set of facts or beliefs relied upon by the respondent’s decision makers, here Mr Winn, when deciding to dismiss (see Abernethy).

78. If the respondent can establish a statutorily permissible reason for the claimant’s dismissal (where the burden is on the respondent) then the Tribunal must turn to consider whether the dismissal was fair in all the circumstances (s.98 (4) 1996 Act). In the case of a dismissal for conduct, guidance was provided by the Court of Appeal in Burchell. We should consider whether, at the time of the dismissal, the respondent genuinely believed in the claimant’s guilt, whether it had reasonable grounds for that belief and whether it had carried out a reasonable investigation to establish and test that belief.

79. We must also ask ourselves whether, having regard to the circumstances, including the size and administrative resources of the respondent, it had carried out a reasonable investigation. That is an investigation of the kind and extent which a reasonable employer could carry out in the circumstances facing this employer.

80. In that and other regards, we must keep in mind the guidance provided in the ACAS code of practice on discipline and grievance procedures. This code is divided into a series of sections the nature of each of which is described in the heading to that section. We have considered the Code on disciplinary issues, in particular, and also the 2020 ACAS guide.

81. With regards to the disciplinary penalty, it is not for us to say what we would have done and then ask whether this employer did the same. As with the investigation, there is a band of reasonable responses and a procedurally fair dismissal will be fair overall if the penalty of dismissal fell within that band.

82. We were not addressed on the ways in which a fair appeals process can "cure" defects in the earlier process and, although we heard evidence as to the appeal, it is unnecessary to consider such matters.

83. Where the reason or principal reason for a dismissal is the making of a protected disclosure, then that dismissal is automatically unfair (s.103 A of the 1996 Act). The respondent dealt with the law on protected disclosures very briefly. The claimant dealt with all aspects of the law in relation to that matter extensively in his written submission. The respondent tentatively questioned whether the various aspects of the test for identifying a protected disclosure could be satisfied as regards the February 2018 and May 2020 complaints, but concentrated on the assertion that the reason for dismissal was as contended for, namely conduct, and had nothing to do with any such protected disclosures.

84. Were the respondent not to satisfy us that the reason for dismissal was conduct, the dismissal would be found to be unfair. Having regard for our findings as to the reason for dismissal set out below, we have not found it necessary to consider whether the disclosures relied upon were protected disclosures, hence we do no set out the law in this regard.

85. We reminded ourselves, as regards the discrimination claim, of s.136 of the Equality Act 2010 concerning the burden of proof. The claimant's submissions citied various authorities in this regard, including the well-known case of Madarassy v Numura International PLC [2007] IRLR 246. The claimant did not cite the most recent authorities, but we did not feel it necessary to ask the parties to comment upon them. The only issue in respect to which we had to take particular note of the burden of proof was in relation to the evidence of the claimant's alleged comparators where the section has no impact as the claimant did not establish the basic facts.

86. An allegation of direct race discrimination involves an exercise of comparison between how the claimant was treated and how an actual or hypothetical comparators were or would have been treated. The treatment relied upon here is the dismissal, if disparate treatment can be established, the Tribunal must decide whether the disparity was "because of" the protected characteristic relied upon here, race.

87. The test is not (as it is for the claims considered above) whether the reason or principal reason for the disparity was the claimant's race, but whether his race was material to the reasoning process, whether consciously or unconsciously. Or to use a phrase adopted in some cases, whether the claimant's race was an effective or substantial cause of the conduct relied upon.

88. Under section 27 of the 2010 Act, an employer victimises its employee if it subjects that employee to a detriment because he has carried out a protected act. A protected act is defined to include the making of an allegation by that employee that the employer or some other person has contravened the 2010 Act. The detriment here is the dismissal.

89. An otherwise protected disclosure does not have that status if false evidence or information is given, or an allegation made, in bad faith. We consider that there would be scope arguing the material subjection to apply in this case. However, the respondent did not rely upon it and we did not invite submissions on it, hence, we did not have regard for it.

90. The key question here, as with the direct race discrimination, is whether the dismissal was "because of" the making of either protected disclosure. The words used to frame the test for causation are now the same for direct discrimination and victimisation, hence once again, we have to ask ourselves whether the doing of the protected acts was material to or an effective and substantial cause of the dismissal.

<u>Applying the law to the facts as found</u>

91. We are satisfied that the reason for the respondent's decision to dismiss the claimant was his conduct as described by the complainants and summarised in Mr Winn's reasoned dismissal letter.

92. Mr Winn genuinely believed the claimant to be guilty of that misconduct. He had reasonable grounds for that belief. He had the statements of the complainants, the claimant's lack of engagement with that which was alleged against him and the claimant's behaviour in the meetings with him to support that belief. Given the claimant's behaviour and the clear and detailed complaints, we consider it reasonable for Mr Winn to have held that belief.

93. There was sufficient investigation of the allegations, the claimant knew of them, had the statements and was given numerous opportunities to comment on them. We consider that the whole process took far too long but we do not consider the delays unfairly impacted the claimant. Indeed, he was the cause of much of the delay and deliberately so. The delay must have impacted on the complainants who had to work with the claimant, albeit only for four hours a week, until his suspension, but that didn't take place until nine months after their complaints were made.

94. We consider the investigation to have been thorough and comprehensive, far from rendering the process unfair, we consider the re-interviewing of the complainants to have been a fair and sensible step given the change in investigator and the lapse of time.

95. The respondent took care to establish the facts, to inform the claimant of the investigations and to meet with him to discuss them. It not only allowed him to be accompanied but reminded him of his right to be accompanied and offered to help to arrange representation if that was needed. Both investigators did their best to obtain all relevant evidence before deciding on whether to refer the matter to the disciplinary process. Their failure to obtain the claimant's detailed response resulted from his failings and not theirs.

96. The disciplinary process was fair. The claimant was provided with all relevant information and given every opportunity to provide his responses. The fact

that he never did provide a detailed response was down to him, he chose to delay or derail the process by his behaviour as described in our findings.

97. He was given the opportunity to appeal, and that appeal was a carefully conducted and comprehensive exercise. Indeed, we consider it an exemplary and fair appeal.

98. This was plainly a case of very serious misconduct, as the claimant eventually conceded. We consider that summary dismissal fell within the band of reasonable responses. Indeed, given the nature of the conduct and the claimant's attitude during its investigation we consider that most, if not all employers, would have dismissed him. The alternative would have risked a continuation of this kind of behaviour as Mr Winn reasonably concluded when considering whether a lesser penalty might be appropriate against the background of the claimant's conduct before him and earlier in the process.

99. The claimant's submissions suggested that there was a disparity of treatment between himself and others which demonstrated unfairness. The only comparator cases relied upon were those of the comparators relied upon for the direct discrimination claim. He has failed to establish the facts necessary to frame any such comparator. In any event, the incidents he relied upon whilst not trivial, do not show the sustained racist behaviour targeted against others which was alleged here.

100. In the circumstances, the unfair dismissal claim must fail. This was a fair dismissal.

101. The making of the disclosures said to be protected disclosures were not the reason or the principal reason for the claimant's dismissal, hence his s.103A claim must fail. Indeed, it is our view that the making of those disclosures (being the February 2018 and May 2020 complaints) had nothing whatsoever to do with the decision to dismiss him. Mr Winn was unaware of the February 2018 complaint and knew almost nothing of the February 2020 complaint beyond it having been made and it being dealt with by others.

102. The treatment relied upon for the direct discrimination claim is the claimant's dismissal. We have already set out our views on his alleged comparators. We are satisfied that a hypothetical comparator would have been treated in precisely the same way. The claimant's dismissal had nothing whatsoever to do with the colour of his skin, his race or his ethnicity.

103. We proceed on the basis on the February 2018 and May 2020 complaints were protected acts. The victimisation claim must nonetheless fail for the same reason that the direct discrimination claim failed. The dismissal had nothing to do with those protected acts.

104. It follows that each and every claim brought by the claimant fails and is dismissed.

105. Finally, we will wish to emphasise our concerns about how long this process took. That is took far too long is obvious. We recognise that looked at in one way much of this was attributable to the deliberate actions of the claimant.

However, we would have expected a large employer with an extensive and expert people or human resources team to have been able to cope much better with such conduct. Those involved with the investigation should have been helped to bring it to a conclusion far more speedily. We contrast the progress of the earlier stages of this process with the efficient and effective handling of the appeal. It is clear to us that the employees who complained against the claimant were badly served by their employer. We hope that lessons will have been learnt.

106. Having heard the outcome of the case, the respondent indicated a present intention to make a costs application. It decided to reconsider its position in the light of our reasoning and comments. In those circumstances any such application should be sent in writing to the Tribunal and no later than 6 March 2023. The claimant should send any written comments or response to that application by no later than 3 April 2023.

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Employment Judge Clarke

Date: 15 March 2023

Sent to the parties on: 23/3/2023

NG

For the Tribunal Office