EMPLOYMENT TRIBUNALS

Claimant: Mr J Primus

Respondent: Sainsbury's Supermarkets Limited

Heard at: Bury St Edmunds **On:** 7, 8, 9, 10, 13 March 2023 and in Chambers 14 and 15 March 2023

Before: Employment Judge K Welch
Ms B Handley- Howorth
Ms L Gaywood

Representation

Claimant: Ms L Redman, Counsel
Respondent: Mr H Zovidavi, Counsel

RESERVED JUDGMENT

The unanimous decision of the Tribunal is that:

1. The Claimant's claim of automatic unfair dismissal for making protected disclosures fails and is dismissed.
2. The Claimant's claim of unfair dismissal fails and is dismissed.
3. The claimant's claim of victimisation fails and is dismissed.
4. No remedy hearing is required.

RESERVED REASONS

1. The claimant made an initial claim against the respondent under case number 3301874/2020 on 17 August 2020 ("the first claim"). He made various allegations of discrimination dating back to 2011.
2. The claimant presented a further claim (case number 3302640/21) on 4 March 2021 following his dismissal from the respondent's employment ("the second claim"). The second claim alleged, amongst other things that his dismissal was automatically unfair by reason of having made a protected disclosure.
3. The claimant was ordered to provide further and better particulars of his claim at a preliminary hearing held on 25 March 2021 before Employment Judge Michell. At this hearing, an open preliminary hearing was listed to consider any application made by the respondent to strike out all or some of the claims within the first claim.
4. An amended grounds of claim was provided by the claimant, and these formed the basis of the claim before us. This claimant brought claims of automatic unfair dismissal for making a protected disclosure under section 103A of the Employment Rights Act 1996 ('ERA'), unfair dismissal and victimisation under section 27 of the Equality Act 2010 ('EQA').
5. Prior to the preliminary hearing, the claimant withdrew his first claim. This claim was therefore dismissed upon withdrawal.
6. The claimant's partner brought proceedings against the respondent under case number 3300557/2021, and the claims were consolidated with the claimant's claims, with the agreement of both parties, so that they would be heard together. However, the claimant's partner withdrew her claim following settlement with the respondent.
7. This therefore meant that the only complaints before us were those contained within the claimant's second claim.

8. Following discussion at the beginning of the hearing, it was agreed that the issues for the Tribunal to decide were as set out in pages 28-29 of the bundle referred to below, as slightly amended, in light of concessions made by the respondent. The respondent conceded that the claimant had done two of the three protected acts relied upon by the claimant for his victimisation complaint as reflected in the list of issues below, which were agreed as follows:

Issues

<u>Unfair dismissal: s 103A ERA</u>

9. Did the claimant make an oral disclosure of information on 12 December in conversation with Mr Ross-Dean which, in the reasonable belief of the claimant, was in the public interest and tended to show that a person had failed, was failing or was likely to fail to comply with a legal obligation, namely the legal obligation not to discriminate against someone or harass them on the grounds of their race?
10. In particular, did the claimant disclose that Mr JG (Operations Manager) had made racist comments to Ms Young (a colleague of the claimant) in the presence of Ms NO (another employee of the respondent). JG had said that “all Muslims are terrorists”. When challenged by Ms Youngs, who said that her first boyfriend had been Muslim, JG told her, “you're fucking disgusting because you went out with one”?
11. If so, was the reason or principal reason for the claimant’s dismissal that he made this disclosure?

<u>Ordinary unfair dismissal</u>

12. Alternatively, was the claimant’s dismissal for misconduct unfair? In particular, did the respondent hold a genuine belief that the claimant had committed misconduct, and, if so, was that belief held on reasonable grounds after a reasonable investigation?

<u>Victimisation: s 27 EQA</u>

13. It was accepted that the following were protected acts under section 27 EQA done in good faith:
    13.1. On 17 June 2020, in his fair treatment complaint, the claimant made an allegation that the respondent had contravened or was contravening the EQA; and
    13.2. The claimant brought proceedings under the EQA (case number 3310874/2020).
14. Was the following a protected act under S27 EQA done in good faith:
    14.1. On 12 December 2020, the claimant made an allegation that JG (Operations Manager) had contravened the EQA?
15. Was the claimant's dismissal because he had done any of these protected acts?

ACAS Code of Practice

16. Did the respondent fail to comply with the ACAS Code of Practice on Disciplinary Procedures in any of the following ways:
    16.1. Paragraph 17 of the Code by failing to allow the claimant's companion to address the investigation hearing;
    16.2. Paragraphs 19 to 21 of the Code by failing to issue the claimant with a written warning or a final written warning instead of immediate summary dismissal;
    16.3. Paragraph 26 of the Code by failing to hold the appeal hearing within a reasonable time; and
    16.4. Paragraph 29 of the Code by failing to inform the claimant of the outcome of his appeal as soon as possible.

Background

17. The parties had agreed a bundle of documents consisting of two lever arch files totalling 640 pages. Additional documents were added to the bundle by the respondent, with no objection from the claimant. References to page numbers within this Judgment relate to pages from that bundle.

18. We were also provided with an agreed neutral chronology and cast list, both of which proved helpful.
19. We were given a lengthy reading list of documents contained within the bundle which both parties agreed would be useful to read before hearing evidence. Therefore, after we had started the hearing, and considered preliminary matters, it was agreed that the panel would take the rest of the day to carry out the necessary reading for the case.
20. We began to hear evidence on the second day of the hearing. We heard evidence from the parties in an order agreed with them as follows:
    - 20.1. The claimant himself;
    - 20.2. Ms Emma Sharman, former Operations Manager of the respondent and investigating officer. Witness for the respondent;
    - 20.3. Mr Martin Pyle, former Store Manager at a different store. Witness for the claimant;
    - 20.4. Mr Jeremy Karikari, former Customer Experience Manager. Witness for the claimant;
    - 20.5. Mrs Donna Kurti, former colleague of the claimant. Witness for the claimant;
    - 20.6. Ms Nicole Youngs, former colleague and current partner of the claimant. Witness for the claimant;
    - 20.7. Mr Steele Ross-Dean, Customer and Trading Manager. Witness for the respondent;
    - 20.8. Mr Ajid Majid, Head of Stores of the respondent and appeal officer. Witness for the respondent; and
    - 20.9. Ms Jenna Nicholls, Store Manager and dismissing officer. Witness for the respondent.
21. All of the witnesses had provided written statements which stood as their evidence in chief; they were asked questions in cross examination and by the panel.
22. The Tribunal ensured that appropriate breaks were given and asked the parties to request any additional breaks if they were required.

Findings of fact

23. The claimant describes his racial background as mixed race. His paternal grandparents are from the Caribbean; his father is black and his mother is white British. We use references within this Judgment to black and minority ethnic (BAME) as this was used by both parties during the hearing.

24. The Claimant was employed by the respondent as a general assistant, working in its online department within the Hadleigh Road, Ipswich Sainsbury's store. He commenced employment on 1 January 2011. Employees working for the respondent are called "colleagues", which is a term we shall use in this Judgment.

25. The respondent has an internal social media site, called Yammer. This has various groups within it, including one for the Hadleigh Road store, which means that posts to this group on Yammer would be seen by all colleagues working in that store, being several hundred people. It also has a National BAME group called 'I am me' (referred to as an ethnic identity mentoring page by Ms Nicholls), which has thousands of colleagues within it. Yammer is monitored by managers within the respondent's organisation. For example, the managers at the Hadleigh Road store would monitor the Yammer posts to the Hadleigh Road store group and would report posts should they think they were inappropriate, and then delete them.

26. The respondent has a Yammer policy [P65] which states:

   "*Yammer is our online community for the workplace where you can connect with colleagues, find out what's going on, share ideas and celebrate success.*

   "We all have a responsibility to make sure everyone feels welcome. ***These Community Guidelines*** *explain how we achieve that on Yammer, and what good looks like, to help us to build a community that's a great place to be for all of us.*"

27. The policy gives guidelines for colleagues using Yammer, including how they should "*be kind & respectful*" and which states, "*Bullying, name calling, or harassment is a flat* ***no*** *and could result in disciplinary action*." Colleagues are told to "*listen and learn*" and that they

should "*Stay neutral. Talking about politics is ok, but don't share extreme political views*" and "…*let's not provoke or sustain arguments or disagreements*." Finally, it states that colleagues should "*Think first*", "*Yammer is an extension of the workplace but in the digital world. Protect each other and the business just like you would at work. If in doubt, leave it out*."

28. The respondent also has various policies which all managers are aware of including, an Equality Diversity and Inclusion policy [p42-45], a Fair Treatment policy [P46-55 and 66-75], an Inclusion Policy [P56-58], a Guide to Discrimination, Bullying, Harassment, Sexual Harassment & Victimisation [P59-64], a Whistleblowing policy [P76], and a Disciplinary and Appeals policy [P77-85]. It was clear that the managers within the store were all familiar with these policies, and their responsibilities under them.
29. Should a colleague experience problems in the workplace, or have any grievances, there were policies in place to raise these. These included raising a Fair Treatment complaint (which we considered to be a grievance) and/or whistleblowing to a manager, the Conduct and Compliance Director, or the Rightline service (an anonymous telephone line). The claimant was aware of these policies and had used them before in raising concerns.
30. The policies confirm that line managers have particular responsibilities under these policies. At page 58 of the Inclusion policy, for example, it confirms that line managers must, "*call out and take action when [they] see behaviour that isn't inclusive*." The individual's responsibilities include "*challeng[ing] inappropriate behaviour when [they] see it*."
31. Following the death of George Floyd and the commencement of the Black Lives Matter movement, the respondent took a positive stance in support of its black colleagues and issued some information/ resources to help colleagues learn more about race. The 'Learning more about race' document within the bundle [P86-90] tried to explain some of the phrases which had come to the fore during this time and explained that, "*the phrase*

'all lives matter' ignores the reality that not everyone's life is more difficult or at risk due to their skin colour."

32. This document also included a section for line managers which said, "*It's really important that you are aware of what our black colleagues are going through. Look out for them, ask them how they are feeling and recognise that they may need some extra support and understanding from you at this time. You won't have all the answers and our black colleagues won't expect you to. They just want you to listen and understand*."
33. In or around June 2020, the Chief Executive Officer (CEO) of the respondent sent an email and posted on Yammer about ensuring that race was called out, and asked people to speak up. It stated, "*we stand together with our black colleagues and customers*." All colleagues underwent additional training on race around this time. It was clear that the CEO wanted its colleagues to ensure that race was discussed, even if those conversations were difficult.
34. In the 'Let's talk about race' document [P91-112], there is a section on the importance of discussing inclusion in the workplace. It says at P101, "*Someone has to go first. Race might not be an easy topic to speak on, but somebody has to go first. When one person opens up the discussion, it helps others to feel comfortable to join in*."
35. Meetings were set up in various of the respondent's stores for colleagues of colour to share their experiences with other colleagues. The claimant referred to them as 'BAME meetings'. These took place from July 2020 but ceased in the Hadleigh Road store a few months later in 2020. The claimant's evidence was that they were attended by the same colleagues, almost all of whom were BAME staff.
36. The Hadleigh Road store was noted by the claimant as having a lack of diversity within it; both as regards colleagues and managers. The store has approximately 16 managers working within it and hundreds of colleagues.

37. The claimant worked in the online department, and was contracted to work part time hours. Whilst he worked more hours when required, he never applied for more hours or promotion during his employment with the respondent.
38. The claimant's line manager, prior to June 2020, was Ms JE. The claimant was off sick with an injured knee from 15 February 2020 and does not appear to have returned until 23 October 2020. From June 2020, the claimant's absence was noted to be for his injury but also anxiety and depression which he says was due to work related stress.
39. The claimant presented a Fair Treatment complaint on 17 June 2020 [P113-4] This complained about race discrimination. He considered that he had been treated differently to other colleagues over a number of years because of his race. He felt that he was subjected to greater scrutiny than his colleagues and had recently been bombarded with text messages from his manager over his absence from work. He alleged that he had also not received a bonus payment of £50 that his team had all received and had not received his 5-year, long service badge.
40. A manager, LM, from an alternative store was appointed to investigate the claimant's Fair Treatment complaint. LM met with the claimant on 9 July 2020. Notes for this meeting appeared at pages 120-140. The claimant's requested outcome was that he receive his £50 bonus, which other colleagues had received and that his line manager, JE and store manager, Ms Francis, were dismissed.
41. LM appears to have carried out a thorough investigation into the claimant's allegations. She interviewed 15 people as part of her investigation, and also had a formal investigation meeting with the claimant's line manager, JE.
42. Following her investigation, LM upheld the complaint in part, finding that inappropriate text messages were sent to the claimant by his line manager, which could be deemed as harassment. It went on to find that the £50 bonus had been credited to the claimant's account for him to be able to use but he had not accessed it, and that other colleagues around the same service as the claimant had similarly not received their long service

awards. It found [P164] that there was "*no evidence of a culture of Racial Discrimination at the Hadleigh Road store, and in fact the issues you have raised have also been experience[d] in parts by other colleagues not within a BAME background. As a result of my investigations there have been a number of behavioural learnings identified and recommendations have been made as a result of this Fair Treatment*".

43. The claimant presented his first claim on 17 August 2020, which was accepted by the respondent as being a protected act for his victimisation complaint.
44. The claimant appealed the decision in an undated letter [P173-177]. This was acknowledged on 20 August 2020 [P178]. The claimant attended an appeal meeting with the respondent's Head of Stores, SC, on 21 August 2020 [minutes P179-200]. The appeal outcome [P201-206] upheld in part some points of his grounds of appeal but dismissed his appeal as regards race discrimination.
45. On 4 September 2020, the claimant then contacted the respondent's CEO to raise concerns over what was happening in the Hadleigh Road store and complain about his Fair Treatment appeal outcome. This was passed to the ERCM Central manager, DB, who, having met with the claimant, carried out a desk top review of the claimant's case. The letter in response [P210] dated 8 September 2020 confirmed that she agreed with the appeal officer's findings that the claimant had "*not been singled out, nor did she find any evidence of racial harassment against you…..[the] outcome was fair and proportionate in relation to your concerns*."
46. An outcome of the claimant's Fair Treatment complaint was that there was mediation between the claimant and his store manager, Ms Francis. This took place on 26 September 2020.
47. The claimant presented his first claim on 17 August 2020, as referenced above.
48. In the Summer of 2020, whilst he was off with his knee injury/ anxiety, the claimant made several posts on Yammer. A selection of which appeared throughout the bundle, including pages 499-501 and 526-537. The theme of some of the posts, which we assume to be to

the ‘I am me’ group was the claimant saying, “*hello I am a black colleague from Hadleigh road and I am going through a lot of discrimination and when [I’m] raising the issue a lot of questions are unanswered and have been told [I’m] childish and extreme for proving and feeling this way any help please thanks Jerome Primus*.” [P499]. It did not appear that these had been taken down by the respondent and nor was he disciplined for making these posts.

49. On 25 November 2020, the claimant’s partner, Ms Youngs, and another colleague witnessed a manager within the Hadleigh Road Store, JG, saying extremely racist and offensive views about Muslims. She told the claimant that evening and she was deeply offended by what she had heard. We accept Ms Youngs’ evidence on this.
50. The claimant and Ms Youngs discussed the best way to deal with the incident. Ms Youngs was worried about reporting the incident but felt that she should and therefore sent an anonymous letter to the respondent on 4 December [P233] about what she had witnessed.
51. The respondent appointed Ms Sharman to investigate the allegations against JG. She attended the store on 11 December 2020 and Ms Youngs gave a statement about the incident [P345-6].
52. It was clear that JG had been suspended whilst an investigation took place, but colleagues within the Hadleigh Road Store, including Ms Youngs, were not officially told of this. There appears to have been a lot of gossip over what had happened and we are satisfied that Ms Youngs and the claimant believed that JG had been suspended following her allegations.
53. We accept that at some point the claimant discussed JG’s conduct with a security guard at the respondent’s premises, and revealed details of the allegations against JG.
54. Ms Youngs was concerned over whether JG was going to attend the store where they worked following her statement and she had spoken with the claimant and Mrs Kurti about this. Mrs Kurti had contacted JG to try and find out whether he had been suspended by sending him WhatsApp messages late on 10 December 2020. She sent screenshots to

Ms Youngs shortly after receiving the messages from JG [P646-650], which went into the early hours of 11 December 2020. This confirmed that JG had been suspended.

55. On 10 December 2020, the claimant put the following post on Yammer, on the Hadleigh Road store group, potentially seen by hundreds, and the 'I am me' group, potentially seen by thousands. It said, "*How come some managers @ Hadleigh Road have racist mindsets and tendencies?*" [P639].
56. The post was seen by Mr Ross-Dean who was the claimant's line manager at the time. He was concerned by the post and therefore reported the post using the respondent's internal reporting procedure. He then deleted it.
57. The claimant also raised a Rightline concern on 10 December 2020, by calling their helpline. The report appeared at pages 641-643. His complaints regarded those about JG, LS (referred to below) and his previous Fair Treatment complaint against Ms Francis. The investigation outcome stated, "*The incidents raised in the Rightline have been addressed with the complainant in his Fair Treatment and Disciplinary cases outlined above*."
58. The claimant reposted his Yammer post on 11 December 2020 saying, "*Can we stop deleting my questions please. Can anyone answer this again why do some managers at Hadleigh Road have a Racist Mentality and tendencies (sic)*?" [P639].
59. Mr Ross-Dean saw the second post, which had been posted on the Hadleigh Road store group and the 'I am me' group. He tried calling the claimant twice about the posts and left a voicemail message for him on 11 December [P234], which had been transcribed and agreed by the parties, which said, "*Hi Jay, it's Steele from work again, just ringing to see if I can speak to you….I'm going to have to delete the Yammer post, just because it's quite a serious accusation to make without any context behind it, obviously you do know the fair treatment process, so if you want to pick up a call with me it would be great to discuss it, and obviously we can follow that process going forward, but yeah, it will have to [be]*

deleted because we can't just have that posted with no context behind it….." The Yammer message was again deleted.

60. We are satisfied that Mr Ross-Dean had spoken with Ms Francis, the store manager prior to deleting these messages.
61. On 12 December 2020, the claimant attended the store with his father, asking to speak to a manager. Mr Ross-Dean was available and took the claimant and his father upstairs to have a chat with him. There was a difference in evidence between what the claimant says he told Mr Ross-Dean and what Mr Ross-Dean says he was told. There were no notes of this meeting to assist us and the claimant's father did not give a statement on what had happened. The claimant says that he told Mr Ross-Dean that the post was aimed at JG and LS, another manager within the Hadleigh Road store who he understood had been moved to the store following a racist comment made to a customer. The claimant said that he told Mr Ross-Dean what JG had said. Mr Ross-Dean said that the claimant had told him that JG had made a racist comment to someone but would not say what was said. He also said that he was concerned about LS because of something about a security guard at another store and that he had heard of a complaint being made against her. The information provided was very vague.
62. We prefer the evidence of Mr Ross-Dean, as we consider that it was more probable that the claimant was concerned about getting Ms Youngs, and possibly others, into trouble by telling him things which were meant to be confidential. Ms Youngs had accepted in cross examination that she had denied having told the claimant about her meeting with Ms Sharman, when in fact she had told him, as she did not want to give the respondent anything to use against the claimant. We understand why the claimant did this and that there was no malice in doing so. However, we consider that the claimant may have been reluctant to give specific details to Mr Ross-Dean.

63. We also note that the claimant did not trust Mr Ross-Dean, as evidenced by the claimant's defence to Mr Ross-Dean's Fair Treatment complaint [P279-281] where he says that Mr Ross-Dean was a liar and "*lied to [the claimant's] face*".
64. Three of the managers at the Hadleigh Road store submitted Fair Treatment complaints about the claimant's posts on Yammer. Ms Francis and LS submitted them on 15 December 2022 [P240-241 and 242-243 respectively]. Mr Ross-Dean's complaint was dated 16 December 2022 [P244-245]. We are satisfied that these managers had spoken with one other over the Yammer posts prior to submitting their complaints. The complaints were not the same, and we do not consider that they were drafted together, although some of the sentiments were similar.
65. The complaints said how the comments had made them feel, that they considered they might affect their future career, were defaming their character and that other managers had voiced concerns over them. They also felt that their management of the store was undermined as they felt nervous managing the claimant and that people were walking on egg shells around him.
66. Emma Sharman was appointed to carry out an investigation into the Fair Treatment complaints. She met with each of the complainants on 18 December 2020 [notes for LS P246-253, notes for Ms Francis 267-278, and notes for Mr Ross-Dean P256-266]. She also met with Mr PS, Food Customer and Trading Manager on 18 December [P254-255].
67. Ms Sharman considered that the claimant should be suspended, and her decision making summary appeared at pages 289-290. The claimant was suspended on 18 December by letter [P286]. This confirmed the decision, "*to suspend you with pay from this date pending an investigation into the allegation of making spurious racist allegations against the management team on Yammer, resulting in numerous fair treatment complaints against you leading to a fundamental breakdown in the business relationship*."
68. On 20 December, Ms Sharman had an investigation meeting with CG, Food Customer and Trading Manager [P291-293]. CG confirmed that she felt like she was being called a racist.

69. The claimant sent undated defences to each of the Fair Treatment complaints [P279-285].

70. During the claimant's suspension, under a post on Yammer from Ms Francis offering free vegetables to staff, the claimant re-posted the respondent's CEO's post about "Time to stand up and take action" [P512]. Other colleagues posted under the claimant's post that they could not see the relevance and also that "*everyone matters*". Mrs Kurti posted in response to this a definition of 'all lives matter' as a controversial slogan. No action appears to have been taken against the person posting that everyone matters, and it does not appear to have been deleted.

71. Ms Sharman met with the claimant on 2 January 2021, to investigate allegations relating to the Yammer posts. Notes for this meeting are at pages 310-336. The claimant was accompanied by Ms Youngs. Both the claimant and Ms Youngs disputed the accuracy of the notes taken during the meeting and considered that they had been fabricated. The notetaker was BS, a manager. The notes are not verbatim, but we do not accept that they had been fabricated.

72. It was clear that Ms Sharman called the claimant by the wrong first name on more than one occasion, by calling him Jeremy rather than Jerome. This clearly upset the claimant and Ms Youngs. Also, the claimant and Ms Youngs did not consider that Ms Sharman was appropriate to carry out the investigation since she they believed that she was friends with LS, one of the managers the claimant's original Yammer post was directed against.

73. We saw a photograph of Ms Sharman at a social function with LS and 2 others [P498]. Her evidence was that it was one of the other attendee's birthdays, and it was through that mutual connection that they had gone out. She said that they were not friends. Although it is claimed by the claimant that they were friends by virtue of the photograph, and by Ms Sharman that they were acquaintances and went out for one meal only, we were unsure whether this was the case.

74. Ms Sharman decided that the matter should proceed to a disciplinary hearing. She gave evidence that she spoke with the respondent's HR department, who gave her the wording for the allegations.

75. A disciplinary invitation letter was sent on 5 January 2021 [P347-348]. This invited the claimant to attend a disciplinary hearing on 8 January. The allegations were:

    "*Bullying and harassment, namely making spurious racist allegations against the management team on Yammer, resulting in numerous fair treatment complaints against you leading to a fundamental breakdown in the business relationship.*

    "Breach of suspension conditions posting additional Yammer post when clearly directed in the suspension letter that this was not permitted.

    "Breach of confidentiality, reasonable belief that you have discussed disciplinary cases naming managers with other colleagues.

    "Counter allegations raised by yourself in an e-mail on 2nd January 2021 to [SC, SR and DS], indicating an unfair and biased investigation."

76. The letter included various documents including the notes of meetings and the Fair Treatment complaints. The claimant did not receive the letter and its contents in sufficient time for the hearing, and the hearing was therefore postponed until 13 January 2021.

77. Ms Nicholls was appointed to hear the claimant's disciplinary hearing. She was the Store Manager in the Canvey Island store. She had no involvement with any of the management at the Hadleigh Road store and had no knowledge of the claimant and we were satisfied that she was independent. Mr Pyle's evidence, which we found compelling, was that he trusted her judgment and that, whilst it should never have got to the point where disciplinary proceedings were necessary, he could not fault Ms Nicholl's decision to dismiss.

78. The notes for the hearing appeared at pages 351-376. The claimant was accompanied by his Union representative. This was a lengthy meeting of some 5 hours. During the meeting, the claimant raised issues that no managers had spoken to him, that he had

phoned, sent emails and no one had answered him. This was the reason that he gave for posting on Yammer. He confirmed in the meeting that "*maybe it wasn't the right thing*" to have done and that he did not mean to offend [P357].

79. Following a two-hour adjournment, Ms Nicholls confirmed that the claimant was summarily dismissed. Ms Nicholls decision making summary appeared at P377-380. A comprehensive list of findings established during the meeting was shown at P378. A letter of dismissal [P387-389] was sent on 15 January 2021. This provided reasons for her decision which we accepted to be the true reasons for his dismissal. This confirmed that the claimant was dismissed summarily. He was given the right to appeal to Mr Majid.
80. The claimant appealed on 26 January 2021 [P395-396] stating that he considered his dismissal was an act of victimisation, that he had not breached confidentiality and a fair process had not been followed. He requested that his appeal be heard by someone who understood racism and its impact in the workplace.
81. Mr Majid heard the claimant's appeal on 11 February 2021 [notes P425- 445]. The claimant was accompanied by his Trade Union representative. In this meeting, the claimant confirmed that there had been a breakdown in the relationship between himself and the management at Hadleigh Road. His representative said that he considered that this was a final straw from someone in a position of despair, which had not been done deliberately or with malice, but was because nothing else had worked. He also said that dismissal was too harsh a sanction in all of the circumstances.
82. Following a break, Mr Majid summarised the grounds of appeal from 1 to 13 [P441-2], which he wished to consider further before coming to a decision. We found this to be a good summary of the claimant's appeal. Mr Majid then carried out further enquiries, by meeting with the security officer the claimant was alleged to have spoken to about JG's conduct, Ms Nicholls, Ms Primus (the claimant's mother who also worked at the Hadleigh Road store), Mrs Kurti, and CH, a Trading Assistant within the Hadleigh Road store.

83. The claimant was provided with an update on the status of his appeal, and the delay in providing him with an outcome on 8 March 2021.

84. The appeal outcome was sent on 17 March 2021 [P467-475]. The claimant's appeal was not upheld, other than acknowledging that Ms Sharman should have taken additional documents the claimant wished to give to her in the investigation meeting. In the outcome letter, Mr Majid went through the 13 grounds of appeal and provided his decision on each of them. He stated at P469 "*I believe that [the posts on Yammer] enflamed (sic) the situation at the time and caused further confusion and stress. I believe that your dismissal from the company was based on an irretrievable breakdown of the working relationship as your perception of the management team and the environment created by your posts have resulted in fear of managing you on a day-to-day basis as a colleague without fear of retribution. This has also been compounded by the additional Fair Treatments, Rightlines and Executive Complaints you have put forward indicating that the 'managers' are racist and bullies*."

85. He referenced the claimant's unhappiness over his own Fair Treatment complaint He stated [P475], "*I also believe that your behaviours in terms of obsessive aggressive grievance raising through Rightlines, Emails to Senior stakeholders in the business and your use of YAMMER, even when suspended, has led to a fundamental and irretrievable breakdown in the business relationship as you are unable to accept an outcome that does not suit your narrative in that you have been racially discriminated against*."

86. The manager JG who had made extremely offensive comments to Ms Youngs and others was dismissed for gross misconduct on 22 January 2021. We were provided with a decision making summary for JG's dismissal [P391-3], but no evidence on why the disciplinary procedure for JG took the length of time it did.

Submissions

87. The parties provided the Tribunal with skeleton arguments prior to the commencement of the hearing. The Claimant provided further written submissions, and both parties expanded upon their submissions orally. Brief outlines are provided below, but the panel took all of the submissions into account before coming to its decision.

88. The respondent contended that the reason for the claimant's dismissal was central to all of the claimant's claims. The obvious reason for his dismissal was that he had committed gross misconduct, either when looking at the individual allegations or when they were considered together. Alternatively, that there was a breakdown in the relationship between the claimant and his managers such that there was some other substantial reason for his dismissal, both of which were potentially fair. The test in BHS v Burchell had been met, and the decision to dismiss was within the range of reasonable responses and the dismissal was fair in all of the circumstances. Whilst it was accepted that the claimant had made two protected disclosures in his original Fair Treatment complaint and by bringing the first claim, there was a dispute over what was said to Mr Ross-Dean by the claimant in their conversation on 12 December 20210. The respondent does not accept that this was a protected disclosure and nor was it a protected act for his victimisation complaint. The dismissal of the claimant was carried out by Ms Nicholls, a decision maker unknown to the claimant and from a different store. It was not put to her that the conversation of 12 December 2020 was in her mind at the time of making the decision to dismiss the claimant. The allegation of her decision being 'infected' by disclosures/ protected acts was not put to Ms Nicholls. The general rule, despite the case of Jhuti, is as set out by the EAT in Kong v Gulf International Bank (UK) Ltd [2021] 9 WLUK 125, which is that the only motivation attributable to the employer is that of the decision maker.

89. The claimant contended that the context of what had happened was important, and the Tribunal were asked to look at the bigger picture, whilst considering the claimant's case. The claimant's position was that the important issue of racism was not being addressed in

his own personal circumstances, nor in what he was seeing within the Hadleigh Road store. This was reflective of what was happening in the world. Sainsburys' CEO had said to call out racism, and the claimant felt that he was doing so and was being ignored. The claimant had made a protected disclosure to Mr Ross-Dean on 12 December, and had been dismissed for doing so, making this an automatically unfair dismissal under s103A ERA. The claimant's reason for dismissal for making "spurious racist allegations", using Yammer during suspension and confidentiality concerns were not the real reason for the claimant's dismissal. The many failures in the investigation and failure to appropriately consider the claimant's reasons and mitigation, and the timing between his disclosure and dismissal, create an inference of a causal connection. The appeal officer had stated on three occasions in the outcome letter that it was the claimant's propensity to complain about racism that caused the breakdown in the relationship. As for victimisation, the claimant had done three protected acts, which do not have to be the only reason for the detrimental treatment, but one of the reasons. It can be just a small factor but must be more than trivial (Igen Ltd v Wong [2005] ICR 931). Therefore, the claimant should succeed on his automatic unfair dismissal and victimisation complaints. As far as ordinary unfair dismissal was concerned, the claimant contends that the claimant's summary dismissal was not based on a genuine belief that he had committed misconduct, held after a reasonable investigation. Also, that dismissal was too harsh a punishment and there was no proper thought to lesser sanctions. This meant that the claimant had received the same disciplinary sanction as JG, who had made heinous racist remarks.

LAW

Public Interest Disclosure

90. Section 43A of the Employment Rights Act 1996 ("the ERA") defines a protected disclosure as "*a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H*."

91. Section 43B of the ERA ("Disclosures qualifying for protection") provides as follows:

    "(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following –

    (a) That a criminal offence has been committed, is being committed or is likely to be committed,

    (b) That a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

    (c) That a miscarriage of justice has occurred, is occurring or is likely to occur,

    (d) that the health or safety of any individual, has been, is being or is likely to be endangered;

    (e) That the environment has been, is being or is likely to be damaged, or

    (f) That information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed…"

92. Under section 43C of the ERA ("*Disclosure to employer or other responsible person*"):

    (1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure (a) To his employer…"

93. In Cavendish Munro Professional Risks Management Ltd v Geduld [2010] ICR 325 the EAT considered what amounts to a 'disclosure of information' and held that there is a distinction between disclosing information, which means 'conveying facts' and making allegations or expressing dissatisfaction. It gave, as an example of disclosure of information, a hospital employee saying 'wards have not been cleaned for two weeks' or 'sharps were left lying around'. In contrast, the EAT held, a statement that 'you are not complying with health and safety obligations' is a mere allegation.

94. The Court of Appeal, in Kilraine v London Borough of Wandsworth [2018] ICR 1850, established that 'information' and 'allegation' are not mutually exclusive. There must,

however, be sufficient factual content tending to show one of the matters in subsection 43B(1) of the ERA in order for there to be a qualifying disclosure.

95. The information disclosed by the worker does not have to be true, but rather, the worker must reasonably believe that it tends to show one of the matters falling withing section 43(B)(1). The employee must also reasonably believe that the disclosure is in the public interest. When deciding whether the worker had the relevant 'reasonable belief' the test to be applied is both subjective (i.e. did the individual worker have the reasonable belief) and objective (i.e. was it objectively reasonable for the worker to hold that belief). Korashi v Abertawe Bro Morgannwg University Local Health Board [2012] IRLR 4, which was endorsed in Phoenix House Ltd v Stockman [2017] ICR 84, in which the EAT held that, on the facts believed to exist by an employee, a judgment must be made, first, as to whether the worker held the belief and, secondly, as to whether objectively, on the basis of the facts, there was a reasonable belief in the truth of the complaints.
96. When considering whether a disclosure is in the public interest, the Tribunal must decide what the worker considered to be in the public interest, whether the worker believed that the disclosure served that interest and whether that belief was held reasonably.
97. In Chesterton Global Ltd (t/a Chestertons) and another v Nurmohamed [2018] ICR 731 the EAT held that it is not for the Tribunal to consider for itself whether a disclosure was in the public interest, but rather the questions are (1) whether the worker making the disclosure in fact believes it to be in the public interest and (2) whether that belief was reasonable.
98. Tribunals should be careful not to substitute their views of whether disclosures are in the public interest for that of the worker.
99. Following Chesterton, there are four questions for the Tribunal to consider when deciding whether a disclosure is made in the public interest:

    a. the numbers in the group whose interests the disclosure served;

    b. the nature of the interests affected and the extent to which they are affected by the matters disclosed;

c. The nature of the wrongdoing disclosed, and in particular, whether it was deliberate or inadvertent; and

d. The identity of the employer.

Automatic unfair dismissal for making a protected disclosure (section 103A ERA)

100. A dismissal is automatically unfair if the reason or principal reason is that the person dismissed has made a protected disclosure (s103A ERA).

101. Section 103A ERA provides that "*An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure*."

102. A Tribunal can draw an inference as to the real reason for the dismissal in coming to its decision.

Ordinary unfair dismissal

103. Section s.98 ("ERA") provides:

"*In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—*

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) ……….

(b) relates to the conduct of the employee

………..

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."

104. We have had regard to the following cases: British Home Stores v Burchell [1978] IRLR 379, EAT; Sainsbury's Supermarkets Ltd v Hitt [2002]; Midland Bank v Madden [2000] IRLR 288, and Post Office v Foley [2000] IRLR 827.

Burden of Proof and discrimination claims

105. The Tribunal had regard to the burden of proof in discrimination claims. This lies with the Claimant. However, if there are facts from which a Tribunal could decide in the absence of another explanation that the employer contravened the provisions of the EQA, the Tribunal must hold that the contravention occurred by virtue of section 136 (2) EQA.

Victimisation: section 27 Equality Act 2010

106. Section 27 of the Equality Act 2010 states as follows:

"*(1) A person (A) victimises another person (B) if A subjects B to a detriment because –*

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act –

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith…"

107. Although Tribunals must not make too much of the burden of proof in a victimisation claim, (Martin v Devonshires Solicitors [2011] ICR 352) it is for the claimant

to establish that he has done a protected act and has suffered a detriment. There needs to be some evidence from which the Tribunal could infer a causal link between the protected act and the detriment, for example, the detriment occurs soon after the protected act, or others were not treated in the same way.

108. It has been suggested by commentators that the three-stage test for establishing victimisation under the pre-Equality Act legislation, endorsed by Baroness Hale in Derbyshire and ors v St Helens Metropolitan Borough Council and ors [2007] ICR 841 can be adapted for the Equality Act so that it involves the following questions:

a. Did the alleged victimisation arise in any of the prohibited circumstances set out in section 27?

b. If so, did the respondent subject the claimant to the alleged detriment?

c. If so, was the reason the claimant was subjected to the detriment that the claimant had done, or might do, a protected act?

109. Following the decision of the House of Lords in Nagarajan v London Regional Transport [1999] ICR 877 it is not necessary in a victimisation case for the Tribunal to find that the employer's actions were consciously motivated by the claimant's protected act. Victimisation may occur if the discriminator was subconsciously affected by the protected act, and it had a 'significant influence' on his or her treatment of the claimant. An employer can be liable for an act of victimisation even where the motives for the treatment of the claimant are benign.

Conclusion

110. In reaching our conclusions we have considered carefully the evidence before us, the legal principles set out above, and the detailed written and oral submissions made by the parties. The following conclusions are made unanimously.

111. We should say firstly that we found the claimant to be an honest witness who clearly feels very strongly about raising issues of racism. Whilst we preferred the evidence of Mr Ross-Dean in relation to the conversation between him and the claimant on 12

December 2020, as witnessed by his father who did not provide a statement, we did not consider that the claimant was lying, but that his recollection of what had actually been said during the meeting, had not been accurately remembered.

112. In considering whether the claimant made a protected disclosure, we are not satisfied that he did so. As we accept Mr Ross-Dean's evidence about what the claimant said during the conversation on 12 December 2020, we find that the claimant made unspecified allegations that JG and LS were racists, but gave no further particulars of why he felt this to be the case. Having considered the case law set out above, we consider that this was a mere allegation as opposed to a conveying of information. We do not accept that the claimant gave specific details of what it is that JG had said, and therefore there was insufficient particularity or factual content within what he said which tended to show one of the matters in subsection 43B(1) was taking place.

113. However, even if this was a protected disclosure, we do not accept that this was the reason or principal reason for the claimant's dismissal, which would be necessary for us to find that the claimant had been automatically unfairly dismissed. We do not consider that any link was shown between the claimant's dismissal and his conversation with Mr Ross-Dean on 12 December 2020. We accept that Ms Nicholls was aware of the conversation between Mr Ross-Dean and the claimant on 12 December, since it was referenced in Mr Ross-Dean's Fair Treatment complaint. This stated that "*he told me about what [JG] has meant to have done and demanded he was sacked on the Monday as he is a racist*". However, Ms Nicholls was not questioned about whether this was in her mind at the time of making her decision. We do not consider that it was.

114. We accept that the real reason for the claimant's dismissal was as set out in Ms Nicholls' dismissal letter and decision making summary, and not because he had made protected disclosures in the conversation with Mr Ross-Dean. We have to consider the reasons for the dismissal in considering his automatic unfair dismissal complaint and as stated above, we find that the reasons for his dismissal were those given by Ms Nicholls.

115. We found the evidence of Mr Pyle compelling, in that he made clear that Ms Nicholls had no choice but to dismiss the claimant in the circumstances following the disciplinary hearing. We also note that he did not consider that she would have dismissed the claimant had she felt that there was racism. We accept that Mr Pyle feels strongly that it should never had got to that point, and that the managers at the Hadleigh Road store should have done more to engage with the claimant so that he did not feel ignored, which may have prevented him from posting on Yammer in the way he did on 10 and 11 December 2020.

116. We then considered whether the claimant's dismissal was an act of victimisation, for having carried out protected acts. The respondent conceded that in raising a Fair Treatment complaint and in bringing the first claim the claimant had carried out protected acts under section 27 EQA, but did not accept that his conversation with Mr Ross-Dean on 12 December 2020 amounted to a protected act. We do not accept that to be the case. We consider that this is not the same test as for protected disclosures and find that the claimant satisfied section 27 EQA by making the bare assertion that JG had made a racist comment, but not providing the details. We therefore consider that all protected acts relied upon by the claimant were made out.

117. We then had to consider whether this was one of the reasons for the dismissal. In considering Igen v Wong as quoted by the claimant in his submissions, it does not have to be of great importance, but can be just a small factor, albeit more than trivial. We also took into account that the dismissal need not be consciously motivated by the protected acts, but it does need to be a reason for the dismissal.

118. However, we do not find that the claimant's dismissal was because he had done protected acts. We find that the dismissal was for misconduct, in having made posts to the Hadleigh Road group and the I am me group on 10 and 11 December 2020, for having posted on Yammer during his suspension, and for breaching confidentiality. We do not consider that the protected acts, being his first Fair Treatment complaint, his first claim

and/or his conversation with Mr Ross-Dean, formed any part of Ms Nicholl's decision to dismiss. Therefore, we do not find that the claimant's claim of victimisation succeeds. We do not find that the decision to dismiss by Ms Nicholls was tainted in any way or 'infected,' as the claimant's Counsel put it, by the protected acts.

119. We note that Mr Majid says in his appeal outcome letter that colleagues were fearful of retribution, and that the Yammer posts "*also had a severe impact on [the claimant's manager's] ability to manage your performance without fear of further fair treatments being raised against them in the future*." However, even when considering this, we do not accept that the decision to uphold the dismissal was because the claimant had raised a Fair Treatment on 17 June 2020, had spoken with Mr Ross-Dean on 12 December and/or had brought a claim on 17 August 2020. The reason was his posts on Yammer on 10 and 11 December, and the belief that he would do this in the future in light of the claimant's comments during the appeal hearing.

120. Finally, the claimant's claim for ordinary unfair dismissal. The respondent has the burden of proving the reasons for the claimant's dismissal. As stated above, we consider that the claimant was dismissed for conduct, being a potentially fair reason to dismiss. We then have to consider whether the dismissal was fair in accordance with s 98(4)ERA.

121. We accept that the respondent carried out a reasonable investigation in to the allegations. It was within the range of reasonable investigations. It was not the best investigation, but it does not have to be. Whilst we note that the claimant had concerns over Ms Sharman's involvement in the investigation, due to her perceived friendship with LS, we do not consider that this affected the disciplinary process.

122. We feel that the letter of suspension could have been clearer in specifically forbidding the claimant from using or posting on Yammer until his disciplinary proceedings had been finalised. His suspension letter saying, "*due to the nature of the allegations and the use of Yammer, your account has been deactivated and will remain so until this matter is concluded*" should have made the claimant realise that he was not meant to post on

Yammer during this period. We note that the claimant had asked about his Yammer account, and that this had been incorrectly reactivated by the respondent during his period of suspension.

123. We feel that the respondent could have been more proactive in contacting the claimant following his Yammer posts before those he made on 10 and 11 December, to try and prevent taking the claimant down a disciplinary route. However, having posted as he did, and as acknowledged by Mr Pyle, the respondent had no choice but to take disciplinary action.

124. We consider that the respondent's use of the word "spurious" in its allegations against the claimant was unnecessary, and inappropriate. We understand that the respondent's HR department gave the wording to Ms Sharman, and we also note that the likely reason given for its use was that not all managers within the respondent's Hadleigh Road store were racist. However, JG, one of the managers in the Hadleigh Road store was dismissed for racism. Nevertheless, this did not, in our view, affect the fairness of the claimant's dismissal.

125. Ms Nicholls gave a clear basis for her decision to dismiss, and we found this to be an honestly held belief that the claimant had committed misconduct based on reasonable grounds and following a reasonable investigation. We find that BHS v Burchell was satisfied in this case and consider that Ms Nicholls' decision fell within the range of reasonable responses. Whilst we and others may not have dismissed in these circumstances, we are satisfied that an employer acting reasonably could have done so. We are not to substitute our view for that of the respondent and, therefore, find that the dismissal was within the range of reasonable responses.

126. In coming to our decision, we did consider the bigger picture, as requested by the claimant's Counsel. We understand that the claimant felt that he had been told to call out racism from the top level within the respondent's organisation, which is something that he felt he was doing on 10 and 11 December 2020. However, there were other ways in which

he could have done so, and ways in which he had done previously. We know that he did not accept the outcome of his Fair Treatment complaint starting in June 2020, but there had been what appeared to be a thorough investigation, which had been further considered on appeal and even reviewed by someone else after the appeal process had been exhausted. We also considered Mr Pyle's evidence which appeared to be that dismissal was appropriate in these circumstances, although it should never have got to the stage where the claimant felt that his only option was to post on Yammer.

127. We considered the ACAS code of practice and whether there had been any breaches of it, as alleged by the claimant. We do not find this to be the case. One of panel members expressed concerns over Ms Sharman carrying out the investigation in light of the discussion towards the end of the investigation meeting with the claimant, where it was alleged that Ms Sharman was biased and that she was friends with LS. We are unable to make specific findings on whether they were friends but can understand the claimant's perception having seen the Facebook photograph. However, on balance, we did not consider that this was a breach of the ACAS code of practice and nor did it affect the fairness of the investigation and/or dismissal and/or appeal, which we find to have been reasonable. Ms Youngs was not prevented from speaking in the investigation meeting, and as there is no right to be accompanied to an investigation meeting, we do not accept this to have been a breach of the ACAS code.

128. Finally, whilst we understand the claimant's view that it is unfair for him to have been given the same sanction as JG, i.e. summary dismissal, we do not accept that this affects the fairness of the claimant's dismissal. We look at the claimant's circumstances and must consider whether the decision to dismiss him in those circumstances was within the range of reasonable responses, which we have found as set out above.

129. We considered whether the respondent had taken into account the claimant's mitigation when coming to its decision. This was raised by his Trade Union representative in the disciplinary hearing and by the claimant in his appeal. Despite this being raised,

they still considered it appropriate to dismiss in all of the circumstances, and we accept that it was within the range of reasonable responses to do so.

130. We felt that the respondent had considered alternatives to dismissal, from the evidence of Ms Nicholls and Mr Majid. For example, as indicated by Ms Nicholls in her decision making summary at page 379, and in her witness statement at paragraph 26, and by Mr Majid in his outcome letter where he says, *"….I believe that your perception of [the respondent] as a company and the management team leave no option for you to continue working in any store in the future*…". Neither the dismissing officer nor the appeal officer felt that there was any alternative in light of their view that he would be likely to commit misconduct associated with Yammer again, particularly as he had posted on Yammer whilst suspended, and due to the breakdown in the relationship between the claimant and the respondent.

131. Therefore, all claims are dismissed and no remedy hearing is required.

Employment Judge Welch

Date: 30 March 2023

JUDGMENT SENT TO THE PARTIES ON

2 May 2023

FOR THE TRIBUNAL OFFICE

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