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EMPLOYMENT TRIBUNALS

Claimant: **Mr Cory Wright**

Respondent: **Mildreds Ltd**

Heard at: **East London Employment Tribunals**

On: **11, 12, 13 and 14 April 2023**

Before: **Employment Judge Jones**

Members: **Ms W Blake-Ranken**
Mr M Rowe

Representation
Claimant: in person (with Ms Schafer)
Respondent: Ms Jennings (Counsel)

JUDGMENT having been sent to the parties on ***14 April 2023*** and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. This was a complaint of unfair dismissal and race discrimination, which the Respondent defended.

Evidence

2. The Tribunal heard evidence from the Claimant on his own behalf and from Ms Nicky Mori, one of the Respondent's HR Consultants, Elizabeth Hughes, another HR Consultant, who dismissed the Claimant and Sam Anstey, Managing Director, who conducted the appeal against dismissal.

3. The Tribunal had a bundle of documents and witness statements from all the witnesses who gave evidence.

4. The Tribunal made the following findings of fact from the evidence in the hearing. The Tribunal only made findings on those matters related to the issues in the case.

5. The issues in the case were set out in the judgment of EJ Russell, sent to the parties on 7 January 2022. The issues are set out below in the judgment section of these reasons.

Findings of fact

6. The Claimant worked as a kitchen porter from October 2017. The Respondent is a chain of vegetarian restaurants. The Claimant worked at the Dalston branch and occasionally he would assist at the Soho and other branches when there was illness or leave. There were 5 chefs in the Dalston kitchen and 2 bakery chefs. The Claimant was sometimes asked to assist the chefs with preparing food such as chopping vegetables.

7. The Claimant was one of a group of 4 – 5 kitchen porters, who were also referred to by the Respondent as kitchen assistants. There was a job description in the bundle for a kitchen assistant, which the Claimant said was never given to him. Although the Claimant's contract stated that he was employed as a kitchen assistant, he considered himself a kitchen porter.

8. The present managing directors took over the business in January 2020. After taking over they began making changes to make the organisation to make it more professional.

9. The Claimant usually worked the late shift which was from 4pm until midnight or until 1am. The Claimant usually cycled to work.

10. The Claimant had his first appraisal in July 2019. This was done by the head chef, Marcello. It is likely that Marcello came to the appraisal meeting having already completed the appraisal form. The Claimant was unhappy with the comments made by the chef on the form as he felt it did not reflect the standard of work he did in the kitchen. One of Marcello's written comments was that the Claimant *'had a tendency to be absent from the kitchen'* on occasions. He also said that the Claimant always did whatever he had asked him to do. The Claimant's response in the meeting was noted on the form as - *'all jobs get done'* and that the photos proved his point. We were not shown any photos. The appraisal form stated that there was an agreed action plan between the kitchen management and the Claimant and that he agreed to improve communication with all kitchen members of staff. It is unlikely that the Claimant was given a copy of the appraisal form on the day, but he did subsequently get a copy as on 1 August 2019, he wrote a detailed response to it.

11. The Claimant's main complaints in that response was that his work and his efforts were not appreciated, that he had not been commended for helping out at other branches and that he always did what was expected of him.

12. We find it likely that at the time, he gave this letter to his direct line manager, Olga. We did not hear from Olga in the Tribunal hearing, but it is likely that given the strength of feeling expressed in this note, the Claimant would not have written it and failed to hand it in. It is likely that he wanted something done and that is why he wrote it and handed it in to his line manager, who he reasonably thought as a representative of the company, someone who would pass it on to senior managers so that the contents could be addressed.

13. We find it likely that the appraisal and the way Marcello conducted it represented a watershed for the Claimant. He felt that it had been unfair. He was disillusioned by the appraisal and by Marcello's comments, and he felt underappreciated by the Respondent. After the appraisal he reduced his hours and no longer offered to cover for absent colleagues at this or other branches. The Claimant did not get a response to the note that he gave to Olga about the appraisal.

14. Around the end of November 2019, the Claimant wrote another memo to managers which referred to more recent matters. He was given what he was told was the email contact address for the Respondent's HR advisor and told that he had to send the documents to that email address, if he wanted an action taken on it. On 4 December 2019, the Claimant sent the email to Nicky@mildreds.co.uk, which is the email address he was given by Sarah, one of the bakery chefs at the Dalston branch.

15. The Claimant did not receive any response from his email. It was not until 8 January that the Claimant was given the correct email address, after he enquired why he had not received a response. On the same day he was given the email address of Nicky Mori at Bespoke HR and he sent his letters to her. Ms Mori responded on the same day to acknowledge receipt.

16. Ms Mori corresponded with the Claimant by email in response to his letters, and they eventually met on 22 January at the Respondent's Dalston branch. In their discussion, the Claimant was informed that as the chef Marcello had now left the business, there was nothing that could be done about the appraisal. Ms Mori told the Claimant that he did not have a right of appeal on the outcome of his appraisal. However, he was told that the Respondent was open to feedback regarding the organisation of the kitchen. They discussed the need to review the kitchen assistant job description as the Claimant felt that he was being asked to do jobs outside of his role which impacted on his ability to do his actual role.

17. It is likely that the kitchen assistant job description was revised following the Claimant's meeting with Ms Mori. It is likely that the Respondent combined the two roles – kitchen assistant and kitchen porter – into one and made one kitchen assistant job description. The new job description requires a kitchen assistant to do both cleaning and food prep, when required. We had a copy in the bundle of documents, but the Claimant did not recall being given a copy before seeing it there.

18. When the new owners purchased the business, one of the changes they wished to make was to streamline the contracts of employment of their staff.

In February 2020, the Respondent began a consultation process with staff about the proposed changes to their terms and conditions of employment. Part of the process was the opportunity for staff to nominate themselves as employee representatives (reps). The Dalston branch where the Claimant worked was entitled to have two staff representatives – one from the kitchen and one from the front of house. The Claimant was interested in being the kitchen rep as he felt that he had experience as he already raised issues on behalf of himself and other staff.

19. However, the Claimant did not complete the nomination form to confirm his interest in becoming a kitchen staff representative. We find it likely that on 27 February there was a consultation meeting at Dalston, which was due to start at 3.30pm, which was therefore before the start of the Claimant's shift. We were not told whether the Claimant attended the meeting, and we were not shown the register of attendance nor do we know if one was taken. It is likely that the forms for nomination were given out at that meeting. We find that the Claimant verbally expressed to Olga, an interest in the role of being the kitchen rep. However, he did not complete the nomination form. It is unlikely that he was given a copy of the nomination form, but we were not told that he asked anyone for one.

20. By this time, the Claimant had Nicky Mori's email address and had recently met with her but did not contact her to find out more about the process of being nominating for the kitchen rep position. There were also individual consultation meetings about the changes being made by the new owners, and it was not clear to us whether he attended his meeting or whether he mentioned it to Ms Mori at his meeting. A woman called Jess who also worked in the kitchen completed the nomination form and was appointed as the kitchen representative. Jess was not black. It is the Respondent's case that she was not white British. This was not challenged by the Claimant.

21. The new contracts were issued in April 2020.

22. The Coronavirus pandemic resulted in a government lockdown beginning on 23 March 2020. It is likely that the business was not operating during lockdown. The Claimant's contract was signed on 2 July, which was also around the time that the government furlough scheme came into operation.

23. The contract confirmed that the Claimant's role was kitchen assistant. The Claimant was working 15 hours per week.

24. Clause 12 of the contract is titled '*return of employer property **and** right to search'*. Clause 12.1 referred to the duty to return company property on termination of employment. 12.2 stated that the employee has no right to remove company property from the premises, without permission from their manager. Clause 12.3 gave the employer the right to inspect and search an employee's person and their possessions, including their work area, bags, locker and vehicle, when on company premises. The subsection did not say that the employer needed a reason to conduct the search. It stated that the search must be conducted with maximum discretion, which indicated to us the requirement to be discrete when doing so. Clause 12.3 did not only apply on termination of contract. Although it is grouped together

with subclauses that refer to termination, 12.3 itself does not refer to termination of the contract but simply sets out the employer's right to search. We find it unlikely that the Claimant and most of the Respondent's employees would have been familiar with this clause, even though it was in their contract. It was a clause that was not frequently relied on.

25. On 17 September 2020, the Claimant cycled to work at about 3.30pm, which was the way he usually arrived at work. He parked his bike in the metal cage in the car park under the restaurant. At the time he arrived at the bike storage area, he saw Olga and another female, who he later learnt was called Dominique, in the area, chatting. Olga was his manager. She asked him why he was there. He told her that he had just arrived at work. He also asked her for the keys to the metal cage, so he could lock up his bike. She gave him the keys and he locked up his bike. Part of the Claimant's role is to ensure that the bin area is kept clean, and he spent a few moments checking the area. He gave the keys back to Olga and they all went into the restaurant.

26. Both Olga and Dominique later said in their statements that at the time that the Claimant was talking to Olga about the keys, they smelt marijuana on him. At the time, if they did, they never said anything to him about it.

27. Later, at about 4.30pm, the executive chef, Dan was leaving work, also by bicycle and was about to unlock his bike. He noticed the smell of marijuana in the storage area and identified it as coming from the blue bike. He went over to the bike and felt the bike bag and noticed that it emitted a strong smell of marijuana. He decided that he needed to discuss it with his management team and to find the owner of the bike so that he could take the investigation further. Dan spoke to Olga and Dom about what he had discovered. They identified the Claimant as the owner of the bike. Dan, Dominique, Olga and the Claimant went together to the storage area.

28. Dominique was a consultant for the Respondent who was on the premises that day conducting a compliance audit. The Claimant did not know who she was.

29. Once they got to the bike area, the Claimant confirmed that he was the owner of the blue bike that they looked at. All three managers stated that they could smell marijuana. Dominique began to ask the Claimant in what he considered to be a disrespectful manner, if they could look inside the bag to prove or deny the presence of drugs on his property. She told him that they suspected him of being in possession of an illegal substance on the Respondent's premises. She said that being under the influence of any substance may significantly impact his ability to work and could be against health and safety, given the environment in which he worked.

30. The Claimant refused to let them search his bag. It is likely that he said to them that he might or might not have something in his bag as he had been out and about before coming to work that day and had not come directly from his home. He did not let the managers conduct the search.

31. Dominique told the Claimant that she could not let him work as he might be intoxicated. She also expressed concern that he might have an illegal substance on the premises. She told him that if he would not open the bag to confirm that it did not contain the substance, she could not let him continue to work. The Claimant got hold of his bike and said that he would be leaving now. As he was cycling off into the distance, Dominique called after him to remind him that he had personal belongings in the restaurant. The claimant collected his belongings and left. The Respondent informed him that he would be hearing from HR.

32. Dominique telephoned Ms Mori on the same day. Ms Mori was the person at Bespoke HR who was assigned to the Respondent's contract and therefore dealt with all queries. She was told that the Claimant had been suspended and that she should write to the Claimant to confirm this. She was not asked for advice but Dominique informed her of the suspension and told to take the next steps, which included conducting an investigation. Dominique told her that the Claimant should be investigated for allegations of being intoxicated at work, being in possession of an illegal substance while at work and refusing to have his bag searched when suspicion was raised of being in such possession. Although in her statement Dominique stated that the Claimant was *possibly* intoxicated, but at the time she called HR and reported it as an allegation of misconduct, she also told HR that the Claimant had been under the influence of drugs.

33. Ms Mori spoke to the Claimant over the telephone to confirm his suspension, pending an investigation. She also told him what the allegations were against him and notified him that he would be getting a letter to confirm. On the following day, 18 September, Ms Mori wrote to the Claimant notifying him of the detail of the allegations. When they spoke, the Claimant asked for the written confirmation to be sent by post. Ms Mori did so and also put in on the Respondent's HR portal known as Planday and by email.

34. The Claimant's evidence was that he did not use email and only used it occasionally, if necessary. During the disciplinary procedure, the Respondent would put communications to him such as letters, policies and documents on Planday. The Claimant told us that he would access the documents but not read them as he relied on his smartphone to get on the internet, and it is not easy to read long documents on the phone. The Planday records showed that he had accessed the documents and we find that he knew to look there for communications from the Respondent. Also, he did tell the Respondent's managers that he preferred communication by post but had not said that he was unlikely to look at Planday.

35. When they spoke, Ms Mori gave the Claimant the option of giving a full statement about the incident, on either the 19 or 21 September. The Claimant stated that the earliest he could do it would be the 23 September. He told her that he would let her know what time was suitable for him to do so on that day.

36. It is likely that over the next few days, Ms Mori tried to contact the Claimant by telephone and by messages on Planday to confirm the time that they

would speak and for him to give a statement. The Claimant did not respond to her attempts to contact him and so she wrote to him again on 22 September and stated that if she did not hear back from him by midday on 23 September, she would proceed with the investigation without his input.

37. Ms Mori spoke to Dan, Olga and Dominique, as part of the investigation and got their versions of the incident. That was all contained in her investigation report.

38. She spoke to the Claimant on 23 September, and he provided a verbal account which is also reproduced in Ms Mori's investigation report. In his statement the Claimant complained that Olga and Dominique passed him on his arrival at work and had not said anything to him about smelling of marijuana. He also told her that he had offered to take the bag outside to be searched and that this was refused by the persons who are present. We find it likely that what he meant be that was that he had offered to have the bag searched in the street, in a more public space than in the locked cage, where the bikes were stored. The Claimant stated that Dominique had been aggressive to him and had spoken to him in a bullying tone. He stated that the had not been in possession of marijuana and that he had not been intoxicated at the time.

39. Once she had the Claimant's version, Ms Mori made sure that he was happy with what she had noted. The Claimant confirmed that he was and asked for copies of the Respondent's policies including the right to search and the drugs policy, to be sent to him by post.

40. After she spoke to the Claimant, Ms Mori contacted the managers again to get their comments on what the Claimant had told her. She spoke again, separately to Dan, Olga and Dominique. They all denied that there had been an offer to search the bag outside. They also denied that anyone had behaved aggressively towards the Claimant. They each agreed that the Claimant had stated that there *'may or may not be something in my bag as I did not come from home'.*

41. The investigation report referred to clause 12.3 of the Claimant's contract. This is the first time that this was referred to. At the time of the incident, the Claimant was not advised that he had the right to have a witness with him. He was also not told as recorded in his contract, that the Respondent had the right to search him and his belongings, whilst he is at work.

42. Ms Mori referred the matter for a disciplinary hearing. In her investigation report, Ms Mori stated that it was proved that the Claimant had breached his contract by not allowing the search to take place. We find that this was not proven at this stage. The Claimant had refused to allow the search to take place, but it had not been proven that this was a breach of contract as the search needed to be conducted in accordance with the contract. We find that Dan had not been there as an independent witness for the Claimant.

43. It was during the investigation that the allegation that the Claimant had been intoxicated, was dropped. There had been no evidence to support it and so it was dropped.

44. On 29 September, Beth Hughes also from Bespoke HR wrote to the Claimant to invite him to a disciplinary hearing to consider the allegations of firstly, being in possession of an illegal substance at work and secondly, refusing to comply with the company's right to inspect and search your person and possessions in accordance with the contract of employment.

45. When she initially wrote to the Claimant, she attached the investigation report, the PDF copy of the statements taken from the managers and a copy of his contract. The letter confirmed that the Respondent will be following the disciplinary process outlined in the ACAS guidelines. The meeting was scheduled for 1 October.

46. The Claimant received the documents by post on 30 September. He did not attend the hearing on 1 October which had been arranged on Google Meets. When Ms Hughes telephoned him on 1 October, he stated that it had been too short notice. He asked for it to be rearranged. He told her that he also could not attend as he had not had time to read the paperwork, that he needed to arrange his own notetaker and he would rather have the hearing in person, at the Respondent's Dalston branch.

47. The disciplinary hearing was rearranged for 7 October. After their conversation on 1 October, Ms Hughes wrote to the Claimant with an invitation to the re-arranged disciplinary hearing. The letter also stated that if the Claimant failed to attend the re-arranged hearing it might result in it being held in his absence. The letter asked the Claimant to contact the Respondent by 5 October, if there were any issues.

48. The Claimant did not contact the Respondent by the 5 October as requested in the letter and therefore it is likely that Ms Hughes was expecting him to attend. On 7 October, Ms Hughes attended and waited for the Claimant to attend. When he did not attend, she telephoned him to enquire whether he was going to attend. The Claimant told her that he would not be attending because his suspension was illegal, because he had not had the drugs, disciplinary and right to search policies sent through as requested. He reiterated his request for the meeting to be held in Dalston. The Claimant was quite angry during this conversation and eventually it ended when he hung up the phone on Ms Hughes. Nicky Mori confirmed that the Claimant had already asked for the drugs policy and the right to search policy but that the Respondent did not, at that time, have a staff handbook that it could share with him.

49. Their conversation was confirmed in Ms Hughes' letter of 7 October in which she stated that the right to search was contained in the contract of employment at clause 12.3 and that there was no separate right to search policy. She enclosed the Respondent's basic training manual and confirmed that there was a section in it entitled – *Drugs and Alcohol*. As far as his request for the disciplinary policy was concerned, she referred him to

the ACAS guidance, which is what the Respondent had already told him that it proposed to follow.

50. This letter was sent to the Claimant by email and by Planday. The letter invited him to another disciplinary hearing and confirmed that this was the third invitation, that the Claimant had to the disciplinary hearing and that if he failed to attend, it would be held in his absence.

51. On 8 October the Claimant wrote by post, to the Respondent's directors. One of those directors was Sam Anstey. In the Claimant's letter, he outlined his grievances against the Respondent and stated that he felt that there was an attempt to push him out of the business because of him speaking out about what he considered to be the bullying culture. He alleged that the disciplinary process he was facing was part of that. He stated that he had seen an email from Nicky Mori informing him that the meeting will go ahead on the 8 October, even if he is absent. He accused the Respondent of rushing through the process and of using bullying tactics. In the hearing the Claimant stated that he used the term '*bullying'* in his letters as another way of saying race discrimination.

52. By the time the Respondent received this letter, Ms Hughes had already made her decision on 8 October.

53. On 8 October, Ms Hughes waited for the Claimant to attend with a companion, as had been arranged. When the Claimant did not attend the Google Meets meeting, she went and ahead and considered the investigation report prepared by Ms Mori, which included that Claimant's statement, and the Claimant's contract of employment. Ms Hughes did not consider the staff training manual or anything else as the Respondent did not have any other relevant policies.

54. It was Ms Hughes' decision that she had a reasonable belief that on 17 September 2020, the Claimant had been in possession of an illegal substance/drug in the workplace, which was a fundamental breach of trust and confidence. In addition, she also held that it was unreasonable for the Claimant to have refused to have his bag searched. In setting out how she came to the conclusion on the refusal to have the bag searched, Ms Hughes acknowledged that the Claimant had the right to refuse to have his bag searched but that she believed that under the circumstances, he should have agreed and his refusal to do so was unreasonable.

55. Her decision to terminate the Claimant's contract of employment was mainly due to her belief that he had more than likely been in possession of an illegal substance, at work, on 17 September. The belief that he had unreasonably refused to have his bag searched was also part of the reason for his dismissal. Therefore, the Claimant was dismissed mainly, because the Respondent reasonably held a strong suspicion that he had been in possession of illegal drugs, at work, on 17 September. The Respondent also considered that the Claimant had unreasonably failed to allow his bike bag to be searched.

56. The Claimant's dismissal took effect from 9 October 2020.

57. On 13 October Mr Anstey wrote to the Claimant to tell him that the Respondent were going to consider his letter of 8 October as his appeal against dismissal. The Claimant was invited to an appeal hearing on 22 October to be conducted in Dalston. He enclosed a copy of the Respondent's new handbook.

58. On 19 October 2020, the Claimant wrote to Mr Anstey to lodge an appeal against dismissal. He stated that the 8 October was not actually an appeal letter but was really a complaint about general treatment at the restaurant. He asked for the hearing to be rearranged for 29 October and Mr Anstey agreed.

59. The Claimant referred to racism for the first time in the appeal letter. He referenced the same things that he had previously referred to as bullying and it is likely that he used those two words interchangeably.

60. The appeal hearing was conducted by the managing director and also the finance director. It took place on 29 October at the Dalston site. On 26 October, in preparation for the appeal hearing, the Claimant sent some documents to the Respondent containing a statement, his reply to the managers' statements and his letter of appeal.

61. It is likely that by this time the Claimant had been locked out of Planday, following his dismissal. However, we find it likely that he received the dismissal letter as it was sent to him by email, post and posted on Planday.

62. At the appeal hearing, Mr Anstey met with the Claimant, and they discussed the incident on 17 September. The Claimant had the opportunity to make all of his points. Mr Anstey had already read the Claimant's additional paperwork beforehand the meeting started. Therefore, we find that the Claimant had the opportunity to respond to statements provided by Dominique, Dan and Olga and to put his version of events to the managing director.

63. At the end of the appeal, Mr Anstey told the Claimant that he would speak to the people concerned and review the meeting notes. We find that after the appeal hearing, Mr Anstey spoke to the three managers concerned. He also gave both Beth Hughes and Nicky Mori the opportunity to provide further statements setting out their dealings with the Claimant, including the dates on when they communicated with him and what exactly happened. We had their detailed accounts in the hearing bundle. Mr Anstey downloaded the access information from Planday which showed the times when the Claimant accessed letters and other documents. There was no way of knowing if the Claimant had read the documents but there was evidence that he had accessed them. Mr Anstey also confirmed in his evidence that Planday does not allow documents to be accessed by a smartphone and so it was unlikely that the Claimant would have been able to access the documents sent to him in that way.

64. As the Claimant had made allegations of race discrimination, Mr Anstey created a rough questionnaire which he gave to staff at Dalston to enquire

whether anyone had directly or indirectly experienced racism in the workplace. We find that out of a total of approximately 25 members of staff, responses were only received from 7 members, one of whom stated that they were not confident that they would be able to recognise behaviours that might be considered racist practices. The rest stated that they had not seen or experienced any racist behaviours in the workplace or unjust treatment of colleagues in relation to their race. The Claimant told us that all the responders to the survey were white. We note that the survey asked people to put their names to their responses and that may have deterred some from taking part or from being completely honest in their responses.

65. This was a rough, first attempt by the Respondent to begin a conversation on these issues in the workplace. The evidence in the hearing was that the kitchen staff, who were not chefs, were from many different cultures, most of whom did not have English as their first language. It is unlikely that any of them responded to this survey.

66. Mr Anstey considered the information that he gathered during his investigation and the documents that had been sent to the Claimant, along with the Claimant's appeal documents. With his decision letter, he attached the recent statements taken from the managers and the notes from Ms Hughes and Ms Mori.

67. The appeal decision was set out in a letter dated 10 November. In that letter, Mr Anstey addressed each of the Claimant's appeal points. He concluded that the disciplinary process had been reasonably followed and that the Claimant had been given ample opportunity to make his case. He upheld the decision to dismiss the Claimant on the grounds of gross misconduct. He also stated that he did not believe that Dominique had behaved aggressively towards the Claimant on 17 September or that there were any concerns of racism at the Dalston restaurant.

68. We had no additional evidence on the allegation of Olga referring to the Claimant as a drug pusher, after his dismissal. We were not told when it was alleged to have happened or who witnessed it. We also had no evidence on the Claimant's allegation that someone else had been caught with drugs in the restaurant and no action had been taken. The Respondent's witnesses were not asked about either of these two allegations and we are therefore unable to make any findings of fact on them.

Law

Direct Race Discrimination

69. Section 13 of the Equality Act 2010 (EA) states as follows:

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

Section 23 EA provides that:

(1) On a comparison of cases for the purposes of section 13, 14 or 19, there must be no material difference between the circumstances relating to each case.

70. If the Tribunal considers that a comparator was or would have been treated more favourably, it must consider whether this difference in treatment was due to the protected characteristic. This was referred to in the case of *Nagarajan v London Regional Transport* [1999] ICR 877 as *'the crucial question'*. Lord Nicholls in that case observed that in most cases this will call for some consideration of the mental processes of the alleged discriminator.

71. As the respondent submitted, the crucial question for the Tribunal, is why the Claimant was treated as he was. In the case of *Madarassy v Nomura International Plc* [2007] IRLR 246, the Court of Appeal stated that *"The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal 'could conclude' that, on the balance of probabilities, the Respondent has committed an unlawful act of discrimination."*

72. The burden of proving a discrimination complaint rests on the employee bringing the complaint. However, it has been recognised that this may well be difficult for an employee who does not hold all the information and evidence that is in the possession of the employer and also because it relies on the drawing of inferences from evidence. This is addressed in section 136(2) of the Equality Act which states that:

"If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred. [But] if this does not apply if A shows that A did not contravene the provision."

73. There is a substantial volume of case law that seeks to provide guidance on the concept of the "shifting burden of proof".

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

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

75. In the same case tribunals were cautioned against taking a mechanistic

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

76. If, at the end of its analysis the Tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, then that is sufficient to establish discrimination. It need not be the only or even the main reason.

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

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

78. If the burden does shift, the employer is required only to show a non-discriminatory reason for the treatment in question; it is not required to show that it acted reasonably or fairly in relying on such a reason. *"The explanation for the less favourable treatment does not have to be a reasonable one; it may be that the employer has treated the Claimant unreasonably. That is a frequent occurrence quite irrespective of the race, sex, religion or sexual orientation of the employee."* (See the judgment in the case of *London Borough of Islington v Ladele* [2009] IRLR 154 per Elias J).

Unfair Dismissal

79. Section 94(1) Employment Rights Act 1996 (ERA), states that an employee has the right not to be unfairly dismissed by his employer. Section 98(1) and (2) states that it is for the employer to show the reason for the dismissal and in the context of this case, that it was for misconduct.

80. The case of *BHS Ltd v Burchell* [1980] ICR 303 sets of the relevant considerations for a tribunal when assessing the fairness of a dismissal for misconduct. The employer must firstly, hold a genuine belief that the employee had committed misconduct. The employer is not required to have conclusive, direct proof of the employee's misconduct but only a genuine belief. Secondly, the employer must have reasonable grounds for that

belief; and thirdly, it must have been derived from a reasonable investigation.

81. If the Tribunal concludes from all the evidence that this is the case; then the next step for the Tribunal is to decide whether, taking into account all the relevant circumstances, including the size of the employer's business and the substantial merits of the case, the employer has acted reasonably in treating it as a sufficient reason to dismiss the employee. In determining this, the Tribunal has to be mindful not to substitute its own views for that of the employer. Whereas the onus is on the employer to establish that there is a fair reason for the dismissal and that the employee was indeed dismissed for that reason; the burden in this second stage is a neutral one. The Burchell test applies here again and the tribunal must ask itself whether what occurred fell within the "*range of reasonable responses"* of a reasonable employer.

82. As Browne-Wilkinson J said in the case of *Iceland Frozen Foods v Jones* [1982] IRLR 439, *"the function of the Tribunal as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair; if the dismissal is outside of the band it is unfair."*

83. The tribunal must look at the overall fairness of the procedure, in particular the 'thoroughness and open-mindedness of the decision-maker' and not just consider whether the appeal had taken the form of a rehearing rather than a review, which had been the earlier way of looking at it. (See *Taylor v OCS Group Ltd* [2006] ICR 1602).

84. The respondent submitted that the Tribunal should also consider the effect of the case of *Polkey v AE Dayton Services Ltd* [1987] IRLR 503, in which it was held that where there are any findings of procedural unfairness, the tribunal must go on to consider whether such matters, if remedied, would have made any difference to the decision to dismiss. The *Polkey* reduction may be expressed as a percentage reduction or a limit on the future loss.

85. Lastly, where the tribunal finds that a dismissal was to any extent caused or contributed to by any action of the employee, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding. The Respondent submitted the case of *Nelson v BBC (2)* [1980] ICR 110 established a three-step test for applying contributory fault reductions, as follows: (1) there must be some culpable or blameworthy conduct; (2) the conduct must have caused or contributed to the dismissal (not be irrelevant to it); and (3) it must be just and equitable to reduce the award.

86. The Tribunal will now set out the issues from the list on pages 14 and 15 of the hearing bundle and give its decision on each.

Applying law to facts

<u>Race Discrimination</u>

87. We will start with the allegations of race discrimination. The Claimant identifies as Afro Caribbean.

Did the Respondent subject the Claimant to the following detriments?

Allegation (a) 11 July 2019, inaccurate appraisal by Marcello and Lisa

88. We accept the Claimant's account of the appraisal meeting. It is our judgment firstly that it is not good practice for a manager to attend an appraisal with the form already completed. If a manager is going to do that then good practice would be for s/he to give the employee a copy to read beforehand so that they can both start the appraisal meeting, knowing what has been written and ready to discuss it. That is not what happened here.

89. We did not have evidence of other appraisals done by Marcello to be able to conclude that he conducted the appraisal in this way because of the Claimant's race. It is possible that this was the way in which Marcello did all his appraisals.

90. The Claimant's initial complaint about this was that it was inaccurate. He did not refer to his race but in his response dated 1 August, he referred to being bullied in the meeting he attended with Marcello and Lisa. It is highly likely that when he met Ms Mori in January, he told her about being bullied by Marcello in the appraisal meeting.

91. It is our judgment on balance, that the Marcello put inaccurate information into the appraisal form and did so well before the appraisal meeting. It is also our judgment that it is highly likely that, contrary to what was written, the Claimant performed well in his role. We did not hear about Lisa in the hearing.

92. The Claimant therefore suffered a detriment by having inaccurate information on his appraisal record.

Allegations (b) - Failure to reply/deal with the Claimant's complaints about the appraisal; and (c) - Failure to deal with the Claimant's complaint dated 4 December 2019.

93. These relate to the way the Respondent dealt with the Claimant's complaint about the appraisal.

94. It is our judgment that finding that the Claimant submitted his letter dated 1 August to the Respondent. It would make no sense for him to write such an emotional and strong letter and then not submit it to the Respondent. In our judgment, the Claimant put the letter on to his line manager, Olga's desk at the Dalston restaurant, for her attention and that it was reasonable for him to do so, as she was his line manager.

95. His letter was not addressed and when he did ask about it, he was given an incorrect email address for HR.

96. The Respondent clearly did not have a process by which letters from employees were forwarded to HR or to senior management. That was to the Claimant's detriment. Also, it was the Respondent's responsibility to ensure that the Claimant had the correct email address of HR. The fact that it took 5 weeks for it to be sent to Ms Mori, is the Respondent's responsibility. In our judgment this was bad practice by the Respondent.

97. We did not hear from Olga in evidence. We did not know if she saw the Claimant's letter and ignored it or that she made a decision not to forward it to senior management and not to give the Claimant the information so he could do so himself. The person who gave him the incorrect email address for HR was not Olga but a different employee.

98. The complaints at (b) and (c) fail as allegations of race discrimination

99. The Claimant wrote an email to Ms Mori in December and in an attachment, the Claimant added matters that had arisen in the interim period. Some of which were about bullying which we accept was sometimes the word the Claimant used to refer to race discrimination to his employer without naming it directly.

100. It is our judgment that Ms Mori responded immediately, upon receipt of the Claimant's email. She quickly arranged a meeting with him to discuss the issues he wished to raise. They discussed the appraisal and the Claimant's feelings about it and Ms Mori informed him that Marcello had left the business and that there was no right of appeal to an appraisal. The Claimant did not make any further complaint about the appraisal.

101. It is likely that the Respondent took on board the Claimant's complaints about the way in which his performance was assessed. In an attempt to address the apparent confusion between the roles of kitchen assistant and kitchen porter, Ms Mori worked with the new Head Chef on re-drafting the job descriptions. It is likely that the Claimant was told that this was one of the things that the Respondent was going to do to address the issue he raised.

102. It is therefore our judgment that the Respondent addressed the Claimant's complaint by meeting with him on 22 January, redrafting the job description so that parts of the kitchen porter and kitchen assistant roles were combined into one kitchen assistant role. Those were the steps that the Respondent took to resolve the issues that the Claimant raised in his complaints about the appraisal and on 4 December 2019. Also, Ms Mori wrote to him on 23 January to confirm the action points from their meeting and again on 4 February, to check that everything was okay.

103. It is our judgment that the Claimant was not subjected to the detriments alleged in allegations (b) and (c) as the Respondent addressed his complaints in the ways set out above. Although it took some time for the complaints to reach HR, the Respondent did respond to his complaints and did address them. As Marcello was no longer employed, the Claimant's complaints could not have been addressed with him. The Respondent made changes to ensure that there could not be any further confusion in

relation to the kitchen roles and took steps to ensure that the Claimant's complaints were heard and looked into.

104. It is therefore our judgment that this fails as an allegation of less favourable treatment and therefore of race discrimination.

Allegation (d) – the Claimant was not appointed to the position of kitchen staff employee representative. The comparator for this allegation is a white female, new appointed, known as Jess.

105. It is our judgment that the Claimant did not submit a written application to be the nominated kitchen representative. As he said in his statement, he spoke to someone and expressed an interest. It is likely that he spoke to Olga. The process of becoming a kitchen representative was either to complete the form and put yourself forward for the position or that another member of staff completes the form and nominates you. It is our judgment that this was open to all and that it was not kept from the Claimant. Whether or not the Claimant was at work when the Respondent held the meeting and outlined the process, it was clear that he knew about it. He was in touch with Ms Mori and knew her email. He did not ask her for a form to complete to nominate himself for the kitchen representative. He did not follow the process. Also, any other member of staff could have used the form and nominated him. Neither of these things happened.

106. Jess was not a black member of kitchen staff. However, it is our judgment that she is not a correct comparator with the Claimant because unlike the Claimant, she completed the form to nominate herself to become kitchen staff representative. This was an important difference between her and the Claimant. Jess would only be a comparator to this allegation if she also had also not applied for the position. As she did apply, she is not a proper comparator.

107. It is also our judgment that the decision to appoint the kitchen staff rep was not a decision of the local management. It was done by HR. In submissions the Claimant named the member of management who had actively discouraged him from applying as Olga. However, it remains the case that he did not submit an application for the post of kitchen representative and the Respondent appointed the person who applied.

108. it is our judgment that there was no decision not to appoint the Claimant as the Claimant had not applied for the position.

109. The Claimant was not subject to less favourable treatment in relation to the appointment of a kitchen employee representative. It is our judgment that if he had submitted an application, he would have been considered for the role. It is also our judgment that if Jess had not submitted an application, it is unlikely that she would have been appointed to the role of kitchen staff employee representative.

110. It is our judgment that this allegation fails as an allegation of race discrimination.

Allegation (e) – Allegations on 17 September with regard to drugs. This Claimant will say that this was a stereotypical assumption based on race.

111. This relates to the incident on 17 September, which led to the Claimant's dismissal.

112. It is our judgment that when the managers went out of the restaurant with the Claimant so that he could identify his bike, Dominique said that the Claimant was more than likely to be intoxicated or under the influence of drugs. The evidence was that she raised this issue then and included it when she spoke to Mr Mori to report the incident, as one of the factors which made her suspend the Claimant. It was one of the allegations that Ms Mori had to investigate.

113. It is our judgment that this was a stereotypical opinion based on her perception of the Claimant as an Afro-Caribbean male. We say this because there was no evidence from anyone that the Claimant was under the influence of drugs that day. No one had observed him as conducting himself as though he were under the influence or intoxicated. The Claimant had been working in the kitchen for at least an hour by the time he was asked to go outside to identify his bike and to agree to the bag search. There was no evidence that had behaved in a way at work which demonstrated intoxication. Later, Dominique stated that she smelt drugs on the Claimant earlier while he was talking to them about keys on his arrival at work. In our judgment, that is unlikely to be true as, given the Respondent's strong response to the possession of illegal drugs, we would have expected to her to challenge him about it at the time, which she did not.

114. It is our judgment that Dominique's allegation that the Claimant was likely to be intoxicated and/or under the influence of drugs was unlikely to have been based on a smell from him or from his conduct. Having not heard from her in evidence, we had her statement and that of her colleagues as well as the Claimant's evidence and statement, from which we made the findings above.

115. It is our judgment that the allegation that he was likely to be intoxicated or under the influence of drugs was one of the issues which led to the Claimant's suspension, in addition to his refusal to have his bag searched and the allegation that he was in possession of an illegal substance at work.

116. At the same time, that allegation was not one of the allegations that was referred to a disciplinary hearing. The only allegations that survived the investigation were the two allegations which eventually led to his dismissal. Those were: - that the Claimant had been in possession of an illegal substance and that he had refused to have his bag searched. Those were the allegations which were referred to a disciplinary hearing.

117. It is therefore our judgment that one of the allegations that the Claimant faced on 17 September, that he was likely to be under the influence of drugs or intoxicated, was a stereotypical assumption based on his race as an Afro Caribbean male.

118. It is not our judgment that the allegations that he had been in possession of an illegal substance at work and that he refused to have his bag searched were less favourable treatment made on the grounds of race. The managers all gave statements that the Claimant's bag on his bike smelt of marijuana. The Claimant refused to have his bag searched. He was then asked to leave because Dominique did not want him on the premises as she believed that he was likely to be intoxicated or under the influence. It is our judgment that the allegations that the Claimant was in possession of an illegal substance, which was likely to have been marijuana and that he refused to have his bag searched were not allegations based on stereotypical assumptions related to his race but were based on what the Respondent's managers witnessed on the day. Dan smelled the substance from the Claimant's bike bag before he had identified that the bag belonged to the Claimant.

119. It is our judgment that the Claimant has proved one fact from which we can infer that he was treated less favourably on the ground of his race when Dominique assumed that he was likely to have been intoxicated and/under the influence, when he attended work on 17 September. It is likely that if he had been a white male with the smell of marijuana emanating from his bike bag, Dominique would not have assumed that he was likely to be intoxicated and/or under the influence if there had been no behaviour from him that suggested intoxication. There was no such conduct from the Claimant. He had been working in the kitchen for at least one hour before he was called out to identify his bike and there was no conduct observed which would lead anyone to suggest that he was likely to be intoxicated or under the influence.

120. It is our judgment that facing an allegation that he was intoxicated or under the influence of drugs while at work, when there was no evidence of this, was less favourable treatment of the Claimant.

Allegation (f) – 9 October 2020 dismissal. The Claimant will say that white staff believed to be in possession of drugs would not have been dismissed.

121. We did not have evidence of a white member of staff being at work, in possession of drugs, who had not been dismissed.

122. In his documents, the Claimant referred to another member of staff who had been in possession of drugs at work but who had not been dismissed. However, we were not given any details of this person in the hearing, and we were not told of their name, race or ethnic origin nor did we have sufficient details of the situation to be able to compare or even decide when or if it happened.

123. The Claimant also made this allegation in his letter of appeal, but he did not provide any particulars in his appeal hearing. It is our judgment that if the Claimant had provided more information about white colleagues who he believed had been in possession of drugs at work and had been treated differently, to Mr Anstey, it is likely that he would have investigated it. Mr Anstey investigated every other issue that the Claimant raised in the

disciplinary process, and it is likely that he would have followed up on that too.

124. We did not have evidence of this as the Claimant did not give him any details to investigate.

125. Therefore, in relation to the allegation that there was someone of a different race at the Respondent who had been in possession of illegal drugs but not dismissed; the Claimant has failed to prove facts from which we can infer that this happened or that the Respondent would not have dismissed a white member of staff found to be in possession of an illegal substance, while at work.

126. This allegation fails.

Allegation (g) – Olga (General Manager) referred to the Claimant at a meeting as a "drug pusher" in from of other members of staff. This was after dismissal.

127. We did not have any more evidence about this, apart from the allegation. We were not told of the context of this allegation or how the Claimant came to the conclusion that this had been said. It was not covered in his evidence. The burden is on the Claimant to prove his allegations of race discrimination and he has failed to prove that this happened.

128. Therefore, in relation to this allegation, the Claimant has failed to prove facts from which we can conclude that this happened.

If the Claimant had been subjected to these detriments, were they less favourable treatment because of race?

129. *We will now go through each of the allegations above and assess, where there was less favourable treatment, whether there was evidence that it had been done on the grounds of race.*

130. Allegation (a) - it is our judgment that the Claimant was treated less favourably. However, we did not have sufficient information from which we could conclude that any inaccuracies on the appraisal form that Marcello completed were written because of the Claimant's race. We also did not have evidence from which we could infer that the way in which Marcello conducted the appraisal meeting was done because of his race.

131. Marcello could have been stereotyping the Claimant because of his race or he could genuinely have been unhappy about the Claimant's performance. We note that he also made positive comments about the Claimant in the appraisal form which would point away from it being done on the grounds of race. Also, it is likely that there had been some confusion about the job description and what duties could be given to kitchen porters and what to kitchen assistants and that may have fed into this appraisal. The Respondent addressed this point, once it was brought to the attention of HR.

132. It is also our judgment that this occurred on 11 July 2019 and the Claimant's claim was brought in March 2021. The complaint is out of time and the Claimant did not give us any information on why he did not raise a complaint with the Tribunal about it at the time although he was clearly very unhappy with the appraisal.

133. This complaint fails as a complaint of race discrimination firstly, because the Tribunal did not have evidence that Marcello had conducted the appraisal in the way he did because of the Claimant's race and secondly, because it was issued outside of the statutory time limit.

134. This allegation fails and is dismissed.

135. It is our judgment that as set out above, Allegations (b), (c), (d), (f) and (g) all fail as allegations of less favourable treatment on the grounds of race. In relation to allegation (b) there was a delay of 5 weeks in the letter reaching the Respondent because Olga either did not forward it to HR or because she failed to give the Claimant the correct information so that he could forward it himself. We did not have enough facts from which to conclude that the reason why it was not forwarded and why he was told that he had to do so, was his race.

136. In relation to Allegation (c), it is our judgment that the Respondent did address the Claimant's complaints, although as Marcello was no longer employed the Claimant did not get a rewrite of his appraisal. He may not have got the outcome he wanted but that does not amount to a failure to reply or deal with his complaint of 4 December. The allegation fails.

137. The Claimant did not apply for the position in relation to Allegation (d) and there was no evidence to support Allegations (f) and (g).

138. It is our judgment that they were not acts of less favourable treatment.

139. Those allegations all fail and are dismissed.

140. Allegation (e) - It is our judgment that one of the allegations that the Claimant faced on 17 September 2020 was done on the grounds of his race. It is the single allegation that the Claimant was likely to be intoxicated or under the influence of drugs. It is our judgment that this was based on Dominique's stereotypical assumption about the Claimant. It is our judgment that if she had smelled drugs on him when he arrived at work when they were discussing the keys to the cage, she would have challenged him about it as she was a senior member of staff and knew that he was about to go in to work in a busy kitchen. She did not do so because it is unlikely that she smelled anything on him. At the time he was suspended she told him that he was likely to be intoxicated and or under the influence. In our judgment, this was based on a stereotype of Afro Caribbean men and not based on any observation of the Claimant or any behaviour that he exhibited. The Respondent had a suspicion that he was in possession of an illegal substance in his bike bag, namely marijuana but that does not mean that he was under the influence at that time.

141. It is our judgment that this single allegation was less favourable treatment of the Claimant, on the ground of his race.

142. This related to an incident that occurred on 17 September 2020. The claim was brought in March of 2021. The claim is approximately 3 months out of time. The Claimant would have been aware that he had been accused of being intoxicated at work at the time of the incident as Dominque said that this was why she could not let him return to the kitchen to work. It was not until he received the invite to the disciplinary hearing that he found out that the intoxication allegation was not going to be referred to the disciplinary hearing.

143. We considered whether it was just and equitable to extend time to allow us to consider the allegation. The Claimant was not legally represented. The Claimant waited until the disciplinary process was complete before bringing this case. It is likely that he felt that he had to complete the disciplinary process before bringing a claim. We do not know when he knew that he had the right to bring a complaint in the employment tribunal. We know from EJ Russell's judgment sent to the parties on 7 January, that he had difficulty accessing computers and did not consider himself computer literate. That was one of the issues in his communication with the Respondent to arrange meetings and we have already made findings about this above.

144. We were not told that the delay in this complaint being issued affected the Respondent's ability to defend it. Although we did not hear from Dominique in the hearing, we were not told whether she is still employed by the Respondent. The Respondent was able to produce evidence and defend the claim.

145. In the circumstances, it is our judgment that it is just and equitable to extend time to allow us to consider this allegation.

146. The burden therefore shifts to the Respondent for a non-discriminatory reason for the assumption that the Claimant is intoxicated and/or under the influence at work.

147. As already stated, the Claimant did not behave at work for the first hour of working as someone who was intoxicated because if he did, this would have been picked up by his managers.

148. The Respondent had a reasonable suspicion that the Claimant had an illegal substance in his bag. The smell of that substance was picked up by Dan on his arrival at work. Dan reported this to the other managers before he knew that the bike belonged to the Claimant. There was therefore a reasonable suspicion that the Claimant was in possession of an illegal substance at work. However, there was nothing from his behaviour, his work, or his demeanour that day which led Dominique to suspect him of being under the influence or intoxicated.

149. There is no non-discriminatory, proved reason why that allegation was made. It is our judgment that she made that allegation based on a

stereotypical assumption that Afro Caribbean men use marijuana and that if he was in possession of it that meant that he had also used it.

150. It is our judgment that the Claimant succeeds and is entitled to a remedy for this particular allegation.

151. In relation to Allegation (e), it is therefore this Tribunal's judgment that the Claimant was treated less favourably on the grounds of his race when he was told that he could not return to work as it was likely that he was intoxicated or under the influence of drugs, when he was asked about this as part of the investigation and had to address this it in his statement. He would not have known that it was not going to be considered at the disciplinary hearing until he received the letter of invitation.

152. The Claimant succeeds in relation to this allegation which was part of the allegations made at the time of the incident on 17 September.

153. The Claimant is entitled to a remedy for his successful complaint and the Tribunal will address this once it has given its judgment on the unfair dismissal complaint.

Unfair Dismissal

154. The test in an unfair dismissal complaint is not what the Tribunal would have done if the members of the Tribunal were faced with the same situation or whether some lesser sanction than dismissal would, in the Tribunal's view, have been appropriate. The test is whether, on the facts of the case, no reasonable employer in the Respondent's position could have dismissed the Claimant. Was it within the band of reasonable responses for the employer to believe that on balance, the Claimant committed misconduct and was it within the band of reasonable responses for his employment to be terminated because of that misconduct?

155. This relates to the investigation, the disciplinary and appeal hearings and the outcome.

The first question for the Tribunal is 1) What was the reason for dismissal? The Respondent relies upon conduct, the Claimant does not accept this, saying it was because of a complaint he made around 4 December 2019.

156. The Respondent relied on gross misconduct. The Claimant's case was that he was dismissed because of a complaint he made around December 2019. The Claimant was dismissed at the end of a disciplinary process which began after he refused to allow the Respondent to search his bike bag on 17 September 2020. Also, the Respondent considered that the Claimant was most likely to be in possession of illegal drugs on his work premises that day.

157. There was no evidence that the disciplinary process which the Claimant faced in September 2020 was in anyway related to the written complaint which the Claimant made in December 2019. His complaint was mainly about the appraisal process and the way in which his then line manager

spoke to him in that process. By the time the Claimant came to work on 17 September, Marcello was no longer his manager. The Claimant's complaint had made its way to the desk of the Respondent's HR consultant, Ms Mori, who met with him in January 2020.

158. We did not have evidence that the Respondent took against the Claimant for writing that letter. The Respondent attempted to address the issues that he raised in it by meeting with him and re-drafting the job descriptions of the kitchen assistant and kitchen porter to make the differences clearer to managers. There was no evidence before us that the Respondent was ill disposed towards the Claimant because of that letter or because he raised issues about his employment. In response to the Claimant's letter, it is our judgment that Ms Mori made a genuine attempt to address his complaint and that she kept in touch with him afterwards to make sure that there were no other issues for him at work.

159. The Respondent has proved that the Claimant committed misconduct on 17 September by more than likely being in possession of illegal drugs in the workplace and also by refusing to allow his bag to be searched by his managers when they made a reasonable request following one of them smelling what he believed to be marijuana from the Claimant's bike bag.

160. The person who dismissed the Claimant, Beth Hughes, had not been the subject of his complaint in December 2019. She was part of the HR company used by the Respondent, but she was not the consultant who dealt with the Claimant's complaint or who re-drafted the job descriptions. She had no prior dealings with the Claimant before the disciplinary process.

161. The evidence showed that the reason for the Claimant's dismissal was his misconduct on 17 September 2020, namely a reasonable belief that he had been in possession of an illegal substance at work and to a lesser extent, that he had unreasonably refused to allow his managers to search his bike bag.

162. It is this Tribunal's judgment that the reason for dismissal was the Claimant's misconduct.

The second question for the Tribunal was (a) Did the Respondent have a genuine belief that the Claimant had committed an act of misconduct (b) was such belief reasonable and (c) was it based on reasonable investigation?

163. In relation to the whole process, it is this Tribunal's judgment that there were a number of attempts by the Respondent, at communicating with the Claimant, at every stage of the disciplinary process, before he engaged with it. This may be because the Claimant has issues with his access to Planday and to email, as he told us in the hearing and as he told EJ Russell in the preliminary hearing on 18 October 2021, or it could be because he found the whole process too difficult.

164. It is our judgment that Ms Mori conducted a thorough investigation of the allegations that she was given by Dominique when she spoke to her on the phone.

165. In conducting her investigation, Ms Mori spoke to the managers who were present when the Claimant was brought out of the kitchen to be confronted by the bikes. She spoke to the Claimant after she spoke to the managers and got his version of events. She asked the Claimant whether he had been intoxicated at the time and once he denied that he had been, she dropped that allegation as there was no independent evidence of it.

166. After she spoke to the Claimant – she again spoke to the three managers to get their comments on what the Claimant said.

167. She then put the evidence together in a report and sent it to Ms Hughes as she had been the person nominated to conduct the disciplinary hearing. There was no one else that the Claimant said she should have interviewed and there was no other evidence that he said to us in this hearing that she should have considered.

168. The investigation did not refer to anything related to the Claimant's past issues with the Respondent that should have been considered.

169. In the investigation report, Ms Mori referred to the right to search in paragraph 12.3 of the contract. She stated in the *'facts established'* part of her report that the investigation had established that the Claimant had breached his contract by refusing to be searched. In this Tribunal's judgment, the investigation had not established that the Claimant had breached his contract by refusing to be searched. It established that he refused a reasonable request from a manager to allow his bike bag to be searched for illegal substances. Ms Mori did not take any decision on the Claimant's continued employment. She simply conducted the investigation and decided that he should face a disciplinary hearing on two of the three allegations she considered. It was up to the person conducting the disciplinary hearing what they made of all the points in the investigation report, after they heard from the Claimant.

170. The investigation confirmed that the Claimant had not asked to be allowed to go outside and get an independent witness to be there while his bag was searched.

171. It is therefore our judgment that the Respondent conducted a reasonable investigation into the allegations of misconduct on 17 September 2020.

172. We then looked at the disciplinary hearing. It is our judgment that there were three attempts to have this hearing and that the Respondent wrote to the Claimant on each occasion by email, post and Planday. On the last attempt, the Claimant was contacted about it by email and Planday and was told about it on the phone. The Claimant only communicated with Ms Hughes by post, and they spoke on the telephone on two occasions. It is our judgment that he did check his emails on the last occasion, which confirmed to us that he did know that the disciplinary hearing was going ahead on 8 October. He did not respond to the deadlines in the letters and did not let the Respondent know that he was not coming to the hearings.

173. Ms Hughes would not have known for certain that he was not going to attend the disciplinary hearings on 7 and 8 October, until the actual day. It is also our judgment that by 8 October the Claimant had all the documents that were available. The Respondent did not have a separate drugs and alcohol policy and also did not have a separate search policy. The Respondent could not send him documents that it did not have.

174. The Respondent was aware that the Claimant wanted the hearing to be done at Dalston, in person. However, given the social distancing rules that were in place at the time, it was not unreasonable for the Respondent to conduct this hearing online. In addition, it is our judgment that prior to the disciplinary hearing, the Claimant and Ms Hughes discussed it by phone and that their discussion was confirmed in the subsequent letter, but at that point, the Claimant was refusing to attend any disciplinary hearing.

175. It is therefore our judgment that it was fair for the Respondent to go ahead with the disciplinary hearing on 8 October.

176. Ms Hughes was clear in the hearing, and it is our judgment that the main reason for the Claimant's dismissal was her belief that he had been in possession of an illegal substance at the Respondent's premises. He was also found to have refused to have his bike bag searched and this was unreasonable, given the circumstances.

177. The Respondent did not dismiss the Claimant for breach of any policy or for being intoxicated.

178. It is our judgment that the Request to search the Claimant's possessions was not done in accordance with the contract of employment. Firstly, at the time they were gathered around the bike where it was parked, none of the managers reminded the Claimant about clause 12.3 off his contract which gave a right to search his belongings. It is our judgment that what happened was not in accordance with this section. It is also our judgment that the right to search in clause 12.3 did not only apply to the situation when someone is being dismissed. Although other parts of clause 12 referred to dismissal, clause 12,3 did not. However, it is our judgment that clause 12.3 was not invoked. Secondly, if the Claimant had been told that the Respondent wanted to search his bike bag under clause 12.3, he would have had a right to have an independent witness, who would have needed to be someone of his choosing. As the person who first raised the alarm of the smell of drugs coming from the Claimant's bike bag, Dan was effectively the first person to accuse the Claimant of gross misconduct, in those circumstances, it would not have been appropriate for him to also attend a search as the Claimant's independent witness as he was not neutral. It would have needed to be someone of the Claimant's choosing. However, the Respondent did not rely on the clause at the time the managers requested to search the Claimant's bike bag. They simply asked him to let them search his bike bag because they smelt what was mostly likely an illegal substance and they wanted to check whether that was in his bag. It is our judgment that in the circumstances, this was a reasonable request, which the Claimant refused.

179. From Ms Hughes live evidence and from the letter of dismissal, it is our judgment that the Claimant was dismissed based on the evidence from Olga, Dom and Dan in their witness statements, that they all smelled a strong smell of what was likely to be cannabis or marijuana coming from the Claimant's bike bag. They confirmed that to be the case when Ms Mori went back to them having spoken to the Claimant. That was the main basis of the decision to dismiss the Claimant.

180. It is this Tribunal's judgment that it was reasonable for Ms Hughes to accept the findings of the investigation that the Claimant's bag smelled strongly of an illegal substance which was likely to be marijuana and that being in possession of this at work breached the implied term of trust and confidence which underpins every contract of employment, between employee and their employer. The statements led to a reasonable conclusion that the Claimant breached that term on 17 September 2020 and that this was an act of gross misconduct.

181. Ms Hughes' decision was that this warranted summary dismissal because of the seriousness of the offence. As far as she was concerned, this had never happened before. She did not have access to the Claimant's personnel records and had not been told of any previous disciplinaries with the Claimant. She was also unaware of any complaints that he had made in December 2019 or at any other time.

182. The decision to dismiss the Claimant was within the band of reasonable responses. It is likely that other employers faced with the managers' statements about the strong smell emanating from the Claimant's possessions on the employers' premises and his unreasonable refusal to allow his bag to be searched, would have come to the same conclusion and made the same decision.

183. It is our judgment that the Claimant's letter of 8 October was treated as an appeal. Mr Anstey met with the Claimant who therefore had the opportunity at that stage to go through all his points regarding the dismissal and his previous issues with management at Dalston.

184. Mr Anstey investigated all points relevant to the Claimant's case.

185. The Claimant relied on the fact that the decision to dismiss him had been made on probability rather than on absolute proof of his possession of illegal drugs. It was on this point that he based his appeal and possibly this case.

186. Mr Anstey was not told of any procedural fault with the process followed by Ms Hughes or Ms Mori or that there were any other witnesses that should have been spoken to or anything else that should have been considered. Although the Claimant's appeal letter stated that the Respondent's managers had got together and ganged up on him, he never denied that there had been a smell. He also did deny possession. Mr Anstey came to the conclusion that Ms Hughes had conducted a fair hearing and that there was nothing in the appeal to challenge her conclusion. We concur with his decision.

187. It is our judgment that the Respondent had a genuine belief that the Claimant had been in possession of an illegal substance at work in his bike bag on 17 September 2020 and that was an act of gross misconduct. That belief came from the evidence given by three managers to the investigation. When challenged, those managers confirmed their evidence. It was reasonable for the Respondent to accept their evidence against the Claimant's denial that he had been in possession of an illegal substance. Even though no one had seen the drugs, the evidence was of a strong smell which was identified as likely to be marijuana. The fact that the Claimant unreasonably refused to allow the Respondent to search his bike bag was a supporting factor but not the main reason for dismissal.

188. In the circumstances, the Respondent's belief that the Claimant was in possession of an illegal substance was reasonable and based on a reasonable investigation.

189. In those circumstances, the decision to dismiss was reasonable, having regard to equity and the substantial merits of the case.

190. In the circumstances, the Claimant's dismissal was fair and reasonable.

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

192. It is therefore our judgment that the Claimant succeeds on one aspect of his race discrimination complaint. The other aspects fail and are dismissed.

193. The Claimant is entitled to a remedy for his successful complaint of race discrimination. We judge at present that it should be in the lower Vento band. We are open to submissions on this from either party.

Remedy

194. After a short adjournment, the parties made submissions on this issue of the remedy that should be awarded to the Claimant for his successful complaint of race discrimination. The law and submissions considered by the Tribunal were as follows.

Law

195. Section 124 of the Equality Act 2010 refers. The remedies a tribunal can award in a successful discrimination complaint are as follows:

    i) To give a declaration on the rights of the complainant and the respondent regarding matters to which the complaint relates

    ii) An order for compensation to the complainant - which can include payments under the headings of injury to feelings, aggravated damages and for pain, suffering and loss of amenity (personal injury) and interest; and

    iii) Make an appropriate recommendation – of steps that the employer must take within specified period to obviate or reduce the effect on the

complainant or any other person of any matter to which the proceedings relate.

Injury to feelings (ITF)

196. The Court of Appeal has given guidance on the assessment of compensation for injury to feelings. In the case of *Vento* the court set bands within which they held that most tribunals should be able to place their awards. Those bands have been amended through subsequent case law and more recently, in Presidential Guidance. The Guidance has been updated annually so that awards for injury to feelings in exceptional cases for the year beginning March 2020 could be over £45,000. In cases of the most serious kind, the injury to feelings award would normally lie between £25,700 – £42,900. In less serious cases, which fall in the middle band, the award would be between £9,000 - £27,000; while for even less serious cases, such as for one-off acts of discrimination or otherwise, the award would be between £900 -£9,000.

197. Awards for injury to feelings are purely compensatory and should not be used as a means of punishing or deterring employers from particular courses of conduct. On the other hand, discriminators must take their victims as they find them; once liability is established, compensation should not be reduced because (for example) the victim was particularly sensitive. The wrongdoer takes the risk that the wronged person may be very much affected by an act of harassment because of their character and psychological temperament. The issue is whether the discriminatory conduct caused the injury, not whether the injury was necessarily a foreseeable result of that conduct. (*Essa v Laing* [2004] IRLR 313 and *Olayemi v Athena Medical Centre* [2016] ICR 1074*, EAT*).

198. The matters compensated for by an injury to feelings award encompass subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress and depression (see *Vento v Chief Constable of West Yorkshire Police (No.2)* [2003] IRLR 102.

199. In making an award for ITF a tribunal needs to be aware of the leading cases in determining how much to award. Much will depend on the particular facts of the case and whether what occurred formed part of a campaign or harassment over a long period, what actual loss is attributable to the discrimination suffered, the position and seniority of the actual perpetrators of the discrimination and the severity of the act/s that have been found to have occurred as well as the evidence of the hurt that was caused.

200. In *Alexander v Home Office* [1988] IRLR 190 *CA*, it was said that:

> *"Awards should not be minimal, because this would tend to trivialise or diminish respect for the public policy to which the Act gives effect. On the other hand, just because it is impossible to assess the monetary value of injured feelings, awards should be restrained. To award sums which are generally felt to be excessive does almost as much harm to the policy and the results which it seeks to achieve as do nominal awards. Further, injury to feelings, which is likely to be of*

a relatively short duration, is less serious than physical injury to the body or mind which may persist for months, in many cases for life."

201. The EAT in *AA Solicitors Limited Trading as AA solicitors and another v Majid* UKEAT/0217/15/JOJ stated that they did not consider that analogies drawn from personal injury awards applying the Judicial College Guidelines were helpful when considering injury to feelings resulting from discrimination.

202. The following cases are taken from *Harvey on Industrial Relations and Employment Law* and provided some guidance to the Tribunal, in addition to the parties' submissions. The Respondent submitted that any award for injury to feelings to the Claimant should be in the lower band. The Tribunal agreed with that assessment.

Relevant lower band race discrimination cases reported in *Harveys*.

Perera v Opus Building Services Ltd (Newcastle upon Tyne) (Case No 2507946/2011) (22 May 2012, [2012] EqLR 724)

203. The claimant was an electrical estimator who was born in England of Sri Lankan parents. On a work's day out when they were both very drunk the Managing Director/part-owner of the respondent told the claimant *'you only get the women because you're fucking black'.* This amounted to direct discrimination and harassment. It was a one-off event and the claim fell within the lower Vento band. The claimant was awarded an injury to feelings award in the sum of £2,000.

204. *Amer v Greggs Plc* (London Central) (Case No 2202006/2008) (25 June 2009, unreported).

205. The claimant was an Egyptian bakery store manager. He was caused hurt and distress by a remark made by another member of staff. It was an isolated incident of racial harassment albeit with some aggravating features as it took place in front of 150 of his colleagues, including junior ones and everyone laughed so he felt particularly humiliated. The impact of the remark was somewhat eclipsed by the claimant's dismissal which was not discriminatory, but which led to depression. The appropriate figure was the very top of the lower Vento band adjusted for inflation. He was awarded £5,500 for injury to feelings.

Doshoki v Draeger Ltd [2002] IRLR 340, EAT.

206. The claimant was an Iranian sales manager. He was subject to occasional racial comments and taunts in public over a period of four months by other members of the sales team, such as *'shut up Ayatollah'* and *'this solution could only come from an Arab'*. He was also called a *'eunuch'* although an apology was given for that. The remarks were insulting and humiliating. The EAT found that the tribunal's award of £750 was inadequate to a degree where it was wrong in law. The award for injury to feelings was increased to £4,000 on appeal.

207. A tribunal has the power to award interest on awards made in discrimination cases both in respect of pecuniary and non-pecuniary losses. We refer to the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996. We can consider it whether or not a party has asked us to do so. The interest is calculated as simple interest which accrues daily at the rate of 8% since 29 July 2013. For past pecuniary losses, interest is awarded from the half-way point between the date of the discriminatory act and the date of calculation. For non-pecuniary losses, such as injury to feelings, interest is calculated across the entire period from the act complained of to the date of calculation.

208. The tribunal retains discretion to make no award of interest if it deems that a serious injustice would be caused if it were to be awarded but in such a case it would need to set out its reasons for not doing so.

Decision

209. It is this Tribunal's judgment that there are no aggravating features to this case, and it is not appropriate to impose a financial penalty in accordance with section 12A Employment Tribunals Act 1996.

210. The Respondent is correct in that Dominique wrote in her statement that she suspected that the Claimant was intoxicated on 17 September, but it was one of the allegations that she reported to Ms Mori and which she was asked to investigate. It was one of the allegations which the Claimant faced on the day. Ms Mori asked him about it in the investigation and he had to defend himself and explain himself in relation to it. There was no basis for it. It was not the Respondent's evidence or submission that being in possession of an illegal substance means that a person is more than likely to have used it themselves or that it would be reasonable to suspect that they had. It is our judgment that the suspicion came from a stereotypical assumption about the Claimant as a black male, as opposed to anything else.

211. It is our judgment that the Claimant did not find out that he was no longer accused of being intoxicated at work or being under the influence at work, until he received the written invitation to disciplinary hearing, which was on 30 September. There was no explanation for the change, and he was not specifically told that the allegation had been dropped. He would have had to read the written invitation to the disciplinary hearing and realised that it was not listed as one of the allegations to be considered.

212. The Claimant lived with this accusation for approximately 2 weeks.

213. It is our judgment that this act of discrimination falls within the lower band of Vento because the allegation was in existence for approximately two weeks, and he did not have to face it at a disciplinary hearing. The Claimant is entitled to injury to feelings because the Claimant had a good work ethic and was upset and felt hurt on being accused of being intoxicated at work. There had been no basis for that allegation. The Respondent are not sure that he was in possession of an illegal substance in his bike bag that day. In the circumstances, it was reasonable for the Respondent to suspect that

he was in possession, but it was not certain and, in those circumstances, to assume that he was likely to be intoxicated was stereotypical rather than a reasonable assumption for his managers to make.

214. In the circumstances, and looking at the cases referred to above, which are quite old, we are not going to award £1000 as the Respondent submitted but £3,000. This was more than a comment. It was an allegation of misconduct which was made without any evidence. Although it was related to the other allegations, it was another, separate allegation which he had to answer to as part of the investigation.

215. We award the Claimant £3,000 as injury to feelings.

216. The Claimant is also entitled to interest, which we did not calculate at the hearing in April. The judgment has been amended to correct this.

217. The Claimant is entitled to interest at 8% for the whole period since that date. He is entitled to interest from 17 September 2020 – 14 April 2023 (940 days). The calculation is as follows: 940 x 0.08 x 1/365 x £3,000 = £618.00.

218. The Claimant is entitled to a remedy of £3,618 as his compensation for his successful complaint of race discrimination.

219. All other complaints fail and are dismissed.

Employment Judge Jones

31 August 2023