EMPLOYMENT TRIBUNALS

Claimant
Mr M Hossain

Respondent
UPS SCS UK Limited

Heard at: Reading by CVP

On: 26, 27, 28 June 2023

Before: Employment Judge Hawksworth
Ms C Anderson
Ms J Pope

Appearances
For the Claimant: in person
assisted by Ms N Hossain (claimant's daughter)
For the Respondent: Mr D Campion (counsel)

JUDGMENT

The unanimous judgment of the tribunal is that:

1. the claimant was not unfairly dismissed, and so the complaint of unfair dismissal fails and is dismissed;

2. the complaints of direct discrimination because of race or religious belief also fail and are dismissed.

REASONS

Claim, hearings and evidence

1. The claimant worked for the respondent as an export clerk from 5 June 2017 until his dismissal on 22 February 2022.

2. The claim form was presented on 27 June 2022 after Acas early conciliation from 20 April 2022 to 31 May 2022. The claimant claimed unfair dismissal and direct discrimination because of race or religious belief. The respondent presented its response on 12 August 2022. The respondent defended the claim.

3. There was a preliminary hearing for case management on 17 February 2023. The final hearing took place by video over three days from 26 June to 28 June 2023.

4. There was an agreed bundle of 231 pages. Page references in these reasons are references to that bundle. In addition, the respondent had

prepared a chronology, cast list and key reading document. The claimant prepared an up to date schedule of loss.

5. We heard evidence from the claimant on 26 June 2023. On the morning of 27 June we heard evidence from the respondent's witnesses Mr Robinson, Ms Matthews and Mr Parkinson. All the witnesses had exchanged witness statements. A short supplemental statement was served by Mr Robinson on 26 June 2023, correcting a point in his earlier witness statement. It was a little over a page long. We allowed the supplemental statement and allowed the claimant time to read it.

6. At lunchtime on 27 June 2023 Mr Campion produced a written document setting out closing remarks on behalf of the respondent. We took a longer lunch to allow Mr Hossain and his daughter Ms Hossain who was assisting him time to read the document. We then allowed a further 20 minutes at Mr Hossain's request, and started again at 2.50pm. Mr Campion made oral closing remarks on behalf of the respondent. Ms Hossain made oral closing remarks on behalf of Mr Hossain.

7. We gave judgment and reasons at the hearing on 28 June 2023. In our reasons, we explained our findings of fact, a summary of the law and the conclusions we had reached. The claimant requested written reasons at the end of the hearing. The judge apologises for the delay in providing these written reasons. This was because of the current tribunal workload and the holiday period.

The Issues

8. The issues were identified at the preliminary hearing as follows (pages 56 to 60 of the bundle). The original numbering has been retained for ease of reference.

1. Employment status and/or identity of the Respondent(s)

1.1 It was agreed the Claimant was an employee of the Respondent within the meaning of section 230 of the Employment Rights Act 1996.

2. Time limits

2.1 The claim form was presented on 27 June 2022. The claimant commenced the Early Conciliation process with ACAS on 20 April 2022 (Day A). The Early Conciliation Certificate was issued on 31 May 2022 (Day B). Accordingly, any act or omission which took place before 22 Jan 2022 (which allows for any extension under the Early Conciliation provisions) is potentially out of time so that the Tribunal may not have jurisdiction to hear that complaint. The Tribunal will consider:

2.2 Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

2.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act or omission to which the complaint relates?

2.2.2 If not, was there conduct extending over a period? S123 (3) (a) Equality Act 2010.

2.2.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

2.2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? S123 (1) (b) Equality Act 2010. The Tribunal will decide:

2.2.4.1 Why were the complaints not made to the Tribunal in time?

2.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

2.2.5 It was agreed that the unfair dismissal complaint was made within the time limit in section 111 of the Employment Rights Act 1996.

3. Unfair dismissal

3.1 It is agreed the Claimant was dismissed.

3.2 What was the reason for dismissal? The Respondent asserts that it was a reason related to conduct which is a potentially fair reason for dismissal under s. 98 (2) of the Employment Rights Act 1996: Misconduct The Tribunal will decide:

3.2.1 Did the Respondent genuinely believe the Claimant was guilty of misconduct?

3.2.2 Was the Respondent's belief held on reasonable grounds?

3.2.3 Did the Respondent carry out as reasonable an investigation as was warranted in the circumstances?

3.3 Was the decision to dismiss a fair sanction, that is, was it within the range of reasonable responses open to a reasonable employer when faced with these facts? The Claimant says the dismissal was unfair because it was as a result of discrimination against him.

3.4 Did the Respondent adopt a fair procedure?

3.5 If it did not use a fair procedure, would the Claimant have been fairly dismissed in any event and/or to what extent and when?

3.6 If the dismissal was unfair, did the Claimant contribute to the dismissal by culpable conduct? This requires the Respondent to prove, on the balance of probabilities, that the claimant actually committed the misconduct alleged.

4. Direct race and/or religion or belief discrimination (Equality Act 2010 section 13)

4.1 The Claimant describes himself as a Muslim of Bangladeshi origin.

4.2 In deciding if the Claimant has been discriminated against the Tribunal will decide: did the Respondent do the following things:

4.2.1 Dismiss the Claimant for gross misconduct on 22 February 2022;

4.2.2 Make the Claimant take a lunchbreak, when the Comparator was not required to take a lunchbreak, with the result that the Claimant had to stay at work longer;

4.2.3 Not allow the Claimant to start work later than his contracted hours;

4.2.4 Not allow the Claimant to "underwork" his contracted hours by as much as other employees were allowed to "underwork" their contracted hours. "Underwork" (a label suggested by the Judge) means claiming pay for hours they had not been at work. In particular the Claimant was dismissed and the comparator was not, even though the comparator had more hours "underworked" than the Claimant.

4.2.5 Gave the Claimant a significantly higher workload than his colleagues.

4.3 Was that less favourable treatment? The Tribunal will have to decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and those of the Claimant; s23 Equality Act 2010. If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated.

4.4 The Claimant says his treatment should be compared with the treatment of his colleague who is of Indian Punjabi descent and not Muslim. The Claimant says he was treated worse than his colleague. The Respondent says the claimant's comparator was in a different contractual position, and with a different disciplinary history, and that was the reason for any different treatment.

4.5 If the Claimant was treated less favourably, was it because of race and/or religion?

4.6 Is the Respondent able to prove a reason for the treatment occurred for a non-discriminatory reason not connected to the Claimants race and / or religion?

9. The issues for determination in respect of remedy were also set out in the list.

The facts

10. This section sets out our findings of fact. We make these findings on what is called the balance of probabilities, that means we decide what we think is most likely to have happened, based on the evidence we heard and the documents that we read. We set out first the chronology of events leading to the dismissal, and then our findings on the facts relating to Mr Hossain's comparator and the discrimination issues.

<u>Mr Hossain's role and the team</u>

11. On 5 June 2017 Mr Hossain began employment with the respondent as an export clerk. The role of the export clerk is an administrative one involving creating documents to go with goods being delivered by the respondent; the export clerk fills in the relevant documents for a third-party provider who delivers them to airlines.

12. The work requires cover across the week, both days and nights, and there was a night team and a day team. Mr Hossain and another clerk (Mr Hossain's comparator) worked nights. The week was split up between them, Mr Hossain worked Tuesday to Friday nights. He worked 40 hours a week in total, from 8:00pm to 7:00am with an unpaid hour for lunch. The other night clerk worked Friday to Monday nights. He worked slightly fewer hours because there were fewer flights and therefore less work during weekend nights than weekday nights. There was an overlap on Friday nights when both were at work.

13. Also because of the higher workload on weekday nights, there was a third night clerk who worked with Mr Hossain on Tuesdays to Fridays. The third clerk was in his probationary period at the time of the matters in question.

14. There were some occasions on which Mr Hossain sought, and was granted, permission to start work later.

Working hours issue

15. In January 2022 the claimant's team leader Graham Robinson became aware that the claimant was not working his contractual hours. The issue was raised by one of the third-party providers who had come to the office during the night because they needed some changes to some freight documentation. They found the office unstaffed.

16. A similar thing had happened in 2018, when a third-party had come to the office to get some paperwork corrected. On that occasion, Mr Robinson obtained the swipe access card information for all the night clerks. The swipe card information gives logging in and out times. Mr Robinson found that Mr Hossain was not logging in at 8.00pm, the start time for his shift. On average he was logging in about an hour later. At that time, in 2018, Mr Robinson spoke to the claimant about his absence from the office and late arrival times. An interview note was kept of that discussion. It was headed 'time keeping'. Mr Robinson did not tell Mr Hossain that his failure to start work at the contracted time was gross misconduct. Mr Robinson did however emphasise the seriousness of the matter by telling Mr Hossain that he had 'in essence stolen 46 hours from the company in four weeks'. Mr Hossain replied by saying, 'You've caught me'.

17. There was another conversation about contractual hours between Mr Robinson and Mr Hossain the following year, on 19 December 2019. That discussion was about Mr Hossain leaving work early, before the end time of his shift, 7.00am. A note was kept of the conversation. Mr Hossain told Mr Robinson that he thought he could leave work as soon as his work had been completed. Mr Robinson said that was not correct and he must be on site for his contracted hours of 8:00pm to 7.00am. At this time the swipe card data did not show any hours issues with any other member of the night team.

18. Returning to the chronology of events in 2022, after the third party raised the issue about the office being unstaffed at night, Mr Robinson obtained the logging in and out data from the swipe cards again. He reviewed the logging in and out times for all three of the export clerks who work the night shift. He saw that the claimant had not been working his full contractual hours. Over the previous three weeks, the data showed that Mr Hossain was over 49 hours short of the contracted hours he should have been working.

'Verbal' warning

19. On 21 January 2022 at 2.54pm Mr Robinson sent Mr Hossain an e-mail in relation to the failure to work his contractual hours. A copy of the swipe data was included, and Mr Robinson said the claimant had worked over 49 hours less than his contracted hours in a three week period. The email said it was a verbal warning and that Mr Hossain was expected to work his contractual hours each and every shift. Although the warning was given in writing in an email, it was described as a 'verbal' warning because it was an informal warning, the first type of warning described in the respondent's disciplinary procedure.

20. In the email Mr Robinson acknowledged that he had agreed with Mr Hossain and his colleague that on a Friday, as they were both working, they could take it in turns each week to leave a little earlier at the end of the shift if there was no work outstanding. Mr Robinson did not say exactly how much earlier it had been agreed they could leave.

21. Mr Robinson copied the verbal warning e-mail to a senior manager, Julie Matthews. A little later the same day, at 3.12pm, she emailed Mr Hossain. She said that it was 'a very serious issue that could lead to further disciplinary action up to and including dismissal'. She asked Mr Hossain how he proposed to pay back the unworked hours. Mr Hossain did not reply.

Investigation meeting

22. Shortly after sending the verbal warning to Mr Hossain, Mr Robinson looked at the swipe card data again. He saw that on the day the e-mail verbal warning was sent, Mr Hossain arrived at work at 8:14pm and left work at 11:37 pm. That was around 7 hours and 30 minutes earlier than his contracted end time. He had no permission to leave early that day.

23. Mr Robinson decided that he had to escalate matters as it appeared that Mr Hossain had ignored the verbal warning. Mr Robinson held an investigation meeting with Mr Hossain on 1 February 2022.

24. At the meeting Mr Robinson gave Mr Hossein copies of the swipe card information. He pointed out some other dates on which Mr Hossain had left early and asked whether the claimant thought it was OK to leave whenever he wanted. Mr Hossain replied, 'No, it's not right'. Later in the meeting, Mr Hossain accepted, 'I have no defence, of course I have no defence'.

25. Mr Hossain raised the question of whether he could finish his shifts earlier instead of taking a lunch break, something he had asked about previously but which had been refused. Mr Robinson said it wasn't possible for Mr

Hossain to do that because there is a legal requirement to have a break after 6 hours of work. Mr Robinson offered to look at start and finish times instead. At the end of the meeting Mr Hossain said that he felt he wasn't being treated equally to colleagues in relation to his request to take lunch at the end of his shift.

26. In the investigation meeting Mr Hossain did not say that he had not seen the verbal warning e-mail from Mr Robinson before leaving his shift early on 21 January 2022.

Disciplinary hearing and dismissal

27. On 14 February 2022 Mr Hossein was invited to a formal disciplinary hearing with Ms Matthews. The invitation letter said the hearing was to investigate 'serious allegations that you have left work without permission on a number of occasions'. It said the sanction might include summary dismissal. It also referred to Appendix D of the respondent's Code of Conduct which gave examples of gross misconduct. The letter set out two of the examples from the code which included leaving work without permission. Updated copies of the swipe card data for January and February were included, these showed that Mr Hossain had worked about 60 hours less than his contracted hours in a four-week period. The letter explained Mr Hossain's right to be accompanied.

28. The disciplinary hearing itself took place on 22 February 2022. At the hearing Ms Matthews asked Mr Hossain why he had left work early. They had a discussion about the e-mail verbal warning that Mr Robinson had sent on 21 January 2022 and about the two previous conversations between Mr Hossein and Mr Robinson about working full hours. Mr Hossain did not say that he had not seen the e-mail of 21 January 2022 before he left at 11:37pm that night.

29. Ms Matthews asked whether Mr Hossain had told other members of staff that they could leave early, and he said he had sent a colleague home when it was quiet. Ms Matthews asked what she would see if she looked at Mr Hossain's logging in and out data for the previous 12 months. He said, 'Nothing but the same'.

30. Ms Matthews also asked why Mr Hossain felt he was not being treated equally, as he had raised that in the investigation meeting. He said it was because colleagues worked different shift patterns and had different contracted hours.

31. After a break the hearing started again. Ms Matthews gave her decision. She decided that the claimant leaving work without permission and working around 60 hours short of his contracted hours in a four-week period amounted to gross misconduct. She decided that there had been a loss of trust and confidence in the claimant, and that he should be dismissed without notice.

32. The outcome letter confirming Ms Matthew's decision and setting out Mr Hossain's right of appeal was sent on 28 February 2022.

Appeal

33. Mr Hossain appealed the decision in a letter of 8 March 2022. His grounds of appeal included:

    33.1 that his export clerk colleague had not been summarily dismissed, even though he had been found to have committed gross misconduct by working 70 hours short of his contracted hours (more than Mr Hossain);

    33.2 it was unfair that his colleague had not been warned previously and only the claimant had been disciplined in the past;

    33.3 he thought there was a culture and an informal agreement that he could leave early on alternate Fridays when the work was completed;

    33.4 he raised allegations of unfair or unequal treatment including a heavier workload, and the refusal of his requests to have a lunch break at the end of his shift.

34. The invitation to the appeal hearing was sent to Mr Hossain on 9 March 2022. The letter explained the right to be accompanied.

35. The appeal hearing took place on 29 March 2022 with Matthew Parkinson. At the time he was the UK and Ireland country manager and was a more senior manager than Ms Matthews. In the appeal hearing Mr Parkinson discussed each of the concerns Mr Hossain had raised, including the concerns about differences in workload and working hours between Mr Hossain and his colleagues on the night team.

36. Mr Hossain also complained that his request to take his lunch break at the end of his shift had been refused. He said he thought there had been favouritism shown towards his colleague, and that Mr Hossain had been treated less favourably because he was not of a Punjabi background.

37. Mr Parkinson said he would investigate the concerns raised, and the allegation that there was a culture of leaving early. The appeal hearing was paused to allow those investigations to take place.

38. In that pause Mr Hossain contacted ACAS for early conciliation on 20 April 2022 and was issued an ACAS early conciliation certificate on 31 May 2022.

39. The reconvened appeal hearing took place on 6 June 2022. Mr Parkinson said that he had thoroughly investigated the points raised by Mr Hossain. He had found no favouritism, and had decided that the dismissal decision had nothing to do with Mr Hossain's background. Mr Parkinson dismissed the appeal and upheld the decision to dismiss for gross misconduct.

40. An appeal outcome letter was provided to Mr Hossain on the same day.

41. Mr Hossain presented his employment tribunal claim on 27 June 2022.

<u>Findings relating to Mr Hossain's comparator</u>

42. We have made separate findings of fact in relation to the alleged inconsistent treatment and the complaints of discrimination, that is the complaints about the difference in treatment between Mr Hossain and his comparator, his export clerk colleague on the night team who worked Friday to Monday nights.

43. Mr Hossein is a Muslim of Bangladeshi origin. His comparator is not Muslim and is of Indian Punjabi origin. At the end of his appeal letter Mr Hossain said he felt the cause of the difference in treatment for the same actions between himself and his comparator was his racial background and religious beliefs being different to his comparator's. This was discussed in the first appeal hearing with Mr Parkinson.

44. Mr Hossain's comparator began his employment with the respondent on 7 July 2014, before Mr Hossain did. The comparator worked on Fridays to Mondays (so that with Mr Hossain and the third export clerk working Tuesdays to Fridays, the whole week was covered, with an overlap on Fridays).

45. The claimant's comparator's contract was different to Mr Hossain, and he had different working hours. The claimant's comparator worked 37.5 hours a week, fewer hours than Mr Hossain who worked 40 hours a week. Mr Hossain's comparator started work later than the claimant: his shift started at 9:00pm rather than 8:00pm. He finished work at 7:00am except for Sunday shifts which finished at 6:30am. At some point in 2014, before Mr Hossain joined the respondent, the comparator's manager agreed that the comparator could take a half hour for his lunch break rather than a full hour.

46. In January 2022, when the issue of working hours was raised by the third-party provider, Mr Robinson obtained the swipe card data for all three export clerks on the night team. He did the same in 2018 and 2019 as well. In 2018 and 2019 the swipe card information showed that there was no significant shortage of hours for anyone other than Mr Hossain. In January 2022 the data showed that both Mr Hossain's and his comparator's hours were short.

47. Mr Robinson held an investigation meeting with the claimant's comparator on 31 January 2022, that is the day before the investigation meeting with Mr Hossain. He held an investigation meeting with third export clerk on 2 February 2022. Mr Hossain's comparator had a disciplinary hearing on 21 February 2022 conducted by Ms Matthews. She decided that he had left work without permission without completing his contracted hours and that his conduct warranted dismissal. However, she took into account that he had not previously been spoken to about leaving earlier. She decided to give him a chance to change his behaviour. She gave him a final written warning for 52 weeks and set out her expectation that he would be at work for the duration of his contracted hours not including his break.

48. Mr Hossain said that another manager in the management hierarchy above (who was on maternity leave at the time of the decision to dismiss him) might have been behind his dismissal or the less favourable treatment he complained of. He thought she might have favoured his comparator as they are of the same racial background and religion. There was no evidence to

support this. We find that she did not play any part in the decision to dismiss.

The law

Unfair dismissal

49. An employee with two or more years' service has the right not to be unfairly dismissed (section 94 of the Employment Rights Act).

50. Section 98 of the Employment Rights Act sets out the tests for determining whether there has been an 'ordinary' unfair dismissal. Subsection 1 provides:

> *"(1) 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."*

51. A reason which relates to the conduct of the employee is a reason falling within subsection (2).

52. In a complaint of unfair dismissal which the employer says is for conduct reasons, the role of the tribunal is not to examine whether the employee is guilty of the alleged misconduct. Instead, in line with guidance set out in the case of British Home Stores v Burchell, the tribunal must consider the following issues:

    52.1 whether, at the time of dismissal, the employer genuinely believed the employee to be guilty of misconduct;
    52.2 whether, at the time of dismissal, the employer had reasonable grounds for believing that the employee was guilty of that misconduct; and
    52.3 whether, at the time that the employer formed that belief on those grounds, it had carried out as much investigation as was reasonable in the circumstances.

53. Where there is a potentially fair reason for dismissal, the tribunal has to consider (under section 98(4) of the Employment Rights Act 1996):

> "*whether in the circumstances (taking into account the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a fair reason for dismissal."*

54. This is determined in accordance with equity and the substantial merits of the case, including whether the respondent acted in a procedurally fair manner and whether dismissal was within the range of reasonable responses open to the employer. The test recognises that there may be more than one reasonable approach for an employer to take in the

circumstances of the case; the tribunal must not substitute its own view for that of the employer.

Direct discrimination because of race or religion or belief.

55. Race is a protected characteristic under sections 4 and 9 of the Equality Act 2010. Religion or belief is a protected characteristic under sections 4 and 10.

56. Section 13(1) of the Equality Act provides:

> "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."

Burden of proof

57. Sub-sections 136(2) and (3) of the Equality Act provide for a shifting burden of proof:

> *"(2) 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.*
>
> *(3) This does not apply if A shows that A did not contravene the provision."*

58. This means that if there are facts from which the tribunal could properly and fairly conclude that a difference in treatment was because of the protected characteristic, the burden of proof shifts to the respondent.

59. Where the burden shifts, the respondent must prove on the balance of probabilities that the treatment was in no sense whatsoever on the grounds of the protected characteristic.

Conclusions

60. We started with the complaint of unfair dismissal and then considered the complaint of discrimination.

Unfair dismissal

61. The legal test for unfair dismissal, as we have explained, does not require us to look at Mr Hossein's case and make our own decision about what we would have done if we had been making the decision in Ms Matthews' place. The test is not for us to decide whether we would have dismissed Mr Hossain in these circumstances, and it is not whether we think Ms Matthews' decision was the right decision.

62. The test we have to apply, and our role in unfair dismissal cases like this, is more limited. This is because the law recognises that different employers might take different approaches in the same circumstances. It recognises that there might be more than one reasonable approach. So, we have to assess whether the decision in this case by Ms Matthews was one of the possible reasonable decisions that an employer might have made in this situation. Another way of putting it is to ask whether the decision to dismiss

Mr Hossain was a decision that fell within the 'range of reasonable responses'.

63. We apply that test by first considering the reason for the dismissal. The respondent says that it was a reason relating to Mr Hossain's conduct. That is one of the potentially fair reasons included in section 98(2) of the Employment Rights Act.

64. In cases where the reason for the dismissal is said to be a reason relating to the employee's conduct, the tribunal does not look at whether the employee was actually guilty of that misconduct. Instead, we approach the question in line with guidance set out in a case called British Home Stores v Burchell. That guidance gives three questions we have to consider, as we have explained.

65. The first question is whether, at the time of dismissal, the respondent genuinely believed the claimant was guilty of misconduct. In Mr Hossain's case, the decision maker was Ms Matthews. We found that the manager who was on maternity leave at the time of the decision did not play any part in the decision to dismiss.

66. We accept that at the time of dismissal, Ms Matthews genuinely believed that Mr Hossain left work early without permission on a number of occasions and had worked significantly less than his contracted hours over four weeks. She also believed that the pattern would be the same over the previous 12 months. Ms Matthews also genuinely believed that Mr Hossain had told another employee to leave early.

67. Ms Matthews genuinely believed those matters to be gross misconduct. There was no evidence before us that there was any hidden agenda or undisclosed reason for the dismissal other than Ms Matthew's belief that Mr Hossain was guilty of misconduct.

68. We also decided (we return to this in more detail below) that Mr Hossain's race and religion played no part in her decision to dismiss.

69. The second question for us is whether Ms Matthews' belief was held on reasonable grounds. Was there a reasonable basis to support her belief? We concluded that there was. Her decision was based on working hours information from Mr Hossain's employee swipe card, the record of discussions with Mr Robinson in 2018 and 2019, the verbal warning e-mail of 21 January, the notes of the investigation meeting, and admissions by Mr Hossain. Those admissions were that he had no defence to not working his hours and that the previous twelve months would be the same. He also accepted in the disciplinary hearing itself that he told another employee to leave early. The information and admissions amount to reasonable grounds for the belief that Mr Hossain was guilty of misconduct.

70. The third element of this part of the test for unfair dismissal is whether UPS had carried out as reasonable investigation as was warranted in the circumstances by the time that Ms Matthews made her decision. We found that the investigation was reasonable. It included examination of the swipe card data and the records of the previous discussions about working hours.

There were interviews with Mr Hossain and his colleagues. Mr Hossain was given an opportunity to explain.

71. We find therefore that the three elements of the guidance set out in the Burchell case are met. That means we go on to the second part of the test for unfair dismissal, that is to consider whether UPS acted reasonably or unreasonably in treating the conduct as a reason for dismissal.

72. We considered the points put forward by Ms Hossain in her closing comments on Mr Hossain's behalf. We reached the following conclusions on those.

    72.1 First, in 2018 and 2019 Mr Robinson had discussions with Mr Hossain about his working hours and made written records of those discussions. In 2018 Mr Robinson said that starting later than the contracted start time was equivalent to theft. That was a clear and understandable way of explaining how serious Mr Hossain's conduct was. In 2019 Mr Robinson said that Mr Hossein must be on site for his contracted hours: he corrected any misunderstanding that Mr Hossain was allowed to leave as soon as his work was finished. We do not accept Ms Hossain's suggestion that Mr Hossain was unclear about this, or that there was any sense of ambiguity about what was allowed and what was not. From December 2019 at the very latest it was entirely clear that Mr Hossain had to be on site for all of his contracted hours and that he could not leave early without permission.

    72.2 These discussions were not put in the form of formal warnings (with an expiry date). However they were still matters that the respondent was entitled to take into account. They were supervisory discussions in which Mr Robinson clarified an important aspect of the respondent's expectations. Mr Robinson was dealing with these matters informally, and hoped that Mr Hossain would correct his behaviour as a result. The discussions were an important part of the circumstances which Ms Matthews was entitled to take into account when considering Mr Hossain's conduct. The fact that Mr Robinson did not say that a further breach would be considered to be gross misconduct does not mean it was unfair for the responded to rely on these discussions. The fact that they were not formal warnings does not make it unfair for the respondent to rely on them. The fact that Mr Hossain's conduct was in breach of expectations which had been made clear was an important aspect of the circumstances.

    72.3 Although Mr Hossain told us that he had not seen the emails of 21 January from Mr Robinson and Ms Matthews prior to leaving work at 11:37 that evening, he did not tell any of the respondents' managers that. He did not mention it in the investigation, disciplinary or appeal meetings. The respondent's managers were therefore proceeding at all times on the basis that Mr Hossain had seen the emails which said that he had to work his contracted hours and that he had (on the same shift on which he had received those e-mails) left over seven hours early without permission. As Ms Matthews understood it, Mr Hossain left seven hours early on the day he received an instruction

to work all of his contracted hours, and this was a very important factor for her. It gave the impression that Mr Hossain had no intention of complying with an instruction that had been given to him.

72.4 We heard a lot of evidence about the approach to the agreement on leaving early on Friday nights. We have decided that the approach that the respondent took to this aspect of the dismissal was also reasonable. The respondent accepted that there was an exception to working full contractual hours which applied on Friday night shifts when more than one export clerk was at work. The respondent accepted that there was an agreement that the senior export clerks could take it in turns to leave a little early if work had been completed. Mr Hossain had not been given a precise definition of what was meant by 'a little early', but it was not unreasonable for the respondent to consider that leaving more than seven hours early did not fall within the scope of that agreement. It was also reasonable for the respondent to consider that the agreement did not go any way towards explaining any early departures on other days.

72.5 We also heard a lot of evidence about the difference in the treatment of Mr Hossain and his comparator. We do not agree that Mr Hossain was under more scrutiny than his colleagues or 'under the magnifying glass' as was suggested. When Mr Robinson first became aware of the working hours issue in 2018 he checked the time records for all staff on the night team. He did the same again in 2019. A consistent approach was taken. The reason Mr Hossein was the only the team who was spoken to about it at those times was because he was the only member of the team whose hours were significantly short.

72.6 In relation to the 2022 investigations, again, the swipe card data was obtained for all three members of the night team. When it was observed that the claimant's comparator's hours were short, he was subject to an investigation and disciplinary hearing in the same way that Mr Hossain was, and at the same time.

72.7 We accept that the decision by Ms Matthews to dismiss the claimant while giving his comparator a final written warning was not inconsistent. That is because there were important features of the circumstances of the two cases that were different. We accept that those different features were the reason for Ms Matthews reaching different decisions. The important features were that Mr Hossain's comparator had not had any previous instances of working significantly shorter hours and being spoken to about it. Also, he had not left a shift very early on the same day that he was given a verbal warning earlier in the shift. Finally, he had not allowed another staff member to leave early. Those differences mean that it was not unfair for Ms Matthews to dismiss Mr Hossain while deciding to give his comparator another chance, even though Mr Hossain's comparator had a greater shortfall in hours in the four week period being looked at. It was open to UPS to impose different sanctions, given the differences in the two cases.

72.8 It was not unfair for Ms Matthews to be the manager who heard the case. She sent an e-mail to Mr Hossain in response to Mr Robinson's e-mail of 21 January asking how he proposed to pay back unworked hours. That did not affect her impartiality and did not amount to any pre judging of the case. She told the claimant how serious the conduct was and that it could lead to further action, but she did not express a view about what action would be appropriate and she did not do anything else which would make her an improper person to hear the disciplinary hearing.

72.9 Having decided that the claimant's conduct amounted to gross misconduct, Ms Matthews considered other sanctions as well but decided that the respondent's loss of trust and confidence in Mr Hossain meant that dismissal was the appropriate option. That was a decision which was open to her to reach, particularly taking into account that Mr Hossain's role required him to work with no supervisor or team leader present and therefore required high levels of trust.

72.10 During the course of the disciplinary proceedings, Mr Hossain referred briefly to possible health issues. It was not clear to us whether Ms Matthews and Mr Parkinson had copies of the claimant's occupational health reports from 2020 and 2021 when they made their decisions. The reports were in the bundle for the hearing before us. Neither said that the claimant required any adjustments to working hours for medical reasons. We have concluded that Ms Matthews and Mr Parkinson not having (or not referring to) the reports did not lead to any unfairness.

72.11 Finally, the concerns raised by Mr Hossain about discrimination in relation to working hours and lunch hours and so on were investigated by those conducting the disciplinary hearing and the appeal. They were satisfied there had been no unfairness of treatment. We have also found there was no discrimination in the treatment of Mr Hossain (we return to this below).

73. Finally, we considered the procedure followed by the respondent. A fair procedure in line with the ACAS code of practice on disciplinary procedures was followed. There was an investigation, a disciplinary hearing and an appeal. Each stage was conducted by different (and increasingly senior) managers. At each stage Mr Hossain was given copies of the documents relied on by the respondent when it made its decisions and told of his right to be accompanied. There was a long delay in the appeal process between the initial meeting and the final appeal decision, but we accept that was because there was a proper investigation being carried out by Mr Parkinson into points Mr Hossein had raised.

74. For those reasons we have concluded that the decision to dismiss Mr Hossain was one of the possible reasonable decisions that an employer faced with this situation could have made. The respondent followed a reasonable procedure when doing so.

75. We agree with Mr Campion that this was a decision which was comfortably within the range of reasonable responses. It was not one we would describe as being on the borderline. For these reasons the claim of unfair dismissal fails.

Direct discrimination

76. Next, we explain our reasons for our decision that the complaints of direct race and religious discrimination also fail.

77. Section 13 of the Equality Act 2010 says that less favourable treatment because of race or religious belief is unlawful. To consider whether treatment is 'less favourable' we consider how a person of a different race or with a different religious belief, in circumstances which are not materially different to the claimant's, was or would have been treated. That person is called the comparator. The rules on the burden of proof in discrimination complaints say that if the claimant proves evidence from which we could conclude that there has been unlawful discrimination, we look to the employer to explain the reason for their treatment of the claimant, and to satisfy us that it is not related in any way to race or religion.

78. Mr Hossain describes himself as a Muslim of Bangladeshi origin. His comparator, his colleague on the night shift team, is of Punjabi origin and is not Muslim. Mr Hossein says that his comparator was treated better than him because of race or religious belief. The acts of less favourable treatment which Mr Hossein complains about were identified at the preliminary hearing and are set out in the case management orders at paragraph 4.2 of the issues. We go through those in turn.

79. The first act of less favourable treatment is the dismissal. Mr Hossain was dismissed by the respondent. The question for us is whether the dismissal was because of race or religion. There was no evidence before us from which we could conclude that it was, so that the burden would shift to the employer. A difference in treatment between one person (who is dismissed) and one person (who is warned), together with a difference in their race or religion is not enough to shift that burden. There has to be something more than that. In this case we have not found anything more than the difference in treatment and the difference of race and religion. We have not found evidence from which we could conclude that there was unlawful discrimination in respect of the dismissal.

80. Even if we had, the claim would not have succeeded. This is because we accept that Ms Matthews did not have the differences in racial background or religious belief between Mr Hossain and his comparator in mind at all (either consciously or sub-consciously) when she decided to dismiss Mr Hossain. We do not accept (if Mr Hossain was suggesting this) that another manager favoured Mr Hossain's comparator and was pulling strings in the background. We found that she was on maternity leave at the time of the dismissal and did not play a part in the decision making. The decision to dismiss was nothing to do with race or religion.

81. The second allegation of direct discrimination is that Mr Hossain was required to take a lunch break while his comparator was not.

82. We found that the respondent did decline Mr Hossain's request to change his lunch break arrangements, that is his request to take his lunch break at the end of his shift. We found that Mr Hossain's comparator was allowed to change his lunch break arrangements, to take a shorter lunch during his shift. There is no evidence that this difference in treatment had anything to do with race or religion such that the burden of proof would shift to the respondent.

83. In any event, there is an explanation for the difference in treatment which is not related in any way to race or religion. That is that the arrangements which Mr Hossain's comparator had made were different to the arrangements Mr Hossain was seeking. The comparator was allowed to take a shorter break in the middle of the day (because of an agreement made before Mr Hossain joined the respondent). The shorter lunch break was still compliant with the obligation in the Working Time Regulations for an employer to provide a break of at least 20 minutes after six hours' work.

84. That was a different arrangement to the arrangement Mr Hossain was requesting. He was not asking for a shorter lunch break during the shift. He was asking for all of his lunch break to be taken at the end of the shift, to allow him to go home early. As Mr Robinson explained to Mr Hossain, that would not have been compliant with the Working Time Regulations requirement to permit a break after 6 hours at work.

85. We accept that this was a good non-discriminatory reason for refusing Mr Hossein's request to adjust his lunch hour arrangements, while his comparator had been permitted to change his. This difference was nothing to do with race or religion.

86. The third allegation of race and religious discrimination is the respondent not allowing the claimant to start work later than his contracted hours. Mr Hossain was allowed to start late, on occasions on which he sought permission to do so. In relation to regular working times, Mr Hossein started at 8:00pm and his comparator started at 9:00pm. Again, we found no evidence to suggest that this difference was anything to do with race or religion such that the burden would shift to the respondent.

87. Even if the burden had shifted to the respondent on this issue, we accept that the reason for the difference in start times was that Mr Hossain and his comparator had different contracts requiring different hours of work. Mr Hossain's had a 40 hour working week, and his comparator a 37.5 hour week. We also accept that the different contracts were for operational reasons, because of the additional work required on night shifts in the weekdays compared to the weekends. This difference was not related in any way to race or religion.

88. The fourth complaint of less favourable treatment is in relation to under working contractual hours, and the dismissal of the claimant with a lower shortfall in hours worked (60 hours in the four week period) than his comparator (for whom the shortfall was 70 hours in that period). This overlaps with the first complaint of discrimination, in respect of the dismissal. And, as we said in our reasons in relation to the complaint of unfair dismissal, the reason for the difference in sanction between Mr

Hossain and his comparator was that their circumstances were different. In particular Mr Hossain's comparator had no previous warnings about working contracted hours, and had not allowed a colleague to work shorter hours. This complaint fails for the same reasons.

89. Mr Hossain's last allegation of less favourable treatment is in relation to higher workload. We have found that Mr Hossain's workload was heavier than his comparators. However, there is no evidence from which we could conclude that this was because of race or religion. If we had found that the burden shifted to the employer in respect of this complaint, we would have accepted the reason put forward by the respondent for this difference, namely that the workload was higher in the week when Mr Hossain worked because there are more flights in the week compared to weekends when Mr Hossain's comparator was working. There were therefore operational reasons why there was a difference in the workload between the claimant and his comparator. UPS had addressed this by having two people on the weekday shifts, and by the weekend shifts being slightly shorter than the weekday shifts. Mr Hossain may have preferred a system which involved rotation between him and his comparator so that sometimes he worked weekday shifts and sometimes weekend shifts, but that was not the system which the respondent put in place. It was up to the respondent to decide what operational arrangements and shift system it wanted. We are satisfied that race or religion played no part in decision making around those operational arrangements.

90. For these reasons none of the allegations of less favourable treatment because of race or religious belief succeed. The complaints of direct discrimination are dismissed.

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Employment Judge Hawksworth

Date: 16 August 2023

Sent to the parties on: 11/9/2023

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For the Tribunal Office