Case No: 2302155/2021
2303194/2021
2303413/2021

EMPLOYMENT TRIBUNALS

Claimant: **A Braithwaite**
D Pryce
S Kahan Howell

Respondent: **Howden Joinery Limited**

Held at: **London South Employment Tribunal**

On: **13, 14, 15, 16 November 2023 and 23 January 2024**

Before: **Employment Judge Burge**
Ms M Oates-Hinds
Mr S Townsend

Representation
Claimants: Ms I Jemmison, paralegal
Respondent: Ms S Firth, Counsel

RESERVED JUDGMENT

It is the unanimous Judgment of the Tribunal that:

1. The Claimants' claims fail and are dismissed.

REASONS

Introduction

1. The Claimants worked for the Respondent until they were dismissed without notice for alleged gross misconduct after they attended a leaving gathering during covid lockdown. All three Claimants claim unfair dismissal and wrongful dismissal, Mr Braithwaite also claims race discrimination, Ms

Pryce also claims race and age discrimination and Ms Kahan-Howell also claims disability discrimination.

The evidence

2. The Claimants gave evidence on their own behalf.

3. Aaron Gibbs (Investigator), David Cox (decision maker for Mr Braithwaite), Mani Soor (decision maker for Ms Pryce), Olivia Elliott (Employee Relations Assistant Manager), Alec London (heard others' disciplinary cases), Mark Fraser (heard Mr Braithwaite's and Ms Kahan-Howell's appeals) and Paul Maddison (heard Ms Pryce's appeal) gave evidence on behalf of the Respondent.

4. The Tribunal was referred during the hearing to documents in a hearing bundle of 821 pages. The Tribunal made it clear that they would only read the pages of the bundle that they were taken to.

5. Pages 822 – 863 were added to the bundle part way through the hearing. Upon her application Ms Jemmison was given an afternoon to consider the new disclosure.

6. After the evidence had been heard the representatives submitted written closing submissions. On 23 January 2024 the representatives attended the Tribunal to make any additional oral closing submissions and to ensure that the Tribunal could ask any questions. The rest of the day was spent in Tribunal deliberations.

Issues for the Tribunal to decide

7. The issues were identified by EJ Fowell at a Preliminary Hearing on 14 September 2022. These were discussed at the start of the final hearing and agreed as follows:

Unfair dismissal

1) In each case, did the company act reasonably in all the circumstances in treating their attendance at this event as a sufficient reason to dismiss? The Tribunal will usually decide, in particular, whether

A) the company had a genuine belief in their misconduct
B) made on reasonable grounds
C) following a sufficient investigation and a fair process and that
D) dismissal was 'within the range of reasonable responses' open to an employer in the circumstances.

2) Ms Jemmison said that although the Claimants thought that the decision to dismiss them was unfair, the investigation procedure was unfair only because the Respondent failed to interview two witnesses that they thought were relevant.

Direct discrimination

3) In each case, did the company, in dismissing the employee, treat him or her *less favourably* than it treated or would have treated someone else in the same circumstances apart from his age, race, or disability (as the case may be). Mr Braithwaite and Ms Pryce describe themselves as being of "black Caribbean heritage".

4) The Claimants rely on named comparators of those who were not dismissed:

   A) Mr Braithwaite compares himself to M Golubics (Caucasian male, also an Assistant Depot Manager)

   B) Ms Pryce compares herself to M Wiltshire (Caucasian, early 20s), B Phillips (Caucasian early 30s) and G Damani (Asian 40s)

   C) Ms Kahan-Howell compares herself to M Wiltshire, B Phillips, G Damani and R Wiltshire.

Discrimination arising from disability

5) The Respondent has conceded that Ms Kahan-Howell had a disability at the relevant time and that they had knowledge of it.

6) Can Ms Kahan-Howell prove that the company dismissed her (the unfavourable treatment) because of the "something arising" in consequence of her disability, namely her high level of absence and lateness.

7) If so, the Respondent says it had a legitimate aim to ensure that its workforce was a safe environment for its staff during the Covid-19 pandemic and that this justified its actions.

8. The parties were not ready for remedy. The Claimants had not provided evidence of their attempts to find other work, the Respondents had not provided evidence of a failure to mitigate. This hearing would therefore only decide liability, with the following potential increases/deductions to be decided:

   1) an uplift in respect of any failure by the Respondent to follow the ACAS Code in relation to their dismissal.

   2) Deduction if there is a chance that they would have been dismissed in any event (*Polkey*)

   3) Did the Claimants contribute to the dismissal by their conduct?

9. If one or more of the Claimants were successful a one day remedy hearing will take place, unless remedy can be agreed between the parties.

Findings of Fact

10. The Tribunal finds that, on the balance of probabilities, the following facts occurred.

11. Deloris Pryce (Telesales / Business Developer at Battersea depot) started employment with the Respondent on 28 April 2014, Simone Kahan-Howell started employment with the Respondent on 25 July 2016 and Anthony Braithwaite started employment with the Respondent on 25 July 2016.

12. The Respondent has an Employee handbook:

> *"6.8e Gross Misconduct*
>
> *Gross misconduct is defined as conduct, on the part of an employee, which is so severe that it destroys the employer/employee relationship, and justifies instant dismissal without notice or pay in lieu of notice. Such dismissal without notice is often called 'summary dismissal'. Examples of gross misconduct, which will normally result in summary dismissal, include the following. This list is not intended to be exhaustive. A more comprehensive list can be found in the full policy and procedure document available on Depotlink or from the HR Department:*
> *…*
> *14. Failure to comply with Health and Safety rules resulting in injury or loss*
> *…*

13. In May 2020 the Respondent's Trade Depot and Field Based Roles Standard Operating Procedures during Covid-19 Pandemic and associated training was introduced.

14. On 21 May 2020 Deloris Pryce completed a Depot and Field Role Covid-19 declaration. On 18 August 2020 Ms Kahan-Howell completed a Depot and Field Role Covid-19 declaration.

15. On 6 January 2021 a Covid-19 national lockdown was announced.

16. There was a Poster displayed in the Respondent's premises:

> *"COVID-19 Update*
> *…*
> *Trade Depot Operations during UK Lockdown - as of 5th Jan. 2021*
> *Following recent Government announcements, you may only leave your home for work if you cannot reasonably work from home.*
> *COVID-19 cases are rising across the UK and this is being compounded by a new variant of the virus which spreads much more easily.*

Around 1 in 3 people infected with Covid-19 have or display no symptoms... so will be spreading the virus without even realising it. We must all take action to protect each other and NHS capacity.
We all have an individual responsibility to follow the rules, without exception

• Employees who are classified as CEV (Clinically Extremely Vulnerable) should work from home. If the employee cannot work from home, then they should not attend work
• Larger Trade Counter Kitchen Display areas should be closed-off in order to reduce potential likelihood of virus transmission
• Priority should be given to conducting customer presentations and surveys virtually/online
• Essential in-house presentation appointments are to be conducted in line with SOP COV:

Presentation Studio Use During COViD-19 Pandemic
• Customer surveys can continue, but should only take place if it is absolutely essential, and with strict COVID secure processes and check lists being followed in line with SOP COV:

Designer Surveys
• Assume everyone is infected with the virus and always maintain 2m social distancing
• Staff who are not protected at work by a screen are to wear facial coverings for ALL face-to- face interactions as per Safety Alert 038 - Update, The wearing of Facial Coverings
• Regularly wash hands with soap and water for a minimum of 20 seconds and use hand gel sanitiser as much and as often as possible throughout the course of the day
• Sanitise i disinfect all surfaces frequently and avoid sharing desks, stationary equipment, phones or PCs etc. If you must share items, then sanitise / disinfect them before use
• You can travel in between different Tier/Alert level areas for WORK purposes, but must observe strict specific Tier/Alert restrictions and limit such journeys as much as possible
• Restrict staff movement, travel and activity to within own work areas, especially Reps and Designers, to prevent spreading the virus in line with SOP COV: 08-11 - Field Based Roles
• You are advised not to car share with anyone from outside your household/support bubble Depot management should continue to strictly follow COVID-19 SOPs, increase depot cleaning
routines, control depot access and ensure C0VID Planned Monitoring checks are conducted and reported through Safe to Trade on a weekly basis.
This COVID-19 Update is to be briefed to all Depot Management and staff and then placed on display in a common staff area until further notice."

17. On 17 February 2021 Mr Braithwaite a received letter from Department of Health & Social Care telling him to shield as he was clinically extremely vulnerable.

18. On 11 March 2021 Mr Wright, then Assistant Manager at the Battersea depot, moved to become Assistant Manager at the Sutton depot.

19. On 12 March 2021 Mr Clinton was contacted by NHS Track & Trace. He took a Covid-19 test on 13 March 2021. Mr Clinton was a Former Depot Manager at Battersea depot who ultimately resigned prior to the disciplinary hearing.

20. On 13 March 2021 there was a social gathering at Battersea depot to say goodbye to Mr Wright who was moving to a different department. It was organised by Mr Clinton. In addition to the Claimants and Mr Clinton, the following people attended:

    1) Mr Case (Warehouse Person at Battersea Depot) (he ultimately received a final written warning)
    2) Ms Damani (Kitchen Sales Designer at Battersea depot) (she ultimately received a final written warning).
    3) Mr Golubics (Assistant Depot Manager at Battersea depot), he was a new starter, had not yet done Health and Safety training (he ultimately received no disciplinary sanction
    4) Mr Noble (Contract Delivery Driver), he was interviewed during investigation
    5) Mr Perry (Kitchen Sales Designer at Battersea depot), was a new starter, had not yet done Health and Safety training, (he ultimately received no disciplinary sanction)
    6) Mr Phillips (Warehouse Person at Battersea depot) (he ultimately received a final written warning)
    7) Ms Turner (Kitchen Sales Designer at Wimbledon depot) (she ultimately received a final written warning)
    8) Ms M Wiltshire (Trade Sales Counter Person at Brixton depot) (he ultimately received a final written warning)
    9) Mr Wiltshire (Handy Person for London (South West)) (he was initially dismissed but sanction was reduced to final written warning on appeal)
    10) Ms T Wiltshire (Business Developer at Putney depot) (she ultimately received a final written warning)
    11) Mr Wright (Former Assistant Manager at Sutton) attended social gathering (he was ultimately dismissed).

21. Two out of the 15 attendees were black Caribbean (Mr Braithwaite and Ms Pryce).

22. Three of the attendees, Mr Clinton, Mr Wright and Mr Braithwaite, were managers and had been involved in ensuring that their depots complied with the Respondent's Covid-19 rules and procedures.

23. Mr Braithwaite gave evidence, that is accepted, that although he was shielding Mr Wright had helped him in his career and so he wanted to go and pay his respects.

24. At the gathering there was food which had been ordered by Ms Pryce and Ms Damani and paid on Mr Clinton's credit card, some alcohol and a leaving presentation in a smaller room for Mr Wright. Mr Braithwaite wore a mask. Ms Pryce hugged Mr Wright, as did Ms M Wiltshire and Mr Phillips. It is clear from photographs and videos of the event, and agreed by the parties, that the attendees at the gathering did not socially distance. Attendees stayed varying lengths of time and the gathering finished at 19.00.

25. In addition to those who were present, the following people were interviewed: Mr Backhurst (Depot Manager at Wimbledon depot) Mr Harambalous (Territory Sales Representative), Mr Keyes (Depot Manager at Fulham depot), Mr Mari (Kitchen Sales Designer at Battersea depot), Ms Melhuish (Assistant Manager at Brixton depot) and Mr Sheehan (Assistant Depot Manager at Fulham depot).

26. The Investigators were Phil Colvill (Regional Security Advisor for London (South East) and South East) and Aaron Gibbs (Regional Security Advisor for London (West and South)). They began their investigation on 16 March 2021.

27. Between 17 March 2021 – 22 March 2021 Aaron Gibbs and Phil Colvill conducted investigation meetings with Anthony Braithwaite, Deloris Pryce and the other employees involved. The investigation included what training attendees had undertaken and what the content was. Photographs were taken of the place the gathering took place, plans of the rooms and a timeline were created. Video footage and photographs were reviewed and pertinent parts extracted.

28. Mr Gibbs prepared the investigation report dated 22 March 2021.

29. The Claimants, and several others were invited to disciplinary hearings in early April 2021. The letters explained what the allegations were, that they could constitute gross misconduct and warrant summary dismissal. The allegations were:

    a) *A breach of the government's Coronavirus restrictions by attending a social gathering at HJ Battersea Depot on 13 March 2021 during lockdown; and*

    b) *A breach of Howdens' health and safety procedures, namely the Covid Standard Operating Procedures, at the social gathering thereby potentially putting the health and safety of him and his colleagues at risk.*

30. It was also explained to Mr Braithwaite in the letter that consideration would be made as to whether his conduct had led to a breach of trust and

confidence, particularly with regards to his managerial position within the Respondent.

31. The Claimants and several other employees were suspended on 24 March 2021.

32. Mr Gibbs updated the investigation report following investigation meeting with Mr Clinton on 26 March 2021.

33. Paul Thain (Depot Manager at Epsom depot) determined whether there was a disciplinary case to answer. He decided that several employees should be invited to a disciplinary hearing, including the Claimants, on 30 March 2021. However, in respect of Ms Perry and Mr Golubics, he decided that the right sanction would be a letter of concern along with full training for the relevant covid sop's and all Howden joinery health and safety as they were new to the business and had not yet undertaken training.

34. David Cox (Area Manager for London (West) heard Mr Braithwaite's, Mr Wright's and Mr Clinton's disciplinary (although Mr Clinton resigned before the disciplinary hearing took place).

35. Alec London (Cluster Manager for London (West)) heard Ms M Wiltshire, Ms T Wiltshire, Mr Wiltshire and Mr Phillips' disciplinary cases.

36. Lianne Matthews (Former Depot Manager at Croydon depot) heard Ms Kahan-Howell's disciplinary case and was supported by Olivia Elliott (Employee Relations Assistant Manager). Mani Soor (Area Manager for London (South and Central) heard Ms Pryce's and Ms Damani's disciplinary cases.

37. Mark Fraser Area Manager for London (North and East) heard Mr Braithwaite's and Ms Kahan-Howell's appeals. Paul Maddison (Depot Manager at Leighton Buzzard depot) heard Ms Pryce's and Mr Wiltshire's appeals.

Mr Braithwaite

38. Mr Braithwaite attended a disciplinary hearing chaired by David Cox on 7 April 2021. Mr Cox played Mr Braithwaite the videos from the gathering and asked him a series of questions.

39. Mr Braithwaite wore his mask at all times and had hand sanitizer. He was not worried about colleagues who worked with his partner, as she was exposed to them anyway and she and Mr Braithwaite lived together so he considered it to be an extension of his own bubble. But he was concerned about one attendee, Ms Turner, who worked in a different Depot. Mr Braithwaite admitted that the social gathering was a breach of NHS/Government Guidelines at the time. Mr Cox thought that Mr Braithwaite was "arrogant" in the meeting, refused to take accountability, was not remorseful and was blasé about the situation even though what he

believed about bubbles was wrong. Mr Cox also thought that as a manager Mr Braithwaite should have known better. The meeting was adjourned.

40. At the reconvened meeting on 13 April 2021 Mr Braithwaite said that he had not researched what a support bubble was and did not feel that he needed to as his view remained that his partner worked there and so it was part of his bubble. The next part of the meeting was taken up with a discussion about how the Respondent had asked Mr Braithwaite to work for a day to finish things off when he was supposed to be shielding. At the end of the meeting Mr Cox told Mr Braithwaite that his decision was that he should be dismissed. In the letter informing him of dismissal dated 15 April 2021, Mr Cox wrote:

> *"In reaching my decision, I considered everything that was discussed at the meeting and all the evidence I had available. I also considered your length of service. However, as a member of staff of almost 4.5 years' service, I am concerned that you did break the rules and you chose to attend the Battersea depot on 13 th March 2021 for a social gathering, placing not only yourself, but your colleagues at risk. As a member of management with increased accountability for both yourself and your team, the expectation would be that you lead by example and ensure that you are fully compliant with any standard operating procedures that may be in place. Unfortunately, I am not confident that you are fully compliant with these procedures. It is worth noting that at no point during this process have you shown any remorse for your actions or any acceptance of what you have done. In your role as Assistant Manager, you are placed in a position of trust and confidence and your conduct has fallen far below what is expected of you. As a direct result of your actions, the above allegations are substantiated, and I believe that the relationship between the employer and employee has been irreparably broken."*

41. Mr Braithwaite appealed on 21 April 2021 saying that he should not have the same sanction as Mr Clinton, he should not have been asked to work after presenting his clinically vulnerable letter. He said "I know now that I made a lot of errors in my judgement that day and for that I am truly sorry for restrictions crossed by myself on March 13th." He also said that he had not been asked about how he felt about his actions at the time and that "after I was made aware of the complications my actions caused, I was very remorseful."

42. Mr Braithwaite attended the appeal hearing chaired by Mark Fraser on 4 May 2021. Mr Braithwaite said that he should get a lesser sanction, he had a mistaken belief about bubbles and that he was remorseful. Mr Fraser decided that there were contradictions in his actions and logic, that as a member of management with additional accountability he should have checked if he was unclear. Further Mr Braithwaite could have turned away once he realized the gathering would be a breach. Mr Braithwaite's appeal was rejected by letter from Mark Fraser on May 2021.

Mr Wright

43. Mr Cox also decided to dismiss Mr Wright. Mr Cox gave evidence, that is accepted, he felt the case was similar to Mr Braithwaite's as he was in a managerial role and so should have known better as he was in a managerial position and responsible for upholding the standard operating procedures. The other "key part" for Mr Cox was that the gathering took place for Mr Wright's leaving of the Depot and that without him attending there would have been no gathering.

Ms Pryce

44. Ms Pryce attended a disciplinary hearing chaired by Ms Soor on 8 April 2021. Ms Pryce confirmed that she and Ms Damani had ordered food for the gathering. She had known in advance that two people that did not work at the Battersea depot would attend the gathering. Ms Pryce understood that the gathering was not permitted under the Government guidelines in place at the time but she went along with doing what they had always done when someone was leaving and also because the gathering was in the depot and most people there were attending the depot every day for work. Ms Pryce acknowledged that two people hugging would have been negligent and irresponsible but said that she could not just stop this in 12 months. She said she was a "hugger" and it was a "habit of a lifetime". Ms Soor then showed Ms Pryce videos from the gathering. Ms Pryce then said that she felt disgusted watching the video and said she understood the issue but she still said she was not responsible. At the conclusion of the hearing Ms Pryce said "I apologise for my behaviour".

45. On 8 April 2021 the disciplinary managers Mr Cox, Ms Soor and Mr London had a meeting with HR. The tribunal finds that the meeting discussed themes and shared information on what they were thinking so far.

46. In evidence to the Tribunal Ms Soor said that she found Ms Pryce as being aggressive and defensive. She did not feel that her words of apology were sincere.

47. The Tribunal accepts Ms Soor's evidence that:

> *"I didn't consider that there were any mitigating factors. I knew that Deloris had been with the business for a long time but I didn't feel that was relevant when we were talking about her putting people's lives at risk. It was a really difficult time for everyone during the lockdown and I felt that Deloris' attitude was so blasé"*
>
> *"I felt that she had displayed no sincere remorse. I felt that what she had done and her attitude was too severe and I was not prepared to take the risk of putting others in danger by allowing her to return to work"*

48. By letter dated 20 April 2021 Ms Soor summarily dismissed the Claimant:

> *"Having watched the video you admitted that you shouldn't have hugged James but that you have a bond with him, and it was very emotional. I asked you how you felt now having seen footage and you said that you felt disgusted and that you understood having seen it. You also said that you were gutted and reiterated that the gathering could have waited."*
>
> *…You displayed a total lack of accountability of your responsibility faced with a Covid situation- ignorance of a situation and what to do in an event like this is no defence for your actions…*
> *Furthermore, you say that you were not clear about policy and implications on wages but signed for the understanding of the policy and guidelines anyway."*

49. Ms Pryce appealed by email dated 25 April 2021. She said that she should have been given warnings before dismissal, she had almost 10 years' service and positive feedback. She appealed the consistency of sanction and said she should not be dismissed where others have not. She raised that covid regulations had not been adhered to by the Respondent and that management did not make it clear previously what the rules were.

50. Ms Pryce was invited to an appeal hearing on 29 April 2021 and attended the appeal hearing chaired by Paul Maddison on 5 May 2021. At that appeal hearing Ms Pryce was defensive and did not accept that she had done wrong, saying at one point "take it or leave it Paul, justify it to me". She was unhappy that others had attended and kept their jobs. Ms Pryce said that she was immune from covid having already contracted it and so she had every right to attend.

51. The appeal hearing outcome letter was sent to Ms Pryce by Mr Maddison on 6 May 2021, her appeal was not upheld. Mr Maddison said that she remained unaccountable, she admitted she would do the same again and so dismissal was the appropriate sanction.

Ms Damani, Mr Case and Ms Turner

52. Ms Soor also heard the disciplinaries of Ms Damani, Mr Case and Ms Turner, all of whom were given a final written warning.

53. Ms Damani had organised the food for the gathering with Ms Pryce and she had also been involved in a lift share which was a breach of the covid regulations and the Respondent's poster. However, the Tribunal accepts Ms Soor's evidence that at the disciplinary hearing Ms Damani was distraught and tearful about what she had done and was extremely remorseful throughout her disciplinary hearing. Ms Soor was confident that Ms Damani would not repeat her behaviour and would not put others at risk if she were to return to work and it was for these reasons that she chose to give her a final written warning and not to dismiss her.

54. The Tribunal accepts Ms Soor's evidence that Ms Turner was also remorseful and understood that what she had done was wrong. Further, she had not been involved in organising the gathering and she was confident that Ms Turner would not repeat her behaviour, would not put others at risk again if she were to return to work and for those reasons she chose to give her a final warning and not to dismiss her.

55. The Tribunal further accepts the evidence of Ms Soor that Mr Case was a new starter and had only been with Howdens for a brief length of time, he was also remorseful and accepted that what he had done was wrong. Ms Soor was confident that Mr Case would not put others at risk if he were to return to work and for these reasons she chose to give him a final warning and not dismiss him.

Ms Kahan-Howell

56. Ms Kahan-Howell attended an investigation meeting on 8 April 2021. Lianne Matthews made the decision to dismiss her but she no longer works for the Respondent and was not a witness to the Tribunal. Olivia Eliott (Employee Relations Assistant Manager) assisted Ms Matthews and she gave evidence to the Tribunal.

57. In the investigation meeting Ms Kahan-Howell raised that she felt "under slight pressure" to attend the gathering as she had had so many meetings with her manager (about her sickness/lateness) and she did not want to be singled out to be not like a team player.

58. At the Disciplinary Hearing, Mathew (Union representative) attended and pointed out that Mr Clinton had been difficult about Ms Kahan-Howell's reasonable adjustments and that as a manager Mr Clinton should have ensured that this event did not happen.

59. Ms Kahan-Howell said that her belief was that those in attendance were in a work support bubble, although she now accepted it was a breach of the Covid 19 guidelines. She had previously questioned Mr Clinton about wearing masks and he had said that masks were needed when with a customer but not if with colleagues. Ms Kahan-Howell said that she wore her mask at work but no one else did. Ms Matthews decided that Ms Kaha-Howell had not taken accountability for her actions during a national lockdown, which were serious and that she could not be confident that she would not repeat her behaviour and so decided to summarily dismiss her.

60. Ms Kahan-Howell appealed on 28 April 2021. She focused her appeal on her difficult relationship with her manager Mr Clinton for the previous 3 years with regards to trying to get reasonable adjustments for her disability and when he invited her to the gathering she felt if she did not attend it would cause further problems for her at work.

61. Mark Fraser heard her appeal on 27 May 2021. At the appeal hearing Ms Kahan-Howell spoke again about her difficult relationship with her manager

and that he had told the staff they were one big work bubble. When challenged about why she had not done her own research she reiterated he was her manager and she listened to him. She said that if she was able to return to work she would feel more confident raising concerns and seeking a better understanding to prevent something like this happening again. Mr Fraser decided that she did not show the appropriate level of accountability and continued to shift responsibility back to her line manager saying that's he was just following the advice she was given. Ms Kahan-Howell's appeal was not upheld on 6 May 2021.

Others

62. Mr London was the decision maker for Mr Phillips. Mr Wiltshire and Ms M Wiltshire. In respect of Mr Phillips he decided that Mr Phillips accepted that he should not have attended the gathering and was very upset and remorseful during the disciplinary hearing. Mr London gave a final written warning. In relation to Ms M Wilshire, Mr London said that Ms M Morgan had not been intending to attend but Mr Clifton had seen her in the car park and invited her in. She was "very remorseful and appeared devastated" during the disciplinary hearing and Mr London decided to give her a final written warning also.

63. Mr London also heard Mr Wiltshire's disciplinary. Mr Wiltshire was very difficult and argumentative and was flippant about the gathering and the consequences of his attendance. Mr London decided Mr Wiltshire's behaviour was unacceptable and he was not reassured that he would not do it again. Mr London decided summary dismissal was the appropriate sanction. The Disciplinary hearing outcome letter was sent to Mr Wiltshire by Alec London and he was summarily dismissed on 14 April 2021.

64. Mr Wiltshire appealed his dismissal. At the appeal hearing Mr Wiltshire was very apologetic for his behaviour at the disciplinary hearing and said that he was under a lot of pressure so had acted out of character. He said he only attended the depot to check on his van and then was only at the gathering for 20 minutes and that he popped into say goodbye. The appeal hearing outcome letter sent to Mr Wiltshire by Paul Maddison said that his appeal was partly upheld and his disciplinary sanction reduced to a final written warning on 7 May 2021.

The law

Unfair dismissal

65. Section 94 of the Employment Rights Act 1996 ("ERA") confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under section 111. The employee must show that he was dismissed by the Respondent under section 95, but the Respondent must show the reason for dismissing the Claimant (within section 95(1)(a) ERA). S.98 ERA deals with the fairness of dismissals. There are two stages within section 98. First, the employer must show that

it had a potentially fair reason for the dismissal within s.98(2).

> *s.98 (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.*
>
> *(2) A reason falls within this subsection if it—*
> *(3) …,*
> *(4) (b) relates to the conduct of the employee,*
> *(5) ….*

66. The second part of the test is that, if the Respondent shows that it had a potentially fair reason for the dismissal, the Tribunal must consider, without there being any burden of proof on either party, whether the Respondent acted fairly or unfairly in dismissing for that reason:

> *s.98 (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—*
> *a. depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
> *b. shall be determined in accordance with equity and the substantial merits of the case.*

67. The employer bears the burden of proving the reason for dismissal whereas the burden of proving the fairness of the dismissal is neutral. The burden of proof on employers to prove the reason for dismissal is not a heavy one. The employer does not have to prove that the reason actually did justify the dismissal because that is a matter for the Tribunal to assess when considering the question of reasonableness. As Lord Justice Griffiths put it in *Gilham and ors v Kent County Council (No.2)* 1985 ICR 233:

> *"The hurdle over which the employer has to jump at this stage of an inquiry into an unfair dismissal complaint is designed to deter employers from dismissing employees for some trivial or unworthy reason. If he does so, the dismissal is deemed unfair without the need to look further into its merits. But if on the face of it the reason could justify the dismissal, then it passes as a substantial reason, and the inquiry moves on to [S.98(4)], and the question of reasonableness".*

68. In the case of *British Home Stores v Burchell* [1978] IRLR 379 EAT, the court said that a dismissal for misconduct will only be fair if, at the time of dismissal:
    (1) the employer believed the employee to be guilty of misconduct;
    (2) the employer had reasonable grounds for believing that the employee was guilty of that misconduct; and
    (3) at the time it held that belief, it had carried out as much investigation as was reasonable.

69. In the case of *Iceland Frozen Foods Ltd v Jones* [1982] IRLR 439 EAT, guidance was given that the function of the Employment Tribunal was to decide whether in the particular circumstances 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 falls outside the band, it is unfair.

70. In the case of *Sainsburys Supermarket Ltd v Hitt* [2003] IRLR 23 CA, guidance was given that the band of reasonable responses applies to both the procedures adopted by the employer as well as the dismissal.

71. The Court of Appeal in London Ambulance *NHS Trust v Small* [2009] IRLR 563 warned that when determining the issue of liability, a Tribunal should confine its consideration of the facts to those found by the employer at the time of dismissal. It should be careful not to substitute its own view for that of the employer regarding the reasonableness of the dismissal for misconduct. In *Foley v Post Office; Midland Bank plc v Madden* [2000] IRLR 82 the court said it is irrelevant whether or not the Tribunal would have dismissed the employee, or investigated things differently, if it had been in the employer's shoes: the Tribunal must not "substitute its view" for that of the employer.

72. The Employment Appeal Tribunal in *Clark v. Civil Aviation Authority* [1991] IRLR 412 laid out some general guidelines as to what a fair procedure requires. But even if such procedures are not strictly complied with a dismissal may nevertheless be fair – where, for example, the procedural defect is not intrinsically unfair and the procedures overall are fair: *Fuller v. Lloyd's Bank plc* [1991] IRLR 336.

73. The Court of Appeal in *Shrestha v Genesis Housing Association Limited* [2015] EWCA Civ 94:

> *"To say that each line of defence must be investigated unless it is manifestly false or unarguable is to adopt too narrow an approach and to add an unwarranted gloss to the Burchell test. The investigation should be looked at as a whole when assessing the question of reasonableness. As part of the process of investigation, the employer must of course consider any defences advanced by the employee, but whether and to what extent it is necessary to carry out specific inquiry into them in order to meet the Burchell test will depend on the circumstances as a whole. Moreover, in a case such*

> *as the present it is misleading to talk in terms of distinct lines of defence. The issue here was whether the appellant had over-claimed mileage expenses. His explanations as to why the mileage claims were as high as they were had to be assessed as an integral part of the determination of that issue. What mattered was the reasonableness of the overall investigation into the issue."*

74. As observed by Mr Justice Langstaff in *Sharkey v Lloyds Bank Plc* UKEAT/0005/15/SM:

> *"It will almost inevitably be the case that in any alleged unfair dismissal a Claimant will be able to identify a flaw, small or large, in the employer's process. It will be and is for the Tribunal to evaluate whether that is so significant as to amount to unfairness any prospect of there having been a dismissal in any event being a matter for compensation and not going to the fairness of the dismissal itself."* (para [26])

Breach of contract

75. A court or tribunal must be satisfied, on the balance of probabilities, that there was an actual repudiation of the contract by the employee. It is not enough for an employer to prove that it had a reasonable belief that the employee was guilty of gross misconduct. This is a different standard from that required of employers resisting a claim of unfair dismissal, where reasonable belief may suffice.

Discrimination

76. Sections 5, 6 and 9 of the Equality Act 2010 ("EqA") provide that age, disability and race are protected characteristics. Section 9(1) sets out that race includes colour, nationality and ethnic or national origins.

77. S.39(2) EqA prohibits an employer from discriminating against one of its employees by subjecting the employee to a detriment.

78. S.136 of the EqA sets out the burden of proof:

A) *"…(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.*

B) *(3) But subsection (2) does not apply if A shows that A did not contravene the provision…"*

79. The burden of proof provisions require careful attention where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or another (*Hewage v Grampian Health Board* [2012] IRLR 870, SC).

80. Guidelines on the burden of proof were set out by the Court of Appeal in *Igen Ltd v Wong* [2005] IRLR 258. Once the burden of proof has shifted, it

is then for the respondents to prove that they did not commit the act of discrimination. To discharge that burden it is necessary for the respondents to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of the protected characteristic, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive. Since the facts necessary to prove an explanation would normally be in the possession of the respondents, a tribunal would normally expect cogent evidence to discharge that burden of proof.

81. The Court of Appeal in *Madarassy*, a case brought under the then Sex Discrimination Act 1975, states:

> *"The burden of proof does not shift to the employer simply on the claimant establishing a difference in status (eg sex) and a difference in treatment. Those bare facts 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 had committed an unlawful act of discrimination."*

82. This approach was approved in *Hewage v Grampian Health Board* [2012] UKSC 37 and in *Royal Mail Group Ltd v Efobi* [2021] ICR 1263.

83. Where there is a difference of treatment and a difference of status it does not take much more to shift the burden of proof. In *Deman v Commission for Equality and Human Rights Commission & others* [2010] EWCA Civ 1279, Sedley LJ held:

> *"We agree with both counsel that the "more" which is needed to create a claim requiring an answer need not be a great deal. In some instances it will be furnished by non-response, or an evasive or untruthful answer, to a statutory questionnaire. In other instances it may be furnished by the context in which the act has allegedly occurred."*

84. Case law recognises that very little discrimination today is overt or even deliberate. Witnesses can be unconsciously prejudiced.

Direct discrimination

85. Under s.13(1) of the EqA direct discrimination takes place where a person treats the claimant less favourably because of a protected characteristic than that person treats or would treat others. Under s.23(1), when a comparison is made, there must be no material difference between the circumstances relating to each case.

86. It is often appropriate for a tribunal to consider, first, whether the Claimant received less favourable treatment than the appropriate comparator and then, secondly, whether the less favourable treatment was because of race. However in some cases, for example where there is only a hypothetical comparator, these questions cannot be answered without first considering the 'reason why' the Claimant was treated as he was (*Shamoon v Chief*

Constable of the Royal Ulster Constabulary [2003] IRLR 285).

87. In *London Borough of Islington v Ladele (Liberty intervening)* 2009 ICR 387, EAT, Mr Justice Elias (then President) confirmed the principal in *Shamoon* and said that a strict reliance on the comparator test can be positively misleading where the protected characteristic contributes to, but is not the sole or principal reason for, the employer's act or decision.

88. Decisions are frequently reached for more than one reason. Provided the protected characteristic had a significant influence on the outcome, discrimination is made out (*Nagarajan v London Regional Transport* [1999] IRLR 572, HL.

89. Where the alleged direct discrimination is age, s.13(2) states that "A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim."

Discrimination Arising from disability

90. Section 15 EqA provides that discrimination arising from disability occurs where:

> *"(1)A person (A) discriminates against a disabled person (B) if—*
> *(a)A treats B unfavourably because of something arising in consequence of B's disability, and*
> *(b)A cannot show that the treatment is a proportionate means of achieving a legitimate aim.*
>
> *(2)Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."*

Conclusions

91. During a National Lockdown, some employees of the Respondent decided to have a gathering to celebrate that one of the managers, Mr Wright, was leaving to join another depot within the Respondent. This gathering was in breach of the Covid-19 national lockdown rules. At that time there was some confusion about bubbles and work but it is agreed by the parties that the gathering was in breach of the rules at the time.

92. This was a gathering for a manager. Mr Clinton, also a manager, was one of the organisers and he paid for the food. Ms Pryce and Ms Damani organised the food. The people in attendance did not socially distance and some hugged. Mr Braithwaite was a manager. He was not in work as he was clinically vulnerable, yet he still decided to attend the gathering, albeit he wore a mask throughout.

93. At the start of the hearing Ms Jemmison said it was the Claimants' case that the investigation was fair, other than the Respondent's failure to interview two witnesses, however this was not advanced in the evidence nor in closing submissions. Case law tells us that investigations do not have to

be perfect. The Tribunal concludes that in this case the investigation was thorough and it was fair.

94. There were 15 attendees at the gathering. The Respondent is a large national employer. Given the size of the investigation and disciplinary procedures there was more than one decision maker. There had been a meeting to discuss findings, to ensure consistency. The meeting of managers, with HR support, that took place on 8 April 2021 was a discussion of themes that had emerged. While it is always going to be difficult for a Respondent with different decision makers to ensure consistency yet preserve independence, the Tribunal concludes it was part of a fair process.

95. One thing the three Claimants had in common was that they were not particularly remorseful, they had all sought to excuse their actions in the investigation meeting and the disciplinary meeting. The decision in all of their cases was summary dismissal. Mr Wright was also summarily dismissed, and Mr Clinton would have had that sanction had he not left prior to the decision to dismiss. The attendees had attended a work event in breach of a national lockdown which is misconduct. The Respondent's belief was formed after a reasonable investigation where all parties admitted being in attendance.

96. However, only four employees were ultimately dismissed. Why was Ms Damani not dismissed, she had been involved in a lift share – a clear breach of covid rules, she had helped organise the gathering and had been at the gathering alongside Ms Pryce. The reason given by Ms Soor was that Ms Damani was extremely remorseful in the disciplinary hearing and she did not seek to excuse her actions. Ms Soor felt confident that Ms Damani could return to the workforce and would not do it again.

97. The decision was made to dismiss Mr Wiltshire after the disciplinary meeting. At that meeting he was very difficult, angry and flippant. Yet his dismissal was overturned on appeal and he was given a final written warning, because he was extremely remorseful in the appeal hearing and because he had only attended the gathering briefly, having attended the depot to check on his van.

98. All three claimants were somewhat remorseful in their appeal. Yet Ms Pryce was also challenging - she said things like "take it or leave it Paul, justify it to me". Ms Kahan-Howell still sought to attribute blame on her difficult relationship with Mr Clinton her manager. Mr Braithwaite spoke about the time when he had been given the clinically vulnerable letter and yet had been told to come in and prepare the store for a day – a clear breach of the covid guidance by the Respondent. Yet these issues were not seen by the Respondent as mitigations for their behaviour, they were seen as a failure to take accountability for their actions. To disregard these explanations was harsh. Mr Braithwaite had clearly shown that the Respondent was not consistent in their covid practices. Ms Kahan-Howell had a difficult relationship with her manager and he had invited her to the gathering which

took place after she was on shift. It is not hard to see that there is a power imbalance there and seniority is likely to lead to some pressure to attend.

99. However, it is not for a Tribunal to say what we would have decided, if we had been in the employer's shoes. We have to look at the Respondent's actions and decide whether the Respondent acted reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant, taking into account that this Respondent is a large national employer.

100. There were differences in the circumstances of Ms Pryce, Ms Kahan-Howell and Mr Braithwaite from those who were not dismissed, namely that the Respondent was not confident that they would not breach covid guidelines again were they allowed to return to work. The Tribunal concludes that these were harsh decisions, or perhaps the decisions not to dismiss Ms Damani and Mr Wiltshire and others were lenient. Either way the Tribunal concludes that it cannot be said that no reasonable employer would have made the decision to dismiss so as to take it outside the band of reasonable responses. The Claimant's claims for unfair dismissal therefore fail.

101. The Claimants were dismissed without notice. They bring a breach of contract claim in respect of their entitlement to notice. The Respondent says that it was entitled to dismiss without notice for gross misconduct. The Tribunal must decide if the Claimants committed an act of gross misconduct entitling it to dismiss without notice. In distinction to the Claimants' claim of unfair dismissal, where the focus was on the reasonableness of management's decisions, and it is immaterial what decision we would have made about the Claimants' conduct, the Tribunal must decide for itself whether the Claimants were guilty of conduct serious enough to entitle the Respondent to terminate the employment without notice. The Tribunal concludes that breaching national covid lockdown rules and attending a leaving do in breach of those rules and the Respondent's direction is conduct so serious it is an actual repudiation of the contract by the employee. The Claimants' complaint of wrongful dismissal (notice pay) therefore fails.

102. The allegations of discrimination were not strongly pursued. Ms Pryce does not mention that she thought age formed a part of her claim in her witness statement. Mr Braithwaite and Ms Pryce said that there were only 2 people of Afro Caribbean heritage and they were both dismissed. But Ms Kahan-Howell was also dismissed, as was Mr Wright and Mr Clinton would have been if he had not resigned first. Mr Golubics was not in materially similar circumstances, he was new to the Respondent and had not undergone training. Mr Wright was also a manager and he was dismissed. Ms M Wilshire, Mr Phillips and Ms Damani and Mr R Wiltshire also had differing circumstances. They were very remorseful and the Respondent concluded that they could be given another chance.

103. In relation to the race and age claims there was no evidence put forward to hint that race or age might have formed a part of the decision making. In relation to disability, there was no hint that the decision makers had regard

to the Claimant's disability, her absence or late history when making their decision. Mr Clinton himself was facing dismissal for organising/attending the party so it is very unlikely, and not alleged, that he would have been able to influence the sanction for Ms Kahan-Howell.

104. Ms Jemmison submitted a schedule of less favourable treatment in her written closing submissions, but these had not been raised as allegations and so have not been considered by the Tribunal.

105. The "reason why" the Claimants were dismissed was because they attended a gathering in breach of the national lockdown rules, and unlike others, the Respondent was not satisfied that if they returned they would not do it again. Additionally, in respect of Mr Braithwaite, the other longstanding managers who attended, Mr Wright was similarly dismissed, as would Mr Clinton have been had he not left prior to the decision to dismiss. There was not "more" sufficient material from which a Tribunal could conclude that on the balance of probabilities the Respondent had committed an unlawful act of discrimination. The burden has not been met and does not shift to the Respondent. The Claimants' discrimination complaints therefore fail.

_____

Employment Judge **Burge**

_____

Date: 6 February 2024