



EMPLOYMENT TRIBUNALS

Claimant: Mr S Tipu

Respondent: John Lewis PLC

Heard at: London South

On: 28th November – 1st
December 2024

Before: Employment Judge MJ Reed, Mr C Rogers and Ms M Oates-Hinds

Representation

Claimant: Mr Ryan Clements, Counsel

Respondent: Ms Grace Nichols, Counsel

RESERVED JUDGMENT

1. The complaint of unfair dismissal is well-founded. The claimant was unfairly dismissed.
2. The complaints of race discrimination and religion or belief discrimination relating to the claimant's 2021 pay review were subject to a deposit order. The deposit was not paid; those claims are therefore dismissed.
3. The remaining complaints of race discrimination and religion or belief discrimination are not well founded and are dismissed.

REASONS

Claims and issues

1. The claimant, Mr Tipu, brought claims for unfair dismissal, race discrimination and religion / belief discrimination. All of these claims relate to a period of annual leave from which he allegedly returned late. John Lewis ultimately dismissed him. Mr Tipu argued that that this was unfair dismissal and also discrimination.

2. At the preliminary hearing on 23rd July 2023 Employment Judge Wright set out the issues to be determined as follows:

Jurisdiction

1. The claimant commenced ACAS proceedings on 11 August 2021 and an early conciliation certificate was issued on 12 August 2021. The ET1 was issued on 9 September 2021.
2. It appears to the Tribunal that the following allegations of discrimination may be out of time:
 - a. Failure to give notice of the investigation meeting with Meral Gearing in or around early May 2021.
3. If any of these claims are out of time, then the Tribunal will consider whether they form part of a continuing chain of discrimination so as to bring them in time. If not, the Tribunal will consider whether it would be just and equitable to extend time.

Unfair dismissal

4. Did the respondent dismiss the claimant for a potentially fair reason? The respondent relies on conduct.
5. Did the respondent follow a fair procedure? In particular:
 - a. Did the respondent believe the claimant to be guilty of misconduct?
 - b. Did the respondent have reasonable grounds for believing that the claimant was guilty of that misconduct?
 - c. At the time the respondent held that belief, had it carried out as much investigation as was reasonable?
 - d. Was the claimant given adequate notice of meetings?
 - e. Was the respondent' procedure and sanction, namely summary dismissal for gross misconduct within the band of reasonable responses open to a reasonable employer?

Race Discrimination / Religion & Belief Discrimination

6. The claimant defines his religion as Islam and his race as Muslim. He relies upon a hypothetical comparator of a white employee who does not follow Islam.
7. Was the claimant subject to the following treatment and was it less favourable treatment?
 - a. Not being given notice of an investigation meeting by Meral Gearing in or around early May 2021
 - b. Being subject to an investigation meeting with Meral Gearing in or around early May 2021
 - c. Being subject to a disciplinary meeting with Sarah Kemp on 19th May 2021

- d. Being dismissed from his employment by Sarah Kemp on 19th May 2021
- e. Having his appeal against dismissal refused by Nigel Towse on 9th June 2021

8. Was the above less favourable treatment because of the claimant's race or religious belief?

- 3. At the beginning of the hearing both parties confirmed that the list of issues was correct. There had been a further element to Mr Tipu's discrimination claims, regarding an alleged failure to carry out a pay review. This, however, had been made subject to a deposit order on 24th July 2023, which had not been paid. Both parties agreed it should therefore be dismissed.
- 4. Both parties also agreed that the Tribunal should not address issues of remedy at this hearing, with the exception of those relating to possible reductions for contributory fault and any Polkey reduction.

Procedure, documents and evidence heard

- 5. The Tribunal heard evidence from Mr Tipu in support of his case. The Tribunal heard from the following witnesses on behalf of John Lewis: Meral Gearing, Sarah Kemp and Nigel Towse.
- 6. There was an agreed bundle of 560 pages. References to page numbers in these reasons are references to that bundle, unless otherwise indicated.
- 7. Both counsel made submissions, including written submissions. Rather than set out these out in detail separately, this decision will address the arguments made as they arise in these reasons.

Findings of fact

- 8. The Tribunal considered the documentary and oral evidence to which it was referred. All findings of fact were made on the basis of the civil standard of proof. That means that the Tribunal concluded that they are more likely to be true than not.
- 9. The written reasons are not intended to address every point of evidence or resolve every factual dispute between the parties. The Tribunal made the findings needed to resolve the legal disputes before it. Where no findings were made or findings were made in less detail than the evidence presented, that reflects the extent to which those areas were relevant to the issues and the conclusions reached.

Background

- 10. John Lewis is a well-known national department store. Mr Tipu began working there in June 2011. At the relevant time he was a Product Specialist on Large and Small Electricals at John Lewis Bluewater.

11. In August 2020 Meral Gearing became a Team Manager at the Bluewater branch. She became Mr Tipu's line manager. She was one of approximately 30 Team Managers at Bluewater.
12. Ms Gearing and Mr Tipu did not have a particularly good relationship. In particular, their relationship worsened following Mr Tipu's pay / performance review in February 2021. This was conducted by Ms Gearing and Mr Tipu's previous line manager. The review concluded that Mr Tipu was underperforming; that he was not delivering on the expectations of his role or demonstrating the skills required, page 130. As Mr Tipu made clear in his evidence, he believed that this assessment was unjust. He believed that it failed to reflect the significant contributions he had made during the difficult period of the Covid pandemic.
13. At this time the Covid pandemic was an ongoing and immediate concern. This meant that, in practice, Mr Tipu was often deployed away from Bluewater in 2020. Between March and June 2020 he had worked at branches of Waitrose. For four weeks in August and September he had worked in John Lewis Ashford.
14. On the 5th November 2020 the second national lockdown came into force and John Lewis Bluewater closed. As a result Mr Tipu was moved to a 'live-chat' role supporting online sales.

Annual Leave request

15. In early March Mr Tipu booked a period of annual leave to take place later in March. The purpose of this leave was to allow him to travel to Pakistan. A member of his family had passed away. In addition, his family was attempting to sell land which had been owned by his Grandfather. That sale had been difficult. His Grandfather had passed away in 1986, but the land remained unsold. The importance of this trip to Mr Tipu was apparent from the fact that he was willing to travel during the Covid pandemic and when, as detailed further below, he knew that travel circumstances might be difficult.
16. On 14th March 2021, Mr Tipu contacted the shop support team at Bluewater to request extending his holiday to run from 22nd March to 7th April 2021. This was authorised by the support team and can be seen recorded on the time off request, p101.
17. When Ms Gearing heard about the holiday request she was concerned because John Lewis Bluewater was to re-open on 12th April 2021. She felt it was important that Mr Tipu was available to work then and was concerned that, if he needed to quarantine upon returning to the UK, this might interfere with his return. She emailed the shop support team on the 16th March 2021, asking them to confirm what had been authorised, who had been involved and what had been discussed, p135.
18. One of the shop support staff replied the same day, confirming that leave had been authorised and saying that Mr Tipu had been told it would be fine to take leave while the store was closed, page 135. The email went on to say that Mr Tipu had been warned about the need to isolate upon his return and had

indicated that he would look at flights / dates that would ensure that he would be back in time, including any time required for quarantine.

19. Ms Gearing then had a phone conversation with Mr Tipu on 17th March 2021. Her evidence was that she explained that he would need to ensure that he could complete any required quarantine period before he returned to work. She also said that she told him that he would need to be back at work in the Branch on 12th April when it was due to reopen.
20. Ms Gearing said that she was particularly concerned to emphasise these points, because there had been a previous occasion when Mr Tipu had returned late from holiday and she wanted to make sure her instructions were clear. She also followed up this conversation with an email to Mr Tipu, page 136. This also emphasised that he must return by 12th April 2021 and that he should take into account a requirement for a 10-day quarantine period on his return.
21. In his evidence Mr Tipu accepted that he had had a conversation with Ms Gearing on the 17th March, but said that he did not recall it in any detail. He denied reading the email she had sent him.
22. The Tribunal concluded that Ms Gearing's account of the conversation on the 17th March was broadly accurate and that, in particular, she told Mr Tipu that he must, without fail, return by the 12th April 2021 for the store reopening and that he must take account of the period of quarantine when booking his holiday. Her account was supported by the emails she sent to both Mr Tipu and the staff support team at the time. It was also an inherently plausible account. It would be natural for a manager in her position to be concerned to ensure there were adequate staff for the re-opening.

Travel period

23. On 15th March 2021 (so prior to any discussion with Ms Gearing) Mr Tipu booked his flights to Pakistan with Qatar Airways. He booked a return flight, outbound leaving on Saturday 20th March 2021, inbound returning in the early morning on the 5th April 2021. His return flight involved a transit in Qatar.
24. Unfortunately, shortly after that the United Arab Emirates was placed on the red zone, for the purpose of covid restrictions on individuals entering the UK. Mr Tipu recognized that this would have meant that he would need to quarantine in a hotel on his return. He therefore cancelled these flights.
25. Also on the 17th March 2021 Mr Tipu booked a one way flight directly to Pakistan with British Airways. That flight departed on 21st March. On his arrival in Pakistan Mr Tipu had to quarantine for about five days.
26. The Tribunal concluded that Mr Tipu made this booking before he had spoken to Ms Gearing on 17th March. Ms Gearing did not recall when the phone call had been made. Mr Tipu thought that he had already booked his flight when he spoke to Ms Gearing, but the Tribunal concluded that, after the significant passage of time, this evidence could be given relatively little weight. The Tribunal did, however, have the travel booking confirmation, page 136. This

appeared to be timed at 13.13. Ms Gearing's email was sent at 18.52. It was the sort of email that was likely to be sent shortly after the phone conversation it confirmed. On balance therefore, the Tribunal concluded that the phone conversation probably took place in the afternoon, after Mr Tipu booked his flight in the early afternoon.

27. While Mr Tipu was in Pakistan the British government announced that it would be placed on the red list. This meant that it was more difficult than Mr Tipu had hoped to obtain a flight home. He attempted to book a flight through PIA (Pakistan's national airline), but was unable to do so. On 29th March he was able to book a flight online to travel back on the 3rd April. But this was cancelled and refunded the next day. Mr Tipu also paid a travel agent for a flight on the 3rd April, but this was also cancelled and refunded.
28. It was not until 6th April that Mr Tipu succeeded in booking a flight, which left at 1am on the 7th April arriving that afternoon, page 142.

Return to UK

29. Upon his return on 7th April the covid restrictions meant that Mr Tipu was expected to quarantine for 10 days. Plainly this meant that he would not be able to return to work, either on the 8th April (in accordance with his annual leave authorisation) or the 12th April (when the store was due to reopen).
30. Immediately upon his arrival Mr Tipu contacted the rota team at John Lewis Bluewater to explain the situation. They told him that he would have to speak to a manager and informed Ms Gearing.
31. Before speaking to Mr Tipu, Ms Gearing contacted John Lewis' People Policy and Advice team (PPA). PPA is the team within John Lewis who provide Human Resources support to managers. That call was noted by the PPA team, page 151. Ms Gearing said that she was dealing with an employee who had been on authorised holiday, but was not going to return on time. She was advised to explore this with him and that there might have been either genuine confusion about the return or unavoidable delays. The advice also raised the question of whether the original booking would have allowed Mr Tipu to return on time. It suggested that the possibility of extending compassionate leave should be considered, but so should the possibility that there had been a deliberate attempt to mislead.
32. Ms Gearing then phoned Mr Tipu. Some elements of that call are common ground. Both Ms Gearing and Mr Tipu agree that Mr Tipu gave an account of his difficulties in booking a return flight from Pakistan. They also agreed that there was a discussion of how Mr Tipu might return to work earlier. Mr Tipu said that he had some virtual training sessions scheduled, which he suggested that he could do from quarantine. Ms Gearing said that this would not be necessary, since there were other staff available to do this. In her evidence to the Tribunal Ms Gearing accepted that this training would have been work Mr Tipu would have expected to do when he returned and this expectation was reasonable.
33. Mr Tipu also suggested the possibility of 'test to release'. Test to release allowed those quarantining to be released earlier by taking a Covid test.

Between 27th November 2020 and 11th February 2021 a test could be taken after five days of quarantine, page 153. If that test was negative quarantine could be ended. After 11th February 2021 test to release required two negative tests, on day two and day eight of quarantine, page 152. If both tests were negative quarantine could be ended.

34. Ms Gearing said that it was not necessary for Mr Tipu to pursue test to release, which he would need to pay for privately.
35. Mr Tipu's evidence was that was also a discussion of time banking in relation to further days that Mr Tipu would now be absent while he was in quarantine. Time banking, in effect, is a system of flexible working within John Lewis. Employees may build up credit by working additional shifts, which they can then use to take additional leave. Additionally, employees may be authorised to take leave on the basis of time banking, with their leave time then being 'paid back' through additional shifts.
36. Mr Tipu says that Ms Gearing agreed that he could time bank the remaining days and this was understood by both of them as authorising an extension to his booked annual leave. Put another way, he says that his absence from the 7th April was not unauthorised and could not have been understood by Ms Gearing to be unauthorised, because she had authorised it by agreeing that it would be time banked.
37. Ms Gearing's account says that she does not recall discussing time banking. She says that she in no sense authorised the leave and that she made it clear to Mr Tipu that there would be an investigation into the fact that he had exceeded his authorised period of absence.
38. On this point the Tribunal concluded that there had been some discussion of time banking, but nothing that bore the meaning Mr Tipu sought to place on it. Rather, it appears to the Tribunal that the discussion of time banking only went so far as it being a pragmatic way of dealing with what had become Mr Tipu's inevitable absence. It is plain from Ms Gearing's action before Mr Tipu's leave that she was concerned that he return prior to the re-opening and that she understood that this would require accounting for the quarantine period. It is equally clear from the PPA note that she was unhappy about what had happened. As dealt with below, she later initiated a formal investigation into Mr Tipu's actions. None of that is congruent with Mr Tipu's account that he was told his further absence would now be authorised through the time banking system and no further action would be taken.
39. On the 13th April 2021 Mr Tipu received an email from NHS Test and Trace indicating that he had been in contact with someone who had tested positive for Covid. It indicated that he should stay at home and self-isolate until 17th April (including that date).

Investigation meeting

40. On the 22nd April 2021 Ms Gearing made another call to the People Policy and Advice team. Again, this was recorded by PPA, page 149-150. They note that Mr Tipu has returned to work, but that Ms Gearing wished to consider further

action. They indicated that this could be investigated and, if there was a case to answer, it would be down to the hearing manager.

41. On the 26th April 2021 Ms Gearing held an investigation meeting with Mr Tipu. It is agreed that Mr Tipu was not told of this meeting in advance. Before the meeting Ms Gearing prepared a number of questions she wished to ask, page 155.
42. Ms Gearing's notes of the investigation meeting have been produced, page 158-170. The Tribunal accepted that these were a broadly accurate account of the meeting.
43. Ms Gearing began by asking Mr Tipu why he had not returned to work on time. He replied that he was in quarantine following his trip to Pakistan. She asked him about his understanding of the Covid restrictions and he said that, on return to the UK he had needed to isolate for ten days or, using test and release, five days. He said that he had understood this before leaving the UK.
44. Mr Tipu said that he had not been aware of John Lewis' Covid policy relating to travel abroad. Ms Gearing suggested that it was his responsibility to be up to date on such policies and to use the intranet to check them as necessary.
45. Ms Gearing suggested that the policy meant it was Mr Tipu's responsibility to ensure he could return to work on the agreed date and to ensure his booked holiday accounted for any period of quarantine required. She suggested that he had not followed this policy. Mr Tipu replied that he did not necessarily agree.
46. There was some discussion of how Mr Tipu's leave was booked and, in particular, what was discussed with the staff support team when it was agreed. Mr Tipu said that he had not discussed the quarantine requirement at that time. He said that no conditions had been placed on his leave.
47. Ms Gearing asked whether, when Mr Tipu booked flights, he had included a quarantine period. He replied that he had wanted to use test and release, so that he would be back for the reopening. He said that this would have allowed him to return on time.
48. Ms Gearing then suggested that, since Pakistan went onto the red list on 9th April, there was still a requirement to quarantine for ten days. (This seems to overlook the fact that Mr Tipu had returned on the 7th April, but this point does not appear to have been appreciated by either Ms Gearing or Mr Tipu at the time.) Mr Tipu responded that he had expected to be able to use test and release to return on time, but that booking a return flight had been difficult.
49. There was further discussion of this point, which Ms Gearing suggested that Mr Tipu had disregarded the need to quarantine, with Mr Tipu responding that he had relied on being able to test and release, which he had expected to allow him to return on time.
50. Ms Gearing later moves on to ask whether there had been delays in Pakistan. Mr Tipu said that he had needed to quarantine there for five days, had two bouts of food poisoning and experienced difficulty booking tickets.

51. Ms Gearing then summarised her understanding of the position, which was that Mr Tipu had failed to comply with John Lewis policy. Mr Tipu said that he had offered to carry on with video training or pursue test and release. He then told Ms Gearing that he had been contacted by the NHS and told he needed to self-isolate, which meant he would not have been able to use test and release.
52. Ms Gearing also produced the email she had been sent on 16th March 2021 by the shop support team, which summarised their conversation with Mr Tipu, page 135. Mr Tipu denied that he had been told about the need to quarantine in that conversation and said that he had only been told that he needed to return before the reopening.
53. Ms Gearing then referred to the conversation she had had with Mr Tipu before his leave and said that she clearly remembers having discussed the need to quarantine with him. Mr Tipu suggested that she had spoken, but he had remained quiet. When asked why he said that sometimes he felt that everything was one way and his needs and culture were not appreciated.
54. At the end of the investigation meeting Ms Gearing told Mr Tipu that the matter would be passed to a disciplinary manager.
55. Following the meeting Ms Gearing requested a witness statement from the staff support team member who had spoken to Mr Tipu on the 14th March. She produced a statement giving her account, page 172-177. She said that she had spoken to Mr Tipu about extending his leave. She had checked this with her supervisor and been told that this would be okay, because it was not an issue while the store was closed. She said she then confirmed this to Mr Tipu, including telling him that he would need to take account of the need to quarantine and that he must make sure he was back to work when the branch reopened.
56. Ms Gearing then prepared a request for a disciplinary, which recorded her investigation and conclusions, page 178. This described Mr Tipu's actions as potentially serious misconduct and unauthorised absence. She summarised her findings as follows:

Investigation found that [Mr Tipu] had not complied with our Covid policy for travel during lockdown despite being a long standing partner who had been prompted by his TM and Shop support team to book his quarantine period within his leave period, and instead proceeded to take additional leave after his leave had ended so he was not back for the store opening, as had been requested of him.

Appointment of disciplinary manager / Invitation to disciplinary

57. Following Ms Gearing's investigation and her conclusion that there should be a disciplinary process, Sarah Kemp was appointed as the disciplinary manager. Ms Kemp was a Team Manager at John Lewis Bluewater. As a Team Manager she was of an equivalent seniority to Ms Gearing. As noted above, she was one of approximately 30 Team Managers at Bluewater.

58. The initial choice of disciplinary manager was Ms Gearing's. She approached Ms Kemp and asked her if she was available to deal with a disciplinary process involving Mr Tipu. Ms Gearing agreed.
59. Both Ms Gearing and Ms Kemp agreed that this was the normal process at John Lewis when an investigator concluded that further disciplinary action was necessary. They would identify a suitable manager at an appropriate level, having regard to the need to select someone who could be independent. The manager who was asked would then consider whether they were available and whether they were a suitable person to deal with the matter.
60. If that manager concluded that there were suitable they would take on the disciplinary exercise. They would first consider the investigation and decide whether there was a disciplinary case to answer. If there was, they would invite the employee to a disciplinary meeting and proceed from there.
61. Ms Gearing provided Ms Kemp with the documents produced during her investigation, in particular the meeting notes from her meeting with Mr Tipu (page 157-170), the email to her from the Shop Support Team on 16th March (page 145), her email to Mr Tipu (page 136) and the witness statement from the Shop Support Team (page 171-175).
62. On 29th April 2021 Ms Kemp spoke to People Policy and Advice to discuss the matter ahead of the disciplinary hearing. PPA took a note of that phone call, page 183. It read as follows:

Partner requested leave to go to India in March. P was advised in an email and via schedulers that he needed to be back ahead of the branch reopening on the 12th and he would need to consider the 10 day quarantine period.

Went on 21 March and returned to the UK on the 7th.

P should have been back on 8 April, branch was due to reopen on 12 April.

P was off between 8-15 April UA because of quarantine.

Manager has investigated with P, he acknowledges the emails but said he chose not to reply and engage in it. P understands our policy on holiday.

P said he didn't read the Intranet around quarantine rules, didn't feel he needed to. P thought he could use the test to release scheme which is where you test on the 2nd and 8h day back in the UK and if you're negative you can end quarantine, but you can only take this after 5 full days in the UK. This still wouldn't have given P enough time.

P said he was originally looking at returning on the weekend of the 3rd and this would've given him enough time to use the test and release scheme, but when booking the flights was no longer an option so he chose to return on the 7th.

P has provided a copy of his visa document which states on it that you are required to isolate upon return to England and P has ticked that confirming he would be.

ADV – Feel that P was clear he was required to quarantine upon return but failed to discuss this with work and get approval for this time, P was reminded but failed to engage in discussion. Fine to invite P to disc for PSM, namely UA.

63. The Tribunal accepted this note as a broadly accurate account of the discussion between Ms Kemp and PPA. It is particularly significant, because it indicates Ms Kemp's understanding of the disciplinary charge against Mr Tipu at this stage. An important element of this understanding was Ms Kemp's view was that Mr Tipu was accused of deliberately booking flights that would inevitably lead to him returning late. This can be seen by the references to 'when booking the flights' and 'chose to return on the 7th', together with the lack of and reference to Mr Tipu's account of having difficulty booking flights in Pakistan.
64. On the basis of the documents and her discussion with PPA, Ms Kemp concluded that there was a disciplinary case to answer. She therefore wrote to him on 6th May 2021, inviting him to a disciplinary hearing on the 17th May 2021, page 186-198. That letter described the potentially serious misconduct as 'your unauthorised absence between 8th to 15th April inclusively'. Enclosed were the documents that Ms Gearing had provided to Ms Kemp. It also included the John Lewis Disciplinary Standard, a document equivalent to a Disciplinary policy. The letter also noted that Mr Tipu was entitled to be accompanied by a work colleague or a trade union representative.
65. On 15th May 2021 Mr Tipu emailed Ms Kemp saying that he had been on annual leave and not received the letter, page 214. He asked for the disciplinary hearing to be postponed. Ms Kemp replied on the 16th May, noting that following John Lewis Policy was only obliged to provide 24 hours' notice of a disciplinary meeting, but agreeing to reschedule the meeting until the 19th May.

Disciplinary hearing

66. The disciplinary hearing went ahead as scheduled on the 19th May 2021. It was chaired by Ms Kemp and attended by Mr Tipu, with his companion Ms Lovick.
67. A notetaker also attended and notes of the hearing have been produced, page 223-239. The accuracy of these notes was confirmed at the end of the meeting by both Ms Kemp and Mr Tipu. The Tribunal accepted them as a broadly accurate note of the meeting.
68. The meeting began with a discussion of what Mr Tipu had understood about when he needed to return. He confirmed that he had booked leave to visit Pakistan from the 22nd March to the 7th April. He denied that he had understood that that a condition of that leave was that he return by the 12th April for the store re-opening.

69. Ms Kemp suggested to him that the need to return by the 12th was clear in Ms Gearing's email. Mr Kemp said that, although he had received the email, he had not read it, because of his issues with Ms Gearing.
70. Ms Kemp then went on to say that the shop support staff member had also made it clear that he needed to return in time for the branch re-opening. Mr Tipu said that he did not recall that conversation.
71. There was then some discussion about why Mr Tipu had not engaged with some of Ms Gearing's questions during the investigation meeting. He said that this was because of his bad relationship with her and that she was manipulative and a bully who had harassed him.
72. Ms Kemp then asked Mr Tipu about how he had come to overstay his leave. He agreed that he had been aware of the need to quarantine upon his return. He said that he had intended to use the test and release scheme, which he had understood to allow him to leave self-isolation after five days.
73. Ms Kemp then made the point that, given that Mr Tipu had returned on the 7th April, testing after five days would not have allowed him to return to work on the 8th. Mr Tipu replied that he had booked a return flight on to be back on Saturday. It appears that Mr Tipu was referring to his original booking with Qatar Airways, although his evidence to the Tribunal was that this would arrive in the early hours of Monday 5th April, rather than a Saturday. This does not appear to have been an attempt to deceive Ms Kemp, since almost immediately Mr Tipu says that his flight back was booked to return on the 4th (the date it left Pakistan and a Sunday).
74. In any event, the issue of what flights Mr Tipu had booked and when was not pursued at this stage by Ms Kemp. She returned to what seemed to her the essential point, that Mr Tipu had been due back on the 8th and this included the requirement to have completed 10 days of quarantine. If, as Mr Tipu was telling her, he had expected to arrive on the Saturday (which was the 3rd April) this would have meant completing quarantine on the 8th, on this basis of what he was indicating was his understanding of test and release. This would have meant him returning on the 9th – which would have been late.
75. Mr Tipu said that he had initially booked flights through Qatar, but cancelled these when it went into the red zone. He said that, at that stage, booking flights was hard and all he had been able to find was the flight out with BA.
76. He also referred to his live chat work, but accepted that this had ended while he was in Pakistan. Ms Kemp did not, however, establish when he been told about live chat coming to an end. He said that he had arranged with Ms Gearing to do video training. Mr Tipu returned to this point later in the disciplinary hearing, saying that he had arranged to do video tutorials on the 8th and 9th. He said he had suggested to Ms Gearing on his return that he could still do this while self-isolating, but that she had refused.
77. Mr Tipu raised a number of other matters during the disciplinary hearing. He said that he felt that his needs and culture were not listened to at John Lewis. He gave examples of his relationship with Ms Gearing, saying she was bullying

and harassing him. He also said that his food had been thrown away by colleagues.

78. He also referred to his mental health, saying said that he was on anti-depressants and his mental health was not great.
79. Mr Tipu also referred to the fact he had received a NHS notification that he had been in contact with someone who tested positive for Covid and would therefore need to self-isolate. The Tribunal accepted that Ms Kemp concluded this was irrelevant, since this period of isolation overlapped with the quarantine requirement and therefore made no difference to when Mr Tipu was able to return to work.
80. Ms Kemp then paused the hearing in order to speak to PPA. That conversation was recorded by PPA, page 182. The Tribunal accepted that record as a broadly accurate account of the call. As with the earlier PPA note, the Tribunal found this significant evidence because it was a contemporaneous record of Ms Kemp's thinking. It records that Ms Kemp told PPA that she felt Mr Tipu was attempting to distract her from the actual issue, which was that he had admitted that he knew he should have returned by the store opening, including the need for 10 day isolation, but had failed to do so. She said that Mr Tipu had clearly made a choice to take more days than allocated or agreed.
81. The hearing was then restarted. Ms Kemp said that she had concluded that Mr Tipu had not provided any mitigation for having taken unauthorised absence, despite knowing he was required to return to work on the 8th April. She said that his concerns about Ms Gearing were not relevant to his absence. For these reasons, she said, she was terminating his contract with immediate effect.
82. There was significant discussion during the Tribunal hearing as to what Ms Kemp meant by 'not provided any mitigation'. She was questioned on this point and both parties made submissions. The Tribunal concluded that Ms Kemp did not use this term in the way that a lawyer might – to mean that there was no factor or circumstance that reduced the seriousness of Mr Tipu's actions or would suggest a less severe sanction should be applied. Rather, she meant that, although Mr Tipu had raised mitigating factors, in her view they were not sufficient to persuade her that a lessor sanction should be applied.
83. The summary dismissal was confirmed in a letter sent on the same day by Ms Kemp, page 240. Copies of the hearing notes were enclosed with that letter.

Appeal

84. On the 25th May 2021 Mr Tipu appealed his dismissal, page 247-249. In brief summary, Mr Tipu appealed on the basis that the sanction of dismissal had been harsh, given all the circumstances of his situation. In particular, he referred to the breakdown in his relationship with Ms Gearing; the urgency and importance of his trip to Pakistan; the difficulties he had had there in booking a return flight and his willingness to either work remotely or use test and release to return as soon as possible. He also referred to Ms Kemp misspelling his name, which he said undermined his trust in her. Finally he referred to his mental health.

85. The appeal was dealt with by Nigel Towse, a Manager in the Appeals Office. His role was to deal with disciplinary appeals from throughout the John Lewis business. Mr Towse was assigned to the appeal by the Appeal Office.
86. Prior to the appeal hearing Mr Towse received and considered: the appeal itself, the dismissal letter and the notes of the disciplinary and investigation meetings.
87. The appeal hearing took place on 9th June 2021. Mr Tipu attended with the same colleague who had accompanied him to the disciplinary hearing. Mr Towse took notes during the meeting and these were produced, page 319-325. The Tribunal accepted that these notes were a broadly accurate account of the hearing.
88. Mr Towse began by explaining his approach to the appeal. He said that he would take action in the event that the decision to dismiss Mr Tipu was 'at fault'. By 'at fault' he meant a decision that was based on inaccurate or incomplete facts or which did not take into account relevant circumstances or if the outcome was unfair, for example because it went against John Lewis policies or Mr Tipu had been treated differently to other employees in closely similar circumstances.
89. Mr Towse began by asking Mr Tipu about his flight bookings. Mr Tipu gave the account set out above – that he had initially booked with Qatar Airways, but cancelled after Qatar went into the red zone; then booked a one way flight and had difficulties getting a return flight while in Pakistan.
90. Mr Tipu agreed that he had been aware of the need to quarantine, but said that he had hoped to be able to work from home if necessary. He said he hadn't known about the date John Lewis Bluewater reopened until he had seen a news item during his leave.
91. Mr Towse asked Mr Tipu about what would have happened if he had not cancelled his original flights. He replied that he would have needed to quarantine in a hotel and this would 'not have been good for me'. When Mr Towse asked why, Mr Tipu moved on to emphasise again that he had intended to use test and release.
92. Mr Tipu also mentioned his mental health and Mr Towse asked how this was connected to his dismissal. Mr Tipu replied that he did not know.
93. Mr Tipu also said that, in his view, Ms Gearing had been planning to get rid of him from day one, which he suggested was connected with him being Muslim.
94. At the end of the hearing, Mr Towse summarised Mr Tipu's grounds of appeal as follows: 'you admit you had [unauthorised absence] but you think [Ms Kemp's] decision was predetermined and was harsh and you should have had a warning'. Mr Tipu confirmed this was an accurate summary.
95. Following the hearing Mr Towse interviewed Ms Kemp and Ms Gearing. Notes of these interviews were produced and the Tribunal accepted they were an accurate record of these interviews, page 327-331

96. In her interview Ms Kemp confirmed that she'd concluded that Mr Tipu had deliberately overstayed his leave.
97. In his evidence to the Tribunal, Mr Towse said that a key question for him was whether Mr Tipu had been aware of the quarantine rules and the date when he needed to return to work when he first booked his holiday. He found that he was, based on the evidence he had seen and his interviews with Ms Gearing and Ms Kemp. On that basis, he told the Tribunal, when Mr Tipu failed to return to work on the 8th April, his absence was unauthorised.
98. Mr Towse rejected the appeal and wrote to Mr Tipu communicating that decision on 15th June 2021, page 385-388.

Relevant policies

99. The Tribunal was referred to a number of John Lewis policies in the course of evidence and submissions. In particular, the Partnership Handbook (page 409-446); the Disciplinary Standard (page 447-455) and the Disciplinary Operating Procedures (page 456-477) were produced.
100. John Lewis also had a specific policy in relation to travel abroad during the pandemic, described as 'Update on the Partnership's approach to foreign travel and quarantine', page 111-112. In particular, two points were discussed relating to travelling to a country without a travel corridor (which included Pakistan).
101. First, the policy said that John Lewis wanted to make sure that its employees had a variety of options and to be as flexible as possible. It indicated that, if an employee had travel booked that would require a period of quarantine, they should discuss this with their manager who would work out the best option. Options included working from home, using more holiday entitlement to cover quarantine, amending working hours and time banking. If these options were not suitable, a period of unpaid leave could also be considered.
102. A conversation of this nature did not occur with Mr Tipu. He did not seek one, either with Ms Gearing or any other manager. Neither Ms Gearing or another manager attempted to have such a conversation with him.
103. Second, the policy confirmed that that an employee who needed to quarantine would need to get agreement for the time period, including the quarantine period, from their manager before booking the holiday.
104. Although there was discussion in the evidence regarding whether Mr Tipu had read or was aware of this policy, the Tribunal's view was that this took matters little further. In respect of booking leave, the policy was largely a statement of what must have been obvious to any employee and that Mr Tipu knew (as he accepted to Ms Gearing, Ms Kemp and Mr Towse). Namely that if travel resulted in a legal requirement to quarantine, that period away from work would need to be agreed in some form with John Lewis. It was self-evident that an employee could not properly book leave, fail to return when expected and

only then inform John Lewis that they were in quarantine. No reasonable employee would believe that they were able to behave in such a way or that any employer would view that as anything other than unauthorised absence.

Matters from which an inference might be drawn

105. In his evidence Mr Tipu referred to a number of incidents from which it was argued an inference might be drawn that John Lewis was likely to have discriminated against him.
106. Mr Tipu said that two BAME employees had been charged with serious misconduct in 2020. Ms Kemp had been their line manager. Both were dismissed. In contrast Mr Tipu referred to a Caucasian employee who had been charged with discount card abuse, but who was not dismissed. Mr Tipu also said that, shortly after his dismissal, another BAME partner had been dismissed.
107. In general, Mr Tipu said that it was well known and apparent to him that white employees were treated better than other employees and were less likely to be dismissed.
108. The Tribunal concluded that it was not appropriate to draw any inference from these matters. The specific accounts of other employees were entirely anecdotal. No details were provided in relation to the misconduct allegations that lead to dismissal. There was no statistical information that would reveal whether BAME or any other group of employees were more likely to be dismissed. Although Ms Kemp had line managed the employees, she had not made the decision to dismiss. Similarly, a mere allegation that white employees in general were treated better or less likely to be dismissed was precisely that – a mere allegation. It contained no factual detail to substantiate it. It fell well short of evidence from which it would have been reasonable to draw any inference against John Lewis.
109. Mr Tipu also referred to two particular incidents with a previous line manager in 2019. He said that, on an occasion that he discussed travelling abroad on holiday she asked him ‘What are you going to blow up?’. Later that year, after Mr Tipu mentioned a mistake he had made she described him as a ‘fucking idiot’; a phrase she repeated several times. This factual account was not challenged during cross-examination and the Tribunal proceeded on the basis that these events occurred as Mr Tipu described.
110. The Tribunal agreed with Mr Tipu that the reference to him potentially blowing something up while abroad could only have been a reference to Islamic terrorism. The suggestion, based purely on Mr Tipu’s race and religion was seriously inappropriate and offensive. The other remarks were not, on their face, connected to Mr Tipu’s race or religion, but were also inappropriate.
111. Had Mr Tipu’s previous line manager been involved in the alleged acts of discrimination that comprised these claims, these events would have sustained an adverse inference of discrimination. The Tribunal concluded, however, that it should not draw any inference from them in relation to the actions of other managers who had not been involved in these incidents. The

events described by Mr Tipu were isolated events which had occurred a significant time before the events of this claim. They were insufficient to justify an inference of discrimination that managers in general at John Lewis were likely to discriminate.

Law

Unfair dismissal

112. The general approach to determining whether a dismissal is fair is set out in s98 Employment Rights Act 1996. S98(1) requires the employer to establish the reason for the dismissal and that it is one of the potentially fair reasons set out in s98(2). In this case the reason relied upon is conduct. The reason for dismissal is the factor or factors operating on the mind of the person who made the decision to dismiss.
113. If an employer succeeds in showing that the reason for the dismissal is potentially fair, the Tribunal must consider whether the dismissal was fair. S98(4) requires that, in doing so, it considers whether in all the circumstances (including the size and administrative resources of the employer) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissal. The fairness of the dismissal must also be determined in accordance with the equity and substantial merits of the case. Neither the employer nor the employee bears the burden of proof on the question of fairness, which is to be approached neutrally.
114. A fundamental element of considering fairness properly, in the context of a claim for unfair dismissal, is that a tribunal must not substitute its own view for that of the employer. Instead, the Tribunal's role is to consider the employer's actions and decide whether they were within the range of possible options open to a reasonable employer in the circumstances. This is often known as the 'range of reasonable responses'. See in particular *BHS Ltd v Burchell* [1980] ICR 303 and *Iceland Frozen Food v Jones* [1983] ICR 17.
115. This means that the tribunal must not 'stand in the shoes' of the employer and decide whether it would have reached the same decision. That would, inherently, involve the Tribunal replacing the employer's decision with their own. The Tribunal must focus on assessing the employer's decision, by reference to the range of reasonable responses. At the same time, that range is not infinitely wide and a finding that dismissal fell outside the range should not inevitably suggest that a Tribunal has substituted its own view for that of the employer, see *Newbound v Thames Water Utilities Ltd* [2015] IRLR 734.
116. In the context of a conduct dismissal, it is appropriate to analyse an employer's decision to dismiss by applying the Burchill test – drawn from the case of *BHS Ltd v Burchell* [1980] ICR 303, although it has been further developed by subsequent case-law. This requires consideration of:
- a. Did the Respondent have an honest belief in the allegations?
 - b. Did the Respondent have reasonable grounds to support that belief?
 - c. Did the Respondent carry out a reasonable investigation into the allegations?

- d. Given all the circumstances, were the allegations sufficiently serious that dismissal fell within the range of reasonable responses open to a reasonable employer?

Polkey Reduction

117. Where a dismissal is found to be unfair, it is open to a Tribunal to reduce any compensatory award to reflect the possibility that the employee may still have been dismissed had the employer acted fairly. This is described as a Polkey reduction, following the case of *Polkey v AE Dayton Serviced Ltd* [1988] ICR 142.
118. As in relation to unfair dismissal, the Tribunal must not substitute its own view for that of the employer, the key questions are a) Whether the employee could have been fairly dismissed? and b) Would the actual employer have done so? See *Hill v Governing Body Great Tey Primary School* [2013] IRLR 274.
119. The assessment of a Polkey reduction is an inherently uncertain exercise since it inevitably involves an element of speculation. Although there are cases in which the evidence related to any potential reduction is so riddled with uncertainty that no sensible assessment can be made, this is unusual. Tribunals should only proceed on the basis that employment would have continued indefinitely where the evidence that it would not have done so can properly be ignored, see *Software 2000 v Andrews* [2007] IRLR 568.

Contributory fault

120. S122(2) Employment Rights Act 1996 allows for a reduction of the basic award where an employee's conduct before the dismissal means that such a reduction would be just and equitable.
121. S123(6) allows for a similar reduction to the compensatory award where the Tribunal concludes that the dismissal was caused or contributed to by any action of the employee. Reductions to the compensatory award, however, are not restricted to circumstances falling within s123(6), because the compensatory award remains governed by the provisions of s123(1), which requires that the Tribunal award 'such amount as the tribunal considers just and equitable in all the circumstances'. This allows, for example, reductions arising from misconduct that was only discovered after the dismissal (see *W Devis and Sons Ltd v Atkins* [1977] ICR 662).
122. In general, however, a reduction for contributory fault will only be made where there had been:
- Conduct that caused or contributed to some extent to the dismissal (see *Nelson v British Broadcasting Corporation (No. 2)* [1980] ICR 110), and
 - that conduct is culpable or blameworthy. This does not require that an employee's actions be unlawful in the sense of being a breach of contract or an actionable tort, but includes behaviour that is perverse, foolish or unreasonable in all the circumstances – provided it is sufficiently serious to reach the threshold of culpable or blameworthy

conduct (see *Nelson v British Broadcasting Corporation (No. 2)* [1980] ICR 110.

Direct discrimination

123. Following s13 and s39 of the Equality Act 2010, we must determine whether the respondent, by subjecting the claimant to a detriment, discriminated against him by treating him less favourably than it treated or would have treated someone else, because of a protected characteristic.
124. In this case the protected characteristic relied upon by the claimant is his race and his religion. Specifically he says that his religion is Islam and his race is Muslim. He relies upon a hypothetical comparator of a white employee who does not follow Islam.
125. A detriment is anything that a reasonable person in the claimant's place would or might consider to their disadvantage. It does not require that there be physical or economic consequences for the claimant – but an unjustified sense of grievance is not a detriment, see *Shammon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11.
126. Consideration of direct discrimination is an inherently comparative exercise. 'Less favourable treatment' requires that the complainant be treated less favourably than a comparator was or would be. The comparator may be an 'actual comparator'; that is someone in materially the same circumstances of the claimant. The tribunal may also need to consider how a 'hypothetical comparator' would have been treated. In some cases, identifying a suitable hypothetical comparator may be difficult and it may be appropriate to focus on considering why a claimant was treated in a particular way, using any evidence as to how other people are treated to inform that view, even if they are in materially different circumstances.
127. If there has been less favourable treatment, the Tribunal must go on to consider whether that was because of a protected characteristic.
128. In some circumstance, however, separating the question of whether there has been less favourable treatment from the issue of why that less favourable treatment occurred will be artificial or cumbersome. In such cases the Tribunal may consider both questions together – essentially asking whether an employee has been treated less favourably because of a protected characteristic, see *Shammon*.
129. One consequence of this comparative approach is that the fact that someone has been treated unreasonably does not mean that they have been discriminated against. For that matter, an employee who has been treated objectively reasonably may still have been discriminated against if they nonetheless have been treated less favourably than an appropriate comparator because of a protected characteristic.
130. Direct discrimination is not necessarily conscious or deliberate. The tribunal must decide 'what, consciously or unconsciously, was the reason for the treatment', see *Chief Constable of West Yorkshire Police v Khan* [2001]

UKHL 48. For there to be direct discrimination it is sufficient that the protected characteristic be a material influence on the reason for the treatment. It does not need to be the only or main reason for the treatment.

131. In relation to all of this, the burden of proof is on the claimant initially to establish facts from which the tribunal could decide, in the absence of any other explanation, that the respondent discriminated. This requires more than a difference in treatment combined with a difference in protected characteristic, see *Madarassy v Nomura International PLC* [2007] ICR 867. There must be something further from which it could be concluded that the protected characteristic influenced the decision. Unreasonable treatment of an employee alone is not sufficient to reverse the burden of proof, see *Bahl v The Law Society* [2004] IRLR 799. If a claimant establishes facts from which the tribunal could (in the absence of explanation) conclude there had been discrimination, it is then for the respondent to show that they did not discriminate.

Conclusions

132. The Tribunal reached the following conclusions. They are set out by reference to the agreed list of issues, although they are somewhat amended and taken in a slightly different order, so that the Tribunal's reasoning can be more clearly understood.

133. In some areas, these conclusions set out additional findings of fact relating to what occurred during the disciplinary process so that these findings and the conclusions from them can be more clearly understood.

Did the respondent dismiss the claimant for a potentially fair reason? The respondent relies on conduct.

134. The Tribunal concluded that the reason Mr Tipu was dismissed was that John Lewis (and in particular Ms Kemp and Mr Towse) believed that he had deliberately absented himself from work by returning from annual leave late. This was a matter related to his conduct and therefore a potentially fair reason. The Tribunal accepted the consistent evidence of Respondent's witnesses that they acted because they believed he had deliberately overstayed his leave.

135. The Tribunal did not accept Mr Tipu's case that he had been dismissed because of his race or religious belief, for the reasons set out below.

*Did the Respondent have an honest belief in the allegations?
Did the Respondent have reasonable grounds to support that belief?*

136. The Tribunal concluded that the Respondent did have an honest belief in the allegations. The Tribunal accepted the evidence from Ms Kemp and Mr Towse that they genuinely believed that he had chosen to overstay his leave.

137. The Tribunal also accepted that the Respondent had reasonable grounds to support that belief. Mr Tipu had overstayed his leave. Although he

denied doing so deliberately there were reasonable grounds for the managers to doubt this account and to conclude that he had acted deliberately. In particular, his failure to return on time and his attempts to suggest that he had not been told that this was required made it reasonable to doubt his account.

Did the Respondent carry out a reasonable investigation into the allegations?

138. The Tribunal concluded that there was a failure to conduct a reasonable investigation into the allegations against Mr Tipu.

139. The difficult with the investigation began in the approach taken by Ms Gearing. Although Ms Gearing was not the decision maker in the dismissal, it is necessary to consider her reasoning and approach at the investigation stage in some detail, in order to understand the context of the later decisions.

140. It is apparent from the notes of the investigation meeting that Ms Gearing focused primarily on the fact that Mr Tipu had failed to return on time. She appears to take the view that, if he failed to return on time, that must be because he had chosen to do so. This can be seen from her questioning of Mr Tipu. Most notably, when she asked why he did not include sufficient time to quarantine (page 164). His reply was to say that his original intention had been to return at an earlier date and that using test and release would have allowed him to return on time. Then, once he was in Pakistan, booking return flights was difficult.

141. Ms Gearing did not engage with this explanation or establish the details of Mr Tipu's account. She did not, for example, ask him about when he originally booked his flights or about the difficulties he suggests he experienced in booking flights from Pakistan. Instead, she repeated her question, asking why the quarantine had not been included. This simply ignored the explanation that Mr Tipu had just provided.

142. This failure to engage with a central plank of Mr Tipu's explanation is also apparent from Ms Gearing's investigation report, page 178. That records, under the explanation provided to her, that Mr Tipu had said that he was 'Unaware of requirement to book quarantine period within leave period'. That did reflect the fact that Mr Tipu had said that he was unaware of John Lewis' policy. But it ignored the significant point that Mr Tipu's account was that he had nonetheless expected to be able to return to work on time.

143. Ms Kemp's understanding of Mr Tipu's response was better than Ms Gearing. She appreciated that Mr Tipu's position was that his original booking would have allowed him to return on time. This is apparent from the note of her discussion with PPA, page 183. She concluded, however, that his original booking would not have allowed him to return to work on time. This was largely based on what Mr Tipu said about his bookings and the trace and release system. In her witness statement she explains that she understood Mr Tipu to be saying that he had expected to be able to leave quarantine on the 9th (because he had originally expected to return on the 4th then complete test and release after 5 days), see WS ¶19.

144. Ms Kemp therefore also did not question Mr Tipu in detail about the difficulties in booking flights from Pakistan. This was because, having concluded that Mr Tipu had never intended to return on time, she viewed it as somewhat tangential.
145. To some extent, the Tribunal accepted that this approach was open to Ms Kemp. A reasonable employer, considering what he said about his bookings and the trace and release scheme could have concluded that Mr Tipu knew that he would not be able to return on time, at least in so far as he would not have been able to return to the physical workplace. It nonetheless bordered on an unfair approach, because there would be a significant difference between an employee who had intended to overstay their leave by a single day and one who had expected to overstay by over a week.
146. The position was further complicated, however, by what Mr Tipu told Ms Kemp about how he expected to return to work. He referred both to continuing his work on the live chat support and to video training, which he would have been able to do from home. In her evidence Ms Kemp said that she had rejected this argument, in large part, because Ms Gearing had been clear during the investigation meeting that this role had come to an end on 27th March 2021.
147. This accurately reflected Ms Gearing's statement during the investigation meeting (page 165), but Ms Gearing did not elaborate on this relatively narrow statement. She did not set out when Mr Tipu would have been told about the live chat coming to an end. Ms Kemp does not appear to have responded to Mr Tipu's point that the 27th March 2021 was significantly after his leave had begun (and even longer after his initial booking was made). Ms Kemp did not investigate this either by asking Mr Tipu for more details, making enquiries of Ms Gearing or of anyone else.
148. Ms Kemp also did not investigate further what Mr Tipu told her about his intention to conduct video tutorials. He had told her that he had expected that he would be able to do this work remotely on the 8th and 9th April. If that was the case, it would mean that his original expectation he would leave quarantine on the 9th could have been compatible with an intention to return on time. Ms Kemp did not ask detailed questions of Mr Tipu on this point and did not check with Ms Gearing. In her evidence to the Tribunal Ms Gearing accepted that virtual training was something that Mr Tipu would have expected to be working on when he returned.
149. These were both significant points, because they went to the heart of Ms Kemp's analysis of the case: that if Mr Tipu had known he would remain in quarantine until the 9th April he could never have expected to return to work on time and therefore his unauthorised absence must have been deliberate.
150. The whole issue was an important one, because there would be a significant difference in the conduct of an employee who had expected to be able to return to work on time, but failed to do so because of intervening events, and one who had never expected to return on time. An employee who had expected to return on time would not necessarily be innocent of misconduct (for example their expectation might have been unreasonable, their actions in attempting to return to work insufficient or they might have failed to keep their employer

informed). But to properly consider the degree of culpability, an employer would need to reasonably investigate what their employee believed and the actions they had taken.

151. This issue was in Mr Towse's mind when he considered the appeal. He was aware of Mr Tipu's position, because it was briefly discussed during the appeal meeting (page 321). He also asked Ms Gearing whether Mr Tipu could have thought he would be able to work from home (page 329). She replied that he could not, because the live chat finished on 27th March and she had made it clear he would be supporting staff in the store. Mr Towse did not, however, establish with her when that had been communicated to Mr Tipu. He then asks about an email, but it is slightly unclear whether this is in reference to the live chat role ending or to the 17th March email regarding Mr Tipu's leave. If it was the former, Mr Towse did not request a copy of the email from Ms Gearing. Although Ms Gearing referred to the need to have Mr Tipu supporting staff in the store, Ms Towse did not explore with her whether this referred to the store's reopening or whether it had been made clear to Mr Tipu he would be required to be in the store before that date. He did not ask about the video training.

152. Overall, the Tribunal concluded that neither Ms Kemp or Mr Towse had done enough to investigate what Mr Tipu might have reasonably believed about how he would be required to return to work and whether he could do so (to at least some degree) remotely. Without completing such an investigation, they were not in a position to properly assess his conduct. This failure was sufficiently serious to take the investigation outside the range of reasonable responses and to render the dismissal unfair.

Other procedural matters

153. *Was Ms Gearing an appropriate investigator?* Mr Tipu argued that Ms Gearing was not an appropriate investigator, because of their previous poor relationship and because she also a relevant witness, given her involvement in the booking of his leave.

154. The Tribunal concluded that there would have been advantages to another manager taking the lead in the investigation. The relationship between Mr Tipu and Ms Gearing had been tense and this was likely to make the process more challenging for both of them. It is apparent from the record of the investigation meeting that Ms Gearing began with a fairly firm view that Mr Tipu had behaved badly. Another manager might have been more open minded at that stage.

155. Nonetheless, the Tribunal concluded that none of these issues were sufficient to render the dismissal process unfair. The fact that a manager and employee have had a tense or difficult relationship does not mean that the manager must therefore be biased and unsuitable to conduct an investigation. Similarly, the fact that a manager has knowledge of the events under investigation does not mean that they are an unsuitable investigator. Indeed, in many cases, it will be a direct line manager who first becomes aware of potential misconduct and carries out the initial investigation. There is nothing inherently flawed in such an approach. Often, in such cases, the manager will have formed a preliminary view of an employee's conduct. That is inevitable

and, provided the disciplinary process as a whole provides a fair opportunity for the employee to present their case and for it to be considered with an open mind, does not mean a dismissal is unfair.

156. The Tribunal did not accept the suggestion that Ms Gearing had set out to have Mr Tipu dismissed in circumstances where she did not believe he had done anything that warranted dismissal. She genuinely believed he had deliberately absented himself from the workplace in defiance of her instructions, which – in her view – justified disciplinary action.

157. *Was the selection of Ms Kemp as the disciplinary manager unfair?* The Tribunal accepted the evidence of Ms Gearing and Ms Kemp that it was normal practice within John Lewis for the investigating manager to approach a suitable manager to conduct the disciplinary process.

158. The Tribunal's view was that this was unusual and a policy that created a real risk of unfairness. An investigating manager who wished to make a dismissal more likely would be able to approach a friendly colleague more likely to fall in with their wishes or simply a manager known to take a stern line. Conversely, an investigating manager who wanted to ensure a less severe sanction could approach a manager with a reputation for leniency or credulity. The more normal approach, whereby the appropriate disciplinary manager is selected either by the operation of policy and their position within the organisation or by someone uninvolved in the process at that point avoids these risks.

159. Nonetheless, in the circumstances of this case the Tribunal was satisfied that the selection of Ms Kemp was not unfair. Ms Gearing did not choose her with any malign intent and Ms Kemp sought to carry out the role objectively. There was no suggestion that Mr Towse was not a suitable person to conduct the appeal.

The procedure overall

160. Other than the failure to investigate detailed above, the Tribunal concluded that the disciplinary process was a fair one. Appropriate meetings were held and Mr Tipu was given the opportunity to respond to the allegations against him.

Was the sanction of summary dismissal for gross misconduct within the band of reasonable responses open to a reasonable employer?

161. The Tribunal concluded that the sanction of dismissal was within the range of reasonable responses open to a reasonable employer.

162. The Tribunal's view was that the decision to dismiss was relatively harsh, given all the circumstances. In particular, the Tribunal noted the difficult family circumstances that made Mr Tipu's trip to Pakistan urgent and important; his willingness to work remotely or to pursue trace and release so that he could return to work as soon as possible upon his return to the UK; his long service

with John Lewis, including the flexibility he had shown during the difficult circumstances of the pandemic and the relatively short period of absence.

163. Nonetheless, the Tribunal reminded itself that it must not substitute its own view of the matter for that of the Respondent and should restrict itself to considering whether the decision was one that a reasonable employer might reach. It was clear that the John Lewis managers concluded that Mr Tipu had deliberately absented himself from work and done so in direct defiance of a clear instruction from Ms Gearing. They were entitled to regard that as a serious matter that warranted dismissal.
164. Mr Tipu argued that one of the reasons that dismissal fell outside the range of reasonable responses was that he was dismissed for failure to follow John Lewis's policy on foreign travel, in circumstances where Ms Gearing had also failed to follow the policy.
165. In particular, Mr Tipu argued that Ms Gearing had not had the sort of discussion anticipated by the policy regarding the possible options for dealing with the quarantine period, such as working from home, using more holiday entitlement, amended working hours or time banking. The Tribunal's conclusion was that this did not materially assist Mr Tipu's claim. Mr Tipu had booked his annual leave without any attempt to discuss the quarantine period with Ms Gearing or to have the sort of conversation outlined in the policy. Once that leave was booked, he was reasonably expected to return at the point that the leave expired. Although the policy suggests that a manager 'should work through the options available' it is putting it too high to suggest that a failure to do so, in these circumstances, amounts to a breach of the policy in the same sense as a failure to return to work on time. Further, even if there had been a breach of the policy in regard to the process of booking leave, as Mr Tipu suggests, it would not justify a failure to return to work on time. In the context of a claim for unfair dismissal it is the employer's actions in relation to the decision to dismiss that must be considered and assessed. An employer's actions prior to this point may provide relevant context, but they are not the focus of the Tribunal's consideration.
166. Mr Tipu also argued that his actions could not reasonably be viewed as unauthorised absence unless he had a) failed to return to work and b) failed to comply with one of the options given in the travel policy. Therefore, since he had been willing (and indeed had) used time banking in relation to his absence, it could not be considered to be unauthorised. The Tribunal did not accept this argument. For an employee's period of absence to be authorised there must be an agreement to that in advance (whether that takes the form of agreed annual leave or another option). If no such agreement has been made and an employee does not attend work, that is unauthorised absence. The fact that such an agreement could have been made (or even would have been made had such a discussion taken place) does not transmute a period of unauthorised absence into a period of authorised absence.
167. Further, the fact that, presented with the reality that an employee has not returned and is unable to do so legally, an employee may make the best of a bad job by applying one of options in the policy to that time does not alter the underlying fact that the employee had been absent without leave.

Polkey Reduction

168. The Tribunal concluded that, had a reasonable investigation been carried out, there would still have been a 50% chance that Mr Tipu would have been dismissed and that a 50% Polkey reduction should be made to the compensatory award on that basis.
169. Assessing what might have occurred had individuals acted differently than they in fact did is not an exact science. The Tribunal has necessarily applied a broad-brush assessment.
170. The Tribunal has borne in mind that a fuller investigation of Mr Tipu's expectations on returning to the UK might have led Ms Kemp and / or Mr Towse to conclude that he had not set out from the beginning to fail to return on time.
171. This would, most likely, have led to them concluding that his absence was less serious. They might have concluded that Mr Tipu was not at fault at all – but simply the victim of unfortunate circumstances meaning that he had been unable to book a return flight. Had they reached such a conclusion, they would not have decided to dismiss.
172. They might well, however, taken a harsher view. They might have concluded that Mr Tipu, despite his statement, did not in fact expect to be able to work from home or that he did not really expect to be able to return in time for the store opening (which would require him to be in the store). This would not have been an unlikely conclusion, especially given the obvious risk that he would not be able to secure a suitable return flight. If that had been their conclusion the further investigation would added little to their analysis and dismissal would have remained very likely.
173. Between these two positions, the managers might have concluded that Mr Tipu had not set out to overstay his leave, but had been reckless of that possibility and failed to discuss the potential issues with Ms Gearing properly before leaving. A finding of this nature could still have led to a justified dismissal, but might also have convinced either Ms Kemp or Mr Towse that a lesser sanction, such as a warning was more appropriate.
174. Taking all of this together, the Tribunal concluded that the best possible estimate was a 50% chance of dismissal.

Contributory fault

175. In addition to the Polkey reduction the Tribunal concluded that there should be a 25% reduction to both the basic award and the compensatory award for contributory fault.
176. In particular, the Tribunal concluded that in leaving the country without having been able to book a return flight, in circumstances where he must have known that he might have difficulty returning on time, and without informing his employer of the potential difficulties was unreasonable and amounted to blameworthy conduct. The Tribunal's view was that, although Mr Tipu had not

deliberately set out to overstay his leave, he was reckless of the possibility. He was determined to travel to Pakistan to complete his family business. He must have known that there was a good possibility that he would not return on time, especially at the point where he could only secure an outbound ticket. He chose to take the risk, gambling that he either would be able to return on time, that he could work remotely (although this had not been explicitly authorised or discussed with his managers) or that, if he was a few days late, no serious disciplinary action would be taken against him. All of this contributed towards his ultimate dismissal, because it led to his unauthorised absence. It was sufficiently unreasonable to amount to blameworthy conduct.

177. Further, the Tribunal concluded that Mr Tipu sought to mislead the John Lewis managers about what had been discussed with him prior to his leave. In particular, he insisted that he had not been told about the need to quarantine upon his return and that his leave period should take account of this or that he would need, without fail, to return by the 12th April for the store reopening. The Tribunal concluded that he had been informed of these requirements by both Ms Gearing and the shop support staff who had authorised his leave. Lying to his managers was blameworthy conduct. It contributed to his dismissal because, having reasonably formed the view that Mr Tipu was giving an unreliable account, those managers were inevitably less trusting of his other statements and viewed his actions as more serious.

Was the claimant subject to the following treatment and was it less favourable treatment?

- a. *Not being given notice of an investigation meeting by Meral Gearing in or around early May 2021*
- b. *Being subject to an investigation meeting with Meral Gearing in or around early May 2021*
- c. *Being subject to a disciplinary meeting with Sarah Kemp on 19th May 2021*
- d. *Being dismissed from his employment by Sarah Kemp on 19th May 2021*
- e. *Having his appeal against dismissal refused by Nigel Towse on 9th June 2021*

178. These events were not in dispute and the Tribunal accepted that they amounted to less favourable treatment.

Was the above less favourable treatment because of the claimant's race or religious belief?

179. The Tribunal concluded that the treatment above was not because of the claimant's race or religious belief.

180. The Tribunal found that Mr Tipu had not established facts from which the Tribunal could decide, in the absence of any other explanation that discrimination had occurred. He had established a difference of treatment in combination with a difference of protected characteristics, in that he had been subjected to disciplinary proceedings where other employees had not. That, however, is insufficient to reverse the burden of proof.

181. Mr Tipu deployed two main arguments in this regard. First, he argued that John Lewis' behaviour had been unreasonable and that this supported an inference of discrimination. The Tribunal did not accept this. Although, for the reasons set out above, the Tribunal found that John Lewis had acted to some extent unreasonably, there was no link to either of the protected characteristics relied upon by Mr Tipu, from which any inference of discrimination could be drawn. Further the nature of the failure was not such that it appeared to the Tribunal unusual or inexplicable. It was a failure to appreciate that fairness required further investigation into Mr Tipu's initial intentions and that an assumption that, since he had not returned on time, he must not have intended to do so, was a dangerous one. Unreasonable behaviour alone was therefore insufficient to reverse the burden of proof.

182. If the burden had been reversed, the Tribunal would have concluded that John Lewis had established that the above treatment was not because of Mr Tipu's race or religious belief. The Tribunal accepted the evidence of John Lewis' witnesses that they acted solely because of genuine concerns relating to Mr Tipu's conduct.

Jurisdiction / time limits

183. Given the Tribunal's finding that no discrimination occurred, the failure to give notice of the investigation meeting in advance could not have been a continuing act. Had, however, it been an act of discrimination the Tribunal would have concluded it was just and equitable to extend time in relation to it. Mr Tipu's claim as a whole was against the disciplinary process that led to his dismissal. The required extension was not a significant one and the prejudice to Mr Tipu – had he proved discrimination occurred – would have been substantial. There would have been no significant prejudice for John Lewis to extending time.

Employment Judge Reed

Date: 25th March 2024

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