EMPLOYMENT TRIBUNALS

Claimant: Mr A Boateng

Respondent: Moss Bros Group Limited

Heard at: London South
On: 5, 6, 7 and 8 February 2024

Before: Employment Judge Heath

Representation
Claimant: In Person
Respondent: Mr A Willoughby (Counsel)

JUDGMENT having been sent to the parties on ***13 March 2024*** and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. The claimant claims unfair dismissal and unpaid holiday pay. His original claim was also for various complaints of discrimination and harassment related to race and religion or belief, and victimisation. These claims were struck out at a preliminary hearing and, despite the strike out being subject to an appeal to the Employment Appeal Tribunal, this hearing dealt solely with the unfair dismissal and holiday pay claims.

Issues

2. The issues were set out in a case management order of EJ Sudra's sent to the parties on 7 July 2023. In short, I was to determine:

    a. What was the reason or principal reason for dismissal? The respondent says the reason was conduct. The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.

b. If the reason was misconduct, did the respondent act reasonably or unreasonably in all the circumstances, including the respondent's size and administrative resources, in treating that as a sufficient reason to dismiss the claimant? The Tribunal's determination whether the dismissal was fair or unfair must be in accordance with equity and the substantial merits of the case. It will usually decide, in particular, whether:

    i. there were reasonable grounds for that belief;

    ii. at the time the belief was formed the respondent had carried out a reasonable investigation;

    iii. the respondent otherwise acted in a procedurally fair manner;

    iv. dismissal was within the range of reasonable responses.

c. If there is a compensatory award, how much should it be? The Tribunal will decide:

    i. What financial losses has the dismissal caused the claimant?

    ii. Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

    iii. If not, for what period of loss should the claimant be compensated?

    iv. Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

    v. If so, should the claimant's compensation be reduced? By how much?

    vi. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

    vii. Did the respondent or the claimant unreasonably fail to comply with it by [specify alleged breach]?

    viii. If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

    ix. If the claimant was unfairly dismissed, did they cause or contribute to dismissal by blameworthy conduct?

x. If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?

xi. Does the statutory cap of fifty-two weeks' pay or [£105,707] apply?

d. What basic award is payable to the claimant, if any?

e. Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

Procedure

3. Prior to the hearing the respondent had sought to stay the proceedings because of the perceived overlap between the unfair dismissal claim still afoot, and the discrimination claims subject to appeal. There had also been some difficulties with case preparation. The claimant resisted this application, and it was refused by the tribunal on 26 January 2024. Following this, the claimant made an application to stay proceedings on 28 January 2024, which the respondent supported. An application was also made to convert the in-person hearing into a CVP hearing. The matter was converted to a CVP hearing.

4. On the first day of the hearing, The claimant renewed his applicationto postpone. In short he argued that there was a substantial overlap between the unfair dismissal case and his discrimination case that was going to a preliminary hearing at the EAT. He argued that the unfair dismissal claim could not be heard fairly without the context of the discrimination claim. It appeared that one purpose of the preliminary hearing before the EAT was to clarify the grounds of appeal and consider which, if any, grounds could proceed to a final appeal hearing.

5. The respondent did not support the claimant's application to stay proceedings. It argued that the case was now prepared (subject to some disagreement about supplementary documents). This was a 2020 case and the was no knowing what, if any, grounds the EAT may entertain or uphold on appeal.

6. In an oral decision I decided that these proceedings would not be stayed. In short:

    a. The tribunal had made a case management decision on 26 January 2024 not to stay proceedings. Although this was on the respondent's application, and the application before me was from the claimant, I did not consider that this was a sufficient change of circumstances warranting revisiting that case management order. No further compelling arguments were made that it was in the interests of justice to revisit it.

b. I did not agree with the claimant that he was unable to present any discrimination arguments in running his unfair dismissal appeal. He could challenged the reasoning of decision-makers and argue that discrimination undermined the reason advanced for dismissal, for example, or that it tainted the process. What I would not be able to do, if the case proceeded, was to determine discrimination claims.

c. There was the possibility that this tribunal could make findings of fact and conclusions that might impact a future tribunal considering a remitted discrimination claim. However, there were so many hypotheticals and variables at play. The scope of the grounds of appeal was still not settled. It could not be known what kind of case might come back to the tribunal from the EAT even if the claimant was successful.

d. This was a claim relating to a dismissal in 2019. If I postponed the case there would be no chance of it being relisted before late 2025. The likelihood would be that the listing team could not put in train listing this case until the outcome of the appeal, which itself could take a considerable amount of time. The strong likelihood was therefore that a hearing date in 2026 would be more likely.

e. It was not in the interests of justice to postpone (or stay) on the basis of such variables and hypothetical difficulties. If the claimant succeeded at the EAT, any remitted discrimination claim could be case managed so that any findings of fact or conclusions of this tribunal were properly taken into account.

7. The parties provided a 358 bundle, to which some policy documents were added. The claimant also provided an 88 page supplementary bundle. The claimant gave evidence having provided a witness statement. The respondent provided witness statements and called:

    a. Mr P Akinnola – Store Manager:

    b. Mr G Crawford – Area Manager.

8. The parties made closing submissions on day 8 February 2024, and I gave an oral decision later that day. On 13 March 2024 the claimant requested written reasons.

The facts

9. The respondent is a leading clothes retailer specialising in formal attire for men. The claimant commenced employment with the respondent on 9 January 2017 as a Sales Adviser at the respondent's Strand Store.

10. In his claim, in which he made numerous claims under the Equality Act 2010, the claimant set out a number of incidents and issues he says he experienced in his employment from 2017 onwards. It has not been necessary for me to find facts make conclusions about most of these allegations in order to determine the issues before me in this case.

11. However, put briefly the claimant has made allegations of discrimination on grounds of race and religion, harassment related to race and religion, victimisation in relation to matters dating from 2017 until his dismissal. Without going into detail, the claimant put a number of grievances during the course of 2017 and 2018. He transferred from Strand to the Stratford store on 30 June 2017. He was promoted to the role of Hire Manager on 1 April 2018.

12. On 29 April 2019, the claimant was signed off sick with work-related stress until 10 May 2019.

13. On 9 May 2019 the claimant raised a grievance in which he made a number of allegations. He alleged:

    a. He had been sidelined and undermined by his then manager, Mr Burley;

    b. He had been targeted by another member of staff who refused to do what he asked them to do, and called him a “disappointment” and a “witch”;

    c. He had been abused by a staff member Neel;

    d. He was unsupported by Mr Burley, who takes the side of staff;

    e. He has not been supplied with the keys to the safe.

14. The claimant did not mention a Mr Danby, who was later to become relevant in the claimant’s claim, in this grievance letter. Mr Danby had been the Deputy Manager, and then became the Store Manager and the claimant’s line manager.

15. On 4 June 2019 it appears the claimant came into conflict with a colleague Ms Cantana, which led to the then deputy manager Mr Crowston suggesting the claimant goes home. The claimant asserted that Ms Cantana refused to support him. The claimant complained to, Mr Danby, who began to investigate by interviewing the claimant.

16. The claimant asserts that Ms Cantana failed to support him on three further dates in June 2019.

17. On 20 June 2019 the claimant had a hearing into the grievance he raised on 9 May 2019.

18. The claimant asserts that on 9 July 2019, Ms Cantana again failed to support him.

19. On 22 July 2019 the claimant was emailed an undated outcome letter to his grievance by the hearing manager, Mr Bebb and Area Manager. Mr Bebb partially upheld the grievance and determined (very much in summary):

a. Mr Burley had not undermined the claimant, and that conversations about his role had been informal. This should have been handled better, and Mr Danby, as new manager, should have regular one-to-one meetings to be clear on expectations.

b. A pay rise issue had been a genuine error in processing, which had been rectified;

c. That team members should not be using derogatory language, but the individual in question had left the respondent's employment;

d. That the store manager Mr Danby would investigate the issue of why Mr Crowston sent him home;

e. That the claimant should have keys to the safe, and it was not clear why this was not the case.

20. There is nothing in this outcome to suggest that the claimant was levelling complaints against Mr Danby.

21. On 23 July 2019, Mr Crowston sent the claimant a message on the Stratford store managers WhatsApp group to say "*9.32 is not a 9-6 shift especially with a lunch break. You may have got away with it this time but the CCTV doesn't lie and neither should you*". The claimant responded that he was not happy with this message, which accused him of being a liar, being put on the group chat. Mr Crowston responded, "*We all change shifts can we all make each other aware on here. We have a management chat for a reason. I've paused the CCTV you can check for yourself. Next time don't lie to my face*".

22. It is also on 23 July that an incident occurred which led to an investigation and disciplinary process which led to the claimant's dismissal.

23. The respondent had the relevant time a disciplinary policy which set out how disciplinary investigations, hearings and appeals should be conducted. It sets out, among other things, that:

a. Where practical and appropriate an employee should be given prior written notice of an investigation meeting, and that this should be conducted in a private room, with a note taker and that the employee should not be intimidated.

b. That before a disciplinary hearing a hearing officer should have a clear picture of the employee's history with the company, and should know what action has been taken in similar circumstances.

c. Before the disciplinary interview the employee should be informed of the grounds of for the alleged conduct, and the possible outcome of the disciplinary hearing. Witness statements and other documents should be made available to the employee.

d. Investigation interviews should be signed and dated.

e. Dismissal can follow where an employee is guilty of gross misconduct, or conduct which otherwise warrants dismissal. Examples of gross misconduct include "*Bullying*" "*Threatening, abusive or violent behaviour, including abuse or harassment involving any fellow employee or any other person or any other serious breach of the Company's Equality Policy*" and also "*Failing to carry out a reasonable request of management, or encouraging others not to comply with such requests*".

24. The respondent also had an Equality Policy with a section headed "*Bullying*". This acknowledged that there was no single definition of bullying, but that in general terms it was behaviour which may be characterised as "*offensive, intimidating, malicious or insulting… It can involve an abuse or misuse of power through means intended to undermine, intimidate, denigrate or injure the recipient*". The policy set out that bullying can take many forms including physical verbal abuse or threats, unjustified criticism, coercing an individual to do something out of fear, ignoring or excluding an individual, setting unreasonable goals, persistent mockery or teasing, spreading lies or malicious gossip.

25. On 25 July 2019, the claimant wrote to HR asking that Mr Crowston deletes the comments he made on the WhatsApp group.

26. At some point in this period Mr Danby, the claimant's line manager, was texted by members of the team about an altercation between the claimant and members of the team. On 25 July 2019 Mr Danby conducted an investigation meeting with the claimant accompanied by Mr Webb, a notetaker. The full meeting, according to the notes was as follows ("DD" is Mr Danby, "AB" is the claimant):

> *14.45*
>
> *DD: Can you relay to me from your perspective an incident that took place on 23rd July between yourself (AB) and Neel, Ela, Mo Gani, Mahvish?*
>
> *AB: No comment.*
>
> *DD: Are you unwilling to assist me on this incident?*
>
> *AB: I am unwilling to comment.*
>
> *Meeting concluded at 14.48.*

27. On 25 July 2019 Mr Danby interviewed Ms Cantana. He recorded the interview in writing on pro forma meeting notes paper which he and Ms Cantana signed. There was no heading, and the document was not dated. In the interview Ms Cantana gave evidence, which included the following:

    a. She was helping a colleague, Devine, with some unpacking. A colleague, Mehvish, came into the stockroom to see if she could help. The claimant then came into the stockroom and ask if she

was still at lunch, and she replied that she was but she was working. He asked when she would be back and she said “any time”.

b. The claimant began shouting at Mehvish, pointing to Ms Cantana, saying “*Stop talking to this lady. Don’t entertain her*.”. He was shouting loudly and he forced move each not to interact with Ms Cantana.

c. At some point the claimant came to collect something, and instead of walking around Ms Cantana he purposely nudged her out of the way.

d. A colleague Neel approached, and the claimant shouted at him to go to the shop floor, and not to talk to Ms Cantana. Neel said “*Who are you to tell me who I can talk to*”. The claimant replied *“I am the manager here. You are nothing, what are you, a senior sales?”*

e. Ms Cantana described herself as feeling very intimidated working next to the claimant, who always makes her do menial tasks. He never says hello to her and always shouts at her and follows her around the store. She said she felt he is bullying her on a daily basis and does the same to Neel. She feels micromanaged and avoids working with him because of the way he treated her.

28. On 25 July 2019 Mr Danby interviewed Ms Afzal (Mehvish). Her interview was recorded in a similar way to Ms Cantana’s, without an introduction or dates. Her interview included the following:

a. She described being in the stockroom with Ms Cantana, and the claimant coming in and asking Ms Cantana whether she was at lunch and when she would be back. She said the claimant shouted at her not to “entertain” Ms Cantana and do some work. He also shouted at Devine not to entertain Ms Cantana.

b. Ms Afzal said that the claimant “*tried to physically remove me from the section by grabbing my arm to lead me out but I pulled away as I didn’t need to be physically led out. I would have followed his instruction without physicality*”.

c. The claimant then said in a loud voice “*I am a manager you should listen to what I tell you*”.

d. Neel entered and a heated argument ensued with the claimant. She heard Neel say to the claimant that he could should not talk to people the way he did. The claimant said “*I am your manager, you are nothing*”. Things became heated and Neel said that the claimant could not call him nothing. The claimant repeated that Neil was nothing.

e. Mr Gani came in and asked the claimant to stop and walked between the claimant and Neel.

f. Ms Afzal said this had taken place around 2pm for about 15 minutes. She said that the claimant later came to apologise to her for shouting at her.

29. On 25 July 2019 Mr Danby interviewed Mr Mo Gani, recording the interview in a similar manner to the two previous interviews. Interview included the following:

    a. He saw the claimant and Neel arguing, with Ms Afzal present. He told Neel to walk away, and as he was doing so the claimant said "*Don't talk to me that you were senior sales, you are nothing*". Neel came back and said "*Oh, so I am nothing*". Mr Gani separated them and Neel when downstairs.

    b. This was not the first altercation the claimant had with Neel, and it was not the first time the claimant has said demeaning comments to him and other members of staff, but this was the first time it almost became physical.

30. On 25 July 2019 at 11.15pm the claimant emailed HR a copy of an appeal against Mr Bebb's grievance outcome, in summary saying that his role was still being undermined, he was not being supported, he was experiencing "*systematic discrimination from top to bottom*", and he said his desired outcomes had not been implemented or acknowledged. He did not mention Mr Danby.

31. Mr Neel Patel had gone off sick with stress shortly after the alleged incident in the stockroom. Ms Downes, an HR business partner conducted an interview with him by telephone on 26 July 2019. She recorded the conversation on pro forma meeting note with pages indicating that it was an investigation meeting. As this was a telephone call, Mr Patel did not sign it. The interview included the following:

    a. Mr Patel said he was suffering from stress, and could not bring himself to be at work.

    b. He described being in the stockroom with Ms Cantana who told him that he was not meant to talk to her because the claimant said so. The claimant then said "*Don't talk to her, she doesn't do fuck all*".

    c. Mr Patel took issue with this and said the claimant should not talk to her like that. The claimant said that he was the manager and "*You are senior sales… I am hire manager, you are sales, you are nothing*".

    d. Mr Patel walked away but felt the claimant was provoking him, and walked back to him, asking him to clarify what he meant by saying that he was nothing. Mr Gani bundled him out of the stock room. Mr

Patel went downstairs and did not interact with the claimant for the rest of the shift.

e. Mr Patel believed the claimant created a toxic environment in the store. He did not think the situation could be resolved as there was a pattern of behaviour. He felt he could not bring himself to come into work. He could not work with the claimant.

32. Also on 26 July 2019 Mr Danby held another investigation meeting with the claimant, accompanied by a note taker Mr Webb. He began the interview "*I wanted to give you another opportunity to give me your account of what took place on July 23.*" The claimant asked what incident as there were a few that happened. Mr Danby clarified it this was an incident in the stockroom concerning the claimant, Ms Cantana, Ms Afzal, Devina, Mr Patel and Mr Gani. The claimant responded "*I do not wish to comment*".

33. Mr Danby set out that one of the biggest concerns he had from "*yesterday's investigations (25/07/19)*" was an allegation that he had grabbed Ms Afzal's arm to pull her out of the stockroom. He asked the claimant to comment. He responded "*no comment*".

34. Mr Danby pointed out that he was asking the claimant straightforward questions, and that it was disappointing that the claimant was not cooperating. The claimant said "*I feel uncomfortable giving comments to you (DD)*". Mr Danby explained that it is the store manager it was his responsibility to provide a safe workplace for his team. He said that the incident appeared to have put that in jeopardy, and that the claimant's unwillingness to comment left him in "*a tough position*".

35. Mr Danby said "*The statements given yesterday (25/07/19) seem to corroborate with each other that your behaviour serve to create a hostile and intimidating environment, used demeaning comments towards your colleagues and at a time be physical to manage the team*." He indicated that he had no choice but to suspend the claimant with immediate effect while the investigation continued. He asked the claimant if he had anything to add, to which he responded "*Well done to you*".

36. On 26 July 2019 Ms Downes sent the claimant a suspension letter confirming that he was suspended pending further investigation of allegations of "*behaviour towards members of your team that could constitute bullying, and failure to engage in reasonable requests from management*".

37. On 29 July 2019 Mr Danby was interviewed by Ms Downes over the telephone.

a. He explained that he became aware of the stockroom incident after he got a couple of text messages saying there had been verbal altercations between Neil and Anthony (the claimant), Anthony and

Ela. He got a message from the claimant about message Mr Crowston put on the WhatsApp group.

b. On the Thursday (this would have been 25 July 2019) Mr Danby first had meeting with Mr Crowston and the claimant together.

c. Then, Mr Danby wished to have a meeting with the claimant, but he refused to cooperate. The claimant was the first person Mr Danby spoke to, and said he was "*hostile from the get go*". He made it clear he did not want to talk to Mr Danby, which made Mr Danby certain that he needed to investigate.

d. Mr Danby was asked who he spoke to after the claimant. He said that he called HR and was advised to investigate the incident. He spoke to Ms Cantana, Ms Afzal and Mr Gani as they were around at the time.

e. Mr Danby said that he waited until the next working day to speak to the claimant (the third time he spoke to him). He described this meeting, and in particular mentioned that Ms Afzal had said that the claimant had tried to pull her arm. He said the claimant sniggered but would not comment.

f. Mr Danby said that because of the severity of the issue he could not guarantee the safety of staff, and the refusal to comment gave him no choice but to suspend the claimant.

g. Mr Danby said that he gave the claimant the opportunity to read over the notes of the meeting, and the claimant used the Oxford English dictionary to query the use of the word "allegedly" and pointed out spelling mistakes made by the notetaker, including the word "demeaning", which Mr Danby found ironic, as this in itself was demeaning.

h. Mr Danby said that the claimant kept on saying "well done" and said that Mr Danby had an agenda.

38. The claimant has raised an issue that a number of the investigation interviews with staff members were undated. He has suggested that there can be no certainty that they were in fact interviewed on the dates suggested, and may even be a later fabrication. While it is right that Mr Danby did not date the interviews of Ms Cantana, Ms Afzal and Mr Gani, he made clear reference to interviews he had carried out "yesterday"' in his interview of the claimant on 26 July 2019. The claimant signed the notes of this meeting as being accurate. Mr Danby also set out a clear timeline of his interviewing of staff members in his own interview with Ms Downes. I find as a fact that Mr Downes interviewed the staff members on 25 July 2019, and that the minutes accurately reflect the content of these interviews. I reject the contention that they were a subsequent fabrication.

39. On 22 August 2019 Mr Henton, Head of E-Commerce chaired the claimant's appeal against his grievance outcome.

40. On 18 September 2019 the claimant travelled overseas on holiday and was away until 11 October 2019.

41. On 8 October 2019 the claimant was sent a grievance appeal outcome letter by Mr Henton. This was nine pages long and thoroughly addressed points the claimant had made in his appeal. Mr Henton did not uphold the appeal, but recommended that Mr Danby should talk to the claimant about how communication between the claimant and the team could be handled better, how to improve his relationship with Ms Cantana and for parameters of the claimant's role to be discussed. Some of the concerns the claimant had raised dated back to 2017. The claimant also referred to his feeling that Mr Danby had not taken steps to address a complaint he made about Mr Crowston calling him a liar on the WhatsApp group. Mr Henton noted that Mr Danby had said the matter had been resolved by Mr Crowston apologising to the claimant and the claimant shaking hands with him and accepting his apology. The letter also refers to the claimant's request on 10 July 2019 for holiday between 18 September 2019 to 11 October 2019.

42. On 17 October 2019 the claimant was invited to a disciplinary hearing on 24 October 2019 chaired by Mr Akinnola, Store Manager of the Oxford Street branch, to discuss allegations of "*Behaviour towards members of the Stratford store team which could constitute bullying; and Failure to engage in reasonable requests from your Line Manager to participate in an investigation meeting*". The claimant was informed that the result of the meeting could be that disciplinary action would be taken against him, up to and including his dismissal. The claimant was provided with a copy of the disciplinary policy, the equality policy and all investigation meetings and witness statements. In the event, the meeting was rescheduled to 28 October 2019 as the claimant said he was ill.

43. The disciplinary hearing took place on 28 October 2019 with Mr Akinnola HR, and the claimant accompanied by his trade union representative. The meeting included reference to the following:

    a. Mr Akinnola asked the claimant to explain what happened on 23 July 2019.

    b. The claimant explained that he requested some support from Ms Cantana, who denied him, creating a negative environment. He said he told Devine not to entertain her because of this. He said he was not feeling well. Half an hour later they were still talking and Mr Patel got involved, raising his voice telling him not to talk to someone, and not to tell people what to do. He said that he said that he was a hire manager and that Mr Patel was senior sales. He said that Mr Patel was walking out of the door saying threatening stuff. Mr Patel approached him as though he was going to hit him, and Mr Gani arrived and walked between them. He said he told Ms

Afzal also not to entertain Ms Cantana, and touched her arm lightly to direct her away from the others. He could not remember, but she may have pulled away.

c. The claimant said that he later saw Ms Afzal, who saw he was upset and gave him a hug. He asked her if she was okay and she said she was fine.

d. The claimant said that he did not trust Mr Danby as he had failed to take action on an incident involving Mr Crowston.

e. The claimant's trade union representative made a number of queries about the witness statements, in that they were not dated so they had no idea when they were done. Ms Wheeler of HR said that she could go and check, but she was sure the notes had been emailed in and this could be checked.

f. The claimant said that the reason he failed to comply with the interview was that Mr Danby has a "*vested interest in the conversation*", and there was a "*conflict-of-interest between myself and him"* and that he was *"involved in the grievance that was ongoing so I didn't feel comfortable to comply*".

g. The meeting was adjourned for a short while, and Ms Wheeler confirmed that she had seen the grievance outcome of 22 July 2019, prior to the incident in the store, and there was no mention of Mr Danby in the outcome letter. She said that at the time Mr Danby was investigating there was no grievance that mentioned him outstanding.

h. The claimant said that Mr Danby was "*complicit*". He said that his allegations (presumably against Mr Crowston) were very serious and that investigations should have taken place equally as both allegations were "*equally serious*".

i. Mr Akinnola put various matters from the investigation minutes to the claimant and allowed him to address these issues.

j. There was a further adjournment, and when the meeting recommenced, Mr Akinnola set out that it he was faced with different versions but had a reasonable belief that the information given in the statements did happen. He read out the definition of bullying within the equality policy, and set out his belief that this is what occurred he made the decision to dismiss the claimant from his employment-based on what he had heard. It was confirmed that he was dismissed for gross misconduct.

k. The claimant was given a right to appeal.

44. On 30 October 2019 Mr Akinnola sent the claimant a disciplinary outcome letter confirming his dismissal. In it:

a. He set out the allegations, and the claimant's accounts.

b. He set out the claimant's concerns about the validity of witness statements. However, it appears the claimant did not deny an incident occurred, although he gave a different version of what happened. Mr Akinnola was confident that the incident occurred.

c. Mr Akinnola set out the claimant's lack of trust in Mr Danby because he had not addressed concerns about Mr Crowston putting material on the WhatsApp group, which led to his not participating in the investigation. Mr Akinnola set out that the grievance outcome received by the claimant on 22 July 2019 did not refer to Mr Danby. Mr Akinnola concluded "*it is my reasonable belief that the incident did occur in the way that was described by four members of the store team, and that your behaviour on that day constituted bullying. Additionally, it is my reasonable belief that your failure to take part in the investigation requested by all Line Manager was not to do with a lack of trust towards your manager but rather a wilful refusal to comply with a reasonable request. Therefore, to confirm, your actions were considered gross misconduct and the decision was made to summarily dismiss you*".

45. On 1 November 2019 the claimant sent a letter appealing the decision to dismiss. He cited concerns with the process and outcome, but did not elaborate.

46. On 12 November 2019 the claimant was invited by HR to an appeal hearing to be heard by Mr Crawford, Area Manager, on 19 November 2019.

47. At the start of the hearing the claimant produced 11 new documents to submit as evidence, some going to issues which had occurred in 2017 at a different store. Mr Crawford found the claimant's account confusing. The trade union representatives summarised the claimant's case is being that he was unhappy with his line manager, and other employees cannot be trusted, and the notes provided by Mr Danby were unsigned and therefore it did not follow process.

48. On 10 December 2019 Mr Crawford sent the claimant an appeal outcome. He dismissed the appeal and addressed the issues the claimant had raised in turn:

a. He acknowledged that there was some missing details in the statements, but was satisfied that there was adequate evidence confirming the dates on which the notes of the witness statements were received by HR. He had no reason to believe they were not completely genuine.

b. Mr Crawford was confident that there were not significant differences in the witness statements, noting that the claimant did not elaborate on what these discrepancies were. Mr Crawford was

satisfied that the claimant's statement corroborated much of what was in the other statements.

c. Mr Crawford did not agree with the claimant that there were points in his grievance of 9 May 2019 which implicated Mr Danby. In any event, Mr Danby began investigating the incident before the claimant appealed. Mr Crawford could not understand why the claimant refused to participate into the investigations.

d. Mr Crawford was satisfied that Mr Danby had carried out investigations 2018 properly.

e. Mr Crawford did not believe that any previous conflict with Mr Crowston was relevant as he was not involved in investigation meetings.

f. Mr Crawford was satisfied that grievance investigations relating to the Strand store in 2017 were carried out properly, and were irrelevant to the disciplinary proceedings under investigation.

g. Mr Crawford did not uphold the appeal, concluding "*I maintain that you committed an act of gross misconduct through behaviour that constituted bullying, and that the reasons you have given for your refusal to participate in the investigation meetings (a failure to follow a reasonable management request) are entirely irrelevant to the matter in hand*".

49. On his dismissal the claimant's holiday entitlement and pay was calculated. For the holiday year commencing 1 April 2019, the claimant had a pro rata entitlement to 117 hours, and, taking into account his holiday in September and October 2019, had taken 19 hours over this entitlement. This was deducted from his final pay.

The law

50. Under section 98(1) ERA 1996 it is for the employer to show the reason for the claimant's dismissal, and that this is a potentially fair reason under section 98(2) ERA 1996. In this context, a reason for dismissal is "*a set of facts known to the employer, or it may be beliefs held by him, which cause him to dismiss the employee*" (*Abernethy v Mott, Hay & Anderson* [1974] ICR 323).

51. The approach to fairness of dismissal is governed by section 98(4) ERA, which provides: -

> *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.

52. The EAT set out the approach to what is now section 98(4) ERA in *Iceland Frozen Foods v Jones* [1983] ICR 17.

> *(1) the starting point should always be the words of [s.98(4)] themselves;*
> *(2) in applying the section an Industrial Tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the Industrial Tribunal) consider the dismissal to be fair;*
> *(3) in judging the reasonableness of the employer's conduct an Industrial Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;*
> *(4) in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;*
> *(5) the function of the Industrial Tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.*

53. Where the reason for the dismissal is misconduct, the approach to fairness is the test in *British Home Stores v Burchell* [1980] ICR 3

> *"First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case."*

54. It is important to focus on the wording of section 98(4) ERA, which does not set out a perversity test. It is for the tribunal to decide how serious the claimant's conduct was on the information available to the employer. It is for the tribunal to assess whether the conduct in question was such as to be capable of amounting to gross misconduct, and a failure to do so could mean that the tribunal would have failed to determine whether it was within the range of reasonable responses to treat the conduct and sufficient reason for dismissing the employee summarily (*Burdis*, and also *Elson v Robbie's Photographic Ltd* UKEAT/0282/18/RN, *Newbound v Thames Water Utilities [2015] IRLR 734).*

55. In *Robinson v Combat Stress* UKEAT/0310/14/JOH the EAT observed:

> *`20. The reference to the reason is not a reference in general terms to the category within which the reason might fall. It is a reference to the actual reason. Where, therefore, an employer has a number of reasons which together form a composite reason for dismissal, the Tribunal's task is to have regard to the whole of those reasons*

in assessing fairness. Where dismissal is for a number of events which have taken place separately, each of which is to the discredit of the employee in the eyes of the employer, then to ask if that dismissal would have occurred if only some of those incidents had been established to the employer's satisfaction, rather than all involves close evaluation of the employer's reasoning. Was it actually that once satisfied of one event, the second merely leant emphasis to what had already been decided? There may be many situations in which, having regard to the whole of the reason the employer actually had for dismissal, it is nonetheless fair to dismiss. An example might be where there had been a chain of events in which it is suspected that an employee had his "hand in the till". If only some of those events are sustained before a Tribunal, nonetheless that might be quite sufficient – indeed perhaps usually would be – for a dismissal for that reason to be sustained even if the employer believed that all the events had occurred whereas the Tribunal thought the employer was only entitled to consider that some had. Similarly, if an employer thought there to have been several different occasions on which racist language had been used by an employee, but a Tribunal concluded that some of those incidents did not bear close examination; or if the employer thought there had been a number of sexual assaults, but the Tribunal thought the number smaller, nonetheless a dismissal – "having regard to the reason shown by the employer" – might easily fall within the scope of that which it was reasonable for an employer to have done.

21. All must depend upon the employer's evidence and the Tribunal's approach to it. But that approach must be to ask first what the reason was for the dismissal, and to deal with whether the employer acted reasonably or unreasonably by having regard to that reason: that is, the totality of the reason which the employer gives."

56. In considering a dismissal that is disciplinary in nature, the tribunal will have regard to the ACAS Code of Practice on Disciplinary and Grievance Procedures.

57. Under the principal in *Polkey v AE Dayton Services Ltd* [1987] IRLR 503 where there is a failure to adopt a fair procedure at the time of dismissal, dismissal would not be rendered fair just because the procedural unfairness did not affect the end result. Compensation can be reduced to reflect the chance of dismissal taking place had a fair procedure been adopted.

58. The burden is on the employer to show what might have happened had a fair procedure been followed, but the tribunal is to take account of all the evidence in making an assessment. Sometimes reconstruction of what might have been is so uncertain or speculative that no sensible prediction can be made (*Software 2000 v Andrews* [2007] IRLR 569 and *King v Eaton (No 2)* [1998] IRLR 686.)

59. Section 123(6) ERA provides that the tribunal shall reduce the amount of the compensatory award by such proportion as it considers just and equitable where it finds that the dismissal was to an extent caused or contributed to by any action of the employee. This involves a finding that

there was conduct "*deserving of blame*" by the employee *Sanha v Facilicom Cleaning Services Ltd* UKEAT/0250/18.

Conclusions

Reason for dismissal

60. I have regard to the observations in Robinson that the reference to the reason for dismissal is not a reference in general terms to the category within which the reason may fall, but to the actual reason or reasons.

61. The respondent relies on two sets of allegations, one of bullying and one of failure to comply with a reasonable instruction. I find that these are the reasons why the respondent dismissed the claimant, and that they are potentially fair in that they relate to conduct.

62. I will say a little more about the reasons, as I have concerns about whether the second set of allegations bear scrutiny as acts of misconduct.

63. Focusing on the failure to follow a reasonable management instructions, I am not satisfied that it was sufficiently clear to the claimant that he was being instructed to provide an explanation to management in his two meetings. In the second meeting it was put to him that he had an "*opportunity, to put his side of things*" (emphasis added). Whilst I find that the claimant's behaviour was not helpful, I do not find that this would amount to misconduct.

64. I raised questions with the respondent's witnesses, which may have hinted at my concern about this disciplinary charge.

    a. In response to questions from me, Mr Akinnola said that he looked at things both individually and collectively, but "*a lot of it was on the bullying*". In re-examination he was asked what would have happened had there been no issue of failure to follow a reasonable instruction and he said "*There was more weight on the bullying. That was an act of bullying. The gross misconduct was from the bullying. I would not change that today*". It is also the case, looking at the disciplinary hearing minutes, that Mr Akinnola appeared to be more focused on the bullying when he was giving his oral verdict.

    b. Mr Crawford's evidence was a little more equivocal. In cross-examination he said he took both strands of misconduct into account, and he was asked if the claimant had been cooperative would his decision remained the same. His response was "*difficult to say. My view on reading the statements today, no*". However, in re-examination he was asked whether he looked at things in a package, and if it were just a question of bullying what he would have done he responded "*the outcome would potentially have been gross misconduct and dismissal if it was just bullying*".

65. Having regard to *Robinson* the reason for the dismissal was the belief that the claimant bullied colleagues and failed to follow a reasonable instruction. This relates to conduct a potentially fair reason.

66. I am satisfied, on balance, that this was one of those cases, as alluded to in paragraph 20 of *Robinson*, where the allegation of bullying was the one which led to the dismissal, and that the failure to comply with a reasonable instruction (which does not bear close scrutiny) "*merely leant emphasis on what had already been decided*"

Genuine belief on reasonable grounds

67. I will take the genuineness of the belief and the reasonableness of the grounds for belief together.

68. It was not put to Mr Akinnola that he did not have a genuine belief in the claimant's two allegations of misconduct. He presented as a straightforward and credible witness and there was nothing to undermine the fact of his belief in the claimant's misconduct.

69. In terms of the reasonableness of the grounds of his belief Mr Akinnola was presented with essentially four accounts from staff members and one from the claimant. There was a substantial overlap in terms of what was agreed to have happened in the stockroom on 23 July 2019. The areas of dispute were largely focused on whether the claimant had said to Mr Patel "*You are nothing*" and whether he had grabbed Ms Afzal or simply touched to move her out of the way.

70. When there are multiple accounts of an emotionally charged situation it is rare that there is a complete correspondence of various accounts. Indeed, in such a situation if all accounts are identical, that in itself might raise suspicions. There are minor differences in accounts, for example, one account suggesting the claimant said Ms Cantana did nothing, and the other that she did "*fuck all*". Broadly speaking, the four statements of the staff members are corroborative. Taken together and individually they present a picture of the claimant telling Mr Patel, a more junior member of staff than the claimant, that he was "*nothing*" on more than one occasion. Ms Afzal was clear that she was grabbed. While not referred to in the disciplinary hearing or dismissal letter, the fact that Ms Cantana gave evidence that she was "*nudged*" out of the way might lend a degree of support to Ms Afzal's contention.

71. Mr Akinnola was faced with, essentially, the evidence of four staff members as against the evidence of the claimant. There is nothing to undermine the suggestion that he made a dispassionate assessment of the evidence in reaching a conclusion to prefer the staff members' broadly corroborative accounts.

72. The claimant seeks to undermine the staff members evidence with a suggestion that Mr Danby could have either masterminded a situation where the staff members gave false evidence against the claimant, or that

he forged their witness statements. I will deal with this below, but I do not find either of those scenarios sustainable on the evidence.

73. I therefore conclude that the respondent had a genuine belief based on reasonable grounds to conclude that the claimant had committed misconduct in the manner alleged against him in respect of the bullying.

Reasonable investigation and procedural fairness

74. Again, I will look these two elements together as there is a substantial overlap in the considerations underlying each issue.

75. When I consider whether there has been a reasonable investigation, I am looking at the disciplinary process as a whole and not just what is commonly referred to as the investigation stage, which forms part of it.

76. When I consider it, I have regard to the ACAS Code of Practice on Disciplinary and Grievance Procedures (2015). Broadly, the Code sets out keys to handling disciplinary issues in the workplace obliging employers to establish the facts of each case, informing the employee of the problem, holding a meeting with the employee to discuss the problem, allowing the employee to be accompanied at the meeting, deciding on appropriate action and providing the employee with an opportunity to appeal.

77. Employers' own procedures also have a role to play in assessing whether there has been a reasonable investigation and procedural fairness. However, policies and procedures are not rigid tramlines, and a deviation from procedure does not necessarily render a process procedurally unfair. A broader view of fairness is required.

78. Mr Danby, the store manager on 23 July 2019, was alerted to potential misconduct at around the time of the alleged misconduct. Faced with allegations of conflict between staff members, he interviewed the claimant on 25 July 2019, having first spoken to him together with Mr Crowston about another issue. It is not clear whether there was a written invitation to this meeting. Mr Danby was, not unreasonably, asking the claimant to put forward his perspective of an incident that had been alleged to have taken place. He was giving the claimant an opportunity to put his version forwards. The claimant did not take this opportunity.

79. At this stage, as is clear from the findings of fact I have made, there was no grievance allegations levelled by the claimant against Mr Danby. I do not consider that he was, as the store manager and the claimant's line manager, unsuitable to carry out this investigation meeting. The contemporaneous evidence at this point in time does not suggest the claimant had significant issues with Mr Danby. Suggestions that he was unsuitable as he was a person who discriminated against the claimant or otherwise had an agenda against him were very much after the event.

80. It is clear that Mr Danby's minutes of interview with Ms Cantana, Ms Afzal or Mr Gani were not dated and there did not appear to be a notetaker. This

was not in accordance with the respondent's disciplinary policy. I do not consider that these procedural lapses have any substantial impact on the fairness of the investigation. The claimant suggests that the lack of dates could mean that these minutes could have been prepared at any time all forged. However, as I have set out above in my findings of fact, there is cogent evidence, including in the interviews Mr Danby attempted to conduct with the claimant, and his own interview with HR, that staff members had been interviewed prior to the claimant's second interview and a timeline was presented by Mr Danby. I do not find that these interviews were forged or that lapses led to an unfair investigation or procedure.

81. The claimant laid great emphasis on apparently crucial evidence having gone missing, in the form of emails to HR attaching the investigation interviews. I do not find that this evidence was crucial, and Mr Akinnola was entitled to delegate to his HR support the checking of emails and to rely on her response that they appeared to show the statements had been sent. There was no requirement for him physically to see the emails. In any event, Mr Akinnola took account of the cogent timeline presented by Mr Danby.

82. In terms of the disciplinary hearing, it is clear from the invitation that the claimant was presented with all the evidence management relied on. He was given the opportunity to be accompanied, and he took this opportunity. The minutes are clear that the claimant was given every opportunity to present his side of the story and to challenge the evidence against him. There is nothing to suggest that this part of the investigation was unfair or contained any procedural fault.

83. The claimant was given an outcome on the day, which was explained to him, and which was followed up in writing. He was given the opportunity to appeal, which he took.

84. The claimant attended his appeal armed with 11 new documents not referred to before. Mr Crawford allowed the claimant to present this evidence, allowed the claimant to develop his grounds of appeal, and took on board all of the claimant's grounds. In his outcome letter Mr Crawford addressed each of the claimant's appeal points and made findings. Again, there is nothing support a contention that this part of the investigation process was unfair or contained any procedural fault.

85. The claimant says that the time in which it took to conclude the disciplinary process, and for him to have been on suspension, was excessive. I note that the incidents that led to the allegations were in the latter part of July 2019. From 18 September to 11 October 2019 the claimant was on holiday. I also note that there was an appeal outcome that was being pursued by the claimant. I do not find the delay manifestly excessive, and there is no evidence, beyond the theoretical, that such a delay resulted in any unfairness.

86. I find that, at the time the belief in the claimant's misconduct was formed, the respondent had carried out a reasonable investigation and acted in a procedurally fair manner.

Dismissal in the range of reasonable responses

87. The respondent, through its hearing officer and appeal officer, determined that the claimant had said to staff members not to "*entertain*" Ms Cantana. Entertain can have a number of meanings, including not to have regard to someone or something or to ignore them. The respondent concluded that the claimant had said to a more junior member of staff "*You are nothing*". It would be reasonable to conclude that such behaviour is demeaning to other members of staff.

88. The respondent preferred the evidence of Ms Afzal to the claimant's, and concluded that he had grabbed her to move her out of the way. It is reasonable to conclude that this physical intervention was intimidating and even abusive.

89. The respondent also had regard to evidence suggesting that this incident, although probably more serious than others, was not isolated. Ms Cantana had described what she found as unacceptable treatment, being shouted at and targeted for menial tasks, and more than one witness, including Mr Patel himself, gave evidence of the claimant's demeaning treatment of Mr Patel.

90. It would be reasonable to conclude that the behaviour the respondent found proven came within its non-exhaustive definition of bullying within the disciplinary policy. As such it would be reasonable to conclude that it amounted to gross misconduct.

91. To find that behaviour amounted to gross misconduct within the respondent's policies is not the end of the story. I find that the behaviour found proven by the respondent is of sufficient gravity that dismissal for it falls within the reasonable band responses. The allegations were of grabbing a colleague to pull her out of the way, and demeaning another colleague. The approach of the claimant was to present himself as the victim and make serious allegations against the investigating manager, which left little scope for mitigation.

92. The claimant makes a point about inconsistency. He contrasts his disciplining and dismissal with the treatment of Mr Crowston. He says that Mr Crowson bullied him by pointing at him and saying "*I would love to send you home*", and by calling him a liar on a WhatsApp group. I have seen the messages on the WhatsApp group, and I compare them, and the other allegation the claimant levels at Mr Crowston, and find that there is not sufficient similarity for the claimant to maintain a claim of unfairness based on inconsistent treatment. The treatment must be genuinely comparable to run such an argument. What has been alleged against the claimant by a number of his colleagues is quite obviously of a different order of gravity.

93. I return to the issue of failure to follow reasonable instruction. I have concluded that a finding of misconduct in this instance is not sustainable. However, I find that this was one of those situations envisaged in paragraph 20 of *Robinson* where this charge simply lent emphasis to what had already been decided. I do not find any evidence to suggest that this charge tipped the balance towards dismissal. I find that the bullying element was the principal reason for dismissal and that dismissal for that alone was within the range of reasonable responses. Looking at the words of the statute I find that dismissal was fair having regard to the reasons shown by the employer, even though those reasons include the reasonable instruction element which was not sustainable. The employer acted reasonably in treating its reasons as sufficient to dismiss as the removal of the reasonable instruction allegation would still leave a serious act of gross misconduct.

94. In the alternative, if it was procedurally improper to include such a charge, I would have found that dismissal would have been a certainty in any event had the employer fairly proceeded with just the bullying charge. I would have reduced compensation to nil.

Holiday pay

95. The claimant applied for holiday in early July 2019 before the alleged incidents. The suspension letter on 26 July 2019 does not say anything about holiday. Potentially it would have been open to the respondent to invite the claimant to a hearing or further investigation interview during the holiday period. It would not have been able to do this if the claimant was overseas. There does not appear to be any agreement between the parties as to the holiday period not being treated as holiday, and the respondent's handbook does not cover the issue.

96. I therefore conclude that the claimant was using his holiday entitlement during the period he had booked and taken holiday. The respondent was therefore justified in deducting the holiday taken over his accrued holiday entitlement when it made the final payment to the claimant. His holiday pay claim is dismissed.

Employment Judge **Heath**

Date 07 April 2024