EMPLOYMENT TRIBUNALS

Claimant: Mr T Shah

Respondent: Food Hub Limited

Heard at: Birmingham **On:** 24, 25, 26, 27, 28 February & 3 March 2025

Before: Employment Judge Maxwell
Mr Howard
Mr Spencer

Appearances
For the claimant: in person
For the respondent: Ms Chan, Counsel

RESERVED JUDGMENT

1. The Claimant's direct discrimination claim is not well-founded and is dismissed.

2. The Claimant's indirect discrimination claim is not well-founded and is dismissed.

3. The Claimant's unfair dismissal claim is well-founded and succeeds.

4. The Claimant's breach of contract claim is not well-founded and is dismissed.

REASONS

Preliminary

1. The Claimant brought claims of unfair dismissal, religious discrimination and breach of contract.

2. The issues for determination were set out in the case management order of EJ Boyle, which followed a hearing on 30 April 2024.

3. We were provided with a bundle of documents running to page 918 and statements from the following witnesses:

<u>for the Claimant</u>

3.1 Tanveer Shah, the Claimant;

3.2 Mohammed Risalat, former International Development Manager;

<u>for the Respondent</u>

3.3 Ardian Mula, Chief Executive Officer;

3.4 Joanna Green, former Director of Quality & Organisational Development;

3.5 Neil Sturrock, former Global Operations Director

3.6 Ryan Schofield, Director of Field Sales and Support

4. Both parties addressed us orally in closing, the Respondent speaking to written submissions.

Facts

<u>Witness Evidence</u>

5. There were are some unsatisfactory elements in the oral evidence of most of the witnesses we heard from. Vague or evasive responses tended to emerge when questions were asked which might otherwise have elicited unhelpful answers.

6. The Claimant was unable to say whether he had been in Egypt for days, a week or several weeks at the end of 2021 and beginning of 2022. Given the Respondent would have expected him to be in the UK carrying out his duties, it was a surprising gap in the Claimant's memory. Mr Mula was at times dismissive or unengaged and struggled to give a clear answers to a number of questions, including about the position of Mr Naseer within the Respondent. As Mr Mula's witness statement said Mr Naseer was the owner of an entirely separate business, this question ought to have been a straightforward one. Mr Sturrock seemed to have an unexplained difficulty hearing or understanding a number of simple questions, including about whether he had prepared a report following his investigation. Whilst Mr Sturrock referred to a period of ill-health as explaining his failure to present the management case at the Claimant's subsequent disciplinary hearing, he did not advance this as an explanation for the absence of a report. Mrs Green gave a number of unsatisfactory answers. Her evidence included that it did not come into her mind that Mr Mula might be a unhappy if she were to reverse his decision on dismissal and allow the Claimant to return to work. This struck us as most unrealistic.

7. Given the lack of a complaint at the time about many of the matters the Claimant pursues in these proceedings and, therefore, contemporaneous documents reflecting what was said or done, deciding who to prefer on contentious matters was not an easy task. There were two witnesses who gave straightforward evidence, both of whom we found to be reliable, namely Mr Risalat on the Claimant's behalf and Mr Schofield for the Respondent. Their accounts were, however, of only limited relevance to the matters we had to decide.

Background

8. The Claimant describes himself as an orthodox practising Muslim who chooses to wear traditional Islamic clothing, which he says consists of a long outer garment similar to a loose flowing robe and a simple head covering. The Respondent operates an app-based food delivery business, conveying food from restaurants and takeaways to their customers. Since being founded, this business has grown and now operates in several countries, including the UK, Egypt and India. The Chief Executive Officer and principal shareholder is Mr Mula. He describes himself as an Albanian Muslim who came to the UK at the age of 14 and was placed with foster parents. He says he was raised as a Muslim and all members of his family follow the Islamic faith. The Claimant cast doubt on whether Mr Mula was a Muslim, saying that he did not comply with the religious obligation to pray. In cross-examination, the Claimant suggested to Mr Mula that he only said he was a Muslim in order to defeat the claim of religious discrimination. When the Claimant asked Mr Mula whether he believed a Muslim could discriminate against another Muslim, Mr Mula replied yes. This did not appear to be the answer the Claimant had expected. We were satisfied that both men were sincere and genuine in what they said about their religious belief.

9. The Respondent has a very diverse workforce. As at the time of the Claimant's dismissal, the largest single group comprised Muslims, about 45%. This has since increased, such that as at November 2023 the proportion of employees identifying as Muslim was 59%. The remainder of the workforce includes Christians, Jews, Hindus, Sikhs, agnostics and atheists. Aside from religion or belief, the workforce includes men, women and people of different sexual orientations. The Respondent has various measures in place to accommodate the religious needs of its Muslim employees, including prayer rooms at all of its offices and the availability of a work pattern excluding Fridays, so they might go to the mosque.

Prior to employment with the Respondent

10. In 2013, the Claimant secured employment in Egypt with a company called ADS as a call centre based customer support agent. The Claimant was interviewed for and appointed to this role by Mr Mula. There is a dispute between the parties as to the ownership of the Egyptian business at the time, and the nature of Mr Mula's interest in this. It is unnecessary for us to make any detailed findings, suffice to say we are satisfied Mr Mula was involved in the business to some extent and, therefore, interested (in the broadest sense) in what went on there.

11. The Egyptian workforce is predominantly Muslim and a point came when the ADS workforce objected to making amendments to menus, to add or remove items which they consider to be prohibited by their religion, in particular alcohol and pork products. This was referred to as dealing with that which was halal (permitted) and haram (forbidden). Mr Naseer, who held a senior position in the Egyptian business, invited the Claimant to bring his imam into the workplace, to explain the application of Islamic principles, which he did. This imam did not, agree with the Claimant's interpretation. The same view was offered by a second imam brought in. Notwithstanding this, the operatives maintained their objection. Whilst ADS was able to accommodate this issue locally to begin with, when the scope of the objection increased and the operatives refused to do any work at all

for businesses which sold alcohol or pork, Mr Mula and Mr Naseer decided to wind down the ADS operation in Egypt and instead transfer that work to India. A later decision to dismiss the Claimant was made by Mr Naseer and Mr Risalat.

Employment with the Respondent

12. In 2018, Mr Risalat was working for the Respondent as Head of Sales. He discovered that the Claimant had relocated to the UK, thought he would be a suitable candidate for one of the Field Sales Executive roles and invited him to apply. The Claimant suggested to Mr Risalat at the time that Mr Mula would be unwilling to employ him, given what happened in Egypt. In this he proved to be wrong. When Mr Risalat proposed taking on the Claimant, Mr Mula agreed, with the proviso the Claimant would have to work with both halal and haram businesses.

13. The Claimant suggests that Mr Mula has always held a grudge against him because of what happened in Egypt, believing him to be the instigator of the workforce objection. He says that Mr Mula was simply waiting for the opportunity to get rid of him. The Claimant's explanation for the apparent inconsistency between this alleged hostility and Mr Mula not vetoing his employment, is that Mr Risalat had autonomy in the business. This struck us as an implausible proposition. Mr Mula was both CEO and owner of the Respondent. The evidence before us suggests he runs the business with a firm hand. It seems unlikely Mr Mula would defer to Mr Risalat in the recruitment of an employee to whom he was hostile. It is more likely and our finding that Mr Mula was content to employ the Claimant as long as the latter performed to the required standard, including working for all of the Respondent's client businesses. Mr Risalat said this in his oral evidence and we accepted it was so. The balance of evidence tends to suggest it was the Claimant who had preconceived negative views about Mr Mula, rather than the position being the other way around.

June 2019

14. The Claimant says that on 17 June 2019, when he went to the Respondent's head office for a training session, Mr Mula looked at his clothing in a derogatory manner, scanning him up and down 3 times. The Claimant says that after this, a new recruit he was training said Mr Mula had not been impressed with his clothes. The Claimant made no complaint about this at the time. Given this matter was raised for the first time in these proceedings, several years after the event, it is asking a great deal of Mr Mula to expect him to be able to recall the way in which he had looked at the Claimant on a particular day in 2019. Mr Mula does, however, deny that he would have looked at the Claimant in this way alleged and we accept his evidence on this. Mr Mula had worked with the Claimant both in Egypt and the UK. He was well aware of how the Claimant chose to dress. In cross-examination, when the Claimant challenged Mr Mula on the basis he was the only person to attend the Respondent's head office dressed in this way, Mr Mula ran off the names of various other employees who came in to work similarly attired. Rather than disputing this, the Claimant then appeared adjust his position, suggesting merely that he dressed in this way more often. We did not find that to be a very effective challenge. Not only do other employees dress as does the Claimant, both in the UK and overseas, the

same is true of many business owners with whom the Respondent deals. In this context the Claimant's mode of dress was unremarkable.

Promotion

15. The Claimant did very well with the Respondent. In about August 2020 he was promoted to Regional Field Account Manager, being responsible for 4 or 5 field sales executives. Mr Mula, who keeps a close eye on performance figures, supported this promotion. The Claimant relies, again, on Mr Risalat's autonomy to explain why this occurred notwithstanding he also says Mr Mula wanted him out of the business. Our conclusion is a simpler one, Mr Mula supported this promotion because the Claimant was a high performer.

Further promotion

16. In July 2021, when Mr Risalat decided to leave the Respondent, the Chief Revenue Officer, Mr Hawkes, suggested further promoting the Claimant, this time to the position of UK Field Sales Manager. Mr Mula thought this was quite a big step up for the Claimant but again agreed. In this instance, the Claimant seeks to reconcile the apparent inconsistency between Mr Mula's alleged ongoing hostility and this further promotion, in the space of less than 12 months, on the basis of Mr Mula's alleged deference towards white managers. There is no evidence to support this assertion. The Claimant was employed and then promoted by the Respondent previously on the basis of an Asian manager's recommendation. Our finding is that Mr Mula was interested in and influenced by current performance, rather than events in Egypt many years before. The Claimant progressed in the business, rapidly, because he was doing so well.

Lunch

17. Mr Mula's PA sent an email to various managers inviting them to join him for lunch on 13 September 2021. The location was a relatively inexpensive American diner themed chain restaurant near to the Respondent's head office.

18. The Claimant suggests this venue was chosen deliberately because the premises had an alcohol licence and Mr Mula knew the Claimant would not attend for this reason. We do not agree.

19. The Claimant did not put this allegation to Mr Mula in cross-examination and so the Judge read it to him from the list of issues. Mr Mula said it was preposterous. We accepted his evidence on this. It was Mr Mula's PA who chose the venue. The invitation was extended to a number of colleagues, many of whom were Muslim. There had never been any complaint, whether from the Claimant or anyone else, about attending a restaurant because it served alcohol. The fact of alcohol being available does not, of course, obligate anyone to consume it. Indeed, many of the Respondent's client businesses have alcohol licences and the Claimant had not objected to visiting them. The Claimant did not raise a concern about this venue at the time. Mr Mula did not know of his undisclosed objection. Mr Mula also said that if the Claimant had raised a concern and asked for a venue to be considered which did not serve alcohol, he would have done so, as he wished to be inclusive. Mr Mula did not have any particular attachment to this restaurant. We found his evidence on this to be convincing. It is entirely

consistent with other accommodations the Respondent has made for its Muslim employees. Furthermore, the Respondent organised meetings away from head office at various other locations, including hotels and coffee shops.

<u>Head office</u>

20. On 14 September 2021, Mr Mula spoke to the Claimant whilst he was at the head office, saying “Mr Hawkes has put a lot of faith in you by giving you this opportunity, it’s a big step up from Team Leader”. The Claimant recalls this conversation in more negative terms, “you were not my choice for the job and I did not hire you”. We think the Claimant's recollection of this has been negatively affected by the passage of time and subsequent adverse events, including his dismissal, following which he first complained in these terms. We prefer Mr Mula’s evidence, which is more consistent with our findings as to his state of mind at the time. If Mr Mula had felt as the Claimant says he spoke, it is unlikely he would have allowed the promotion.

<u>Expenses</u>

21. Mr Mula came to believe that the finance team were being somewhat lax in their application of the Respondent's expenses policies. He decided it was necessary to instil more financial rigour and to this end, directed that all expenses should referred to him for sign off. The Respondent used an app for this purpose. Mr Mula challenged a number of employees on their claims.

22. Mr Mula denied an expenses claim made by the Claimant for £75, with respect to a prospective hotel stay on 7 to 8 December 2021 at the Hilton hotel local to the Respondent's head office. Mr Mula responded through the app “use a cheaper alternative”. The Claimant says his request was in line with the Respondent's policy, which allowed for hotel expenses in that amount. The Claimant also told us that he sometimes sent expenses claims directly to other managers, rather than putting them through the app, so as to avoid Mr Mula. The Claimant cites a comparator for this claim, namely Mr McGuinness, who had his request for a £75 stay at the Hilton accepted. In cross-examination, the Claimant had some difficulty answering the question – was Mr McGuinness a director – but eventually said he was and also a member of the Respondent’s senior leadership team.

23. The Respondent's policy on hotel expenses is in the following terms:

> **5.0 Hotel accommodation**
>
> **The nightly budget for hotel accomodation is as follows in the UK: The lowest cost options should always be booked and the company recommends utilising 'Travel Lodge' or 'Premier Inn' in order to get the best rates. The cost for any hotel room should not however exceed £75 per night and this should include breakfast.**
>
> **Senior Leadership Team (permanent direct reports of the CEO or MD) The lowest cost options should always be booked and the company recommends utilising 'Premier Inn', 'Hilton' or 'Doubletree by Hilton' in order to get the best rates. The cost for any hotel room should not however exceed £105 per night and this should include breakfast.**

24. Mr Mula's approach to the hotel policy was that £75 was a maximum rather than a minimum and he refused the Claimant's request because he believed a cheaper alternative could be found.

25. In early 2022, the Claimant claimed a £25 "per diem" payment. Mr Mula denied the request and commented "give me details please". It is apparent from these words that that Mr Mula's decision was not necessarily final, rather he required more information. The Respondent's policy allowed a claim of up to £25 when an eligible employee was required to stay away from home overnight. In effect, this was a subsistence payment. Mr Mula responded in this way because it was not clear to him that the Claimant was staying overnight. Although the initial response was sent through the app, the Claimant and Mr Mula spoke about this shortly thereafter. The Claimant recalls Mr Mula saying "You're telling me that you come to Stoke to do a day's work and I have to pay you £25 for the privilege". We think he probably did say something along these lines, at it would tend to reflect a belief on the part of Mr Mula that the Claimant was not staying overnight. The Claimant responded that he was entitled to this under the policy and his colleagues claimed it. What he did not do was say to Mr Mula – I am staying overnight. We were not referred to an associated claim for hotel expenses on this occasion, either approved or refused, which might have might have been expected in the event of an overnight stay.

<u>Business Performance</u>

26. Following the departure of the Chief Revenue Officer, Mr Mula asked Ms Sims, the interim Managing Director, to do a deep dive into the performance of the Field Sales and Telesales teams. Mr Mula was concerned about a marked decline in the figures, in particular the number of new client businesses being signed-up.

<u>Review Meeting</u>

27. The Respondent's practice when making internal promotions was to do so by way of an initial 6-month secondment. In effect a trial period. Because she had only been the Claimant's line manager for a short period after Mr Hawkes left, Ms Sims asked Mr Mula to sit in on his review meeting. The meeting was due to be in person but was rearranged to take place by Zoom. Ms Sims and Mr Mula were concerned the Claimant was not spending enough time in the field coaching, mentoring and leading his team. A decision was made to extend the Claimant's trial period in his new role

28. Ms Sims sent her summary of the discussion to the Claimant by email. This is a fair reflection of what was said:

> **Trial Period Review Meeting - 12/01/22 We discussed: Top issues Team performance Value generation Topical areas Feedback provided: - Encouraged to step back and review the situation holistically – Balance what the business needs with the activities required to generate the right performance level - Look at how to achieve consistent performance levels from all team members within an acceptable range - Spend 80% of time out in the field shadowing team members Tan has demonstrated a calm and professional approach. He is clearly dedicated to the business and his team, and has a strong cultural alignment with both the culture of the**

> **business but also the addressable market. Tan reiterated his long hours and dedication, and his desire to achieve good performance levels without creating risk for the business in relation to managing individuals. He was encouraged to apply a more black and white/unemotional approach to management through consistent application of performance interventions including coaching, glide paths, and then formal warnings. We committed to ensuring Simon Farmer spends a significant amount of time with Tan assessing approach and providing support on achieving maturity across the field sales organisation. Tan raised issues in consistency across the wider sales teams, and pointed out problems associated with other teams accessing more favourable deals and the issues this also created at a client level. We advised Tan that his trial period in this role would be extended by three months. This was to enable the business to provide the right focused support for Tan to help him succeed and create sustainable performance from his entire team.**

<u>New Line Manager</u>

29. Mr Farmer joined the Respondent in January 2022. Following an induction period, he took over as the Claimant's line manager. Shorty following this, Mr Mula and Mr Farmer discovered the Claimant was in Egypt, where he had family, and this was not during a period of authorised annual leave.

30. The Respondent has produced IP evidence it obtained subsequent to the Claimant's dismissal, which suggests he was in Egypt for several weeks. The Claimant argued this evidence was unreliable, as it shows him in Cairo or London on sequential days and he was not flying back and forth. The Claimant was, however, unable to say how long he spent in Egypt at this time. The Respondent's suggestion of VPN usage by the Claimant would seem most likely to explain the pattern of his IP access. The Claimant lives in Wales, rather than London and notably, from a point in February 2022, when it is common ground the Claimant was back in the UK, he accessed the Respondent's web-based tools from various UK locations, which would be consistent with him travelling in the field. We note that whilst there was a contemporaneous concern about the Claimant being in Egypt rather than the UK, the IP evidence cannot have informed any decisions the Respondent made about his employment.

<u>Dinner</u>

31. Mr Mula’s PA sent calendar invite to various employees for an evening meal at the Milehouse pub. The Claimant was included in the circulation list. He chose not to attend because the premises served alcohol. As before, the Claimant did not raise any concern with Mr Mula, who remained unaware of the objection.

<u>Conversation</u>

32. On 14 February 2021, the Claimant, Mr Mula and others were having lunch in the head office kitchen. During this the Claimant made comments about Islam. It appeared to Mr Mula that the Claimant was seeking to press his religious beliefs on colleagues and being disparaging about other religions. The Claimant's comments included that Allah was the only God and Islam the only credible religion. Mr Mula became concerned that employees of other religious faiths may be offended by these remarks. Mr Mula said the Claimant could not force his

views onto others, he was showing disregard for different religious beliefs and everyone who worked for the Respondent should be comfortable and happy. Mr Mula then left the kitchen. We accept the Claimant's evidence that he was addressing his remarks to those he believed to be fellow Muslims. We do, however, note, as Mr Mula pointed out at the time, the Respondent has a diverse workforce, including those of many other faiths. It is also clear that not all of those who identify as Muslim interpret or practice their religion in the same way. We are less inclined to accept the Claimant's characterisation of this conversation as being light hearted. The Claimant has firm religious convictions and it is apparent he takes his faith very seriously. It is likely that his comments about matters of religious faith would have been expressed in a similarly serious way.

<u>Vehicle</u>

33. When the Claimant was first employed he had a company car. As a result of negative feedback from employees about the tax treatment of this benefit, the Respondent decided to move to a system of providing a financial allowance instead. Employees were warned that when the lease on their current vehicle came to an end, it would not be replaced. They were expected to obtain their own vehicle to use instead when this happened. In February 2022, Mr Farmer became aware the Claimant's vehicle had been returned to the dealership but he had not purchased his own car. Mr Farmer reiterated to the Claimant that he was meant to be out in the field and gave him two weeks in which to obtain a car. When Mr Mula learned of this he was concerned the Claimant was finding reasons not to be in the field.

34. On 14 March 2022, James Page, the Respondent's Senior HR Business Partner, met with the Claimant. Because it was believed the Claimant had been refusing to obtain a vehicle and go into the field, Mr Page arranged this meeting with the intention of suspending the Claimant for failure to follow a reasonable management instruction. When they met, however, the Claimant informed Mr Page that had just purchased a vehicle. The Claimant said at the time that he recognised this might seem convenient (i.e. suspicious). Nonetheless, Mr Page accepted what he was told at face value and did not suspend the Claimant. Mr Page did however write to the Claimant, warning of disciplinary consequences if he failed to work in the field as required. Mr Page's letter included:

> **Further to our meeting this evening which initially commenced in order to suspend you for refusing a reasonable management request. You informed me that you had successfully purchased a car over the weekend and had had it delivered to your home today.**
>
> **You confirmed when asked that as a result of this you would be getting the car insured tomorrow and from tomorrow you would return to being field based as per your role requirements.**
>
> **[…]**
>
> **You explained how financially restricted you are due to having to provide for family both in Egypt and the UK and I offered to arrange for a £300 float to be deposited into your bank account tomorrow, so that you could use it in the interim and claim your mileage back as an expense while you**

> **waited for the fuel card to be delivered. You declined this offer and said instead you would borrow the money from someone.**
>
> **You were first made aware and consulted about the change from having a company car to car allowance back in December 2018 and have certainly known since September 2021 when cars started to be returned and exchanged for a car allowance that this change was going to affect you and by when.**
>
> **It is a requirement of your role to be field based at least 4/5 days per week, and refusing to be so for whatever reason is considered an act of gross misconduct.**
>
> **Should there be a period in the future where you fail to be field based when requested to do so by your line manager, then the matter may progress to a disciplinary that ultimately could lead to your summary dismissal from the business.**
>
> **[…]**
>
> **Before concluding the call you mentioned problems you had had in getting expenses authorised. I explained that as long as all claims are pre-authorised and within the policy then there should be no delays in the process.**
>
> **I explained that where hotel accommodation was concerned you should research the hotels available and always select the cheapest option and not automatically book up to the nightly allowance amount. I gave examples on how you could demonstrate that this had been done in order to address any concerns raised when seeking authorisations for expenses.**
>
> **I stated that the business would not expect you to stay in accommodation that had a Trip Advisor score of less than 4/5, and nor would we expect you to stay in accommodation where you had stayed before and reported extremely poor and unacceptable standards.**

35. The Claimant replied to Mr Page, providing further information about his vehicle acquisition. He also made a comment which suggested the requirement for him to be in the field was new:

> **Please be informed, I intend to insure and tax my car prior to the commencement of my shift on 15/03/2022, thus allowing me to begin my new role in the field.**

36. The Claimant's evidence was that prior to Ms Sims taking over from Mr Hawkes, he had not been required to go into the field to work with his team and this requirement was raised with him for the first time during the review in January 2022 and, therefore, a change in the way his role would be carried out. We accept this. The Claimant also said that following the departure of Ms Sims, the requirement to be in the field was no longer in place. On this latter point, we were less convinced. Nothing had been said expressly to that effect and the conclusion the Claimant says he drew appears, adopting his language, to be a convenient one.

First Dismissal

37. On 1 August 2022, Mr Mula conducted a review of the previous month's expenses. He was concerned about a marked increase and wanted to identify where this was coming from (i.e. which individuals or departments). In doing this he encountered something unexpected going the other way, namely that the Claimant's expenses were far lower than those of the rest of his team. Given the Claimant had a national role rather than a regional one, Mr Mula would have expected to see the opposite pattern.

38. Mr Mula told Mr Farmer to invite the Claimant to a meeting. The WhatsApp message sent to the Claimant indicated this was for a catch up. It is quite clear, however, the reason of the meeting was that Mr Mula was very concerned the Claimant was still not doing his job in the field, despite this requirement having been made very clear.

39. The Claimant met with Mr Mula and Mr Farmer on 2 August 2022. Mr Mula believed the expenses data demonstrated the Claimant had travelled away from home on 6 or 7 occasions during the previous 3 months. Mr Mula asked the Claimant whether he had any more receipts and how many days out of the last 60 he had been in the field. The Claimant did not provide a specific answer to this latter question but instead argued he did not need to be in the field to do his job. Mr Mula disagreed, pointing to poor sales figures for the Claimant's team. Mr Mula was angry. He believed the Claimant was not doing the job he was being paid for. We accept the Claimant's recollection of this part of the conversation, namely that he was accused by Mr Mula of "stealing money from the company" and "illegitimately taking a salary". These words appear likely as they would reflect a strength of feeling on the part of Mr Mula consistent with what happened next, namely the Claimant's summary dismissal for gross misconduct.

40. The Claimant says Mr Mula had been waiting for the opportunity to get rid of him because of what happened in Egypt many years before. We do not accept that. The Claimant's employment history with the Respondent is inconsistent with that proposition. If Mr Mula had, as the Claimant puts it, held a grudge in this regard, it seems most unlikely he would have agreed to the Claimant's initial appointment or indeed repeated promotions. The Claimant progressed in the business because he performed well and Mr Mula valued that. It seems far more likely that the reason for Mr Mula's sudden decision to dismiss was his belief that the Claimant was in effect, stealing from the company. Mr Mula was so angry that he dismissed the Claimant on the spot.

41. After the meeting, Mr Mula spoke to Mr Page and says he was advised that he should have followed the correct process. We believe it is likely that Mr Page went further than that and told Mr Mula his dismissal of the Claimant, without following any proper process, would inevitably be found unfair by an Employment Tribunal.

Claimant's appeal

42. The Claimant appealed against his dismissal by way of an email of 5 August 2022 addressed to Mr Page. This included:

> **James, as you are aware, I was called into a meeting by Ardian Mula on 02/08/2022.**
>
> **I was informed that Ardian Mula wanted to have a "catch up".**
>
> **During the meeting I was unceremoniously dumped, sacked from my role of almost 5 years with immediate effect!**
>
> **I was told I was guilty of gross misconduct, a charge that I am not willing to accept and want to appeal.**
>
> **I mentioned during this meeting that I wished to appeal the decision and that I would be waiting for written confirmation of the decision so that I may officially respond with my request to appeal.**
>
> **James, to say that the way that I have been dealt with by FoodHub is absolutely disgusting and shockingly unprofessional is an understatement.**
>
> **[…]**
>
> **Please accept this email as confirmation of my intention to appeal the action that was taken to remove me from my position at FoodHub.**
>
> **I must add, the manner in which I have been dealt with by Ardian Mula and FoodHub concerning the termination of my employment is causing me undue stress and worry.**
>
> **Ardian Mula discriminated against me whilst I was an employee at FoodHub and it would seem he fully intends to continue his discrimination after having unfairly removed me from my role.**
>
> **Upon securing the U.K. Sales Manager role, Ardian Mula told me that, "You're not my choice, I didn't hire you!"**
>
> **I hope that as the HR Director at FoodHub you will strive to apply the correct processes and procedures in relation to my situation.**
>
> **[…]**

<u>Dismissal Letter</u>

43. Also on 5 August 2022, the Claimant received a letter confirming his dismissal. This included:

> **Further to the meeting held on Tuesday 2nd August 2022, where it was discussed with you serious concerns relating to acts of gross misconduct and breaching the terms and conditions of employment, a decision was taken to dismiss you without notice from the business.**
>
> **The reasons given for this decision were;**
>
> > **• Being untruthful to the business about being field based when you were not.**

> **• Refusing a reasonable management request to be field based driving sales, working with your teams and connecting face to face with clients.**
>
> **• Working from home or another place rather than in the field where you are contractually required to be in order to perform in your role.**
>
> **This letter confirms that you were summarily dismissed from your employment with Foodhub Limited on the 2nd August 2022 and will be paid up until this date.**
>
> **[…]**
>
> **You have a right of appeal against the decision. If you wish to appeal, please submit a written notice of appeal to myself within 7 days from the receipt of this letter, stating your reasons for the appeal. Any appeal would be heard independently**

<u>Appeal hearing</u>

44. The Claimant attended an appeal hearing on 12 August 2022. The transcript of indicates that Mr Sturrock was “Interviewer / Chair” and Mr Page “HR / notetaker”. The Claimant complained about a lack of a fair procedure and said that Mr Mula “had his knifes sharpened for me from a long time ago”. The Claimant suggested Mr Chu had been recruited as his replacement. The Claimant disputed the requirement for him to work in the field 4 to 5 days a week, saying this had not been presented to him formally and he had not accepted it by signing. Nonetheless, the Claimant said he was working in the field and his expenses of supported this. The Claimant also said that most of his field work had been done in his local region, South Wales and the West of England. As such he did not need an overnight stay.

45. The appeal hearing was adjourned and resumed on 15 August 2022. Mr Sturrock said he had decided to revoke the decision to dismiss and reinstate the Claimant because of a failure by the Respondent to follow the disciplinary procedure. Mr Sturrock then went on to say he believed further investigation was necessary into whether the Claimant had been carrying out the duties of his role. Mr Sturrock said he would carry out that investigation and the Claimant would be suspended whilst it took place. A letter from Mr Page of the same date confirmed this.

46. The decision made on the Claimant's appeal is an unusual one. In circumstances where the disciplinary decision appears unfair, the appeal officer might be expected to make their own decision about the matter, on whether to uphold the misconduct finding or vary the sanction. Where further enquiries are necessary, the appeal officer could make those before arriving at a decision. Mr Sturrock gave unsatisfactory evidence when asked whether Mr Mula was likely to be happy if the appeal decision had allowed the Claimant to return to work. Whilst we accept Mr Sturrock could not speak for Mr Mula, it must have been obvious he would have been unhappy. Mr Sturrock’s unwillingness to express a view on the likely reaction was evasive. Mr Sturrock gave two reasons for determining the appeal in the way he did, firstly to protect the business and

secondly to give the Claimant a fair opportunity to state his case. Our conclusion is that the decision was driven by the first factor.

Suspension and investigation

47. The following day, 16 August 2022, a suspension letter was sent, which included:

> **I am writing to confirm the conversation between yourself and Neil Sturrock, Global Operations Director on the 15th August 2022 in which he suspended you from your duties pending investigations into certain allegations. These allegations are sufficiently serious as to require us to investigate them under the Company's disciplinary procedure.**
>
> **The allegations are that you have been failing to fulfill your role as National Field Sales Manager by:**
>
> > **• Being present nationally in the field leading your team to deliver sales targets**
> >
> > **• Being present engaging face to face with priority leads in order to secure the recruitment of potential high revenue generating clients.**
> >
> > **• Refusing a reasonable management request to be field based nationally 4 days per week in order to perform the duties associated with the role of National Field Sales Manager.**

48. The suspension letter said the Respondent had considered whether suspension was a necessary step and had concluded it was, but did not provide any reasons for this.

49. The Claimant was required to attend a first interview on 22 August 2022. The transcript described the roles of Mr Sturrock and Mr Page in the same way as at the appeal. The opening remarks, however, included:

> **JP – Ok, in regards to the way that we are going to conduct this meeting today I have been supporting Neil with some of the data collation that we needed to do as part of the investigation and have struggled to get it sent across to Neil so that he can access it all, he has got some of it, and so are you happy for me to present the information to you today Tan, Neil will take notes and Neil is still the investigating officer and the person who decides ultimately upon the evidence and what direction the investigation takes, but its just going to be me asking the questions and me presenting the evidence if you like is that ok**
>
> **C – I would have thought it would have made more sense for you to perhaps have called the meeting once you have managed to provide that information to Neil and given him a chance to review it**
>
> **JP – Well we have gone through the information with Neil and he has gone through what he has got, its simply the questions that Neil is asking me to read out on his behalf, is that ok?**

50. We find ourselves entirely in agreement with the Claimant's observations as set out above. If the roles were to be as stated, Mr Sturrock would need time to familiarise himself with the evidence before interviewing the Claimant. This did not happen and instead, Mr Page proceeded to lead the interview and ask questions of the Claimant. We also note Mr Page would be involved in this process at almost every stage following the initial summarily dismissal. Our conclusion is that Mr Sturrock was investigator in name only. It was Mr Page who made enquiries and the relevant decisions.

51. The Claimant accepted that he was told to spend 4 to 5 days each week in the field, albeit he said this was a change in his role and disputed that a proper process had been followed in this regard. The Claimant was asked about working remotely in Egypt. He said he had been in Egypt on holiday and contracted Covid which meant he had been unable to fly back to the UK. The Claimant could not say when he was in Egypt but agreed there was a period when he worked remotely from there. Mr Page referred the Claimant to a number of specific dates when he had been able to ascertain the Claimant's whereabouts and asked whether these were the only times he had been in the field. The Claimant denied this, he said it was difficult to operate in the field because of the administrative burden of his role and spent the majority of his time in his local region.

52. Mr Page said he had looked at the Respondent's CRM platform and this did not show the Claimant's activity. The Claimant said he did not have access to the system in the same way as the sales staff did, he needed to be able to review their data but his own activity would not be recorded as he did not have the facility to log this. Mr Page referred the Claimant back to various dates when he had found evidence of fuel or other expenses that showed the Claimant in the field. Mr Page said the Claimant's mileage and other evidence did not support what he was saying. The Claimant challenged whether Mr Page had reviewed all the fuel cards he had used. The Claimant also suggested he may have taken some annual leave.

53. The interview was adjourned and resumed the following day. Mr Page produced a spreadsheet, which he said recorded the Claimant's expenses. He said his further enquiries showed the Claimant had used another fuel card but this had only one further transaction. Mr Page had also identified when the Claimant took annual leave, which included 4 weeks for his daughter's wedding between April and May, along with some individual days off. Mr Page presented the Claimant with a further analysis of the dates when he believed there was evidence that put him in the field.

54. The Claimant said that he had gone through matters trying to account for what Mr Page had asked him the previous day. He said he remembered making use of the £300 cash float, which meant that some of his fuel expenses would not have been obtained by way of a fuel card. Mr Page said the Claimant should have submitted expense claims for this. The Claimant said that had not been explained to him at the time and he thought that money had been given to him to pay for fuel. Mr Page said he had not provided any receipts. The Claimant said he would try to "fish" these out. Mr Page disputed this explanation, saying that £300 would not have lasted 5 weeks. The Claimant said that as he had worked locally, he would not spend more than £40 or £50 per week. The Claimant said

he did not claim parking expenses as local client businesses were often located near unpaid on-street parking. The Claimant also said he spent time supporting the Respondent's top 20 customers, many of whom were local to him. The Claimant was asked whether he had personal records of his activity and replied this had not been expected of him.

55. The Respondent found there was a case to answer. Notwithstanding this, no investigation report was prepared. Nor did any other document set out the findings which had been made.

56. Mr Sturrock gave oral evidence that he had been involved in many previous disciplinary proceedings, either as lead investigator or in some other capacity. He agreed it was usual for an investigation report to be prepared. Despite this prior experience, Mr Sturrock found it difficult to answer simple questions about whether he had prepared a report and – when it became clear he had not done so – why that was. On more than one occasion Mr Sturrock said he did not hear or understand the question being asked. We concluded he was being evasive. Mr Sturrock said that Mr Page acted on his behalf at the disciplinary and conveyed his findings. When asked how this could be done in the absence of a report, Mr Sturrock said there was a handover. There is no documentary evidence supporting such a handover. Mr Sturrock's witness statement does not refer to a handover and indeed, his witness statement says he had no further involvement in this matter after writing to the Claimant to advise of the decision. We do not accept there was any handover meeting between Mr Sturrock and Mr Page.

57. By a letter of 24 August 2022, the Claimant was informed of the decision that there was a case to answer. Whilst this was sent in the name of Mr Sturrock, we find that it was Mr Page who made the decision. The letter included:

> **Having reviewed the information and evidence gathered as part of the investigation process and considering your responses when presented with the information and evidence, I have decided that the case warrants being progressed to a disciplinary hearing.**
>
> **My reason for this is that the evidence demonstrates to a conclusive standard that you refused a reasonable management request to fulfil your duties as UK Field Sales Manager, by being field based across the UK for 80% of your working week.**
>
> **This reasonable expectation and request was explained to you verbally and in writing by Ardian Mula and Jackie Sims on the 12th January 2022 and again by James Page on the 14th March 2022.**
>
> **When questioned and presented with the evidence demonstrating that you had not complied with this reasonable request, you failed to adequately explain why, give any mitigating reason for this, or demonstrate that you were in fact field based contrary to the evidence.**

<u>Disciplinary</u>

58. A letter of 24 August 2024 required the Claimant to attend a disciplinary hearing. The decision-maker was to be Ms Green, the recently appointed Director of Quality and Organisational Development. Having only been with the Respondent

for three weeks, Ms Green was still in her probation period. Her line manager was Mr Sturrock, the same person who had decided there was a case to answer. Her letter included:

> **I will chair the hearing, which will also be attended by Lee Cook, Head of Service as a company witness. James Page will be in attendance and will present the disciplinary case on behalf of Neil Sturrock who unfortunately is unable to attend.**
>
> **The disciplinary charges which the hearing is being convened to consider are as follows:**
>
> **That you failed to follow a reasonable management request associated with the duties associated with your role. To work in the field 80% of your working week, liaising with clients and spending time leading, coaching and mentoring your team to deliver the targets as set by the company.**
>
> **Please find enclosed relevant documentation generated by the investigation and a copy of the Company's disciplinary procedure. This evidence is provided in order for you to prepare your case. You will be given every opportunity to explain and account for your alleged actions.**
>
> **You should be aware that the outcome of the hearing could be that you are issued with a disciplinary sanction up to and including dismissal.**

59. The Claimant's disciplinary hearing began on 30 August 2022. The transcript describes Ms Green as "Interviewer / Chair", Mr Page as "HR Representative" and Mr Cook as "Company Witness / Note Taker". Ms Green's opening remarks included:

> **Are you sure, ok so the format of the meeting will be as follows, I will ask James to present the case, after each piece of evidence James presents I will ask both him and you any questions I need to so that I have the clarity and am clear in each point and evidence given, you will also have the opportunity to add any points that you would like to, I will also give you time at the end of the evidence and case being presented to add any further points information or for you to present any counter arguments before I adjourn to make a decision on what, if any action should be taken**

60. Mr Page presented the management case. He began by providing various statistics to show that the performance of the Claimant's team had been poor. Asked for his comments, the Claimant explained his view that the figures were largely explained by the Respondent's decision to withdraw its freemium product. He said the subscription-based model put in its place was far less attractive. In connection with being field-based, the Claimant said this was first mentioned by Ms Sims but shelved when she left the business.

61. With respect to Mr Page's spreadsheet, the Claimant explained this had been presented to him during the investigation meeting and he had not been afforded an opportunity to rebut its contents. The Claimant added:

> **[…] but since our last meeting and since James shared the spreadsheet with me I have had an opportunity to go through all of my fuel receipts and whats quite stark and I mentioned this in the meeting I said I have not had a chance to go through my receipts but I will do so to you know**

compare and contrast with the table you presented and whats quite stark you are missing loads of fuel purchases of which I have receipts for which are linked to my car which is made on my key fuels card which is mentioned on the receipts and all of the receipt purchases or the fuel purchases that I have made on my key fuels card that you have highlighted on your spreadsheet I don't believe I of the values that you have recorded on there are correct, they are all incorrect so you know it kind of makes you question the records that the finance team have been compiling because they have missed several months of fuel purchases that I made on the key fuel card and they have managed to get the figures wrong across the spreadsheet that you have presented to me so kind of you know if anything it makes you question that whole spreadsheet and I have actually compiles a spreadsheet if you want I can share my screen and I can show you the errors that were made on the sheet that you presented to me

62. The Claimant was asked to send his spreadsheet and copies of the receipts by email. Notably, he was not saying the Respondent had failed to include cash purchases for fuel (such as might have been made using the float) he asserted that fuel card transactions were missing. The Claimant had identified 7 such fuel transactions. The Claimant also said he had no reason to keep all of his fuel receipts, these were ones he had been able to find and there would have been others he no longer had.

63. The Claimant told Ms Green that his activity was not recorded on CRM because the nature of his access to that system was such that whilst he could review the activity of those who worked under him, he did not record his own. Ms Green asked why he had not reported this problem. The Claimant said he did not see it as such, he had not been told to record his own activity and believed he could do his job without this.

64. The hearing was adjourned and the Claimant sent Ms Green his annotated spreadsheet and receipts.

65. The disciplinary resumed on 1 September 2022. Mr Page said the online fuel statements only went back so far, the archives had now been checked and he now had the full history. No copies of the documentary material being referred to were made available to the Claimant, he was simply presented with an updated schedule. Mr Page said there was a discrepancy in some of the figures because the card statements received by the Respondent did not include VAT or fuel duty. Mr Page said he had been able to validate the Claimant's receipts from numbers 8 to 15.

66. Despite Mr Page’s presence having been explained on the basis he would present the management case and Ms Green would ask the questions, Mr Page proceeded to ask the Claimant about fuel transactions before and after a period of leave. Mr Page then said “Jo would you like me to hand over to you at this point?” and she then took up the point with the Claimant. The Claimant said he put fuel in the vehicle the day before going on leave to use that day and on returning, he filled up so that he had a full tank ready for an early start on the next working day. Mr Page proceeded to ask, or set up for Ms Green, a number of similar questions. The unstated implication behind Mr Page’s questions was

that the Claimant had been putting fuel in his vehicle for personal use and, therefore, these transactions were not evidence of him working in the field.

67. The disciplinary transcript includes several sections, over many pages, in which it is Mr Page who is asking detailed question of the Claimant rather than Ms Green. Indeed, it was most often these sections that the Respondent referred us to and relies upon in these proceedings.

68. Later in the disciplinary, Mr Page read out the content of an email from Mr Farmer addressing what he had said to the Claimant about the need to work in the field. The intended purpose of Mr Farmer's evidence appears to be to show that the requirement to spend 4 or 5 days in the field was not new and dated back to 2021. The Claimant had not been given a copy of this email. The Tribunal having seen the document, it is apparent Mr Farmer was asked a very leading question about the Claimant being required to spend 80% of his time in the field. Despite this, the meaning of Mr Farmer's answer is ambiguous.

69. At the end of the second day, the Claimant was given 48 hours to see if he could find any more evidence to show when he was in the field. The Claimant said he would look. He also said the case put against him was based on suggestions and assumptions. Mr Page responded:

> **From and investigation point of view only this isn't for me to comment on the disciplinary and I am representing Neil here, as I have presented the evidence it is Neils belief and the test here is reasonable belief that is what from a legal perspective from an employment law perspective is the test is reasonable belief. There is no evidence that has been presented to you in the investigation or that I have presented to you last meeting or this meeting that demonstrates that you have been in the field 80% of the time the only evidence that has been presented and you have contributed**
>
> **to in the disciplinary is that you have filled up you car on more occasions than we initially thought by presenting those receipts but in terms of evidence of you seeing I don't know a client a on a specific date that afternoon client c, in terms of you being in a specific area of the country there is absolutely no evidence that we have been able to obtain that states that from an evidential point of view or that you have been able to produce as evidence to I suppose to not argue but to put your case across and defend the case**

70. We do not accept that Mr Page was representing Mr Sturrock and presenting the latter's views and beliefs. There was no vehicle for their transmission. No investigation report had been prepared and the letter which informed the Claimant of a case to answer included only a minimalistic rationale. Our conclusion is that Mr Page was responsible for the preparation of the management case. The views expressed were his own.

71. Mr Page sent a copy of Mr Farmer email to the Claimant and Ms Green after the meeting.

72. A letter from Ms Green advising the Claimant of his dismissal (for the second time) was sent to him on 5 September 2025. This included:

> **I have carefully considered all the evidence and the points you made at the Hearings. I have concluded that the complaint that you failed to follow a reasonable management request associated with the duties associated with your role. To work in the field 80% of your working week, liaising with clients and spending time leading, coaching and mentoring your team to deliver the targets as set by the company are proved and disciplinary action is appropriate.**
>
> **Given the seriousness of the case and taking account of earlier conversations, reviews and emails sent to you in relation to this matter, I have concluded that your employment should be terminated with notice. This letter is therefore notice of termination of employment as of Wednesday 7th September 2022 (the date that this letter will be delivered to you via Special Delivery).**
>
> **[…]**
>
> **You have the right to appeal my decision. If you wish to appeal, please submit a email notice of appeal to James Page […] within 7 days from the receipt of this letter […]**

73. Whilst we accept it is more likely than not Ms Green did believe the Claimant was guilty of misconduct, she did not arrive at this conclusion free from influence by Mr Sturrock, Mr Page or Mr Mula. Ms Green was exceedingly new to the business. She was only 3 weeks into her probation period. The management case being presented to her was purportedly that of Mr Sturrock, her line manager, who had found a case to answer. She was in a position where anything other than a dismissal would, in substance, be overturing the decision of her direct line manager and the CEO. It must have been entirely obvious – whether or not she was told expressly what was expected of her – that Mr Mula would be extremely unhappy if her decision allowed the Claimant to return. Her responses when asked about Mr Mula's likely reaction were evasive and unconvincing. Furthermore, we were struck by the part played in these events by Mr Page, who was involved throughout from start to finish. We have come to the conclusion that Mr Page was orchestrating this process, to achieve in what was intended to be a defensible manner, the outcome that Mr Mula had already decided upon. To that extent, Ms Green's decision was a foregone conclusion.

74. The Claimant did not appeal.

Law

<u>Direct Discrimination</u>

75. In the employment field and so far as material, section 39 of **the Equality Act 2010** ("EqA") provides:

> **(2) An employer (A) must not discriminate against an employee of A's (B) -**
>
> > **(a) as to B's terms of employment;**
> >
> > **(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;**

(c) by dismissing B;

(d) by subjecting B to any other detriment.

76. As to the meaning of any other detriment, the employee must establish that by reason of the act or acts complained of a reasonable worker might take the view that they had thereby been disadvantaged in the circumstances in which they had thereafter to work. An unjustified sense of grievance cannot amount to a detriment for these purposes; see **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285 HL**.

77. EqA section 13(1) provides:

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

78. The Tribunal must consider whether:

78.1 the claimant received less favourable treatment;

78.2 if so, whether that was because of a protected characteristic.

79. The question of whether there was less favourable treatment is answered by comparing the way in which the claimant was treated with the way in which others have been treated, or would have been treated. This exercise may involve looking at the treatment of a real comparator, or how a hypothetical comparator is likely to have been treated. In making this comparison we must be sure to compare like with like and particular to apply EqA section 23(1), which provides:

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

80. Evidence of the treatment of an actual comparator who is not close enough to satisfy the statutory definition may nonetheless by of assistance since it may help to inform a finding of how a hypothetical comparator would have been treated.

81. As to whether any less favourable treatment was because of the claimant's protected characteristic:

81.1 direct evidence of discrimination is rare and it will frequently be necessary for employment tribunals to draw inferences from the primary facts;

81.2 if we are satisfied that the claimant's protected characteristic was one of the reasons for the treatment complained of, it will be sufficient if that reason had a significant influence on the outcome, it need not be the sole or principal reason;

82. In the absence of a real comparator and as an alternative to constructing a hypothetical comparator, in an appropriate case is may be sufficient to answer

the "reason why" question - why did the claimant receive the treatment complained of.

83. The definition in EqA section 13 makes no reference to the protected characteristic of any particular person, and discrimination may occur when A is discriminated against because of a protected characteristic that A does not possess; this is sometimes known as 'discrimination by association'.

84. The burden of proof is addressed in EqA section 136, which so far as material provides:

> **(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.**
>
> **(3) But subsection (2) does not apply if A shows that A did not contravene the provision occurred.**

85. When considering whether the claimant has satisfied the initial burden of proving facts from which a Tribunal might find discrimination, the Tribunal must consider the entirety of the evidence, whether adduced by the claimant or respondent; **see Laing v Manchester City Council [2006] IRLR 748 EAT**.

86. Furthermore, a simple difference in treatment as between the claimant and his comparators and a difference in protected characteristic will not suffice to shift the burden; see **Madarassy v Nomura [2007] IRLR 246 CA**.

87. The burden of proof provisions will add little in a case where the ET can make clear findings of a fact as to why an act or omission was done or not; see **Martin v Devonshires Solicitors [2011] IRLR 352 EAT**, per Underhill P:

> **39. This submission betrays a misconception which has become all too common about the role of the burden of proof provisions in discrimination cases. Those provisions are important in circumstances where there is room for doubt as to the facts necessary to establish discrimination generally, that is, facts about the respondent's motivation (in the sense defined above) because of the notorious difficulty of knowing what goes on inside someone else's head "the devil himself knoweth not the mind of man" (per Brian CJ, YB 17 Ed IV f.1, pl. 2). But they have no bearing where the tribunal is in a position to make positive findings on the evidence one way or the other, and still less where there is no real dispute about the respondent's motivation and what is in issue is its correct characterisation in law […]**

88. A number of recent cases have dealt with the application of EqA section 13 in cases where the Respondent argues that a detriment was done not because the Claimant held a particular religious or philosophical belief, but rather because they had manifested that belief in an inappropriate manner. Pursuant to section 3 of the **Human Rights Act 1998**, domestic legislation must so far as possible be read and given effect in a way that is compatible with the **European Convention on Human Rights**, article 9 of which creates an absolute right to hold such beliefs and a qualified right to manifest the same:

> **1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching practice and observance.**
>
> **2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.**

89. In **Page v NHS Trust Development Authority [2021] EWCA Civ 255** the Claimant was dismissed because he expressed views about homosexuality, same-sex marriage and adoption. His direct discrimination claims failed because it was held that he had been dismissed not because he was a Christian but rather because of the comments he had made. Per Underhill LJ:

> **68. I start with a point which is central to the analysis on this issue. In a direct discrimination claim the essential question is whether the act complained of was done because of the protected characteristic, or, to put the same thing another way, whether the protected characteristic was the reason for it: see para. 29 above. It is thus necessary in every case properly to characterise the putative discriminator's reason for acting. In the context of the protected characteristic of religion or belief the EAT case-law has recognised a distinction between (1) the case where the reason is the fact that the claimant holds and/or manifests the protected belief, and (2) the case where the reason is that the claimant had manifested that belief in some particular way to which objection could justifiably be taken. In the latter case it is the objectionable manifestation of the belief, and not the belief itself, which is treated as the reason for the act complained of. Of course, if the consequences are not such as to justify the act complained of, they cannot sensibly be treated as separate from an objection to the belief itself.**
>
> **69. The distinction is apparent from three decisions in cases where an employee was disciplined for inappropriate Christian proselytisation at work – Chondol v Liverpool City Council [2009] UKEAT 0298/08, Grace v Places for Children [2013] UKEAT 0217/13 and Wasteney v East London NHS Foundation Trust [2016] UKEAT 0157/15, [2016] ICR 643. In essence, the reasoning in all three cases is that the reason why the employer disciplined the claimant was not that they held or expressed their Christian beliefs but that they had manifested them inappropriately. In Wasteney HH Judge Eady QC referred to the distinction as being between the manifestation of the religion or belief and the "inappropriate manner" of its manifestation: see para. 55 of her judgment. That is an acceptable shorthand, as long as it is understood that the word "manner" is not limited to things like intemperate or offensive language.**

90. Underhill LJ returned to this subject in **Higgs v Farmor's School [2025] EWCA Civ 109**:

> **74. In summary, Page was decided on the basis that adverse treatment in response to an employee's manifestation of their belief was not to be treated as having occurred "because of" that manifestation if it constituted an objectively justifiable response to something**

"objectionable" in the way in which the belief was manifested: it thus introduced a requirement of objective justification into the causation element in section 13 (1). Further, we held that the test of objective justification was not substantially different from that required under article 9.2 (and also article 10.2) of the Convention. I should clarify two points about language:

> **(1) The word "objectionable" in para. 74 is evidently a (possibly rather inapt) shorthand for the phrase in para. 68 "to which objection could justifiably be taken". Both have the same effect as the word "inappropriate" which is also used.**
>
> **(2) The "way" in which the belief is manifested is a deliberately broad phrase intended to cover also the circumstances in which the manifestation occurs.**

That is the ratio of Page (as regards the direct discrimination claim). I need to make five further points about it.

75. First, my formulation does not directly apply the four-step process identified in Bank Mellat, but it is a compressed version of the same exercise, involving (a) the identification of a feature of the employee's conduct to which the employer could legitimately object (broadly corresponding to step (1)), and (b) an assessment of whether the employer's response to that feature was proportionate (broadly corresponding to steps (2)-(4)). It is no doubt best practice to consider each of the Bank Mellat steps separately, but it is well recognised that there is a considerable degree of overlap between them.

76. Second, the equation of the applicable test with that under article 9.2 of the Convention appears to bring in not only the test of objective justification but also the requirement that the act in question be "prescribed by law". […] However, even if, absent Page, it would be unnecessary to import this element, I cannot see that it causes any conceptual problem in this context: the employer's rights under the employment contract provide the necessary framework of "law", in the sense in which that term is used paragraph 2 of articles 9 and 10.

77. Third, the burden of proof of objective justification is on the employer. […] as a matter of general principle a justification for interfering with a qualified Convention right must be proved by the party relying on it.

78. Fourth, although Page imports a test of objective justification into the separability approach, it does so only because of the protection conferred on the right to manifest a religious belief conferred by the Convention. It has no impact on the application of the separability approach in other cases.

79. Fifth, as regards a claim of harassment, section 26 of the 2010 Act requires the treatment to be "related to" the protected characteristic, rather than "because of" it as in section 13 (1). It was not suggested in argument before us that that difference renders the ratio of Page inapplicable in harassment cases, and I do not believe that it does.

Indirect Discrimination

91. A useful starting point for understanding indirect discrimination was provided by Lady Hale **in Chief Constable of West Yorkshire Police and another v Homer [2012] ICR 704 SC**:

> **17. […] The law of indirect discrimination is an attempt to level the playing field by subjecting to scrutiny requirements which look neutral on their face but in reality work to the comparative disadvantage of people with a particular protected characteristic. […]**

92. Insofar as material, EqA10 section 19 provides:

> **(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.**
>
> **(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—**
>
> > **(a) A applies, or would apply, it to persons with whom B does not share the characteristic,**
> >
> > **(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,**
> >
> > **(c) it puts, or would put, B at that disadvantage, and**
> >
> > **(d) A cannot show it to be a proportionate means of achieving a legitimate aim.**

93. The Claimant must show the PCP, group and individual disadvantage and in that event, by operation of EqA section 136, the burden the shifts to the Respondent to justify the PCP; see **Dziedziak v Future Electronics Ltd EAT 0271/11**, per Langstaff J.

94. The conventional approach to establishing, for the purposes of section 19(2)(b), whether those who share the claimant's protected characteristic were at a particular disadvantage compared with those who do not share that characteristic, is to identify a relevant pool of employees, or potential employees, and to look for evidence of disparate impact as between those who do or do not have the particular characteristic. The continuing relevance of this approach was confirmed by Lady Hale in **Essop and others v Home Office (UK Border Agency) Naeem v Secretary of State for Justice [2017] ICR 640**:

> **28. A fifth salient feature is that it is commonplace for the disparate impact, or particular disadvantage, to be established on the basis of statistical evidence. That was obvious from the way in which the concept was expressed in the 1975 and 1976 Acts: indeed it might be difficult to establish that the proportion of women who could comply with the requirement was smaller than the proportion of men unless there was statistical evidence to that effect. Recital (15) to the Race Directive recognised that indirect discrimination might be proved on the basis of**

statistical evidence, while at the same time introducing the new definition. It cannot have been contemplated that the "particular disadvantage" might not be capable of being proved by statistical evidence. Statistical evidence is designed to show correlations between particular variables and particular outcomes and to assess the significance of those correlations. But a correlation is not the same as a causal link.

95. The pool for comparison should include all of those affected by the PCP, per Lady Hale in **Essop**:

> **41. Consistently with these observations, the Statutory Code of Practice (2011), prepared by the Equality and Human Rights Commission under section 14 of the Equality Act 2006 , at para 4.18, advises that:**
>
> > **"In general, the pool should consist of the group which the provision, criterion or practice affects (or would affect) either positively or negatively, while excluding workers who are not affected by it, either positively or negatively."**
>
> **In other words, all the workers affected by the PCP in question should be considered. Then the comparison can be made between the impact of the PCP on the group with the relevant protected characteristic and its impact upon the group without it. This makes sense. It also matches the language of section 19(2)(b) which requires that "it"—ie the PCP in question—puts or would put persons with whom B shares the characteristic at a particular disadvantage compared with persons with whom B does not share it. There is no warrant for including only some of the persons affected by the PCP for comparison purposes. In general, therefore, identifying the PCP will also identify the pool for comparison.**

96. Where group disadvantage is established, the Claimant must also show that they suffered the relevant disadvantage. If this is done, then the burden shifts to the Respondent. EqA section 19(2)(d) affords a defence to what would otherwise be discrimination, in that it permits the employer to justify measures which have a discriminatory affect. The ECJ in **Bilka-Kaufhaus GmbH v Weber von Hartz [1986] IRLR 317** addressed the question of objective justification for a pay policy which adversely affected part-time workers:

> **45 […]**
>
> > **2. Under Article 119 a department store company may justify the adoption of a pay policy excluding part-time workers, irrespective of their sex, from its occupational pension scheme on the ground that it seeks to employ as few part-time workers as possible, where it is found that the means chosen for achieving that objective correspond to a real need on the part of the undertaking, are appropriate with a view to achieving the objective in question and are necessary to that end.**

97. The Court of Appeal in **R (Elias) v Secretary of State for Defence [2006] IRLR 934 CA** at paragraph 151, adopted the same formulation; per Mummery LJ:

> **151.[…] As held by the Court of Justice in Bilka Kaufhaus GmbH v Weber von Hartz [1986] IRLR 317 at paragraphs 36 and 37 the objective of the measure in question must correspond to a real need and the means used**

> **must be appropriate with a view to achieving the objective and be necessary to that end. So it is necessary to weigh the need against the seriousness of the detriment to the disadvantaged group. It is not sufficient that the Secretary of State could reasonably consider the means chosen as suitable for attaining the aim.**

98. Accordingly, when considering whether the employer has shown that which is required to justify an otherwise discriminatory measure pursuant to EqA section 19(2)(d), the following must be established:

    98.1 the measure corresponds to a real need on the part of the employer;

    98.2 the measure is appropriate with a view to achieving the employer’s objective;

    98.3 the measure is necessary to that end.

99. Per Balcombe LJ in **Hampson v Department of Education and Science [1989] ICR 179 CA**. justification in this context requires an objective balance to be stuck:

> **34. However, I do derive considerable assistance from the judgment of Lord Justice Stephenson. At p.423 he referred to:**
>
> > **'... the comments, which I regard as sound, made by Lord McDonald, giving the judgment of the Employment Appeal Tribunal in Scotland in the cases of Singh v Rowntree MacKintosh Ltd [1979] IRLR 199 upon the judgment of the Appeal Tribunal given by Phillips J in Steel v Union of Post Office Workers [1977] IRLR 288 to which my Lords have referred.**
> >
> > **What Phillips J there said is valuable as rejecting justification by convenience and requiring the party applying the discriminatory condition to prove it to be justifiable in all the circumstances on balancing its discriminatory effect against the discriminator's need for it. But that need is what is reasonably needed by the party who applies the condition; ...'**
>
> **In my judgment 'justifiable' requires an objective balance between the discriminatory effect of the condition and the reasonable needs of the party who applies the condition.**

100. The required balancing exercise will include a consideration of:

    100.1 the nature and extent of the discriminatory impact of the PCP;

    100.2 the more serious the impact, the more cogent must be the justification;

    100.3 the reasonable needs of the business;

    100.4 whether the employer’s aim could have been achieved less discriminatory means.

Unfair Dismissal

101. Pursuant to section 98(1)(a) of the **Employment Rights Act 1996** ("ERA"), it is for the respondent to show that the reason for the claimant's dismissal was potentially fair and fell within section 98(1)(b).

102. If the reason for dismissal falls within section 98(1)(b), neither party has the burden of proving fairness or unfairness within section 98(4) of ERA, which provides:

> **In any case 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 sufficient reason for dismissing the employee, and**
>
> **(b) shall be determined in accordance with equity and the substantial merits of the case.**

103. Where the reason for dismissal is conduct the employment tribunal will take into account the guidance of the EAT **in BHS v Burchell [1978] IRLR 379**. The employment tribunal must be satisfied

    103.1 that the respondent had a genuine belief that the claimant was guilty of the misconduct;

    103.2 that such belief was based on reasonable grounds;

    103.3 that such belief was reached after a reasonable investigation.

104. The employment tribunal must also be satisfied that the misconduct was sufficient to justify dismissing the claimant.

105. The function of the employment tribunal is to review the reasonableness of the employer's decision and not to substitute its own view. The question for the employment tribunal is whether the decision to dismiss fell within the band of reasonable responses, which is to say that a reasonable employer may have considered it sufficient to justify dismissal; **see Iceland Frozen Foods v Jones [1983] IRLR 439 EAT**.

106. The band of reasonable responses test applies as much to the Burchell criteria as it does to whether the misconduct was sufficiently serious to justify dismissal; see **Sainsbury's Supermarkets v Hitt [2003] IRLR 23 CA**.

107. Where an appeal hearing is conducted then the Burchell criteria must also be applied at that stage, in accordance with the decision of the House of Lords in **West Midlands Co-operative Society v Tipton [1986] IRLR 112 and the speech of Lord Bridge**:

> **"A dismissal is unfair if the employer unreasonably treats his real reason as a sufficient reason to dismiss the employee, either when he makes his original**

> **decision to dismiss or when he maintains that decision at the conclusion of an internal appeal.”**

108. After an appeal, the question is whether the process as a whole was fair ; see **Taylor v OCS Group Limited [2006] IRLR 613 CA**, per Smith LJ:

> **46. […] In our view, it would be quite inappropriate for an ET to attempt such categorisation. What matters is not whether the internal appeal was technically a rehearing or a review but whether the disciplinary process as a whole was fair.**
>
> **47. […] The use of the words 'rehearing' and 'review', albeit only intended by way of illustration, does create a risk that ETs will fall into the trap of deciding whether the dismissal procedure was fair or unfair by reference to their view of whether an appeal hearing was a rehearing or a mere review. This error is avoided if ETs realise that their task is to apply the statutory test. In doing that, they should consider the fairness of the whole of the disciplinary process. If they find that an early stage of the process was defective and unfair in some way, they will want to examine any subsequent proceeding with particular care. But their purpose in so doing will not be to determine whether it amounted to a rehearing or a review but to determine whether, due to the fairness or unfairness of the procedures adopted, the thoroughness or lack of it of the process and the open-mindedness (or not) of the decision-maker, the overall process was fair, notwithstanding any deficiencies at the early stage.**

Conclusion

Direct Religious Discrimination

109. We will address each of the alleged detriments in turn.

On 17 June 2019 Mr Mula made a comment about the Claimant's traditional Islamic clothing saying “I am not impressed with your choice of clothing

110. EJ Boyle, in identifying the Claimant’s direct religious discrimination claim, appears to have misunderstood this alleged detriment. As is clear from the Claimant’s particulars of claim, his complaint is about how Mr Mula looked at him. The words are attributed to someone else, who the Claimant says noticed this.

111. The alleged detriment was not done. Mr Mula did not scan the Claimant head to toe at least three times, nor did he otherwise look at the Claimant in a derogatory way. As set out above, Mr Mula was well aware of how the Claimant dressed, which was unremarkable in this context.

13 Sep 2021 Mr Mula deliberately selected a licenced venue - for a team building meeting which he knew the claimant would not be able to attend due to his religious beliefs

112. This detriment was done in part. Such a venue was selected but not by Mr Mula. His PA made the choice. The lunch was to take place at an inexpensive chain restaurant near to the Respondent's head office.

113. The Claimant did not complain at the time and Mr Mula was unaware of his objection.

114. The Claimant has failed to discharge the initial burden of showing facts from which we could, in the absence of an explanation, find this was done because of religious belief.

115. Further and separately, we accept the Respondent's non-discriminatory explanation, namely the restaurant was chosen because it was in a convenient nearby location and not expensive. This had nothing whatsoever to do with the Claimant or his religious belief.

<u>14 Sep 2021 , Mr Mula stated to the claimant "you were not my choice [for the role of UK Field Sales Manager] and I did not hire you for the job"</u>

116. The alleged detriment was not done. What Mr Mula said was "Mr Hawkes has put a lot of faith in you by giving you this opportunity, it's a big step up from Team Leader".

117. With respect to what was actually said, the Claimant has failed to discharge the initial burden of showing facts from which we could, in the absence of an explanation, find this was done because of religious belief.

118. Further and separately, we accept the Respondent's non-discriminatory explanation, namely Mr Mula believed the Claimant's promotion was a big step up, in the sense that it was far more demanding role. This had nothing whatsoever to do with religious belief.

<u>7 Dec 2021 Mr Mula rejected the claimant's expenses claim for a hotel saying it was too expensive when his non Muslim colleagues claims were accepted. [Mr David McGuinness is a comparator here]</u>

119. This detriment was done.

120. The Claimant has failed to discharge the initial burden of showing facts from which we could, in the absence of an explanation, find this was done because of religious belief.

121. Mr McGuinness is not a comparator within section 23 of the Equality Act 2010, as there were material differences between his circumstances and those of the Claimant. Not only was Mr McGuinness a member of the senior management team, the Respondent's expenses policy expressly provided for a more generous hotel expenses regime for such employees.

122. Further and separately, we accept the Respondent's non-discriminatory explanation, namely that Mr Mula believed managers were applying the expenses policy in a lax manner. As happens in many organisations, and is reflected in the Claimant's evidence, the upper limit in an expenses policy becomes viewed by some as the default amount and other words in the policy – such as "the lowest cost option should always be booked … In order to get the best rates" – are ignored. We are satisfied that was not Mr Mula's view. This had nothing whatsoever to do with religious belief.

<u>Around the first quarter of 2022, Mr Mula querying the Claimant's claim for a per diem of £25 when other colleague were not questioned. [Mr David McGuinness, Mr Paul Hughes Mr James Page are comparators here]</u>

123. This detriment was done.

124. Mr Mula responded to the Claimant saying “give me details please”. The expenses policy allowed for such a claim when an employee was required to make an overnight stay away from home. There is no evidence of an associated expenses claim for hotel expenses. The Claimant did not say to Mr Mula at the time that he was staying overnight.

125. The Claimant has failed to discharge the initial burden of showing facts from which we could, in the absence of an explanation, find this was done because of religious belief.

126. Further and separately, we accept the Respondent’s non-discriminatory explanation, namely that it did not appear to Mr Mula that the Claimant was making an overnight stay and entitled to this payment under the policy.

<u>Feb 14 2022 Mr Mula shutting down a conversation in the office about Islam which the claimant was participating in</u>

127. Following the Claimant having put forward his views about Islam in the manner set out above, Mr Mula said the Claimant could not force his views onto others, he was showing disregard for different religious beliefs and everyone who worked for the Respondent should be comfortable and happy. Mr Mula then left the kitchen.

128. Whilst we recognise the **Shamoon** test represents a low bar, we are not persuaded Mr Mula’s modest intervention amounted to a detriment. No disciplinary sanction was imposed, nor intimated. There was no follow-up at all. Mr Mula simply encouraged the Claimant not to continue speaking in this way and to be mindful of the feelings of others who did not share his beliefs. To the extent the Claimant subjectively considered himself to be at a resulting disadvantage in the workplace, we do not find that was objectively reasonable.

129. In case we are wrong about Mr Mula’s response crossing the **Shamoon** threshold, we have gone on to further consider this claim on the basis it did amount to a detriment.

130. We have construed the Claimants’ claim as amounting to a complaint of discrimination because of the manifestation of religious belief, as opposed to one where it is alleged the detriment was done because of the fact of his belief. For the sake of completeness, however, we will consider both forms, starting with the latter.

131. The Claimant had failed to discharge the initial burden of showing facts from which we could, in the absence of an explanation, find this detriment was done because of his religious belief. At a workplace lunch, Mr Mula discouraged (he did not stop) the forceful expression of religious views. There is nothing to suggest that a hypothetical comparator of a different religious or philosophical

belief, emphatically expressing their views, would have been treated any differently. Further and separately, we accept the Respondent’s non-discriminatory explanation, namely that Mr Mula spoke as he did because he was concerned that others of different religious faiths may be offended by the Claimant’s remarks. It was the manner in which the Claimant expounded upon his faith rather than the fact of it, which caused Mr Mula to act.

132. Quite plainly, the Claimant’s comments were a manifestation of his religious belief. In the strict causal sense (ignoring how a comparator would have been treated) Mr Mula said what he did because of that manifestation. The Respondent contends this was an inappropriate manifestation and what Mr Mula said was proportionate.

133. We are satisfied that the Claimant's remarks were inappropriate in this context. As is well-established, the workplace in not the place for proselytization. The forceful expression of religious views may be entirely legitimate in the public square, but not necessarily at the head office of your employer, where more neutrality is likely to be expected.

134. Mr Mula acted as he did because he was concerned that employees of different religious faiths may be offended by the Claimant’s remarks, even if they were not being directly addressed. The dogmatic expression of one’s own religious belief and disparaging comments about the credibility of other religions are not merely apt to cause offence, but may also create a hostile workplace environment for those who do not share such views. The Respondent has a legitimate interest and aim in avoiding such a situation.

135. Mr Mula’s response was proportionate. As set out above, he did not take or intimate disciplinary action, indeed he did not follow this up in any way. Mr Mula merely discouraged the Claimant from continuing to speak in this way. There was no lesser step that could have been taken, save to do nothing at all.

<u>Mr Mula summarily dismissing the claimant on 2 August 2022 and accusing him of stealing form the company</u>

136. This detriment was done.

137. The Claimant had a national role. He was told by his line manager in January 2021 that he was required to spend 80% of his time in the field with the members of his team. Mr Mula was concerned to discover the Claimant had spent an extended period in Egypt, working remotely, at the end of 2021 and beginning of 2022. In March 2022, the requirement to spend 80% his time in the field was reiterated by Mr Page, who warned that a refusal to do so would be considered an act of gross misconduct and could result in summary dismissal. In August 2022, Mr Mula was reviewing the expenses claims and discovered a surprising lack of such coming from the Claimant. This led him to believe the Claimant, who had pushed back at the requirement to be in the field, had simply ignored this instruction. Mr Mula confronted the Claimant with what he had found and was not at all persuaded by the explanations offered. He was so angry about this he dismissed the Claimant on the spot.

138. The Claimant has failed to discharge the initial burden of showing facts from which we could, in the absence of an explanation, find he was dismissed because of religious belief or any manifestation of this. There is nothing whatsoever to link Mr Mula's sudden decision either with the fact of the Claimant's religious belief (which the Claimant did not contend for) or his opposition to working for haram businesses when employed in Egypt many years before (which the Claimant did assert).

139. Further and separately, we accept the non-discriminatory explanation, namely Mr Mula decided to dismiss the Claimant because he believed the Claimant had not been doing the job he was paid for and was over many months and was, in effect, stealing from the company.

<u>The claimant's suspension, investigation and eventual second dismissal on 7 September 2022</u>

140. These detriments were done.

141. On 2 August 2022, the Claimant was summarily dismissed in circumstances that were obviously unfair. The various steps complained of under this detriment were an attempt by the Respondent to reverse that act and then achieve the same result, in a manner it would be able to successfully defend before the Employment Tribunal.

142. The Claimant has failed to discharge the initial burden of showing facts from which we could, in the absence of an explanation, find these steps were taken because of religious belief or any manifestation of this. Whilst we have concerns about the fairness of this process, to which we will come, the Claimant has shown nothing which makes a link with religion.

143. Further and separately, even if the burden had shifted, we found as a fact there was a non-discriminatory reason for these various steps, namely to protect the business, by achieving the Claimant's dismissal, which Mr Mula had already decided upon, by more defensible means. This had nothing whatsoever to do with religion.

<u>Indirect Religious Discrimination</u>

144. The alleged PCP is set out in the list of issues as:

144.1 To arrange work meetings to take place in licenced premises. These being on 13 September 2021 in Frankie and Bennies and on 19 January 2022 at the Milehouse pub.

145. We do not find there was such a PCP. The Claimant was employed by Respondent for several years. Over this entire period, he has referred us to only two occasions on which colleagues were invited to join Mr Mula for a meal at premises where alcohol was sold. Other meetings away from the office had been arranged in unlicensed premises such as coffee shops. There was no practice in this regard, of holding work meeting at licensed premises. The Claimant raised no concern at the time and Mr Mula was unaware of his objection. If the Claimant had made a request, it is likely a different location would have been

found where alcohol was not served. These two occasions were ad hoc arrangements and not indicative of a general approach of selecting licensed premises for work meetings.

146. Given our finding with respect to the PCP, it is unnecessary for us to consider group disadvantage and justification.

Unfair Dismissal

Belief

147. We are satisfied that Ms Green believed the Claimant was guilty of the alleged misconduct. For the reasons set out above, however, she did not arrive at this conclusion freely, but rather was under pressure (whether express or implied) from Mr Mula and Mr Page to uphold the disciplinary case and dismiss the Claimant.

Investigation.

148. Two investigatory meetings were held with the Claimant, he was asked relevant questions and given an opportunity to respond to the allegations. Whilst the Claimant complains about being presented with material, in particular Mr Page's spreadsheet, for the first time during the investigation, this in itself is not an uncommon or unfair approach. The Claimant was given the opportunity to provide further information in rebuttal at the disciplinary hearing.

149. Within the context of the proceedings conducted by the Respondent, the enquiry made of Mr Farmer would not appear relevant. Ostensibly, in terms of the questions asked of the Claimant, the Respondent was investigating whether he was in the field to required extent during 2022.

150. An obvious step would have been to contact the Claimant's line reports, asking whether they recalled or had any records with respect to occasions when the Claimant had been with them in the field. Coaching and mentoring those who worked under him, was given as one of the main reasons why the Respondent wished the Claimant to be in the field. This omission would not, however, on its own take the investigation outwith the reasonable band. Some reasonable employers might have made this enquiry, some others may simply have done as did the Respondent and relied upon documentary records.

151. Nonetheless, we find there were fundamental flaws in the Respondent's investigation.

152. Our conclusion is that it was Mr Page rather than Mr Sturrock who was investigator and the position in that regard was deliberately misrepresented to the Claimant. Furthermore, we find that Mr Page recognised the initial dismissal by Mr Mula would almost certainly be found by a Tribunal as unfair and set about organising a process that would appear fair, but would achieve the same result.

153. We find that Mr Page was only looking for evidence which supported the alleged misconduct and went against the Claimant. The clearest example of this is the information obtained with respect to fuel expenses. Mr Page did not provide the Claimant, or indeed this Tribunal, with the statements from the fuel card

company that were said to be relied upon in compiling different iterations of his spreadsheet. Had Mr Page investigated the position with fuel card expenses in a full and fair way, contacting the fuel card company and requesting duplicates where necessary (if the Respondent had not retained the originals) he would have found all of the relevant transactions on the first occasion. Mr Page did not do this, instead he produced an unreliable and incomplete spreadsheet.

154. The Claimant, believing the information supplied by Mr Page was partial, rooted around trying to find copies of his receipts. It is important to note, there would be no need for him to make expenses claims with respect to fuel card usage and as such, no reason for him to retain paper receipts when he filled up his car in this way. The fact of the Claimant being able to find many receipts for transactions Mr Page had not included in his original spreadsheet was fortuitous. Those receipts pointed to the inadequacy of the investigation Mr Page had carried out. When the Claimant said there may have been other paper receipts for fuel card use which had been lost, this was entirely plausible. There would seem little reason to have confidence in Mr Page's updated schedule. He explained this to the Claimant on the basis of having searched the "archives" but still did not provide copies of the source material. Notably, he did not find any fuel card transactions beyond those for which the Claimant was able to produce a paper receipt. Mr Page was not called as a witness and we did not have the opportunity to ask him any questions. Although not the only matter relied upon, the lack of fuel expenses formed a central plank of the management case. Obtaining and providing comprehensive records in this regard ought to have been a straightforward step and given the Claimant was at risk of dismissal, no reasonable employer would have failed to take it.

<u>Grounds</u>

155. The documentary evidence provided with respect to fuel expenses was flawed, for the reasons set out above. Although Mr Page prepared a summary, he did not make copies of the source material available to either the Claimant or Ms Green. It should have been apparent to Ms Green, given the evident unreliability of Mr Page's first spreadsheet, that she needed to scrutinise this closely. Instead, however, Ms Green appears to have proceeded on the basis that the second iteration was reliable and complete. In the circumstances and without sight of the underlying material, this was not a conclusion that could safely be drawn. Given the unsatisfactory way in which this evidence emerged and was presented by Mr Page, no reasonable employer would have accepted it without further scrutiny.

156. Whilst, as we have already noted, the fuel expenses evidence was a very important part of the case against the Claimant, it was not the only evidence in support of the disciplinary allegations. The Claimant was interviewed at great length. His account included a number of propositions that may have been open to doubt.

157. The Claimant made various comments which a reasonable employer may have thought tended to undermine the credibility of this assertion that he had been in the field 80% of the time. During the investigatory and disciplinary process, the Claimant objected to the requirement to be in the field, saying it was unnecessary. The Claimant suggested there was an incompatibility between him

discharging the administrative burden of his role and being in the field. The Claimant also appeared to dispute whether he was, properly, subject to a requirement to be in the field, as he argued he had not been presented with this in a document which he then had to sign and agree. The Claimant's own evidence might, therefore, be thought to cast doubt on his denial of the allegation.

158. Separately from whether the Claimant had been in the field 80% of the time, he also appeared to construe this requirement narrowly, in a way that could be satisfied by him attending businesses that were local, such that he could visit them without the need for an overnight stay. This was put forward to explain away the absence of hotel expenses claims. Given the Claimant's role was a national one, there would be a question as to whether the practice he said he was following, if accepted to be true, was actually compliant with the instruction he had been given.

159. Furthermore, the Claimant explained that his CRM access did not include the facility to record his own activity and he was able to do his job without making personal notes. This account could, reasonably, be doubted. If the Claimant was in the field, meeting client business owners and supporting his team members, some paper trail (whether digital or physical) might be expected, recording the details of meetings to be attended, with messages or emails setting these up and notes of what was covered or agreed after they took place. Whilst some reasonable employers may have taken the Claimant at his word, others may have doubted this explanation.

160. We have come to the conclusion there were reasonable grounds to support a belief that the Claimant was guilty of the alleged misconduct, namely that he had been given a reasonable management instruction to work in the field 4 days out of 5 and did not comply with it. Whilst there were very real weaknesses in the fuel card evidence, some reasonable employers may have doubted the credibility of the Claimant's evidence and come to the conclusion that on balance, it was more likely than not he had failed to comply with the instruction. This is, however, far from the only conclusion that could have been reached. Other reasonable employers may have accepted the Claimant was genuine in what he said, considered he should not be criticised for the absence of records he was not obliged to keep and decided the fuel card evidence was insufficiently reliable to find the allegation proven. The case was a borderline one.

<u>Fair procedure</u>

161. Following the Claimant's summary dismissal by Mr Mula, the steps taken thereafter had the superficial appearance of fairness: an appeal was heard and allowed; an investigation was conducted; the Claimant was suspended pending the outcome; the Claimant attended two investigatory interviews and had an opportunity to comment on the evidence; a case to answer was found; a disciplinary hearing was conducted by a different manager; the allegation was upheld and the Claimant dismissed.

162. The difficulty is that we are not satisfied any of those involved in the various steps, carried them out in a fair, independent and open-minded manner. On the contrary, our finding is that this was a process orchestrated by Mr Page, to

achieve the outcome already decided upon by Mr Mula, namely dismissal. Whilst Mr Sturrock was purportedly the investigator, we found he did not carry out that role in practice. It was Mr Page who did the investigation and he was looking only for evidence which supported the allegation. The vital fuel card data was not obtained or presented in a fair and complete way. As for the probationary employee Ms Green, she was not a remotely appropriate person to be appointed as decision-maker. The case for the Claimant's dismissal was, purportedly, prepared and to be presented by her line manager. The Respondent's CEO had already decided to dismiss the Claimant, believing he was, in effect, stealing from the company. In the circumstances, Ms Green was under enormous pressure, whether express or implied, to make sure the Claimant was not allowed to come back to the business. Sadly, we have come to the conclusion that the process followed by the Respondent was an exercise in window-dressing.

Sanction

163. Whilst we have come to the conclusion that the Claimant's dismissal was unfair because of flaws in the investigation and process followed, it is appropriate for us to consider the position as far as sanction is concerned if, contrary to our finding, the disciplinary allegation had been fairly upheld.

164. Quite plainly, dismissal would have been within the range of reasonable responses. The importance of the relevant management instruction and the view the Respondent would take should the Claimant fail to comply, namely that it amounted to gross misconduct, was spelled-out to him very clearly by Mr Page in March 2022. The Claimant could have been under no illusions in this regard. Whilst dismissal is not the only outcome that could have followed, we could not possibly say that no reasonable employer would not have decided to dismiss.

Polkey

165. This is a case in which is appropriate for us to consider a reduction in any compensation awarded to reflect the prospect the Claimant would still have been dismissed, even if the Respondent had followed a fair procedure. In particular in this case, albeit narrowly, we found there were grounds that some reasonable employers would have considered were sufficient to uphold the disciplinary allegation, in particular if, notwithstanding the weaknesses in the fuel card evidence, they seriously doubted the Claimant's credibility. This was, however, a marginal case. Even if the allegation were held, it does not follow that an open-minded disciplinary hearing officer would have decided to dismiss. A view may have been taken, in light of the Claimant's long and previously unblemished good service, to issue a final warning and give him one more chance to do the job the Respondent expected him to. This is perhaps all the more likely if the decision-makers thought Claimant had not disregarded the requirement to be in the field entirely, but had instead construed it in an overly narrowly way, spending time in the field but doing so close to home. We have decided the correct approach to the Polkey reduction is to reflect this in a 50% prospect of the allegation being upheld and a 50% prospect of dismissal in that event. Accordingly the prospect of a fair dismissal is 50% x 50%, namely 25%.

166. Any compensatory award made to the Claimant will be reduced by 25% to reflect the prospect that he would have been dismissed fairly in any event.

Contributory Fault

167. We have not made a finding of contributory fault. For the reasons set out above, the fuel card evidence is deeply flawed. We are not satisfied we can fill that gap with adverse findings based on the Claimant’s credibility. We have also made substantial adverse findings with respect to the evidence of the Respondent’s witnesses. The burden is on the Respondent prove misconduct on balance of probabilities for this purpose and it has not done so.

Breach of Contract

168. The evidence suggests the Claimant may have been entitled to some form of bonus or commission based upon the performance of his team. Such an approach is often adopted where employees have a sales role or manage a sales team. We have not, however, been referred to evidence of the terms which applied. Whilst the Claimant has put forward a figure he contends for, he has not explained how this is calculated or pointed to any evidence of the sales performance of his team upon which it is based. In a breach of contract claim, the burden is on the Claimant to establish the relevant contractual term and the facts relied upon to show a breach. The Claimant has done neither.

Time

169. The Claimant’s unfair dismissal claim was presented within the period of three months, as extended by ACAS early conciliation.

170. Given that we have not found for the Claimant on any of his discrimination claims, the question of a continuing act does not arise and nor are we required to consider any extension of time on just and equitable principles.

Approved by: **EJ Maxwell**

Date: 9 April 2025