EMPLOYMENT TRIBUNALS

Claimant: Florentin Moraru

Respondent: Boohoo.com UK Limited

Heard: in Sheffield on 2,3,4,5 and 6 June 2025

Before: Employment Judge Ayre
Mr D Crowe
Mr D Fields

Representation

Claimant: In person
Respondent: Thomas Wood, counsel

Romanian Interpreter: Cristina Calniciuk

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claimant was unfairly dismissed. The claim for unfair dismissal succeeds.

2. The claim for direct race discrimination is not well founded. It fails and is dismissed.

3. The respondent breached the claimant's contract of employment by not giving him notice of termination or making a payment in lieu of notice. The claim for notice pay is well founded.

REASONS

Background

1. The claimant was employed by the respondent as a warehouse operative from 6

September 2020 until 20 December 2023. On 23 March 2024 he issued a claim in the Employment Tribunal following a period of early conciliation that started on 14 March 2024 and ended on 18 March 2024.

2. The claimant is bringing complaints of unfair dismissal, wrongful dismissal (notice pay) and direct race discrimination. A Preliminary Hearing for case management took place on 3 October 2024 before Employment Judge Maidment. At that hearing there was a discussion about the claims that the claimant is bringing, a draft list of issues was produced, the case was listed for final hearing today and case management orders were made to prepare the case for final hearing.

The hearing

3. There was a bundle of documents running to 144 pages. The bundle had been prepared by the respondent but, in breach of the Case Management Orders, the respondent's representative did not send a hard copy of the bundle to the claimant. At the start of the hearing the claimant still did not have a hard copy of the bundle.

4. At approximately 5 pm on the day before the hearing was due to start, the claimant wrote to the Tribunal raising a number of procedural concerns about the way in which the proceedings had been conducted by the respondent and its solicitors. In his letter he asked the Tribunal to order the postponement of the final hearing "*to ensure a truly fair process*".

5. On the first day of the hearing the claimant was asked twice if he wanted the Tribunal to postpone the hearing. The Tribunal was concerned that the claimant's ability to prepare for the hearing had been adversely affected by the lack of the bundle, particularly since the claimant is a litigant in person, and the documents in the bundle were all written in English, which is not his first language.

6. The claimant told the Tribunal twice that he did not want the final hearing to be postponed, and preferred to go ahead. Mr Wood indicated that the respondent did not want the hearing to be postponed either.

7. In light of the fact that the claimant's preference was to go ahead, it was the unanimous decision of the Tribunal that we should proceed with the hearing. The claimant was given time however to read through the bundle before giving evidence.

8. An additional two pages were added to the bundle on the first day of the hearing. The document was produced by the respondent and was a record of a Toolbox Talk which the respondent says took place on 30 November 2023, but which the claimant's witnesses say took place after the claimant was dismissed. The document appeared relevant to the unfair dismissal claim, and it was the unanimous decision of the Tribunal that it should be admitted into evidence.

9. We heard evidence from the claimant and, on his behalf, from:

    1. Jason Ledger, former colleague;

2. Cristian Sandu, former colleague;

3. Ionut Bejenaru, former colleague;

4. Gabriel Claudiu Geru, friend; and

5. Elena Nicolae, the claimant's wife.

10. The claimant produced a supplemental witness statement that was served on the respondent in advance of the hearing. The respondent did not object to the supplemental statement being introduced into evidence and the Tribunal has considered it.

11. For the respondent we heard evidence from James Mitchell, Operations Manager, who heard the claimant's appeal against dismissal.

12. Mr Wood produced opening submissions. The claimant objected to the introduction of the opening submissions. Mr Wood agreed that the submissions would be considered at the end of the evidence, as part of his closing submissions. The respondent made its oral submissions on the afternoon of the second day of the hearing. The claimant asked to make his submissions the following day so that he had time to prepare them. The Tribunal agreed to the claimant's suggestion. The claimant made his submissions on the morning of the third day of the hearing, and the Tribunal reserved its judgment.

The issues

13. The issues that fell to be decided in the case were set out in the Record of the Preliminary Hearing and confirmed at the start of this hearing as being the following:

Unfair dismissal

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

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

    i. There were reasonable grounds for that belief;

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

    iii. The respondent otherwise acted in a procedurally fair manner; and

iv. dismissal was within the range of reasonable responses?

3. Was the dismissal unfair due to a lack of consistency of treatment? The claimant says that his colleagues and managers behaved in the same way as he did, and that none of them were disciplined or dismissed. He maintains that during the internal process he raised this issue and that the respondent ought reasonably to have carried out further enquiries. The claimant also says that it is significant that, only after his employment ended did an instruction go out to staff regarding not consuming the promotional product, and that he had not been aware, because it had not been brought to his attention, that this was the intended use of the chewing gum. The claimant also says that he was unable to properly defend himself due to a lack of awareness of the respondent's disciplinary procedures and the respondent's failure to provide those to him during the internal disciplinary process.

Remedy for unfair dismissal

4. There was insufficient time during this hearing to determine questions of remedy for unfair dismissal, other than those relating to ***Polkey*** and contributory conduct. A separate Remedy Hearing will be arranged.

Wrongful dismissal / notice pay

5. What was the claimant's notice period?

6. Was the claimant paid for that notice period?

7. If not, was the claimant guilty of gross misconduct?

Direct race discrimination

8. Was the dismissal of the claimant less favourable treatment? The claimant says he was treated less favourably than:

    i. Reece Hunt, British;
    ii. Jason Ledger, British;
    iii. Daniel Wright, British;
    iv. Sylwia Juszczyk, Polish;
    v. Daniel Dziedzic, Polish;
    vi. Marzena Hunek, Polish;
    vii. Kamil Pyra, Polish; and
    viii. Dita Kaa, Latvian.

9. If so, was it because of race? The claimant relies on his Romanian nationality.

Remedy for discrimination

10. In light of our conclusions on the merits of the race discrimination claim, it is not necessary for us to consider questions of remedy for discrimination.

Findings of fact

14. The following findings of fact are made on a unanimous basis.

15. The claimant was employed by the respondent as a Warehouse Operative. He began working for a company called Clipper Logistics plc on 6 September 2020. On 1 July 2022 the claimant's employment transferred under TUPE to the respondent. The claimant remained working as a Warehouse Operative, on his original contract of employment, until his dismissal on 20 December 2023. He worked in the Stock Control department of a large warehouse in Sheffield, which also included a packing department.

16. The claimant had a written contract of employment which he signed on 28 August 2020. The contract contained the following provisions:

"*28. **Notice to Terminate & Payment in Lieu***

….

28.2 After successful completion of the probationary period referred to in clause 2, the prior written notice required from the Company to you to terminate your employment shall be one week's notice for each complete year of continuous employment up to a maximum of 12 weeks' notice….

*29. **Termination Without Notice***

29.1 The Company shall be entitled to dismiss you at any time without notice or any payment in lieu of notice if you commit a serious breach of your obligations as an employee, any act of gross misconduct or if you cease to be entitled to work in the United Kingdom…."

17. The respondent had a Disciplinary Policy which included a list of 'offences' which it is stated will be treated as gross misconduct. The list includes "*Theft or fraud*".

17. The respondent is an online retailer. In the warehouse where the claimant works products are stored and then packed and shipped to customers. The respondent has contracts with third parties under which it agrees to put one of the third party's products, or a flyer advertising the third party's products in the parcels it sends out to customers.

18. In 2023 the respondent received supplies of Mentos chewing gum. The chewing gum was delivered to the warehouse and was to be added to customers' parcels. There was a conflict of evidence as to where the Mentos were placed. We prefer the claimant's evidence on this issue which was corroborated by the evidence of Mr Ledger who is still employed by the respondent. We find that boxes of chewing gum were left in many places around the warehouse, including on pallets, on packing benches and on desks.

19. Although the respondent has a rule that food is not to be consumed in the warehouse many employees helped themselves to the chewing gum and consumed it whilst at work. This included team leaders and members of management. The claimant's evidence that he saw team leaders eating the chewing gum was

corroborated by the evidence of his witnesses, two of whom are still employed by the respondent.

20. The claimant saw colleagues, including team leaders and managers, eating the chewing gum and believed that it was available for general consumption by staff. He helped himself to the gum and ate it, believing that there was nothing wrong in doing so and that eating it was common practice. The period of time in question was the run up to the Christmas holidays and some staff assumed that the Mentos were being offered by the respondent for this reason.

21. The claimant also took packets of the gum to the area of the warehouse that he and other members of the stock control team worked in. He stored the packets under the stairs, so that he could share them with colleagues. He did not take any chewing gum out of the building. The respondent suggested that the claimant was hiding the chewing gum under the stairs because he knew he should not have taken it. We prefer the claimant's evidence on this issue and find that the reason he put the chewing gum underneath the stairs was to store it until he could distribute it to his colleagues. The claimant did not seek at any point to cover up what he was doing, as demonstrated during the investigation meeting when he immediately told Mr Wright that he had taken and eaten the chewing gum and did not seek to deny it.

22. On or around 12 December 2023 some of the respondent's Site Services team who were cleaning in the warehouse found some packets of Mentos chewing gum under the stairs and reported it. The respondent checked the CCTV footage of the area and it showed that the claimant had put packets of the chewing gum under the stairs.

23. On 13 December the claimant was called into a meeting by Daniel Wright, his team leader. Mr Wright told the claimant that he was carrying out an investigation into alleged theft. He asked the claimant if he knew anything about Mentos and the claimant replied "*Yes of course, is for everybody to share it. I just take it to share it with my colleagues. Nobody told me that is forbidden or something, absolutely."*

24. Mr Wright asked the claimant where he had taken the Mentos from and the claimant told him he had taken them from packing, from the benches and put them on the stairs. Mr Wright then asked the claimant if he felt he was stealing the Mentos and the claimant replied "*I don't think so. If you steal it, you take them home, right? I was sharing with my colleagues and all departments….all the people from this warehouse take them.*"

25. The claimant was asked if he had any specific names of other people who had taken the Mentos and said that he did not. Mr Wright asked him why, if he thought it was permitted to have the Mentos, he had hidden them. The claimant replied, "*To have it for others as well for other days, so if the company think it's forbidden, I just don't give a damn for this.*"

26. Mr Wright asked the claimant if he wanted to see the CCTV footage of him putting the chewing gum under the stairs and the claimant said he did not want to as he had already said that he put the gum there. Mr Wright then took the claimant to the

security office where he played him the CCTV footage. The claimant accepted that he was the person in the footage and repeated that he was putting the Mentos under the stairs to share them with his colleagues. He also said that everyone in the warehouse was eating the Mentos.

27. At times during the investigation meeting the claimant started laughing. He referred to security as 'Mr Policeman' and at one point started singing. The claimant's evidence to the Tribunal, which we accept, was that he behaved in this way because he was nervous and surprised by what was happening. As far as he was concerned he had done nothing wrong. During the meeting the claimant was completely open and honest when questioned by the respondent and it is clear from his responses that he did not realise that there was any restriction on eating the Mentos.

28. At the end of the meeting the claimant was suspended. Mr Wright thanked the claimant for his honesty and for being forthcoming about taking the Mentos. He said that the Mentos did not belong to the claimant or to the respondent, but belonged to Mentos who had a contract with the respondent to distribute the chewing gum as inserts to its customers.

29. The claimant said that nobody had told him that he could not take or eat the chewing gum and that he had seen the gum on the table and thought it was for free.

30. Mr Wright told the claimant that there had been a 'toolbox talk' about the Mentos the previous week and asked whether the claimant had signed it. The claimant replied that he had not.

31. There was in evidence before us a document headed 'toolbox talk' which purports to be a record of informal training. The document states:

"*I confirm that I attended the toolbox talk and fully understand the information delivered regarding sample inserts, these inserts should be inserted to every customer parcel and should not be consumed, damaged or taken off the premises. Signing this document confirms that the employee his been made aware of the above and that if not followed will be in breach of the company policy and will be treated as gross misconduct.*"

32. The document was created by the respondent's training team on or around 30 November 2023. Some time later, Mr Wright took the document to individual members of the stock control department and asked them to sign it. At no point was the claimant asked to sign the document or told that the Mentos should not be consumed. Three witnesses for the claimant, all of whom worked in the department at the relevant time, told the Tribunal that they were not shown the document until January 2024, after the claimant had been dismissed. Mr Sandhu and Mr Bejenaru gave evidence that they signed on 13 January 2024 and that until then they did not know that consuming the Mentos chewing gum was prohibited. Mr Ledger also gave evidence that he did not know, at the time of the incident for which the claimant was dismissed, that the chewing gum was not for general consumption.

33. The notes of the appeal hearing that toom place on 10 January 2024 record that

twice during that meeting Mr Mitchell, the appeal hearer, said that the toolbox talk had been carried out after the claimant had been dismissed. We find that at no point prior to the incident for which the claimant was dismissed, had the respondent told staff not to consume the Mentos.

34. No investigation whatsoever was carried out by Mr Wright into the claimant's suggestion that other people were also eating the Mentos.

35. On 14th December Kamila Kmiciewicz, Shift Operations Manager, wrote to the claimant inviting him to a disciplinary hearing to consider an allegation of gross misconduct, namely suspected theft of Mentos. The claimant was informed of his right to be accompanied at the meeting, and warned that one of the possible outcomes could be a disciplinary warning up to and including dismissal. Enclosed with the letter were minutes of the investigation meeting and the suspension meeting, confirmation of suspension, a copy of the CCTV and a copy of the respondent's disciplinary policy. The claimant said that he had not been provided with a copy of the disciplinary policy. There was however evidence in the bundle indicating that it was attached to an email sent to him on 14 December. We prefer the respondent's evidence on this issue and find that the disciplinary policy was sent to the claimant on 14 December, ahead of the disciplinary hearing.

36. The disciplinary hearing took place on 20 December 2023. It was chaired by Ms Kmiciewicz who was accompanied by Natalie Nevralova, HR Coordinator, who took notes. The claimant attended unaccompanied.

37. Ms Kmiciewicz showed the claimant the CCTV footage and the claimant accepted that he had put the Mentos under the stairs. The claimant was asked about his behaviour during the investigation meeting, and it was suggested to him that he had not taken matters seriously as he had been laughing and joking. The claimant said that he had reflected on things since he had been off work and felt that the word thief was a "*little bit hard and heavy*". He was asked if he felt remorseful and replied that nobody had asked him why he did it, and that it was because he saw the Mentos all over the place and that everyone was eating them. He said that Mr Wright had only told him afterwards that it was forbidden.

38. Ms Kmiciewicz said that it was common sense not to eat the products and that by taking them the respondent could be in breach of its contract with Mentos. The claimant repeated that he had not taken the Mentos outside of the warehouse. He was asked how long he had been taking the Mentos for and said 'a few times'.

39. Once again the claimant said that other people had also been eating the Mentos. He offered to give Ms Kmiciewicz the names of other people but Ms Kmiciewicz did not want to know the names, and instead replied "*We are here discussing your case*".

40. At the end of the meeting Ms Kmiciewicz dismissed the claimant with immediate effect for gross misconduct. The claimant was not given any period of notice or paid in lieu of notice. The notes of the meeting record that she told the claimant that:

"*….there are no reasonable explanations for your actions. Through your own*

admittance you confirmed taking the product of mentos for your own use. And no matter the value of the product I can't classify this as nothing else but a theft. There are no mitigation circumstances to take mentos off the packing area. There are not property of yours mine or boohoo…. You will take consequences for the choices you made by hiding the products it feels like you haven't got a right intentions in the first place. But also proofs that you understand your wrong doing at the time."

41. Ms Kmiciewicz informed the claimant of his right to appeal against the decision to dismiss him.

42. On 21 December Ms Kmiciewicz wrote to the claimant confirming her decision in writing. In the letter she wrote that:

"*You admitted to the allegation and confirmed taking Mentos inserts from packing benches, keeping in a hidden place, sharing them out and consuming. You stated you did not treat this as a theft and that it should not be treated as one….*

After investigation, the evidence and your statements proved that you committed a gross misconduct. Despite the value of the products this is classified as theft. These was no reasonable explanation to move the inserts out of packing benches and I cannot see any good intentions in such act. Consequently a decision to dismiss you with immediate effect due to committed gross misconduct has been taken.

This letter confirm the termination of your employment effective from Wednesday 20th December 2023 you are entitled to holiday pay due…"

43. On 27th December the claimant appealed against the decision to dismiss him. An appeal hearing was initially arranged for 4 January 2024 but then rearranged to 10th January because the claimant was out of the country on 4 January.

44. The appeal hearing was chaired by James Mitchell, Operations Manager. Mr Mitchell was accompanied by an HR Administrator, and the claimant had a colleague with him.

45. Shortly before the hearing was due to start the claimant sent an email setting out his grounds of appeal. These included a clear allegation of discrimination in which the claimant wrote:

"*I feel discriminated against compared to my colleagues who participated in the consumption of promotional items without facing similar consequences. I would like to emphasize once again that certain managers also consumed chewing gum from the respective packages, and the fact that only I was fired reflects an arbitrary and discriminatory approach by the company.*"

46. The claimant also wrote in his email that "*The prohibition of consuming promotional items was not clearly communicated before being suspended and subsequently fired.*"

47. At the very start of the appeal hearing Mr Mitchell appears to express frustration and/or disappointment that the claimant had sent in grounds of appeal shortly before

the hearing. This is unfortunate and, in our view, set the wrong tone for the appeal hearing. The grounds of appeal are not lengthy, running to just one page, and the very purpose of an appeal hearing is for an employee to explain why they are challenging the decision that has been made. The fact that the claimant chose to do this in writing should not have attracted criticism from Mr Mitchell, particularly given that English is not the claimant's first language.

48. During the appeal hearing the claimant said again that he did not know that it was forbidden to take the Mentos, and that he had heard that after his dismissal the respondent had put up a sign saying that it was forbidden. Mr Mitchell told the claimant that a toolbox talk had been done, but said twice during the appeal hearing that the toolbox talk had been carried out after the claimant had been dismissed.

49. Mr Mitchell said that it was 'common sense' that the Mentos were for customers and that he should not have to tell people not to take them. He asked the claimant for the names of other people who had been eating Mentos in the warehouse. By the time of the appeal hearing the claimant had been dismissed for eating Mentos. He was worried that if he gave names, other people would be dismissed also, and, understandably, did not want to get his colleagues into trouble. He asked Mr Mitchell whether something bad would happen to colleagues if he gave names, and Mr Mitchell replied that it could be bad for them or good for them and that he could not promise anything.

50. The claimant explained that it would not be possible for him to give Mr Mitchell the names of colleagues because he did not want to do 'bad thing for them' and that a lot of his colleagues, including team leaders, didn't know that eating Mentos was forbidden. The claimant asked him to check CCTV footage of the warehouse, but Mr Mitchell did not do so. Mr Mitchell took no steps whatsoever to investigate a key part of the claimant's defence to the allegations which would quite possibly have excused his behaviour entirely. He appears to have approached the appeal with a closed mind.

51. The claimant pointed out that if the toolbox talk had taken place earlier, he would not have taken the chewing gum. Mr Mitchell was dismissive of this, commenting "*But you still did it, unfortunately we can't undo that*".

52. Mr Mitchell took no steps to investigate the claimant's allegations of discrimination. In the appeal hearing he merely said that because the claimant would not tell him who the other people were he could not investigate. This left the claimant in an impossible position of having to choose between getting his colleagues into trouble and the respondent not properly considering his appeal. Mr Mitchell told the Tribunal that he did not believe there had been any discrimination, but we find that he formed this conclusion without carrying out any investigation into the allegation of discrimination.

53. Mr Mitchell appeared almost resentful of having to conduct the appeal. When the claimant asked him to check CCTV because it would show other people also eating Mentos and would support the claimant's version of events, Mr Mitchell refused to do so and said, "*Do you think I have time to check whether everyone's chewing gum*?"

Mr Mitchell told the Tribunal that he could not recall whether or not he had made the comment 'do you think I have time to check whether everyone's chewing gum'. We find that he did make it.

54. In his evidence to the Tribunal Mr Mitchell suggested that the reason the CCTV was not checked was because by the time of the appeal the recordings would have been overwritten automatically, and that there were too many cameras in the warehouse for him to check. He accepted however that he could have spoken to team leaders and asked them whether, as the claimant said, it was common practice to eat the Mentos, and whether they knew that it was wrong to do so.

55. At the end of the appeal hearing Mr Mitchell told the claimant that he was confident that the correct decision had been made. On 16th January 2024 he wrote to the claimant confirming the outcome of the appeal. In the letter he stated that:

"*…. I assure you that a fair and thorough investigation has taken place….*

….it is evident that taking or consuming company products, such as Mentos Mints, not owned by Boohoo or yourself, should be understood without the need for explicit communication. "

56. Mr Mitchell also wrote that the claimant had been asked to provide the names of colleagues who had consumed the Mentos during the disciplinary hearing. This is not true. On the contrary, the notes of the disciplinary hearing record the claimant offering to provide names, and Ms Kmiciewicz not taking him up on the offer. The fact that Mr Mitchell misinterpreted or misread the minutes of the disciplinary hearing in this way is further evidence that he did not approach the appeal with an open mind.

57. Mr Mitchell concluded that the claimant's actions were 'pre-meditated' and that the claimant's actions had serious implications for the respondent's brand integrity. This was not an allegation that had been put to the claimant at any point prior to his dismissal.

58. The respondent says it was obvious that Mentos should not have been consumed. The fact that the respondent considered it necessary to provide training to staff on the issue suggests that it knew that it would not necessarily have been obvious to staff that the Mentos should not be consumed.

59. The only investigation that was carried out in this case was to look at the CCTV footage of the claimant and to interview the claimant. Neither Mr Wright nor Ms Kmiciewicz took any steps to investigate whether what the claimant was saying about it being common practice across the warehouse to eat Mentos was in fact true or not. Ms Kmiciewicz was offered names by the claimant, but declined to take them.

60. The claimant had more than three years' service with the respondent at the time of his dismissal, and a clean disciplinary record. There was no evidence before us to suggest that either of those matters were taken into account by Ms Kmiciewiz at the time she made her decision to dismiss the claimant. Nor was there any evidence that she considered any alternatives to dismissal. Mr Mitchell's evidence to the

Tribunal was that, when reaching his decision on the appeal he did not take account of the claimant's length of service. He could not remember whether or not he had considered the claimant's clean disciplinary record or any alternatives to dismissal. There is no mention of him doing so in his witness statement or the documentary evidence. We find on balance that the respondent did not give any consideration either at the dismissal stage or the appeal to the claimant's length of service, his clean disciplinary record or to imposing an alternative sanction than dismissal.

61. The claimant is Romanian. There were a mix of nationalities working in the warehouse including other Romanians. Two of the witnesses who gave evidence for the claimant were Romanian employees of the respondent. One is still employed by the respondent, the other was employed until May 2024. Neither faced any disciplinary action in connection with eating Mentos in the workplace. A third witness for the claimant is a British employee of the respondent who is still employed.

62. All three former colleagues of the claimant gave evidence, which was not challenged by the respondent, that they had seen other employees, including team leaders, eating Mentos in the workplace. All three also gave evidence that they did not know that eating the Mentos was prohibited. We accept their evidence on these issues.

The Law

Unfair dismissal

63. In an unfair dismissal case, such as this one, where the respondent admits that it dismissed the claimant, the respondent must establish that the reason for the dismissal was one of the potentially fair reasons set out in section 98(1) or (2) of the Employment Rights Act 1996.

64. Section 98(1) provides that: "*In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show – (a) the reason (or, if more than one, the principal reason) for the dismissal, and (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*"

65. If the respondent establishes a potentially fair reason for dismissal the Tribunal must then go on to consider whether the dismissal is fair or unfair under section 98(4) of the Employment Rights Act 1996:

"*Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –*

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."

66. Conduct does not have to be culpable, blameworthy or reprehensible in order to amount to a fair reason for dismissal, although this can be a factor when deciding the fairness of the dismissal (***Jury v ECC Quarries Ltd [1980] WLUK 116*** and ***JP Morgan Securities Plc v Ktorza [2017] 5 WLUK 237***). In the latter case the EAT held that the Tribunal was wrong to find that in order for an employee to be fairly dismissed for conduct that conduct had to be culpable, and that sections 98(1) and (2) of the ERA did not require that an employee was aware that their employer would not approve of their behaviour.

67. Where conduct is established as the reason for dismissal, the starting point for the Tribunal when considering whether the dismissal was fair is the test in ***British Home Stores Ltd v Burchell [1980] ICR 303***, namely:

1. Did the respondent have a genuine belief that the claimant was guilty of the misconduct?
2. Did the respondent have reasonable grounds for holding that belief; and
3. At the time it formed that belief, had it carried out as much investigation as was reasonable ?

68. One of the considerations under section 98(4) is whether dismissal was within the range of reasonable responses, i.e. was it an option that a reasonable employer could have adopted in all the circumstances. The Tribunal must not substitute its view of the appropriate disciplinary sanction for that of the employer (***Iceland Frozen Foods v Jones [1983] ICR 17***). The range of reasonable responses test is not a perversity test, and it applies also to the procedure followed by the respondent including the investigation (***Sainsbury's Stores Ltd v Hitt [2003] IRLR 23***)

<u>Wrongful dismissal</u>

69. The Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 SI 1994/1623 gives Tribunals the power to hear claims for breach of a contract of employment or other contract connected with employment where the claim arises or is outstanding on the termination of the claimant's employment.

70. In a wrongful dismissal claim, where it is admitted that the claimant was not given or paid for his notice period, the question is whether the claimant was in repudiatory breach of his contract of employment such that the employer was entitled to dismiss him without notice.

71. In a wrongful dismissal case questions of reasonableness do not arise, and the issue is whether the employee was guilty of conduct so serious as to amount to a repudiatory breach of the contract of employment entitling the employer to summarily terminate the contract (***Enable Care and Home Support Ltd v Pearson EAT 0366/09***).

72. In ***Laws v London Chronicle (Indicator Newspapers) Ltd [1959] 1 WLR 698*** the Court of Appeal held that, in order to justify a summary dismissal, the employee's behaviour must amount to a repudiatory breach of the contract, or put another way, must disclose a deliberate intention to disregard the essential requirements of the contract. In ***Neary and anor v Dean of Westminster [1999] IRLR 288*** it was held that the conduct by the employee must "*so undermine the trust and confidence which is inherent in the particular contract of employment that the[employer] should no longer be required to retain the [employee] in his employment.*"

Direct discrimination

73. Section 13 of the Equality Act provides that:

> "*(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"*

74. When determining questions of direct discrimination there are, in essence, three questions that a Tribunal must consider:

a. Was there less favourable treatment?
b. The comparator question; and
c. Was the treatment 'because of ' a protected characteristic?

75. In a direct discrimination case the claimant must have been treated less favourably than an actual or a hypothetical comparator. Section 23(1) of the Equality Act 2010 provides that there must be "*no material difference between the circumstances*" of the claimant and the comparator. The comparator must be "*in the same position in all material respects*" as the claimant, save that the comparator does not share the claimant's race (***Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337***).

76. The Equality and Human Rights Commission Code of Practice on Employment (2011) states that:

> "*…. it is not necessary for the circumstance of the two people (that is, the worker and the comparator) to be identical in every way; what matters is that the circumstances which are relevant to the treatment of the worker are the same or nearly the same for the worker and the comparator…*"

77. In ***Gould*** Mr. Justice Linden explained that "*The question whether an alleged discriminator acted "because of" a protected characteristic is a question as to their reasons for acting as they did. It has therefore been coined the "reason why" question and the test is subjective…For the tort of direct discrimination to have been committed, it is sufficient that the protected characteristic had a "significant influence" on the decision to act in the manner complained of. It need not be the sole ground for the decision…[and] the influence of the protected characteristic may be conscious or subconscious.*"

Burden of proof

78. Section 136(2) of the Equality Act 2010 sets out the burden of proof in discrimination claims, with the key provision being the following:

"*(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…"

79. There is, in discrimination cases, a two stage burden of proof (see ***Igen Ltd (formerly Leeds Careers Guidance and others v Wong [2005] ICR 931*** and ***Barton v Investec Henderson Crosthwaite Securities Ltd [2003] ICR 1205*** which is generally more favourable to claimants, in recognition of the fact that discrimination is often covert and rarely admitted to. In ***Igen v Wong*** the Court of Appeal endorsed guidelines set down by the EAT in ***Barton v Investec***, and which we have considered when reaching our decision.

80. In the first stage, the claimant has to prove facts from which the tribunal could decide that discrimination has taken place. If the claimant does this, then the second stage of the burden of proof comes into play and the respondent must prove, on the balance of probabilities, that there was a non-discriminatory reason for the treatment. So, if the claimant establishes a prima facie case of discrimination, the burden shifts to the respondent and the Tribunal has to consider whether the respondent's explanation is sufficient to show that it did not discriminate.

81. The Supreme Court has more recently confirmed, in ***Royal Mail Group Ltd v Efobi [2021] ICR 1263****,* that a claimant is required to establish a prima facie case of discrimination in order to satisfy stage one of the burden of proof provisions in section 136 of the Equality Act. So, a claimant must prove, on the balance of probabilities, facts from which, in the absence of any other explanation, the employment tribunal could infer an unlawful act of discrimination. In ***Royal Mail Group Ltd v Efobi [2021] UKSC 33*** the Supreme Court found that: "*no adverse inference can be drawn at the first stage from the fact that the employer has not provided an explanation.*"

82. In ***Glasgow City Council v Zafar [1998] ICR 120***, Lorde Browne-Wilkinson recognised that discriminators ' do not in general advertise their prejudices: indeed they may not even be aware of them'. Direct discrimination is often covert rather than overt, and a Tribunal can look at all the material before it when determining whether there has been less favourable treatment (***London Borough of Ealing v Rihal [2004] IRLR 642***).

83. The Tribunal has the power to draw inferences of discrimination where appropriate. Inferences must be based on clear findings of fact and can be drawn

not just from the details of the claimant's evidence but also from the full factual background to the case.

84. Factors that may be relevant when considering whether a claimant has made out a prima facie case of discrimination can include:

1. Unanswered questions or evasive answers to questions;
2. Conduct during the proceedings;
3. The lack of a credible explanation by the respondent; and
4. Discriminatory comments

85. It is not sufficient for a claimant merely to say, 'I was badly treated' or 'I was treated differently'. There must be some link to the protected characteristic or something from which a Tribunal could draw an inference. In ***Madarassy v Nomura International plc [2007] ICR 867*** Lord Justice Mummery commented that: "*the bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination."*

86. In ***Deman v Commission for Equality and Human Rights and others [2010] EWCA Civ 1276***, Lord Justice Sedley adopted the approach set out in ***Madarassy*** that 'something more' than a mere finding of less favourable treatment is required before the burden of proof shifts from the claimant to the respondent. He made clear, however that the 'something more' that is needed to shift the burden need not be a great deal. Examples of behaviour that has shifted the burden of proof include a non-response or evasive answer to a statutory questionnaire, or a false explanation for less favourable treatment.

87. Unreasonable behaviour is not, in itself, evidence of discrimination (***Bahl v The Law Society [2004] IRLR 799***) although, in the absence of an alternative explanation, could support an inference of discrimination (***Anya v University of Oxford & anor [2001] ICR 847***).

Conclusions

88. The following conclusions are reached on a unanimous basis, having considered carefully the evidence before us, the relevant legal principles, and the submissions of the parties.

Unfair dismissal

89. We have considered first what the reason for dismissal was, reminding ourselves that it is for the respondent to establish that there was a potentially fair reason for dismissal, and that a reason for dismissal is a set of facts known to the respondent, or a set of beliefs held by the respondent, which caused it to dismiss the claimant (***Abernethy v Mott, Hay & Anderson [1974] ICR 323***).

90. The respondent says that conduct was the reason for dismissal. The claimant

says he was dismissed because he is a Romanian national. Mr Wood submitted that the two are not necessarily exclusive, as it is possible that the principal reason for dismissal for unfair dismissal purposes was conduct, and that race was a material influence for the purposes of the race discrimination claim.

91. We find on the evidence before us that the reason for the claimant's dismissal was conduct. The claimant was dismissed following a disciplinary process and conduct was given as the reason for dismissal at the time.

92. The claimant's assertion that he was dismissed because of his nationality was not supported by any evidence. The claimant was working in an environment in which there were a mixture of nationalities, including other Romanians, and there was no evidence before us to suggest any general prejudice either towards the claimant because of his nationality or towards other Romanians. Two of the claimant's witnesses were former colleagues of his in the warehouse who are also Romanian. Neither of them were disciplined or dismissed for eating Mentos. One of them is still working there, and the other left in May 2024

93. There is no mention in any of the documents before the disciplinary hearing of the claimant's nationality, nor any evidence from which we could draw an inference that nationality was the real reason for dismissal. The documentary evidence before the Tribunal all points towards conduct as being the reason for dismissal.

94. We therefore find that the claimant was dismissed by reason of conduct, which is a potentially fair reason for dismissal.

95. We have then gone on to consider whether the respondent acted reasonably or unreasonably in all the circumstances, including the respondent's size and administrative resources, in treating that as a sufficient reason for dismissal.

96. The dismissing manager did not give evidence in these proceedings, nor was there any evidence from anyone present in either the investigation or the disciplinary hearings except the claimant. The Tribunal has considered carefully the minutes of the disciplinary hearing and the outcome letter. It does appear from those documents that Ms Kmiciewicz believed that the claimant was guilty of misconduct and there was no evidence before us to suggest that Ms Kmiciewicz did not genuinely believe that the claimant was guilty of misconduct. Mr Mitchell, who did give evidence, clearly believed that the claimant was guilty of misconduct.

97. On balance therefore we find that, at the time it took the decision to dismiss the claimant, the respondent had a genuine belief that the claimant was guilty of misconduct.

98. The next question therefore is whether there were reasonable grounds for the respondent to have that belief. The evidence before it at the time was the CCTV footage showing the claimant putting Mentos under the stairs, and the claimant's honest and open admission in the investigation and disciplinary hearings that he had done so.

99. Whilst the respondent had reasonable grounds for believing that the claimant had taken and stored the chewing gum under the stairs, it did not in our view have reasonable grounds for concluding that this amounted to gross misconduct or theft. The claimant did not seek to hide or cover up what he had done, and was honest and open throughout the disciplinary process. His behaviour was consistent with a genuine belief that eating the chewing gum was acceptable and common practice. The claimant stated very clearly from the outset that he didn't believe that what he was doing was wrong. He also said, in support of his assertion that there was no restriction on taking and eating the chewing gum, that many people were doing it, including team leaders and managers.

100. If it were the case that others were taking and eating the chewing gum, that would have supported the claimant's position that he did not know it was wrong to do so. Even more so if those in positions of responsibility, such as team leaders and managers, had been openly taking and eating the gum as he suggested. An employee can not in our view be criticised for doing something which he believes is acceptable behaviour because it is common practice, including among those in authority.

101. Whilst we accept that there are some types of behaviour that an employee does not need to be told is wrong – such as, for example, fighting in the workplace, the behaviour for which the claimant was dismissed does not fall into that category.

102. The respondent did not give serious consideration to the claimant's explanation for his behaviour At appeal stage Mr Mitchell appeared to accept that employees had not been told not to eat the Mentos until after the claimant had been dismissed, but said that the respondent should not have had to tell people because it should have been obvious. It clearly was not obvious however to many of those working in the warehouse, including the claimant, who took and ate the chewing gum.

103. The claimant's behaviour during the disciplinary process was consistent with his version of events. He was open and honest, did not deny taking or storing the chewing gum, and provided an explanation for his actions.

104. The fact that the claimant was laughing at times during the investigation meeting can be explained by a genuine belief at that stage that he had nothing to worry about because he had done nothing wrong, and anxiety at being called into an investigation meeting.

105. We therefore find that the respondent did not have reasonable grounds for concluding that the claimant was guilty of theft and therefore of gross misconduct.

106. Turning next to the investigation carried out by the respondent, we have reminded ourselves that the test we have to apply is whether the investigation carried out by the respondent fell within the range of reasonable responses.

107. We find that it did not. The claimant's defence to the allegations, namely that it was common practice and that he did not know it was wrong, was not investigated at all. It is a fundamental part of a reasonable investigation that an employer looks

for exculpatory evidence as well as for evidence of guilt. This respondent took no steps whatsoever to look for exculpatory evidence. The claimant was consistent in his defence throughout the process, and the respondent took no steps to investigate it.

108. Ms Kmiciewicz, when offered names by the claimant, indicated that she did not want to receive them as the disciplinary hearing was about the claimant. Mr Mitchell did ask for names, but when the claimant refused to provide them, fearing, with good reason, that others may be dismissed also, and suggested instead that Mr Mitchell look at CCTV, Mr Mitchell refused to do so, saying he did not have time.

109. It is clear from the minutes of the appeal hearing that the claimant only refused to provide names after Mr Mitchell had told him that something bad could happen to anyone else found to have eaten the chewing gum.

110. In his evidence to the Tribunal Mr Mitchell said that there were a lot of cameras within the warehouse and that CCTV footage is automatically overwritten within 28 or 31 days if not downloaded and saved. The appeal hearing however took place less than 28 days after the events for which the claimant was dismissed. Mr Mitchell accepted that he could have looked at some of the CCTV or asked team leaders in the warehouse whether they were aware of employees eating the gum.

111. It is a fundamental failing in the respondent's investigation that it took no steps whatsoever to investigate the claimant's defence to the allegations. A defence which, if upheld, could have resulted in the claimant not being dismissed. For this reason we find that the investigation conducted by the respondent fell out with the range of reasonable responses.

112. We have then gone on to consider whether the respondent acted in a procedurally fair manner. There was in this case an investigation meeting at which the allegation was put to the claimant. The claimant was then invited to a disciplinary hearing. He was informed in advance of the hearing what the allegation was and of his right to be accompanied. He was warned that a potential outcome of the disciplinary hearing may be dismissal, and sent copies of the evidence relied upon by the respondent, together with a copy of the disciplinary policy. He was informed of the outcome of the disciplinary hearing in writing, and offered the right of appeal, which he exercised. He was invited to an appeal hearing, at which he was accompanied, and was informed of the outcome of the appeal in writing. The whole process was conducted in a timely manner as there were less than four weeks between the incident coming to light and the appeal hearing

113. We find that the procedure followed by the respondent was a fair one and compliant with the ACAS Code of Practice on Disciplinary and Grievance Procedures (2015).

114. The next issue for consideration is whether the decision to dismiss the claimant was within the range of reasonable responses. We have reminded ourselves that it is not for the Tribunal to step into the shoes of the employer and substitute its view of the appropriate sanction for that taken by the employer. Rather the question for

us is whether dismissal fell within the range of sanctions available to a reasonable employer. We take account of the decision in ***London Ambulance Service NHS Trust v Small [2009] IRLR 563*** in which the Court of Appeal held that it is "*all too easy, even for an experienced ET, to slip into the substitution mindset*", that the real question is "*whether the employer acted fairly and reasonably in all the circumstances at the time of the dismissal*" and that the focus should be on the respondent's conduct, rather than on the claimant's.

115. The claimant asserts that the dismissal was unfair because of inconsistency of treatment and because he didn't know that what he was doing was wrong.

116. On the question of inconsistency of treatment, we find that others in the warehouse, including team leaders and managers, were eating the chewing gum. Mr Wood referred us to the case of ***Wilko Retail Limited v Gaskell EAT/0191/18*** in which the EAT held that:

"*…. an ET should only find that a dismissal is unfair for inconsistency if the two cases in question were truly similar (see **Hadjioannou v Coral Casinos Ltd [1981] IRLR 352**, in particular, at paragraphs 24 to 25 of the discussion and guidance in that case, where it was stressed that ETs must scrutinise arguments based on disparity with particular care). Specifically, in **Securicor v Smith [1989] IRL 356**, it was noted that the range of reasonable responses test extends to questions of consistency: provided the assessment of the similarities and differences between different cases was one which a reasonable employer could have made, the ET should not interfere even if its own assessment would have been different. Indeed, in **Securicor v Smith** the Court of Appeal held that the employer's decision on consistency could only be overturned if its assessment was so irrational that no employer could reasonably have made it.*"

117. In the respondent's submissions, the claimant's case can be distinguished from that of other people who may have eaten the chewing gum because the respondent believed that he had hidden the chewing gum, and because of his behaviour during the investigation meeting. There is no mention of the claimant's behaviour during the investigation meeting in the dismissal letter however, and only a passing reference to the claimant keeping the Mentos in a 'hidden place'. The dismissing manager did not give evidence to the Tribunal.

118. There is a lack of evidence before the Tribunal on the question of inconsistency of treatment. That lack of evidence is due entirely to the respondent's failure to properly investigate the question of others' behaviour during the disciplinary process, and the paucity of its evidence to this Tribunal. The dismissing manager closed her mind to the possibility that others may be doing the same thing as the claimant, and did not want him to give her names.

119. The respondent's approach to the question of other people was out with the range of reasonable responses. That being said, there is quite simply not enough evidence before this Tribunal for us to find that there were others who had stored the chewing gum under the stairs for distribution to colleagues.

120. We accept, on the evidence before us, that the claimant genuinely did not know that what he was doing was wrong, and believed that eating the Mentos was common practice, including amongst management. The respondent had not, at the time of the incident for which the claimant was dismissed, taken any steps to inform him and others that the Mentos should not be consumed. It was common practice for staff to consume them and the claimant saw managers doing so.

121. It is, in our view telling that even before the claimant was dismissed, the respondent thought it necessary to tell people not to eat the chewing gum, as evidenced by the training team's preparation of a tool box talk to be delivered to staff. The tool box talk was prepared, but not delivered, at the end of November 2023, suggesting that the respondent knew that there was an issue with staff. Had the respondent investigated properly the defence put forward by the claimant and found that eating the chewing gum was common practice and that the claimant didn't know it was wrong, a reasonable employer would not have dismissed for it.

122. We find that it was out with the range of reasonable responses to dismiss an employee who at all times clearly stated that he believed his conduct was permitted because (a) it was common place (b) managers were doing the same thing and (c) he hadn't been told not to do it. Moreover, the respondent did not consider alternatives to dismissal, nor did it take account of the claimant's clean disciplinary record and his length of service.

123. We therefore find that the dismissal of the claimant was substantively unfair.

124. As the unfairness was substantial rather than procedural it is not appropriate to make a ***Polkey*** deduction. In any event, in light of the evidence adduced by the claimant, and in particular the evidence of his three former colleagues, we find that had the respondent properly investigated, it is likely that it would have concluded that eating the chewing gum was common practice including amongst team leaders.

125. We have considered whether to make a deduction for contributory conduct. In order to do so, we would have to be persuaded that the claimant was guilty of culpable or blameworthy conduct (***Topps Tiles plc v Hardy [2023] IRLR 803***), namely conduct which was "*deserving of blame"* (***Sanha v Facilicom Cleaning Services Ltd EAT/0250/18***). In determining this issue, we have focused on what the claimant actually did, rather than on the conduct of the respondent.

126. We find that the claimant's behaviour, in taking chewing gum and storing it for distribution to colleagues, was not deserving of blame. We accept that his motivation in doing so was to be able to share the gum with colleagues who worked in stock control. The claimant did not seek to deny what he had done and was open with the employer throughout the investigation and disciplinary process. The claimant saw others, including those in positions of authority, taking and eating the gum, and thought it was acceptable to do so.

127. We accept the claimant's evidence that he put the gum under the stairs to store it rather than to hide it. Storing is consistent with his explanation that there was a big warehouse and he took the chewing gum to the part of the warehouse that his team

worked in.

128. For these reasons it would not, in our view, be appropriate to make any deduction for contributory conduct.

129. The claim for unfair dismissal succeeds. There shall be no reduction either for ***Polkey*** or for contributory conduct.

Wrongful dismissal

130. The claimant was entitled, both under the terms of his contract of employment and by virtue of the statutory minimum notice period set out in section 86 of the Employment Rights Act 1996, to three weeks' notice of termination of his employment. He was employed from September 2020 to December 2023 and had three complete years' service.

131. The question for the Tribunal is whether the claimant's conduct amount to either:

1. "*a serious breach of your obligations as an employee, any act of gross misconduct*" for the purposes of section 29 (Termination without Notice) of his contract of employment; or

2. Conduct which entitled the respondent to treat the contract as terminable without notice in accordance with section 86(6) of the Employment Rights Act 1996.

132. It is the conclusion of the Tribunal that the claimant's conduct did not fall into either of the above categories. In storing the chewing gum to share it with his colleagues the claimant was acting in a manner which he believed was common practice within the workplace and which was authorised. It cannot be said that the claimant deliberately intended to disregard an essential requirement of his contract of employment. Nor can it be said, either subjectively or objectively, that his conduct undermined trust and confidence such that the respondent could no longer be expected to employ him.

133. The respondent has therefore breached the claimant's contract of employment by failing to pay him three weeks' notice. The wrongful dismissal claim succeeds.

Race discrimination

134. The allegation of race discrimination relates to the dismissal itself. We have reminded ourselves that in a direct discrimination case it is for the claimant to establish, on the balance of probabilities, circumstances from which, in the absence of an adequate explanation from the respondent, the Tribunal could conclude that the claimant was treated less favourably because of race. We have also reminded ourselves that a mere difference in treatment and a difference in race is not sufficient to establish discrimination – something more is required (***Madrassy***).

135. There was no evidence before the Tribunal to suggest that anyone else was disciplined or dismissed for eating or storing Mentos, and the Tribunal finds that the

claimant was the only one. The claimant has identified eight comparators for the race discrimination claim. Of those, three are British, four are Polish and one is Latvian. There was no evidence before the Tribunal of the circumstances of those comparators, with the exception of Jason Ledger, a British employee who still works for the respondent. There was therefore insufficient evidence before us to decide whether their situations were materially the same as the claimant's.

136. Even if the comparators named by the claimant were in materially the same circumstances as the claimant, of more importance in determining the race discrimination claim however is the fact that the claimant has not been able to identify anything more than a difference of treatment and a difference of race.

137. The Tribunal was not assisted in its consideration of the claim by the absence of the manager who took the decision to dismiss. There was however nothing in the documentary evidence before the Tribunal to suggest that Ms Kmiciewicz' decision was influenced in any way by race. There is no mention of race in the evidence before us, and nothing from which we could draw an adverse inference that race was the reason for the claimant's dismissal. In reaching this conclusion we have taken account of the fact that the workforce at the warehouse was an international one, and of the evidence of two former colleagues of the claimant, who are also Romanian and who were not subject to disciplinary action.

138. The claimant has not discharged the first stage of the burden of proof set out in section 136 of the Equality Act 2010. The claim for race discrimination therefore fails and is dismissed.

Remedy

139. A separate hearing will be listed to determine questions of remedy. The parties will receive notice of that separately.

Approved by:
Employment Judge Ayre
Date: 23 June 2025

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

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