



EMPLOYMENT TRIBUNALS

Claimant
Mr F J Ayeh

v

Respondent
Greggs Plc

Heard at: Birmingham On: 11 - 14 September 2017

Before: Employment Judge J K Macmillan

**Members: Mr J Wagstaffe
Mr P R Trigg**

Appearance:

For the Claimant: In Person

For the Respondent: Mr Gorasia, of counsel

RESERVED JUDGMENT

The claimant's complaints of unfair dismissal and race discrimination fail and are dismissed.

REASONS

Background and issues

1. Mr Ayeh complains that he was unfairly dismissed from his employment as a bakery operative on 11 October 2016 and that his dismissal was an act of race discrimination. Mr Ayeh has represented himself and we have heard evidence in support from two former colleagues, Mr Duane Jamie and Miss Sarah Leadwich. He complains that the dismissal was unfair because he was more harshly treated than a colleague in a comparable situation; the respondents had breached their disciplinary procedure by taking into account a written warning which he had never received; they had failed to acknowledge that he had not attended the Health and Safety training which underpinned the first written warning and they found that he had sworn at a colleague when this was contrary to the weight of the evidence obtained at the investigation stage.
2. The basis of the race discrimination claim is rather more elusive. In the claim form in the narrative description of the complaint no mention of race discrimination is made. However, at paragraph 11 of the narrative he refers to other employees who had sworn directly at staff not being dismissed. The only clue that a discrimination claim was being brought is that at section 9 of the

claim form he ticked the box referring to discrimination. Early in the proceedings, Mr Ayeh was asked to provide further particulars of the claim form and after a series of preliminary hearings the issue was identified as one of direct race discrimination, the allegation being that Mr Ayeh, whose racial or ethnic origin is described as Black African, had been treated more harshly than a comparator, Miss Cindy Payne who is said to be of mixed White British and Black Caribbean race, who had committed similar acts of misconduct. At a much later stage Mr Ayeh sought to introduce as fresh allegations of race discrimination that he had been singled out by the respondents for excessive duties which had been imposed on him and no-one else but at a further preliminary hearing that application was refused. However, he was allowed to introduce evidence by way of background of his allegedly excessive work load in support of his overall claim that his dismissal was racially discriminatory.

3. At the start of this hearing the assumption of all those on the respondent's side, and indeed of the Tribunal, was that the act of more favourable treatment of which Mr Ayeh was complaining, was the disciplinary sanction handed out to Cindy Payne in May 2016 when she was given a written warning for swearing at a colleague. Mr Ayeh however explained that he was only placing very limited reliance on this episode and his principal complaint was about an episode which had occurred between him and Cindy Payne in 2013 when she had not only sworn at him but had thrown a piping bag of cream at him. He had raised a grievance about this but no disciplinary action had been taken against her and both of them had received counselling. His complaint of race discrimination therefore seems to depend upon a comparison of the respondent's treatment of Cindy Payne primarily in 2013 but to some very peripheral extent in 2016 and the treatment which the respondents afforded him in 2016. The alleged onerous workload is advanced only as tending to show discriminatory attitudes on the respondent's part and does not stand as an independent head of claim of race discrimination.
4. The respondents admit the dismissal and give as the reason that Mr Ayeh had committed a series of acts of misconduct, at least some of which were acts of gross misconduct, beginning with an occasion in May 2016 which led to the issuing of a written warning on 20 June 2016; two incidents on 15 August 2016 followed by further incidents on 31 August 2016, the August events being dealt with together at the same disciplinary hearing after following different investigatory routes. The common thread through all of these events is said to be Mr Ayeh's insubordination and use of foul language to colleagues. The respondents have been represented by Mr Gorasia of counsel and we have heard evidence from Mr Les Westbury who dealt with the May 2016 incident and investigated the August 31st incidents, Ms Jo Sherrat who took the decision to dismiss Mr Ayeh, Mr Adam Yates who heard his first appeal against dismissal, and Ms Karen Walker who dealt with his final appeal.

The Law

5. The right not to be unfairly dismissed is enshrined in section 94 of the Employment Rights Act 1996. Section 98 deals with the general provisions relating to fairness. It provides, at subsection (1)

"in determining for the purposes of this part whether the dismissal of an employee is fair or unfair it is for the employer to show-

(a) the reason (or if more than one the principal reason) for the dismissal and

(b) that it is either a reason falling within subsection (2) or some other substantial reason...

6. Amongst the potentially fair reasons for dismissal in subsection (2) is one which relates to the conduct of the employee and that is the allegation here. The all important test of reasonableness is set out in subsection (4). This provides:

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

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

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

7. It is very important that the limitations on the Tribunal’s role in complaints of unfair dismissal is understood. We do not sit like a bench of magistrates to determine the guilt or innocence of the claimant. Our task is to scrutinise the respondents and to say whether the decision to dismiss fell within the range of responses of the reasonable employer to the facts which we find were known to or should have been known to the respondents when the decision to dismiss was taken. We are not permitted to substitute our judgment for that of the employer and it is therefore perfectly permissible for us to conclude that while we would not have dismissed an employee the employers nonetheless were acting fairly in so doing because dismissal fell within the range of reasonable responses.

8. In misconduct cases the Employment Tribunal is guided by the well known authority of ***British Home Stores v. Burchell*** [1978] IRLR page 379 in which the Employment Appeal Tribunal said that in order to successfully defend a complaint of unfair dismissal for misconduct the employer has to show only that they genuinely believed the allegation which they make against the employee, that they had reasonable grounds for that belief, and that they reached that belief on those grounds after making all the enquiries which were reasonable in the circumstance. That of course is subject to the caveat that dismissal was, after such an enquiry, within the range of responses open to the reasonable employer. It follows that the Tribunal is not permitted to take into account when determining the reasonableness of the respondent’s actions things which the employee did not raise during the course of the disciplinary proceedings by way of defence or mitigation and which are raised for the first time in the Employment Tribunal.

9. The concept of direct discrimination on a prohibited ground such as race is to be found at section 13 of the Equality Act 2010. This 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”.

10. It is important to note that direct discrimination occurs only if a person is treated *less favourably because* of their race.
11. Section 136 deals with the burden of proof in any proceedings which relate to a contravention of the Act,
 - “(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provisions 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”*
12. As the respondent’s principle contention is that the circumstances relating to Cindy Payne and to Mr Ayeh are materially and fundamentally different and it is that difference which justifies the difference in treatment, the key provision for the purposes of this claim appears to be section 23(1) which has the cross heading “Comparison by reference to circumstances.” It provides:
 - “On a comparison of cases for the purposes of section 13... there must be no material difference between the circumstances relating to each case”.*

The Facts

13. The respondents are a very large and well known company. Essentially they are bakers with a large number of retail outlets. Mr Ayeh commenced employment with them in April 2002 as a bakery operative at their Birmingham bakery. He worked in the confectionary section. Although bakery operatives are supposed to perform a range of tasks Mr Ayeh seems principally to have worked as the mixer man making various mixes to be added to cakes etc. He also worked on the conveyor belt, sometimes acted as team leader and sometimes relieved the injection man. A central complaint of his is that he was put upon by the respondents and frequently found himself doing two or three tasks at the same time. That appears to be the case, but it is also the case that he worked large numbers of hours of entirely voluntary overtime most weeks. He would come in three quarters of an hour before the start of every shift and sometimes stay late. He makes no complaint about the number of hours he worked, only what he was asked to do during those hours.
14. The respondents are of large size and administrative resource. They have an extensive disciplinary procedure and policy. The policy lists a number of acts which it categorises as gross misconduct. They include “using indecent or inappropriate language or behaving in an indecent manner” and “serious insubordination including failure to follow a reasonable instruction from a manager”. Appendix 1 to the policy is a list of disciplinary sanctions. It begins with a verbal warning and ends with dismissal. Dismissal is split into two parts, (A) being procedural dismissal and (B) summary dismissal. Procedural dismissal is defined thus:
 - “Where the managers reviewing the case are not satisfied that the conduct or performance of the individual and previous valid final written warning has brought about the required improvements and mitigating factors”*
15. Under the heading ‘Disciplinary Action – Formal Action’ the following appears:

“The outcome of the disciplinary hearing will depend on the seriousness of the incident and also whether the individual has any prior warnings etc. If an individual has been issued with a warning previously which is still live, and then subsequently commits a further breach or misconduct of a similar nature, they would normally progress to the next level of warning. This is not absolute however, and depending on the nature of the situation, further action may be carried out at any higher level”.

16. Both of the industrial members of this Tribunal are impressed with the disciplinary procedure which they regard as a model of fairness and clarity. We find as a fact, contrary to one of Mr Ayeh’s principle contentions, that the policy does not require a previous and still live, valid final written warning before a procedural dismissal can be implemented.

May 2016

17. On 6 May 2016 Mr Ayeh had come in early as usual and was tearing plastic covers off some frozen product in preparation for the start of production. He left them lying around on the floor creating a trip hazard. On the previous day the 5th, he had done exactly the same thing and had been spoken to by his supervisor, Robert Beards, who told him that the covers should be put into the bin immediately to avoid the trip hazard. Mr Ayeh had done then so on the 5th but on the 6th he did not. The email from Mr Beards raising the matter with Les Westbury a Production Manager reads thus, so far as relevant,

“This morning as I was walking around the bakery I noticed that the bags again were on the floor. I said to [Mr Ayeh] that he needed to clear them away immediately and that we had spoken about this the day before, he said ‘I don’t care they are not in a dangerous position’ I stated that they are on the floor in the middle of the bakery and they needed to be cleared straight away, he said ‘I’m on my own I don’t care I don’t have a bin’, I pointed out five bins all within a few steps of the location which was between the end of the walkway going to the revents and the doughnut fryer.

I explained that this is a trip hazard and someone could hurt themselves, he said ‘I don’t care I am on my own’ at this point I noticed Meena (Meena Wody) was in so I showed her what I was talking to [Mr Ayeh] about.

She agreed with me and Kevin picked the bags up.

Through the whole ordeal [Mr Ayeh] was very aggressive and did not carry out this reasonable request”.

18. The respondent’s hierarchy is that above the bakery operatives are team leaders and above the team leaders are supervisors and so on that day (as he was not acting up) Mr Beard was two rungs higher up the managerial ladder than Mr Ayeh. A Mr Ali conducted the investigation on behalf of the respondents. After Mr Beards had completed a formal investigation record statement Mr Ali spoke to Meena Wody who is of the same racial origin as Mr Ayeh. She supported Mr Beards’ account. When Mr Ayeh was interviewed by Mr Ali he gave the following explanation.

“I unwrapped the Gregg’s nuts in between the table and the metal detector for the jam doughnuts, this is where I put the bags on the floor.

After I unwrapped them I went to get the blue belt and I was bringing it back. Rob called me and said "I have told you about this so many times, and I want you to pick up the bags now from the floor" he said this in a disrespectful voice. I answered "I'm busy and I am on my own, and when I'm finished I will pick them up." Rob said "if you don't pick them up straight away I will report you". I said "I don't care". He then called Meena over and I carried on with my job. I looked where the bags had been and someone must have picked them up. The bags were not in any area where people could trip up."

19. Mr Ali also interviewed a Mr Uber who is also of the same racial origin as Mr Ayeh and who described him as being loud and animated and aggressive towards Rob Beards. The investigation led to a disciplinary hearing which was conducted by Mr Westbury. On 15th June Mr Ayeh was sent a letter by the respondents requiring him to attend the disciplinary hearing. He has confirmed that he was also sent the investigation pack, which includes the summary of Mr Ali's key findings, where the following appears:

"[Mr Ayeh] has been here a number of years and is an experienced operator but has had the following training: housekeeping and hygiene procedure/clean as you go 3/6/2015, and because of the training he is fully aware of his H&S responsibilities to himself and his colleagues".

Amongst the documents enclosed was a record of attendance at that training. The allegation was of gross misconduct namely "failing to follow a reasonable request from your supervisor on 6 May 2016 by not putting plastic covers in the bin as instructed and highlighted as a Health & Safety risk on more than one occasion."

20. The allegation is therefore not of breach of Health & Safety but of refusing to follow a reasonable request. In other words it is an allegation of insubordination. At his disciplinary hearing Mr Ayeh agreed that he had purposely rearranged the area where he was unwrapping so that he could put the plastic covers on the floor and when challenged that he knew it was not the right thing to do he simply replied 'everyone does it that way'. Later when it was pointed out to him that a supervisor had asked him to do something and he had blatantly refused, he agreed but added "Rob came looking for me, he said pick up this, his tone of voice was not good. Why did he not pick up the plastic himself but instead he walked over to me passing them".
21. At the end of the disciplinary hearing he was told that he would be given a first written warning and the decision would be sent to him in writing. He asked for it to be sent to his home address and he said that he thought that it was too severe a sanction indicating perhaps an intention to appeal. Mr Ayeh did not in fact appeal. He now contends that there are procedural irregularities with this warning because he never received written confirmation as promised (which explains why he did not appeal as he was told he could not appeal until he received the written confirmation), that the warning should not have been given because he had not attended the Health & Safety training mentioned in the investigation report and the document produced by the respondents showing his attendance at the training has a signature on it which is clearly not his because his name as printed by the signatory is spelt incorrectly as is the signature itself.

22. While it is true that the signature on the record of attendance at the Health & Safety training does raise some awkward questions because it does not immediately appear to be Mr Ayeh's signature, in our judgment this has no bearing on the fairness of the warning which was for refusing to obey a reasonable management instruction, not breach of H&S. Moreover there are serious doubts about the truthfulness of Mr Ayeh's claim not to have received written confirmation of the warning nor to have attended the training. These doubts arise from the fact that at each stage of the disciplinary process which led to his dismissal, up to and including the appeal before Mr Adam Yates, the Bakery Operations Manager from the respondents' Treforest Bakery who was brought in especially to hear it because Mr Ayeh has raised concerns about the impartiality of local managers, the fact that he was subject to the written warning was expressly raised and he never queried the validity of the warning. In particular he did not say that he had never received it in writing nor did he say that he had never attended the training. These points were first taken by Mr Ayeh in the final appeal to Miss Karen Walker, who took the view that he was only raising them because Mr Yates had decided to downgrade the dismissal from summary to procedural. Miss Walker thought that this was a disingenuous, opportunistic attempt by Mr Ayeh to take advantage of that decision by claiming that a procedural dismissal was not open to the respondents because of the failures surrounding the written warning.
23. Mr Ayeh has never denied that he was told at the conclusion of the disciplinary hearing that he would be given a written warning for the events of 6 May. In our judgment, given the very clear defiance of his supervisor which he has never apologised for but has always attempted to justify, and given the list of gross misconduct offences in the disciplinary procedure, he was dealt with very leniently by the respondents in only being given a written warning.
24. In his closing submission Mr Gorasia invited the Tribunal to conclude that Mr Ayeh was not a witness whose evidence could be regarded as credible because of the number of contradictions in his oral evidence and the number of occasions on which he had shifted ground. This is one example on which he relied. Mr Ayeh contended that the reason why he had not appealed the written warning was because he could not appeal until he had received the written notification of the warning and he had 10 days to appeal after he had received the written notification. However he appealed immediately after being told he was going to be dismissed and before he had received written notification of that decision. When this was pointed out to him in cross examination, he changed tack slightly saying that he had acted promptly in the latter case because he was now without a job whereas it had not been necessary for him to act promptly in the former case because he remained in the respondent's employment. We should add that when told by Mr Ayeh that he had not received written confirmation of the warning the respondents did investigate but were unable to say conclusively whether or not it had been posted to him although there was a copy on his personnel file. In our judgment whether he received it or not is beside the point. He has always accepted he had been given a written warning which had been conveyed to him orally and he does not claim that the document on his file was not an accurate record of the warning and the reasons for it.

15 August 2016

25. There were two separate but related incidents on 15 August. It is an important part of Mr Ayeh's explanation for his behaviour that he was acting as team leader between 12am and 2pm which was when the first of the incidents occurred. The respondents deny that he was acting up between those hours. Mr Ayeh has called Sarah Leadwich who was the team leader on that day to support his contention. Miss Leadwich says that she was required to attend training between 12 and 2 and she had told Mr Ayeh that he would be acting up in her absence. Her witness statement does not say whether she, of her own volition, appointed him as acting team leader or was passing on a message from supervisors. When the respondents investigated this they found that Sarah Leadwich had clocked out at 11:48 and had not clocked back in. Moreover, the person who she said was delivering the training she claimed to have been attending reported that no training took place between 12 and 2 that day, the only scheduled training being from 6:00 that evening. We are therefore not satisfied on the balance of probabilities that between 12 and 2 on 15 August Mr Ayeh was acting as Team Leader and the respondents had reasonable grounds for rejecting his contention that he was. But much more importantly, the respondents were not unreasonable in taking the view that even if he had been acting up, his behaviour would not have been justified.
26. Both of the incidents on 15 August involved confrontations with Meena Wody who was a substantive team leader. She was also the victim of an alleged verbal outburst by him on 31 August. In connection with that episode in particular, but it must also apply to the episode on 15 August, Mr Ayeh said in evidence that Miss Wody was quite capable of fabricating complaints against him because she wanted him to lose his job. That was the first time any such allegation has been made by Mr Ayeh in the context of the disciplinary proceedings. Immediately after he was suspended on 31 August he raised a grievance which did include an allegation that a work colleague was out to get him and when that was explored as part of his grievance the identity of that colleague appeared as Meena Wody. But not only did Mr Ayeh not make any complaint about Meena Wody's truthfulness in the course of the disciplinary hearing he was expressly asked if he could explain why she and another witness would say that he had used the words complained of if he had not done so. His only reply was that he believed that they were friends. More importantly, he was specifically asked whether there was any link between the issues he had raised in his grievance and the matters the subject of the disciplinary proceedings and he said that there was not apart from the fact that there was someone else who had behaved in a similar way and who had not been suspended. That was a reference to Cindy Payne. So not only did Mr Ayeh not volunteer this vital piece of evidence that Meena Wody was untrustworthy because she was out to get him, when given the opportunity to explain why she might have fabricated the story he offered an entirely different and much weaker explanation.
27. This is another example, submits Mr Gorasia, of Mr Ayeh's tendency to shift ground as it appears to suit his case. His first explanation for not claiming that Ms Wody was out to get him was that he had only heard it as shop floor rumour and he did not want to say it for fear of getting someone else into trouble. But that explanation does not sit at all happily with the fact that he raised it as part of his grievance. He then claimed that he had not raised it during the disciplinary hearing because he was expressly told that he had to keep the

grievance and the disciplinary matters separate. When asked to justify this claim he eventually took the Tribunal to the minute of the grievance appeal meeting which was heard by Mr Ivor Ellcock on 2 November 2016 which is after Mr Ayeh had been dismissed and records Mr Ellcock as explaining "... the grievance and disciplinary must be kept separate and that he could not consider anything raised in this meeting which was in relation to the disciplinary." That does not say what Mr Ayeh claims that it says. All it says is that Mr Ellcock is dealing only with the grievance and so that meeting must not be used as a supplementary appeal in the disciplinary proceedings. But far more importantly, it is clear from the minutes of the disciplinary hearing that led to his dismissal that he was expressly asked whether there was any link between the subject matter of his grievance and the subject matter of the disciplinary charges and apart from the disparity of treatment with Cindy Payne he expressly said there was not. We do not accept that any impediment was placed on Mr Ayeh's ability to defend himself at the disciplinary hearing and we reject his contention that the complaints made by Meena Wody were untrue because she was intent on getting him to lose his job.

28. It may well be the case that on 15 August Mr Ayeh was under pressure. He does seem to have taken on, or been asked to take on, a multitude of roles during the ordinary working day on a number of occasions. The first incident happened when Miss Wody noticed that one of her team of operatives, Maria Lopez, had been instructed by Mr Ayeh to leave the belt and wash some trays. Miss Wody asked him why he was taking Maria off the belt and he said that he needed her to clean the bowls in the sink. Miss Lopez then returned to the belt. A little later there was a further confrontation over an operative called Liz who Mr Ayeh thought should be putting up cornflake cases. Miss Wody then said to him that she needed Liz to get the job done quicker and that once the job was done he could have as many people as he wanted putting up cases. Miss Wody complained that Mr Ayeh then said 'No' in a raised voice and that if he couldn't have Liz he was going to have Maria back. In the investigatory interview Miss Wody was then asked by Shirley Girdez, the interviewer, "What gives [Mr Ayeh] the right to question what you were doing, also was he a team leader?" Miss Wody replied "For that day [Mr Ayeh] was mixer man not team leader. That is the way it is, he challenges my decisions all the time." When she was asked what happened next, Miss Wody said "he went up to the end of the belt where Maria was doing boards and he stopped her from loading the board on the belt". He stood between the belt and Maria to prevent her from doing what Miss Wody had asked her to do thereby stopping the belt and causing staff to stand around and watch. Miss Wody then said to Mr Ayer, "if you have any issues with my decision about Maria then you need to go to the office and speak with supervisors" to which Miss Wody claims that he replied "I'm not going to the office they are the ones who need to come to me".
29. Miss Wody then went to get an acting supervisor called Ricky who came down to the belt. After making enquiries Ricky told Mr Ayeh to get the line finished as Meena Wody had asked him to do and then he could have people to help do the cases. According to Miss Wody, Mr Ayeh responded to Ricky "No she is not doing boards you can tell anyone, I will go to anybody even Jan and nobody is going to do anything to me ... you can take me to anyone and they are going to get fucked". Miss Wody then walked away. That appeared to be the end of the incident but later that day Mr Ayeh noticed Miss Wody and Mark Kyte, a

supervisor, discussing work matters with Ricky. This appears to have annoyed him as he came over and is alleged to have said in a confrontational manner words to the effect "I have been standing here watching you talk to Meena for the last ten minutes". Mark Kyte responded by saying "Don't question what I am doing I am speaking to Meena, go back to work". Mr Ayeh then seems to have walked away.

31 August 2016

30. This matter was still being investigated as a disciplinary offence when the third and final incident of 31 August took place. It again involved Miss Wody who appears to have been merely acting as a messenger conveying an instruction from the supervisors to Mr Ayeh who on that day was acting up as team leader. In her investigation interview Miss Wody said that she had approached Mr Ayeh to say that she was just passing a message from the supervisors but before she could pass the message on Mr Ayeh interrupted and said "My friend do not tell me anything (raised voice) if they have anything to tell me they should tell me themselves." Miss Wody says he was not shouting but he did raise his voice a lot. She went on that she continued to deliver the instruction which is what she had been asked to do but Mr Ayeh was clearly ignoring her. After a period of time she says the only words he spoke were "I don't want to hear anything from you, fuck you." Miss Wody then walked away and went to the office.
31. The matter was investigated by Mr Westbury. He interviewed Miss Wody and a Mr Lukash Tandec. Mr Tandec confirmed that he had been standing with Mr Ayeh when Miss Wody had approached him and when Miss Wody had said to Mr Ayeh "I am just giving the message" Mr Ayeh had told her to "fuck off". Four other people were interviewed who were nearby but not as close as Miss Wody or Mr Tandec. One witness reported Mr Ayeh as saying in a loud voice only that if the supervisors wanted him they could come and get him themselves and heard Mr Ayeh as he walked away say "Fucking hell if they want me they should get me". Other witnesses confirm the same. Therefore only two witnesses claim to have heard him swear directly at Miss Wody, while four others heard him swearing - apparently either to himself - about the supervisors and the instruction he had been given.
32. Mr Ayeh prepared a written statement in advance of his investigatory interview. After explaining where he was when Meena approached him to convey the message he writes this:

"I said to her I'm not listen to you he should come and tell me himself. Why you coming to tell me. You can go to the office and tell him what I said. She walk off and I said fucken hell they want me work on the belt, fill the kettle and fucken take the injector man off for break, they think I am fucken slave or a donkey ..."
33. When he was questioned by Mr Westbury he was asked whether he had told Meena to fuck off. He denied it but he did say that as she walked away he was swearing to himself. In the context of what he has said to the Tribunal about Meena Wody's truthfulness it is interesting to note that he was next asked whether he had any issues with her and he replied 'No'. He said he was not aware he had upset Meena, he was mad at what he was being asked to do by the supervisors and as Meena walked away he started swearing to himself.

34. The disciplinary hearing took place on 11 October having been delayed because of Mr Ayeh's grievance. It was conducted by Jo Sherratt who is a Technical Manager at the respondents' Birmingham bakery. Mr Ayeh was accompanied by a work colleague, Glen Davis. Nothing new emerged at the disciplinary hearing although when confirming that he was acting team leader on 15 August he gave a different explanation to the one that he has given to this Tribunal saying that "that day Sarah was in she went home early so I took over to TL". That has now become a claim that Sarah went on training. The meeting was lengthy and Miss Sherratt took over an hour to consider her decision. She informed Mr Ayeh that he was summarily dismissed for speaking to a supervisor and colleagues in a disrespectful and undermining manner on 15 August and using foul and abusive language and speaking in an inappropriate way to a team leader on 31 August. She expressly took into account the pattern of his recent behaviour.
35. Mr Ayeh immediately appealed in a very short letter which did not set out any grounds. The appeal was conducted by Mr Adam Yates and during the course of the hearing Mr Ayeh confirmed that he felt that his behaviour on 15 August had been acceptable and that he had done nothing wrong. He apologised for using indecent language on 31 August but maintained that he had not used it directly towards Meena Wody. He again referred to Cindy Payne having used bad language but no disciplinary action being taken against her. During his evidence to us he was adamant that the issue with Cindy had involved not just swearing but the throwing of a pipe bag of cream at him. This was never mentioned at any stage of the disciplinary process and when asked to explain why, he said that it was only the fact that Cindy had sworn at him that was relevant because that was the only issue being raised against him. The appeal hearing lasted four hours after which Mr Yates went away to consider his decision. In the interval between the hearing and the decision he checked whether Sarah Leadwich had been on training on 15 August, but was assured that she had not been because there was no training.
36. The appeal was reconvened on 25 November when Mr Yates told Mr Ayeh that he noted he had a live written warning on his file for misconduct, that he had recently undergone Values and Diversity Training and so should be aware of the standards of behaviour expected and had committed other wrongdoing on 15 August. This suggests that Mr Yates' primary focus was on the events of 31 August about which he said this
- "I have decided that if you had a clean disciplinary record then your misconduct on 31 August would warrant a final written warning. However given the existence of the live written warning already on file I think it would be reasonable to escalate this to a dismissal for misconduct. Ultimately based on the findings above I don't believe that you deserve another chance and I think you are likely to commit further acts of misconduct if I were to re-engage or reinstate you.*
- Therefore I confirm that my decision is to change the summary dismissal to a procedural dismissal as of 11 October 2016 due to misconduct. This change will mean that you will receive payment in lieu of notice."*
37. Mr Yates confirmed to us that that was simply an exercise of clemency on his part so that Mr Ayeh's lengthy service would not go unrewarded. He was not in any sense doubting that Mr Ayeh had committed acts of gross misconduct and

the substitution of procedural dismissal carried no greater significance than that it allowed Mr Ayeh to be paid his notice pay.

38. The final stage of the respondents' procedure is a second appeal which is on the papers only. It was at this stage that Mr Ayeh raised for the first time the fact that he did not get written confirmation of his warning and that he had not attended, nor signed to confirm his attendance at, the H&S training. Miss Walker gave that ground of appeal very short shrift. She noted that the warning had been discussed and referred to in both the original disciplinary meeting on 11 October and the appeal on 7 November and at no time had Mr Ayeh mentioned that he had not had the outcome letter and so had not had the chance to appeal the warning. In consequence Miss Walker felt that his explanation lacked credibility. The appeal was dismissed.

Interim conclusion

39. There can be no doubt that all of the relevant decision makers genuinely believed that Mr Ayeh was guilty of the misconduct complained of. There can equally be no doubt that the respondents had carried out a thorough and full inquiry into each of the allegations. All witnesses were interviewed, notes were taken of the interviews and the paperwork was shared with Mr Ayeh. The investigatory meetings, and the disciplinary and first appeal meetings were lengthy and thorough. The Tribunal is also satisfied that the respondents had reasonable grounds for believing that Mr Ayeh had committed each of the acts of misconduct complained of including having sworn directly at Meena Wody on 31 August. The fact that four witnesses only heard him swearing to himself does not mean that he did not swear at Miss Wody as well. Mr Ayeh could offer no explanation for why Miss Wody or Mr Tandec should concoct a story other than that they might have had a friendship and the respondents were certainly not unreasonable in accepting their evidence. Set against the background of the examples of gross misconduct in the respondents' disciplinary procedure and the fact that Mr Ayeh had a live written warning on file, the decision to dismiss was clearly within the range of reasonable responses. But that interim conclusion is subject to the issue of equality of treatment with others who have committed similar offences. It is that which forms the basis of the race discrimination claim to which we now turn.

The discrimination claim

40. Although it is merely background, we should start with Mr Ayeh's contention that he was systematically overburdened with work. His witnesses confirmed that he was indeed routinely asked to do numerous jobs. However, they could not say whether this was because he was black or whether it was because he was recognised as a willing worker. The fact that he did many hours of voluntary overtime apparently weekly (we note that in his claim form he gives his weekly average pay as £600 and his weekly average hours as 50 meaning 10 hours of overtime per week) strongly supports the view that he was a hard and willing worker. There is no suggestion that any of the overtime was anything other than entirely voluntary and he has himself emphasised that it was his regular habit to arrive for work $\frac{3}{4}$ of an hour before the start of the shift.
41. There is a relatively small team in the confectionary area and Mr Ayeh was not the only black African member of the team - there were six others and there were also members of other ethnic minorities. There is no suggestion, not even from Mr Ayeh, that anybody else was burdened with additional work, indeed he

rather makes the opposite point that he was the one singled out whereas others were treated with greater favouritism. Whilst we are satisfied that he appeared to be the supervisors' "go to" man when an extra task needed to be done, that does not seem to have been an issue for him until towards the end of his employment with the respondents. In short there is no evidence whatsoever from which we could conclude that there was any connection between his ethnic or racial origins and the fact that he seems to have been the 'go to' man. This background of excessive work therefore does not assist us when it comes to the central issue of whether the dismissal was tainted with race discrimination.

42. Mr Ayeh relies principally not on something which the respondent did but on something which the respondents failed to do in 2013. The available evidence is rather vague but it does appear to be the case that there was at least one and possibly two, confrontations between him and Cindy Payne. While it is not clear it does appear that in one of those Cindy made contact with him with a piping bag of cream. It seems likely that she threw it at him. Mr Ayeh raised a grievance which was investigated. Possibly because the respondents understood that his complaint of race discrimination concerned their failure to dismiss Cindy Payne in 2016 the documentation in the bundle around this 2013 incident is rather sparse and we have heard no direct evidence about it other than from Mr Ayeh. We must however approach his evidence with considerable caution, not only because of the many anomalies in it which we have already referred to but for an additional reason which will turn to in a moment. His grievance was investigated by the Stores Manager, Shirley Gurdez, who concluded that both he and Cindy Payne, who was at that time his team leader, had behaved inappropriately and had used inappropriate language towards each other. Miss Gurdez's conclusion was that the incident did not warrant any further action in terms of disciplinary sanction but her recommendation was that both Mr Ayeh and Miss Payne receive a coaching and counselling session with regard to the use of appropriate behaviour and language in line with company values. This was described as a supportive measure.
43. In our bundle of documents was a manuscript record of the counselling meeting which Mr Ayeh attended and a typed transcript which does suggest that the manager conducting the meeting, a Mr Cory Jost, understood that Mr Ayeh had sworn at Cindy after she had thrown the piping bag of cream at him. The note records that Mr Ayeh did not accept the counselling, did not accept that he had yelled at Cindy or swore at her and he felt that if anything he was the victim of an assault. Mr Ayeh's first reaction when these documents were drawn to his attention was that the note was a fabrication and he had not attended the counselling meeting. He said it was clear that he had not attended the counselling meeting because his signature was not on the manuscript record. The Tribunal asked for the original of the manuscript record to be produced because the copy in the bundle was rather faint. When the original was produced Mr Ayeh's signature became apparent proving that he had indeed attended the counselling. It is a central thread of Mr Ayeh's case that he has been treated less favourably than Cindy Payne over what he regards as a similar act of misconduct. It is clearly an issue which has rankled with him over the years. He raised the point several times during the course of the disciplinary and appeal hearings and also as part of his grievance of 2016. He had raised it before, in 2014, in another grievance letter. We therefore find it very difficult

indeed to believe that he could have forgotten that he had attended the counselling session, particularly as he was so obviously aggrieved by its outcome.

44. This then appears to be another opportunistic attempt by Mr Ayeh to take advantage of what, on the face of the document in the bundle, was a procedural lacuna – not having signed the manuscript record of the meeting - to construct a claim which he almost certainly knew to be false, that there had been no such meeting. It is for that reason that we find it impossible to place much reliance on Mr Ayeh's account of the incident between him and Ms Payne. However, there is sufficient material in the paperwork for us to be satisfied on the balance of probabilities that there was some kind of confrontation between the two (on Mr Ayeh's account there were two separate confrontations) and that it is likely that it involved her throwing a piping bag of cream at him. We were not taken to anything in the bundle giving Cindy Payne's side of the story, in particular her reason for throwing the piping bag. On the material we have seen there is nothing which could enable us to say that the respondents' decision, after what appears to have been an investigation into a grievance, that there were faults on both sides and that disciplinary action was not called for, was not an appropriate decision, untainted by racial considerations and Mr Ayeh has produced no reliable evidence to the contrary. The incident therefore seems to have been a one off and was of significantly lower key than the incidents which led to Mr Ayeh's dismissal.
45. There was a second incident involving Cindy Payne but not Mr Ayeh in May 2016. She was given a written warning for losing her temper with, and swearing at, a colleague. But there is a very obvious difference between her attitude to the disciplinary charge and Mr Ayeh's attitude to his disciplinary charges. The interview notes with Cindy Payne in 2016 show someone who was conscious that she had done wrong, contrite and apologetic. Mr Ayeh's stance in contrast, apart from apologising for the use of bad language under his breath on 31 August, was quite the opposite. Defiant, even arrogant, with no acknowledgement of fault on his part and the language which he used in the various interviews shows a worrying attitude towards those in authority over him. Supervisors are criticised for being disrespectful to him, and for not themselves doing tasks which he was being directed to do. He does not appear to take kindly to being thwarted when he feels that a task needs to be done and he does not take kindly to being given directions which he does not feel he should comply with.
46. We remind ourselves of the provisions of section 23 of the Equality Act. On a comparison of cases for the purposes of section 13 (complaints of direct discrimination) there must be no material differences between the circumstances relating to each case. In our judgment there are significant material differences between the cases of Cindy Payne and the case of Mr Ayeh, the most significant difference being that Mr Ayeh committed three or arguably four separate acts, each of which could legitimately have been characterised under the respondents' procedure as gross misconduct, between 6 May and 31 August 2016 and showed little or no recognition that he had done so. Ms Payne committed one such act in 2016 (the 2013 incident being reasonably seen by the respondents as six of one and half a dozen of the other) and fully acknowledged that she had been in the wrong. The complaint of race discrimination therefore fails.

Final conclusion

47. In the unfair dismissal context, as Mr Gorasia has reminded us, the leading authority on the question of disparity of treatment is ***Paul v East Surrey District Health Authority*** [1985] IRLR 305 CA. In that case the claimant complained that his dismissal was unfair because he had been treated differently from other employees who had been found to have committed a similar offence, namely drinking on duty. The Court of Appeal gave guidance on the correct approach where complaints of disparity of treatment are made. At paragraph 36 of the Judgment of Lord Justice Beldam, the following appears

“An employer is entitled to take into account not only the nature of the conduct and the surrounding facts but also any mitigating personal circumstances affecting the employee concerned. The attitude of the employee to his conduct may be a relevant factor in deciding whether a repetition is likely. Thus an employee who admits that conduct proved is unacceptable and accepts advice and help to avoid a repetition may be regarded differently from one who refuses to accept responsibility for his actions, argues with management or makes unfounded suggestions that his fellow employees have conspired to accuse him falsely. ...”

48. As Mr Gorasia submits all of those aggravating elements are present in Mr Ayeh’s case. Therefore there is no reason to disturb our preliminary finding that this dismissal was one which fell within the range of responses of the reasonable employer and was fair. The employer was not required to treat him in the same way that it treated Cindy Payne because the circumstances of the two cases, and in particular the conduct of the two employees both in terms of frequency of offending and recognition of fault, were materially different. The complaint of unfair dismissal therefore also fails and is dismissed.

Employment Judge J K Macmillan

Dated 11th October 2017