



EMPLOYMENT TRIBUNALS

Claimant

Respondent

MM

v British Airways PLC

Heard at: Amersham

On: 16, 17, 18, 19, 24 and 25 September
26 September 2019 (in chambers)

Before: Employment Judge Manley

Members: Mr A Kapur
Mr D Bean

Appearances

For the Claimant: In person

For the Respondent: Mr S Margo, Counsel

RESERVED JUDGMENT

1. The claimant was dismissed for a reason relating to his conduct and that dismissal was not unfair.
2. There were no acts of harassment or discrimination relating to the claimant's religion and his claims for religious harassment and/or discrimination are dismissed.
3. There were no acts of sex harassment or discrimination and the claimant's claims for sex harassment and direct discrimination are dismissed.
4. The claimant is not entitled to any payment for holiday pay and his unlawful deduction of wages claim is dismissed.
5. The respondent was entitled to dismiss the claimant summarily without notice because he committed an act of gross misconduct. The claim for breach of contract is dismissed.
6. All the claimant's claims are now dismissed.

REASONS

Introduction and issues

1. The claimant brought claims against the respondent after his dismissal in November 2017.
2. At a preliminary hearing in August 2018 attempts were made to draw up a list of issues but further information was needed, and a further hearing was therefore arranged on 19 March 2019 after the claimant had provided information.
3. The issues were then recorded but redactions were needed after an anonymity order was made. With those redactions, the issues are as follows:

4. **Unfair dismissal claim**

- 4.1 The respondent agrees that the claimant qualifies to claim unfair dismissal, this part of the claim is in time and the claimant was dismissed.
- 4.2 What was the reason for the dismissal? The respondent asserts that it was a reason related to conduct which is a potentially fair reason for section 98(2) Employment Rights Act 1996. That is the respondent relies on a breach of its dignity at work policy and abusive rude and offensive behaviour in the presence of colleagues in the work place. Factually, the respondent says that the claimant exposed an intimate part of his body in the workplace, in an unsolicited manner and he allowed photographs to be taken of it by others. The respondent must prove that it had a genuine belief in this misconduct and that this was the reason for dismissal.
- 4.3 The claimant says that the respondent dismissed him because from January 2016 to September 2017 he complained to the management through various statements, WhatsApp messages and face to face. He says the respondent dismissed him because of his complaints about sexual harassment and bullying and racial abuse.
- 4.4 Did the respondent hold that belief in the claimant's misconduct on reasonable grounds? The burden of proof is neutral here, but it helps to know the claimant's challenges to the fairness of the dismissal in advance and they are identified as follows:
 - 4.4.1 The allegation for which the respondent now says it dismissed the claimant had already been known about and dealt with. The respondent brought the same picture that had been dealt with in 2016 back into issue in 2017.

- 4.4.2 There was one picture taken when the claimant was asleep and QQ put his penis to the claimant's lips and took pictures and he said if the claimant did anything about it the claimant would get into trouble and the picture would be publicised. The claimant was frightened to do at about it. SS was the main witness: he said he could help the claimant, but he was warned by TT and Niss Parker that he would not get his voluntary redundancy money if he helped the claimant at all.
- 4.4.3 When the claimant reported what QQ had done to BA case management, they did not take it very seriously and they did not question any witness who might have supported the claimant, although he had pictures and WhatsApp evidence.
- 4.5 On the same burden of proof, did the respondent carry out as much investigation was reasonable in all the circumstances?
- 4.6 Was the decision to dismiss a fair sanction, that is, was it within the reasonable range of responses for a reasonable employer?
- 4.7 If the dismissal was unfair, did the claimant contribute to the dismissal by culpable conduct in that he was actually guilty of the conduct relied upon? This requires the respondent to prove, on the balance of probabilities, that the claimant actually committed the misconduct alleged.
- 4.8 Does the respondent prove that there was a percentage chance of a fair dismissal in any event? If so, what is the percentage and when would dismissal have taken place? ('Polkey'.)
5. **Section 26: Harassment on grounds of race and/or religion or belief.**
- 5.1 Did the respondent engage in unwanted conduct as follows?
- 5.1.1 PP in August 2016 said: *'not another Muslim is going to run our country'*, the he pointed a finger towards the claimant and said, *'you ISIS Muslim cunts'*
- 5.1.2 On 22 March 2017 PP said, *'when are we going to finish these Muslims, especially the one sitting here?'*
- 5.1.3 On 22 March TT and Brian Stephens said, *'we have had it with these Muslims and this ISIS. They should be sent to Mecca and blown off.'*
- 5.1.4 When the claimant responded to him, TT said, *'all you Muslims are the same'*.

- 5.1.5 On 22 May 2017 Brian Stephens said, '*this ISIS will never stop unless we Britons stand together and deal with these bastards.*'
- 5.1.6 On 19 June 2017 PP said, '*It's about time we finished them all*'
- 5.1.7 On 3 July 2017 PP said, '*Muslim cunts again*'
- 5.1.8 On 26 August Del Ninja said to the claimant: '*what's all this. You marry them, you convert them and then you kill them. What's wrong with you ISIS cunts?*'
- 5.1.9 In March 2017 to August 2017 QQ and Herjeet Chocker refusing to allow the claimant to go and pray;
- 5.1.10 When claimant used to sit down and eat, PP used to come and fart towards the claimant's food and then he and QQ would laugh about it;

Section 26: Harassment on grounds of sex/sexual orientation

- 5.1.11 In January 2016 the claimant was in a working pod and QQ came and pulled the claimant's trousers down;
- 5.1.12 In March 2016 when they were moved into Steps, QQ joined as well: he came and touched the claimant on his bottom; when the claimant told him off, he started laughing;
- 5.1.13 In April 2016 in a pod QQ tried to grab the claimant and kiss him.
- 5.1.14 In April 2016 the claimant was sitting on a sofa in a pod and started feeling itchy so he took his top off and QQ took the claimant's picture. The claimant asked him to stop and delete the pictures. QQ failed to delete the pictures.
- 5.1.15 In May 2016 QQ pinned the claimant down, trying to force himself on the claimant and touch the claimant;
- 5.1.16 In May 2016 when the pictures were taken QQ came and pulled the claimant's trousers down and took pictures. The claimant did not allow this: he said, 'please delete the pictures';
- 5.1.17 QQ did not delete the pictures;
- 5.1.18 In July 2016 early one morning the claimant was lying down in a box room, QQ's penis was touching his lips and QQ was taking pictures;

5.1.19. In September and October 2016 on more than one occasion, QQ pulled the claimant's trousers down.

5.1.20 On four occasions between February 2017 and June 2017 QQ pulled the claimant's trousers down.

5.1.21 In September 2017 as the claimant was lying down on the seat QQ was touching the claimant's private area. This was witnessed by 6 people who did not help the claimant at all.

5.1.22 Between August 2017 and September 2017 QQ repeatedly sent the claimant transvestite videos on WhatsApp.

5.2 Was the conduct related to the claimant's protected characteristic?

5.3 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

5.4 If not, did the conduct have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

5.5 In considering whether the conduct had that effect, the tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

6. Section 13: Direct discrimination on grounds of race and or/religion, sex sexual orientation.

6.1 Has the respondent subjected the claimant to the following treatment falling within section 39 Equality Act, namely:

6.1.1 Any of the treatment not found to have been harassment.

6.2 Has the respondent treated the claimant as alleged less favourably than it treated or would have treated a comparator without the protected characteristic.

6.3 If so, has the claimant proved primary facts from which the tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?

6.4 If so, what is the respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?

7. Section 27: Victimisation

- 7.1 Has the claimant carried out a protected act? The claimant relies upon the following:
- 7.1.1 In September 2017 the claimant complained to Alistair Sykes, Rashid Khan and Lorna Eliot about QQ touching his private parts;
 - 7.1.2 On three occasions from June 2016 to November 2016, including 4 November 2016, the claimant sent a written statement to Mr Alistair Sykes, Lorna Eliot and Rashid Khan saying that QQ was touching him and kissing him, taking his trousers off and showing his penis;
 - 7.1.3 in November 2016, and again to Simon Taylor in September 2017 the claimant made allegations of victimisation, sex/sexual orientation / race and religion and belief harassment.
 - 7.1.4 In September, October and November 2016 the claimant complained to Alistair Sykes about intimate images sent to him by QQ.

- 7.2 If there was a protected act, has the respondent carried out any of the treatment identified below because the claimant had done a protected act?

7.2.1 Suspending and/or dismissing the claimant.

8. Is the claim in time?

- 8.1 The claim form was presented on 6 March 2018. ACAS received notification on 24 January 2018 (day A) and an EC certificate was sent on 23 February 2018 (day B). Accordingly, any act or omission which took place before 25 October 2017 is potentially out of time, so that the tribunal may not have jurisdiction.
- 8.2 Does the claimant prove that there was conduct extending over a period which is to be treated as done at the end of the period? Is such conduct accordingly in time?
- 8.3 Was any complaint presented within such other period as the employment tribunal considers just and equitable?

9. Unpaid annual leave – Working Time Regulations

- 9.1 The parties agree that the claimant's leave year ran from 1 April to 31 March.

- 9.2 How much of the leave year had elapsed at the effective date of termination? The effective date of termination was 16 November 2017.
- 9.3 The claimant was entitled to 28 days leave in a year. In consequence, how much leave had accrued for the year under regulations 13 and 13A?
- 9.4 How much paid leave had the claimant taken in the year?
- 9.5 How many days remain unpaid?
- 9.6 What is the relevant net daily rate of pay?
- 9.7 How much pay is outstanding to be paid to the claimant?
- 10. Breach of contract**
- 10.1 The respondent accepts that it dismissed the claimant without notice.
- 10.2 To how much notice was the claimant entitled?
- 10.3 Does the respondent prove that it was entitled to dismiss the claimant without notice because the claimant had committed the gross misconduct alleged? NB this requires the respondent to prove, on the balance of probabilities, that the claimant actually committed the gross misconduct, not just that it reasonably believed that this was the case.
- 10.4 To how much notice was the claimant entitled?
- 4 Orders were also made at that hearing for anonymisation of various individuals involved in these proceedings and that remains in force and it was affected in this judgment.

The hearing

- 5 This matter was listed for a 10-day hearing but in the event, completed in a shorter time. The tribunal read the witness statements and relevant documents in the first day and proceeded to hear from the claimant and the following witnesses for the respondent:

TT – Crew Leader
QQ – Crew Leader
PP – Ramp Agent
Lorna Elliott – Senior Integrated Ramp Manager
Alastair Sykes – Operational Manager
Nicola Porter – People Policy Manager
Simon Taylor – Heathrow Operations Manager
Wendy Saib – Heathrow Services Manager

RR – Operations Manager
Oliver O'Dwyer – Resource Planning Manager
Lindsay Callard – Head of Heathrow HSSE

- 6 We also had a witness statement from SS who was a Ramp Agent and who has left the employment of the respondent. He did not give evidence for health reasons.
- 7 The bundle of documents contains relevant policies, notes and minutes of meetings and relevant letters. It also contains some WhatsApp messages and photographs of text messages. The tribunal has also seen stills of what would appear to be videos which seem to have been sent by mobile phone. The claimant also handed in further copies of photographs which were in the bundle which he believed might be clearer.
- 8 During the hearing we watched a short video on the claimant's phone (as there was no other copy) which showed QQ and SS, and which is described in QQ's witness statement at paragraph 17. QQ can be seen putting his arm up the trouser leg of SS. QQ said it was done to demonstrate to the claimant what "odd" conduct might be. This had been shown to the dismissing officer at the disciplinary hearing.
- 9 We also watched another recording on the claimant's phone. This was a video recording where nothing could be seen, but we heard an exchange between the claimant and a fellow worker, Mr Orridge. We listened to this audio recording several times because it was very difficult to hear what was being said, partly because the recording had been made without Mr Orridge's consent. We did hear Mr Orridge say something to the effect of "*he does it to me too*". This had also been shown to the dismissing officer at the disciplinary hearing.
- 10 We also clarified whether the complaints between issues 5.1.1 and 5.1.10 were race or religious discrimination and the claimant agreed that they related to his Muslim faith and were therefore allegations of religious harassment/discrimination. Similarly, the issues between 5.1.11 and 5.1.22 were clarified as being allegations of sex harassment/discrimination and not sexual orientation harassment/discrimination.

Facts

- 11 We find that the following facts are relevant to the issues which we must determine.
- 12 The claimant commenced working for the respondent in 2007. Before working where he was when he was dismissed, he had worked in "Loading". He moved to the Loading Support Team (LDS) at the beginning of 2016. This Team carries out a variety of roles with respect to necessary ground power around the aircraft and includes things like positioning and repositioning the jetties, maintenance of steps to the aircraft, moving ground equipment and so on.

- 13 The evidence was that employees are required to be largely self-directing because of fluctuations in work. Ramp Agents, which was the level that the claimant worked at, were expected to monitor flight schedules and undertake tasks which need completing without necessarily being asked to do so. The crew team leaders were responsible for overseeing teams of eight who worked in pairs. They were expected to ensure that work was completed but had no managerial responsibilities.
- 14 One of the crew team leaders was TT but the claimant's line manager was Rashid Khan, who was related to him by marriage. Mr Khan had some but limited involvement in matters which we will come to. Mr Khan's line manager was Mr Sykes and Mr Sykes' line manager was Ms Elliott.
- 15 British Airways is a substantial employer and it has a number of policies as would be expected for an employer of this size. The ones which are relevant for our purposes are EG901, which is the disciplinary procedure and EG903, which is the grievance policy.
- 16 The claimant had no previous recorded disciplinary matters on his file when he came to be dismissed later.

2016

- 17 The claimant makes a number of allegations with respect to inappropriate touching and behaviour by QQ commencing in January 2016. All are denied by QQ who gave evidence. For some of these allegations as set out above, we have heard very little evidence and for others we have had more detailed evidence.
- 18 The claimant's witness statement was not as clear as it might have been and lacked the specifics about dates and how they related to the incidents set out above in the issues. He was cross examined on the witness statement and the tribunal also asked him some questions.
- 19 The claimant alleges that, in January 2016, QQ pulled his trousers down. He also alleges that, in March 2016, he touched him on his bottom and when the claimant told him off, he started laughing. QQ gave evidence and denies these allegations as indeed he does the others which we will shortly come to. There is no evidence from any other witnesses about these alleged acts. The claimant did make some reference to these behaviours in an email he sent to Mr Sykes in November 2016, but they were not raised directly with QQ.
- 20 The claimant has not satisfied the tribunal that, on a balance of probabilities, these matters occurred. This is partly because of the lack of any independent evidence and partly because of what we say about the incident which occurs later in May of 2016 which we will come to. The claimant has been inconsistent in his evidence to the tribunal as indeed he was when he was attempting to explain matters to his employers. Those facts are not made out.

- 21 The claimant also alleges that various matters occurred in April 2016. He says that QQ tried to grab and kiss him, which is denied. Again, there are no independent witnesses and no further detail, nor was it raised in the email to Mr Sykes in November. The claimant has not satisfied us that, on a balance of probabilities, that matter occurred.
- 22 The other matter which is referred to in April is that the claimant took his top off and QQ took photographs of him. It is indeed a fact that the claimant did take his top off and QQ took photographs which we have seen. The claimant's explanation is that he believed there had been some sort of infestation in the room the team used, known as the "POD", and he was showing the marks on his stomach. It is possible that this might well have been the reason for the claimant to take his top off and QQ took the photographs. QQ denies that the claimant asked him to delete those photographs. In any event, the tribunal have seen them and they do not indicate any discomfort on the part of the claimant. We take the matter no further than that.
- 23 In May 2016, the claimant complains that QQ pinned him down, tried to force himself on him and touched him. He gave no more evidence about that incident and it is denied. Again, although there are references which seem similar to behaviour by QQ in the email of 4 November, there is nothing specifically which raises that issue. The claimant has not satisfied us, on the balance of probabilities, that that matter occurred.
- 24 We had considerable evidence about the next matter which occurred in May 2016. This appears as issue 5.1.16 and 5.1.17 in the list of issues. Indeed, it is the matter for which the claimant was subsequently dismissed.
- 25 We have seen five photographs showing the claimant with his trousers around his knees with his bare bottom exposed. In one of those photographs he can be seen bending over spreading his "bum cheeks" in front of someone who is sitting down, who we understand to be Mr Chhokar. On another photograph the claimant is smiling. These photographs were not seen by the respondent's management until September 2017. The claimant's explanation when he was asked about it then was that QQ had taken his trousers down several times and, on this occasion, the claimant took his trousers down himself and said, "*Is this what you want?*". The claimant accepted under cross examination that he had maintained that version of events five times right up to the first appeal hearing when he then said that QQ had taken his trousers down. He suggested that an explanation for that was some embarrassment on his part because he was concerned that some of his relatives worked at the airport.
- 26 QQ told us that the claimant had carried out these actions; pulling down his own trousers and exposing himself in the way the pictures show, and that QQ decided to take and retain these photographs in case they needed to be shown at some point to illustrate the claimant's behaviour. Nobody complained about this incident at the time. The tribunal finds that the claimant did pull down his own trousers and that he voluntarily exposed his

bottom to those in the POD and he appeared to be enjoying the incident. The claimant has not satisfied the tribunal that QQ took his trousers down, not least because that was not the version of events that he gave the first five times when asked about it.

- 27 Later in May 2016, PP wrote a comment on the whiteboard which was critical of the claimant. He referred to the claimant as "*blow out*" which is a phrase used commonly at the respondent for someone who says that they will be attending for overtime and then does not attend. This affects other people's earnings and is often criticised. It was clearly critical of the claimant and the claimant wrote a response criticising PP for writing on the wall "*So everyone can see it and take a piss out of me that's so childish. Grow up*". PP responded on the same whiteboard with a number of expletives, but the matter was taken no further at that point.
- 28 The claimant alleges that there were further incidents which he says happened in July 2016. The first is the incident set out in issue 5.1.18 which is that the claimant was lying down in the box room, QQ's penis was touching his lips and he was taking pictures. QQ denies that this incident occurred and there is no photograph. The claimant suggested that SS was a witness to this incident, but SS's witness statement makes it clear that he saw no such incident. The claimant also alleged that SS had been threatened that he should not say anything about it, or he would lose out in his voluntary redundancy, but SS said that those conversations never occurred. The claimant has not always been consistent in his evidence about this incident. For instance, he put it rather differently when he wrote to Ms Saib after dismissal and said that QQ had put his penis in his mouth. He did not mention this incident in the email to Mr Sykes in November although he did say that QQ had "*exposed his penis*". Again, the claimant's credibility is seriously undermined by his inconsistent evidence. If this had occurred, it seems to the tribunal that it would be very strange that the claimant did not complain about it at the time. The claimant has not satisfied the tribunal, on a balance of probabilities, that this incident occurred.
- 29 The claimant complained to Ms Elliott in August 2016. Rather than complaining about any actions of QQ, the claimant asked to speak to Ms Elliott about TT. In summary, he complained about how he believed TT's allocation of tasks was unfair. He raised several concerns about TT, including the fact that he believed he was using his position as a union representative to be absent for periods of time. Ms Elliott's evidence was that the claimant said nothing about any conduct of QQ "*sexual or otherwise*". Ms Elliott spoke to TT who said that he had some problems with the claimant as he called his seniority into question and that he was difficult to manage. TT was upset by the way the claimant was behaving and Ms Elliott advised him to try and ensure that work was evenly distributed as far as possible.
- 30 In September TT created a WhatsApp group to encourage communication between the team members in Block C, which is where the claimant was placed. In response to this, the claimant responded to the message

concluding “*Clear your hearts and minds from me and let’s work as a team. I have to forgive and forgot about everything so let’s start fresh and I am sorry if I did hurt anyone*”.

- 31 In the list of issues, under matters which have now been identified as religious discrimination, issue 5.1.1 states that PP made a comment in August 2016 (when Sadiq Khan was elected Mayor of London) - “*Not another Muslim is going to run our country*”, pointed his finger at the claimant and said, “*You ISIS Muslim cunts*”. PP denies having made this or indeed any of the other comments attributed to him later. The claimant made no mention of this matter when he spoke to Ms Elliott and, as will become clear, did not mention any aspect of abuse with respect to his religion until very much later. This allegation was not made until after the claimant had brought these tribunal proceedings. The claimant has not satisfied the tribunal, on a balance of probabilities, that this remark was made.
- 32 There are also allegations that QQ pulled the claimant’s trousers down in September or October but for reasons given above there is no independent evidence of this, no clear complaint about it and it is denied. The tribunal are not satisfied, on a balance of probabilities, that it occurred.
- 33 On 2 November 2016, TT complained to Barry Tadd, who was a more senior manager, about the claimant’s behaviour. TT’s evidence is that Mr Tadd then came to speak to the team about behaviour, but the claimant was not present. TT gave evidence that Mr Tadd said he would speak to the claimant the next day and that he (TT) rang the claimant and told him to expect a call from Barry about the team’s concerns. TT said that he offered to accompany the claimant to the meeting with Mr Tadd. When the claimant was asked questions about this in the tribunal, he denied that TT had telephoned him at home. Under cross examination, he said that he had had a phone call but that it was from another colleague. However, when he was shown evidence that TT had made a call to his number lasting eight minutes the claimant accepted that that call had been made by TT.
- 34 It may well have been TT’s call, and the fact that Mr Tadd was going to talk to him, that led to the claimant writing the first email to Mr Sykes which is dated 3 November. This is a short document which appears at page 147 of the bundle and refers to bullying and harassment and complains, primarily, about TT’s behaviour. Mr Sykes told us that when he saw that email he decided immediately to speak to members of the team and we have seen notes of his discussions with QQ, Mr Chhokar, Mr Sidhu, Mr Parker, “Snowy Mo”, SS and the claimant. It was clear to Mr Sykes that the email appeared to have been cut off, so he asked the claimant to send a complete version of the email which he did on 4 November.
- 35 There are some differences between the first page of that but, in summary, the claimant complains about a number of matters about TT but also about QQ and various other members of his team. Mr Sykes noticed that there were some allegations of inappropriate behaviour which he sets out at

paragraph 6(a) to (h) of his statement about QQ. In summary, these are that QQ repeatedly removed the claimant's trousers, that he exposed his penis in the workplace, that he took photographs of the claimant without his trousers on, that he implied the claimant's relationship was inappropriate and sexual, that the claimant had said that he himself had removed his trousers when he saw QQ approaching him (which is clear reference to the May 2016 incident). The claimant also complained about PP telephoning him at home, people taking smoking breaks and others bullying and picking on him.

36 When Mr Sykes spoke to the claimant's colleagues, they raised a number of concerns about him. They said that he was not a team player, that he did not always turn up to work overtime which he had agreed to, and that his behaviour was erratic. When Mr Sykes met with the claimant, his concerns were mostly about TT and Mr Sykes therefore interviewed TT on 8 November. Mr Sykes did not put directly to QQ the allegations of inappropriate behaviour although he did ask TT on one occasion "*Is there any other behaviours that have gone on in the POD that are inappropriate and shouldn't be happening at work?*" to which TT referred to a confrontation between himself and the claimant.

37 Mr Sykes interviewed the claimant further on 11 November and the tribunal has seen his notes of that conversation. It is almost exclusively about difficulties with TT and other vague references to being bullied. The claimant resisted the suggestion that he might move teams which Mr Sykes suggested. He raised no issues about QQ.

38 The tribunal considered Mr Sykes explanation for why he did not pursue what appeared to be relatively serious allegations of QQ's inappropriate behaviour at work. Mr Sykes' explanation was that the claimant concentrated almost entirely on issues with TT's allocation of work when he met with him and that his allegations, specifically those about QQ "*got lost*". Although the tribunal do not believe that is a particularly satisfactory explanation, it is perhaps understandable given that the claimant did not raise the matters again. In any event, there was no contemporaneous investigation into those allegations.

39 The claimant was then on a period of sick leave and special leave in November and December and he returned to work in early 2017.

2017

40 The claimant returned to work on 2 January 2017. There was then a meeting between Alastair Sykes, the claimant and TT to discuss relationships in the Block C team. A trade union representative was also present. Mr Sykes reminded the claimant that he had offered him the chance to work in a different area and the claimant had, for a short while, worked on the baggage belts but had then been granted special leave. He then returned after a period of sickness where he had had therapy and counselling. Mr Sykes told those present that he believed some of the behaviour in the team was unprofessional and disruptive and had led to

poor relationships. He then reported that he had personally visited Block C before the meeting and that the atmosphere seemed better. The claimant said that he did not wish to lodge a formal grievance and agreed that the atmosphere was better. The claimant's evidence is that he was told to delete photographs from his phone, but this is denied by Mr Sykes. Indeed, Mr Sykes's evidence, which we accept, was that no photographs were shown to him at this point so no mention of deletion would have occurred.

- 41 Mr Sykes said that he would send letters confirming their discussion and he did so with the claimant receiving a letter dated 25 January setting out what had been discussed in the meeting (page 195-196). The claimant was reminded that, if he believed he had been subject to harassment or bullying at work, a formal complaint could be made through the EG903 Grievance Procedure. Other people in the team received similar letters.
- 42 The claimant alleges that there were four occasions when QQ pulled his trousers down between February to June 2017. As with other allegations of this kind, the claimant has failed to convince the tribunal, on a balance of probabilities, that these incidents occurred.
- 43 The claimant did complain to Mr Khan about bullying around 25 February but then said he would take it further with Mr Sykes. The claimant had chest pains but was deemed fit after an ambulance was called and attended.
- 44 The claimant's case is that there were three incidents of religious abuse on 22 March 2017 (the date of the Westminster terrorist attack). These involved PP, TT and a Brian Stephens (who might be Brian Smith). The incidents are denied as are all the allegations contained within issues 5.1.1 and 5.1.10. PP and TT gave evidence. The rosters show that the claimant was not at work that day in any event. As with the other comments, we will come to, the only evidence is that of the claimant. The claimant made no mention of these alleged comments until after his dismissal and, given the multi religious make up of the workforce and the fact that the claimant had relatives working there, it is not credible that he would not have complained earlier, given that he did complain about other matters. The claimant has not shown that, on a balance of probabilities, these comments were made.
- 45 A similar comment is also alleged to have been made on 22 May 2017 (the date of the Manchester Arena terrorist attack), but the records show the claimant was absent from work. For the same reasons as are set out above, this allegation is not made out.
- 46 A further similar comment is alleged to have been made by PP on 19 June 2017 (the date of the Finsbury Park mosque terrorist attack), which is denied by PP. PP's evidence is also that neither he nor the claimant were in work that day. For those and the same reasons as set out above, the claimant has not made out that allegation.

- 47 In late June, TT spoke to Mr Khan about concerns he had about the claimant's conduct. Mr Khan also spoke to QQ. A meeting with Mr Khan was held where the claimant mentioned bullying but made no mention of the allegations of sex or religious discrimination or harassment. The trade union representative offered to try to resolve matters and later reported to Mr Khan that he had resolved them.
- 48 On 3 July 2017, the claimant alleges a similar comment made by PP, which is denied. Although PP was in work the rosters show that the claimant was not at work but on annual leave. The claimant has failed to satisfy the tribunal that, on a balance of probabilities, the remark was made. The claimant was then absent on dependency and sick leave, returning on 25 August.
- 49 The list of issues contains allegations that QQ sent "transvestite videos" to the claimant between August and September 2017. The allegation is denied by QQ. The only other evidence the tribunal saw about this allegation were still photos on the claimant's phone of video clips which appeared to be pornographic. These appeared to have been sent on 20 June but there was no indication of the year and were sent from a phone in the actual name of QQ. QQ indicated that another person could have put his name onto a phone to send them and told the tribunal that the police had looked at his phone when these matters were investigated by them and they found nothing. The claimant did not report these matters to Mr Sykes and the tribunal do not accept, on a balance of probabilities that QQ sent such videos.
- 50 The claimant did report a matter concerning 'Del Ninja' in August (which appears at issue 5.1.8) at the preliminary investigation meeting in October 2018 (see page 430). He said there that he reported it to Mr Sykes but that is denied, and the tribunal accept that the claimant did not tell Mr Sykes. Although we have heard directly from "Del Ninja", the claimant has not satisfied the tribunal, on a balance of probabilities that the remark was made. It is not credible that he would not have reported such a remark, and the other similar ones. The tribunal accepts that the workforce contains people who practice various religions and the claimant had a line manager in Mr Khan who he could have spoken to.
- 51 There are two allegations in the list of issues at 5.1.9 and 5.1.10 about which we heard very limited evidence. Both are denied by the respondent. The claimant gave no further details of when or how many times he had been refused the opportunity to pray and we accept TT's evidence that he had allowed him to pray when asked. Q said that he had not been asked. The claimant has not satisfied the tribunal that there was any such refusal. PP denied that he farted near the claimant's food and said that the claimant was guilty of such behaviour. Again, the claimant has been unable to give sufficient evidence for the tribunal to find that such behaviour occurred. Even if it had, it is hard to understand the connection to religion.

- 52 A further incident involving QQ is alleged to have taken place in September. This was the alleged touching of the claimant's 'private parts' said to have been witnessed, in issue 5.1.21 by six people, but, in the claimant's witness statement, he provided the names of three people who were present. QQ denies the allegation and, given the inconsistencies in the account provided by the claimant, he has not satisfied the tribunal that this incident happened.
- 53 On 2 September the claimant complained to Mr Khan about allocation of duties after his return from sick leave and an informal meeting was arranged. On the same day TT spoke to Mr Khan about what the claimant could do and whether there was any restriction on his duties.
- 54 On 3 September QQ and PP went to see another manager Dean Hughes to raise concerns about the claimant's behaviour. QQ cannot recall precisely what was raised but believes that it concerned the claimant complaining about allocation of work or refusing to carry out work.
- 55 On 7 September the claimant sent an email to Ms Elliott, Mr Sykes and Mr Khan which alleged bullying and other concerns about members of the team. At the end of the email he wrote "*I was asleep again QQ touched my private part I woke up and told him off*". He complained "especially" about TT.
- 56 Ms Elliott decided that the matter needed investigation and she asked Mr Simon Taylor to carry out an investigation on 8 September. Mr Taylor met with the claimant on 8 September. The claimant complained about bullying by colleagues, TT abusing his position and shouting at the claimant and QQ touching him on his "private parts". Mr Taylor's evidence was that the claimant focussed on TT. The claimant was handed copies of EG903 and asked to consider whether he wanted to make a formal grievance. The claimant stated, at one point, that he did not want to make a formal grievance.
- 57 On 9 September the claimant sent further emails saying he wanted to take the matter formally, particularly saying that he wanted to take a grievance against TT but not mentioning QQ. As this was a Saturday, Mr Taylor responded to say the grievances would be registered on Monday.
- 58 However, on Monday 11 September, the claimant sent an email to say that he had decided that he did not wish to pursue the grievance against TT (page 237). In that email the claimant says "*I have spoken to TT and he has said sorry to me and I have decided not to take this case forward and I would like to withdraw my complaint. Regard MM*".
- 59 As Mr Taylor had begun to look into the matters raised by the claimant, especially those which relate to allegations of inappropriate behaviour by QQ, investigation into that continued.
- 60 On or around 21 September, QQ, who had heard that he was to be suspended sent the photographs, which we have described above at

paragraph 25 of the May 2016 incident, to Dean Hughes. QQ was then suspended because the respondent had received information from the claimant that he had sexually harassed him.

- 61 The claimant was spoken to on 22 September and shown the photographs. He said in that interview that the photos had been given to Mr Sykes although Mr Sykes denied that they were shown to him at any point before he saw them later in the disciplinary process. This is the first time that the claimant says that he himself took his trousers off and made the comment "*Is this what you want*". He explained the bare chest photographs with respect to insect bites. The claimant was also suspended.
- 62 The claimant attended a preliminary investigation interview on 5 October and the second preliminary investigation on 17 October. Details were given by him then much in line with evidence he has given to the tribunal namely, that he was being bullied and harassed, that QQ took the photographs and that QQ had taken his trousers down on a number of occasions. The only point where the claimant referred to any comments about religion was as quoted above at paragraph 50. Other people were also spoken to during the investigation. They included Mr Sykes, QQ Mr Chhokar and Mr Khan. A second preliminary investigation meeting was also held with the claimant.
- 63 The respondent decided that QQ should attend a disciplinary hearing which he did on 19 October. The officer who dealt with QQ's disciplinary hearing was RR who is an Operations Manager for the respondent. Although it had been decided at the preliminary stage that there was insufficient evidence against QQ, it was decided that it would be better to investigate it further. During the disciplinary hearing QQ explained what he believed were difficulties in working with the claimant. He said that the claimant had voluntarily dropped his trousers along with other inappropriate behaviours. He denied the allegations of inappropriate behaviour at any time. RR decided that the investigation showed no inappropriate behaviour by QQ and that is what the officer found.
- 64 QQ explained to RR and subsequently to us the effect of the allegation on him and his family. He also explained that although he was not disciplined because the allegations were found to be false, the claimant had reported his behaviour to the police who then carried out an investigation including confiscating his mobile phone. QQ explained the effects on himself and his family.
- 65 As far as the claimant was concerned it was decided that there was a case for him to answer on the basis of his answers at the two preliminary investigation meetings and he was also called to a disciplinary hearing.
- 66 The claimant attended a disciplinary hearing on 7 November with Ms Saib. She explained to the tribunal that she looked at the preliminary investigation notes (which were extensive) and the respondent's policies. Although she had the personnel file, she did not look at that before the

meeting with the claimant and, in any event, it had nothing of any consequence in it. The claimant repeated what he had said about the incident in May which was that he had taken his own trousers down in some way because he anticipated QQ doing it. She also explained that she had been shown a video (explained above in paragraph 8) which was of QQ putting his hand up the trouser leg of SS. She explained that she did not think that was a similar incident to that shown on the photographs as it did not reveal any part of a naked body and there seemed to be no offence being caused. Although it seemed a little odd, she did not believe it was any way similar to the claimant taking his trousers down revealing his bottom and spreading his bum cheeks.

67 She also saw and heard the video (where it is only possible to hear the audio part of it) with the claimant discussing matters with Mr Orridge (see above at paragraph 9). As a result of that, she decided that she would speak to Mr Orridge. Mr Orridge was very shocked, Ms Saib said, to hear that his discussion with the claimant had been secretly recorded. He was adamant that he was not suggesting in that recording that there had been any inappropriate touching. The tribunal could not hear Mr Orridge suggest otherwise in that recording.

68 Ms Saib decided that the claimant's behaviour amounted to gross misconduct. She took into account the fact that it had happened some time earlier, but she believed that it was so serious that she would dismiss. She did not consider that any alternative sanction was appropriate given the possibility of other people seeing such an incident, including customers and other members of staff.

69 We heard some evidence from Ms Saib about the different standards which appear to be in place for those "above wing" and these, as with the claimant, who are "below wing". Some of that may well be to do with the fact that the majority of those below wing workers in this environment, as described to us, were male but we were told that such behaviour was not condoned, although it was known that some of the behaviours were less than ideal. However, Ms Saib said this was a serious matter and one which, in her view, clearly breached the respondent's policy about dignity at work. She expressed concern that the incident of the claimant taking his trousers down was in an operational area which was adjacent to jetties where the customers boarded the aircraft. She was quite clear that the incident was quite different from that where QQ could be seen putting his hand up a trouser leg of a colleague.

70 Ms Saib met with the claimant to tell him of his dismissal on 16 November and confirmed it in a detailed letter of outcome. That letter sets out the allegations of "*breach of EG103 Dignity at Work-Diversity and Inclusion and Abusive, rude or offensive behaviour in the presence of workmates and in the workplace*" and the decision to dismiss without notice. The letter is over 4 pages long and recites what was discussed at the disciplinary meeting and the investigation that Ms Saib undertook thereafter. She concluded as follows:

“Having listened to your explanations and mitigation, it is my belief that your behavior showed a distinct lack of respect towards your colleagues and put them in a very awkward situation that was beyond their control.....the effect of your actions could have had a detrimental effect on your colleagues’ wellbeing in the workplace and personal life”

- 71 In the tribunal hearing, Ms Saib told us that she considered that a final written warning would not be an appropriate sanction as she was concerned such an incident would not happen again and might be witnessed by customers and/or other employees including female staff.
- 72 The claimant immediately appealed saying that his dismissal was “*unfair and unjust*”. Although he was asked at this appeal and the next level for further grounds of appeal, the claimant was not able to supply them.
- 73 On 17 November the claimant sent an email to Ms Saib where he accepted that he did not tell the truth about the photograph of the May 2016 incident. What he said in the email is that QQ did take his trousers down rather than him taking them down himself. His explanation seems to be that he would “have been a laugh sock” (probably a laughingstock. He makes other allegations in that document including the allegation that QQ “*put his penis in my mouth*”. In short, the claimant accepted that he was changing his version of events in that letter.
- 74 The claimant was invited to an appeal meeting by Mr O’Dwyer and there was a hearing of that on 4 December with an outcome of the appeal on 19 December. The dismissal was confirmed.
- 75 He then appealed against that to the second (final) stage appeal hearing which he was invited on 10 January. The appeal hearing was on 19 January 2018. It was at this hearing that the claimant asked Mr Callard, who was the appeal officer, whether his dismissal was because “*I am Muslim*” to which Mr Callard replied that that was not the reason. The claimant did not mention any of the comments about religion referred to above. The dismissal was confirmed.

Law and submissions

Unfair dismissal

- 76 The first question for the tribunal on the unfair dismissal claim is whether the respondent has shown a potentially fair reason to dismiss the claimant. If it does, the question for the tribunal is whether the respondent acted reasonably in all the circumstances of the case. The dismissal will be unfair if no reasonable employer would have dismissed the claimant in the same situation. This is the band of reasonableness test as set out in *British Leyland v Swift* [1981] IRLR 91 and *Foley v Post Office* [2000] IRLR 827 and other cases.

77 The test in *British Home Stores Ltd v Burchell* [1980] ICR 303 applies to conduct dismissals. The tribunal must be satisfied that the respondent entertained a reasonable suspicion amounting to a belief that the claimant is guilty of the alleged misconduct. The following test must be applied:

- a. Did the respondent believe that the claimant was guilty of the misconduct alleged?
- b. Did the respondent have in mind reasonable grounds upon which to sustain that belief?
- c. At the time the belief was formed, had as much investigation as was reasonable in the circumstances of the case been carried out?

78 Fairness is to be judged at the time of dismissal. However, when considering whether an employer acted reasonably in dismissing an employee, the whole process including any appeal should be considered (*Taylor v OCS Group Ltd* [2006] ICR 1602). It is not for the tribunal to substitute its own view of the appropriate penalty for that of the respondent; nor should the tribunal ask itself whether a lesser sanction would have been reasonable.

79 So long as the whole process leading to the dismissal is within the band of reasonable responses, the dismissal will be fair. *Sainsbury's Supermarket Ltd v Hitt* [2003] IRLR 23 states that the reasonableness test applies to the investigation stage.

80 If the claimant succeeds, s.122(2) and s.123(6) of the Employment Rights Act 1996 might apply. The tribunal has discretion to reduce the basic award and the compensatory award by such amount as is "just and equitable", if the claimant's conduct to any extent caused or contributed to the dismissal. In order for a deduction to be made for contributory fault, the employee's conduct must be culpable or blameworthy (see *Nelson v British Broadcasting Corp (No 2)* [1980] ICR 110).

81 If there has been some procedural failing by the employer, the Tribunal can make a "Polkey" reduction to any compensation to take account of the chances that the claimant would have been fairly dismissed in any event. The EAT provided guidance on the application of this principle in the case of *Software 2000 Ltd v Andrews* [2007] ICR 825:

"The question is not whether the Tribunal can predict with confidence all that would have occurred; rather it is whether it can make any assessment with sufficient confidence about what is likely to have happened, using its common sense, experience and sense of justice" (at paragraph 53)

Equality Act (EQA) claims

Harassment

82 Section 26 EQA defines harassment as follows:

- “(1) A person (A) harasses another (B) if—
- (a) A engages in unwanted conduct related to a relevant protected characteristic, and
 - (b) the conduct has the purpose or effect of—
 - (i) violating B's dignity, or
 - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
- (2) A also harasses B if—
- (a) A engages in unwanted conduct of a sexual nature, and
 - (b) the conduct has the purpose or effect referred to in subsection (1)(b).
- (3) A also harasses B if—
- (a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,
 - (b) the conduct has the purpose or effect referred to in subsection (1)(b), and
 - (c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.
- (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
- (a) the perception of B;
 - (b) the other circumstances of the case;
 - (c) whether it is reasonable for the conduct to have that effect.

83 The protection from harassment, which applies only if the conduct is related to a protected characteristic, is not designed to protect claimants from trivial acts that cause upset.

Direct discrimination

84 Direct discrimination occurs where “because of a protected characteristic, A treats B less favourably than A treats or would treat others”: s.13(1) EQA.

85 The tribunal must compare like with like (except for the existence of the protected characteristic) and “there must be no material difference between the circumstances” of B and the comparator: s.23(1) EQA. In *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] IRLR 285 Lord Scott said as follows in respect of the characteristics of a comparator:

“...the comparator required for the purpose of the statutory definition of discrimination must be a comparator in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class.”

86 The fact that a claimant has been treated less favourably than an actual or hypothetical comparator is not enough to establish discrimination. Something more is required. In *Madarassy v Nomura International plc* [2007] ICR 867, Mummery LJ said as follows:

“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.”

87 In determining whether discrimination has taken place, the tribunal must enquire as to the conscious or subconscious mental processes which led the alleged discriminator to take a particular course of action in respect of the claimant, and to consider whether a protected characteristic played a significant part in the treatment: see *Nagarajan v London Regional Transport and others* [1999] ICR 887 (HL)).

88 S.136 EQA provides for the shifting burden of proof as follows:

“ (1) This section applies to any proceedings relating to a contravention of this 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 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”

89 It has recently been confirmed by the Court of Appeal in *Ayodele v Citylink and anor* [2017] EWCA Civ 1913, that the burden of proof is upon the claimant. In *Barton v Investec Henderson Crosthwaite Securities Ltd* [2003] IRLR 332, the EAT set out guidance to tribunals on the burden of proof rules then contained in the Sex Discrimination Act 1975. This was approved, with minor revisions, by the Court of Appeal in *Igen Ltd and others v Wong and other cases* [2005] ICR 931.

90 The conventional approach involves a two stage approach by the tribunal. At stage 1 the question is: can the claimant show a prima facie case? If the claimant can show such a prima facie case then the tribunal moves onto stage 2 and asks itself: is the respondent's explanation sufficient to show that it did not discriminate? In *Hewage v Grampian Health Board* [2012] ICR 1054. Lord Hope emphasised the limited significance of the burden of proof provisions (and the technical workings of the two stage test) in most cases. He stated, at paragraph 32, that these provisions, “*will require careful attention where there is room for doubt as to the facts*

necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other."

91 The employer has a defence if it can show that it took "*all reasonable steps*" to prevent the employee from doing that thing or anything of that description: s109(4) EQA. The test to be applied was established in *Canniffe v East Riding of Yorkshire Council* [2000] IRLR 555, EAT. There are two questions:

- a. Whether there were any preventative steps taken by an employer; and
- b. Whether any further preventative steps could have been taken that were reasonable

92 In *Croft v Royal Mail Group* [2003] ICR 1425, the Court of Appeal confirmed that the extent to which step taken by an employer would have made a difference is a factor that a tribunal is entitled to take into account. In that context, Pill LJ said as follows: "*Steps which require time, trouble and expense, and which may be counterproductive...many not be reasonable steps if, on assessment, they are likely to achieve little or nothing.*" The EHRC Employment Code states that "*An employer would be considered to have taken all reasonable steps if there were no further steps that they could have been expected to take.*"

93 The EHRC Employment Code is to be considered for guidance in applying the provisions of EQA. S123 EQA provides that the time limit for bringing a discrimination complaint is three months from the date of the act complained of or a further period that the tribunal finds is just and equitable. The burden of persuading the tribunal to exercise its discretion to extend time is on the claimant. The granting of an extension is the exception rather than the rule. Guidance in *Robertson v Bexley Community College* [2003] IRLR 434, CA is at paragraph 25:

"It is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule."

94 In *British Coal Corporation v Keeble* [1995] UKEAT 413/94/0607 the EAT considered the meaning of "just and equitable" (in the context of the Sex Discrimination Act 1975) and made clear that the Tribunal's discretion is as wide as that of the civil courts under s33 of the Limitation Act 1980. Section 33(3) of the Limitation Act 1980 provides (as is relevant) that the court "*shall have regard to all the circumstances of the case*" and, in particular to:

- “ a. the length of, and the reasons for, the delay on the part of the claimant;*
- b. the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the claimant or the defendant is or is likely to be less cogent than if the action had been brought within the normal time limit;*
- c. the conduct of the defendant after the cause of action arose, including the extent (if any) to which he responded to requests reasonably made by the claimant for information or inspection for the purpose of ascertaining facts which were or might be relevant to the claimant’s cause of action against the defendant;*
- d. the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action;*
- e. the extent to which the claimant acted promptly and reasonably once he knew whether or not [the Respondent’s conduct]...might be capable...of giving rise to an action for damages;*
- f. the steps, if any, taken by the claimant to obtain...legal or other expert advice and the nature of any such advice he may have received.”*

Conclusions

95 These are the tribunal’s conclusions, based on the facts as found by us and applying the legal tests set out above. We give our answers to the issues under Equality Act 2010 before we move on to considering unfair dismissal.

96 We deal first with the victimisation claim which is set out between issues 7.1.1 to 7.2.1. The claimant did carry out a protected act. The date at 7.1.1 is wrong. The claimant complained to Lorna Elliott in August 2016 but not mention QQ touching his private parts. The claimant did complain, as set out at 7.1.2, to Alastair Sykes on 4 November 2016 about QQ touching and kissing him etc. The claimant did suggest to Simon Taylor in the second stage appeal in January 2018 that the dismissal might be because of his religion but not before. The claimant did not complain to Alastair Sykes about intimate images being sent to him. Although not all those matters are made out, we do accept that the email to Alastair Sykes of 4 November 2016 is a protected act raising as it does potential issues of harassment related to sex. That is the only protected act.

97 We therefore ask the question whether the suspension or dismissal of the claimant was because of the protected act. We cannot find that that is the case. There is no reason for the delay between the protected act in November 2016 and September 2017 when the respondent began to take

action with respect to the photographs of May 2016. The reason that steps were taken then was because that was when the photographs came to management's attention. The suspension and later dismissal did not arise from what the claimant said to Alastair Sykes in November 2016. What is more, and, as we have indicated, somewhat to our surprise, it appears that the matters the claimant raised in November 2016 with Alastair Sykes "got lost" rather than led to any action by the respondent. The reason for the claimant's suspension or dismissal was because of the coming to light of the photographs and what the respondent considered to be misconduct.

98 We turn then to the allegations of harassment on the grounds of religion and sex. It is argued that some of the complaints may be out of time because they occurred more than three months before the claim form was presented in March 2018. This must be true of those allegations that relate to 2016 and early 2017. To bring those complaints in time the claimant would have to argue that there was an act extending over a period or it would be just and equitable to extend time. As a litigant in person the claimant has not specifically made those arguments. Because we have found that the claimant has not satisfied that the acts occurred as he has alleged, we have not spent time considering the out of time issue.

99 We can say that the claimant has failed to make out any facts upon which we could conclude that harassment related to his sex or his religion has been made out. He has not shown us that any of the facts as alleged by him occurred in the way in which he alleges they did. He has failed to shift the burden of proof to the respondent. It therefore follows that his complaint of harassment on either of those grounds must fail as there is nothing for the respondent to explain. For the same reasons, we cannot find that there was any direct discrimination because of his sex or religion.

100 As for the unfair dismissal claim, we say first that the respondent has satisfied the tribunal that the reason for the claimant's dismissal related to his conduct. That was the reason that it undertook the investigation, followed the disciplinary process and decided that dismissal was the appropriate sanction.

101 We then turn to consider whether the respondent held the belief in his misconduct on reasonable grounds. The claimant does not suggest any defects in the procedure although he does point out (at issue 4.4.1) that the photographs were from May 2016, some time before. That is accepted but, of course, the respondent was not aware of them until September 2017 when it took immediate steps to investigate.

102 Issue 4.4.2 suggests a photograph of an incident where there are no photographs and the tribunal has found that the incident did not occur. Nor did the claimant produce evidence that he suggested he had of pictures which supported his case.

103 We need to consider whether the respondent carried out as much investigation as was reasonable in the circumstances. We have seen the extent of the investigation which was thorough. Several people were

interviewed, QQ was suspended and went through a disciplinary process, ultimately finding that he had not carried out the acts suggested by the claimant. This seems to us to be a full and thorough investigation with one exception. It does not appear that SS was spoken to at the time, but we have read his witness statement for this hearing. It is more than likely that, if they had spoken to him, he would have said what his witness statement says which is that he did not support the claimant's allegations. In all the circumstances this is an investigation which falls within the band of reasonable investigations.

104 Turning then to issue 4.6, we need to consider whether dismissal was a reasonable sanction in all the circumstances. We cannot say that Ms Saib's decision to dismiss the claimant fell outside the range of reasonable responses. The images which we have seen, particularly of the claimant's trousers being down and what he is then photographed doing and his smiling face, is a clear indication of something which a reasonable employer could consider to be misconduct. Whilst there might have been some other incidents amongst this team, some of which seem rather unusual, this is an act which goes beyond that. Given the claimant's difficulty with being consistent in what he said happened and his acknowledgment during the disciplinary process that he himself took his trousers down, pulled his bum cheeks apart in front of a colleague and smiled at the camera, the tribunal accept that a decision that this amounted to gross misconduct and to dismiss does not fall outside the range of reasonable responses. The dismissal was not unfair.

Annual leave

105 The claimant did not pursue this matter. It is clear from Ms Porter's evidence that he had taken all holidays he was entitled to at the point of dismissal. That claim fails.

Breach of contract

106 The claimant's conduct amounted to serious conduct which was so serious as to entitle the respondent to dismiss him without notice. The claim for breach of contract must fail.

107 In summary, all the claimant's claims fail and are dismissed.

Employment Judge Manley

Date: 16 October 2019

Sent to the parties on: 17 October 2019

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For the Tribunal Office