



EMPLOYMENT TRIBUNALS

Claimant

Mr Clifton Coleman

v

Respondent

Tesco Stores Limited Limited

Heard at: (CVP)

On: 14-17 March 2023

Before: Employment Judge R Wood; Ms I Fox; Mr J Sharma

Appearances

For the Claimant: Mr Hailston (Lay Representative)

For the Respondent: Miss Wheeler (Counsel)

RESERVED JUDGMENT

1. The Claimant was not the subject of discrimination based on race by the respondent.
2. The claimant was unfairly dismissed by the respondent.

DECISION

Claims and Issues

1. Page numbering referred to in square brackets in these reasons are to pages in the bundle, unless otherwise stated.
2. This is a claim which involves allegations of direct race discrimination, and unfair dismissal. The claimant was dismissed from his employment as a warehouse manager with the respondent on 26 July 2021. The respondent asserts that he was dismissed on the grounds of misconduct. In particular, it is alleged that he displayed favoritism towards a member of his team, a Ms Kinga Szabo. There were three separate facets to this allegation. Firstly, it was alleged that on a number of occasions, the claimant improperly made her the subject of 'delays'. This is a mechanism by which employees could be compensated for time spent not working whilst on shift, for instance when required to attend meetings with management. The respondent's position is that he had used 'delays' in respect of social discussions with Ms Szabo.

Further, that he had keyed 'delays' into the time keeping system (known as WFC) which were in excess of the time spent involved in the meetings/discussions. In either case, it was alleged that he had artificially inflated her performance in respect of those shifts.

3. For his part, the claimant denied he had done anything wrong in this regard. He admitted to having several meetings with Ms Szabo over the course of three shifts on 9, 10 and 11 June 2021. These took place in the outdoor smoking area. He stated that these were meetings about important and confidential personal matters involving Ms Szabo, and that it was appropriate to take a significant amount of time to deal with the issues raised. It was his view that she was, at the time, a vulnerable individual, who needed understanding and empathy. The claimant said it was common practice to offset the time spent in these meetings by keying in 'delays' to WFC, so that she was not disadvantaged in terms of performance indicators. She was a picker in the warehouse, and the time spent outside of that environment could be a serious performance issue.
4. Secondly, it was alleged that Miss Szabo was made the subject of inappropriate late amendments by the claimant. It was common ground that from early 2021, notwithstanding that if a member of staff was late, that they would still be paid, and that WFC would be amended to show (in the case of a night shift) an arrival time of 22.00hrs. However, what was asserted by the respondent was that this amendment should be marked as 'late and acknowledged' so as to leave a record of lateness for performance management purposes. It was alleged that the claimant was failing to do this in Ms Szabo's case. There were five occasions when this had happened: on 20 and 21 January, and 18, 19 and 25 March 2021. [162].
5. Again, the claimant said this was common practice amongst managers at the site. He said there was nothing in writing which required managers to mark a late on the system. Staff were paid for the full shift in any event so there were no financial implications associated with the practice.
6. Thirdly, it was alleged that the claimant had inappropriately changed Ms Szabo from non-premium shifts to bank holiday premium shifts i.e one paid at a non-standard rate, without a business justification. The respondent alleged he had done this on a number occasions, and specifically for the late May bank holiday in 2021.
7. In relation to bank holidays, the claimant denied that there had ever been a need to have a business justification before moving someone onto a bank holiday shift. It was sufficient that a member of staff wished to work on a bank holiday. Managers had been told to look after staff and to grant requests where possible.
8. In broader terms, the claimant alleges that his dismissal was the result of him being singled out on the grounds that he was black. He was the only non-white member of the night shift management. This caused him to be treated differently to other members of the team in that others who had

behaved in the same way in respect of the use of delays, late amendments, and swapping bank holiday shifts, had not been disciplined and/or dismissed. The claimant went on to allege that the respondent had based its decision on inaccurate information and that the process was bias and predetermined. Those involved, particularly Mr Maloney, who chaired the disciplinary hearing, were subject to conflict of interests.

Procedure, Documents and Evidence Heard

9. The Hearing took place on 14-17 March 2023. The claim was heard via a remote CVP hearing. We first of all heard testimony from the respondent, 's witnesses. We heard evidence from Mr Martin Maloney (planning and capability manager); and from Ms Kate Fairbrother (distribution centre manager). We also heard from the claimant, as well as a number of witness who gave evidence on his behalf. These were Mr Djibril Mohammed; Mr Michael Brown; and Mr Ziyad Hussain. Each of the aforesaid witnesses adopted their witness statements and confirmed that the contents were true. We also had an agreed bundle of documents which comprises 406 pages. We also heard helpful submissions from Mr Hailston and Miss Wheeler.
10. In coming to our decision, the panel had regard to all of the written and oral evidence submitted, even if a particular aspect of it is not mentioned expressly within the decision itself.

Legal Framework

11. The relevant legislation in respect of the allegations of direct discrimination is contained in the Equality Act 2010 ("the Act").
12. Race is a protected characteristics as defined by section 4 of the Act. Sections 39 and 40 prohibit unlawful discrimination against employees in the field of work. Section 39(2) provides that:

"An employer (A) must not discriminate against an employee of A's (B) -

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c) by dismissing B; or (d) by subjecting B to any other detriment."

13. Section 136 of the Act provides that:

"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".

This provision reverses the burden of proof if there is a prima facie case of direct discrimination.

14. In summary, the Act provides that a person with a protected characteristic is protected at work from prohibited conduct as defined by Chapter 2 of it. In addition to the statutory provisions, Employment Tribunals are obliged to take in to account the provisions of the statutory Code of Practice on the Equality Act 2010 produced by the Commission for Equality and Human Rights.
15. Direct discrimination is defined in section 13(1) of the Act as “*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*”. The application of those principles was summarised by the Employment Appeal Tribunal in London Borough of Islington v Ladele (Liberty intervening) EAT/0453/08, which has since been upheld:
 - (a) In every case the Employment Tribunal has to determine the reason why the claimant was treated as he was. In most cases this will call for some consideration of the mental processes (conscious or subconscious) of the alleged discriminator.
 - (b) If the Employment Tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it is significant in the sense of being more than trivial.
 - (c) Direct evidence of discrimination is rare and Employment Tribunals frequently have to infer discrimination from all the material facts. The courts have adopted the two-stage test. The first stage places a burden on the claimant to establish a prima facie case of discrimination. That requires the claimant to prove facts from which inferences could be drawn that the employer has treated them less favourably on the prohibited ground. If the claimant proves such facts then the second stage is engaged. At that stage the burden shifts to the employer who can only discharge the burden by proving on the balance of probabilities that the treatment was not on the prohibited ground. If they fail to establish that, the Tribunal must find that there is discrimination.
 - (d) The explanation for the less favourable treatment does not have to be a reasonable one. In the circumstances of a particular case unreasonable treatment may be evidence of discrimination such as to engage stage two and call for an explanation. If the employer fails to provide a non-discriminatory explanation for the unreasonable treatment, then the inference of discrimination must be drawn. The inference is then drawn not from the unreasonable treatment itself - or at least not simply from that

fact - but from the failure to provide a non-discriminatory explanation for it. But if the employer shows that the reason for the less favourable treatment has nothing to do with the prohibited ground, the burden is discharged at the second stage, however unreasonable the treatment.

- (e) It is not necessary in every case for an Employment Tribunal to go through the two-stage process. In some cases it may be appropriate simply to focus on the reason given by the employer (“the reason why”) and, if the Tribunal is satisfied that this discloses no discrimination, then it need not go through the exercise of considering whether the other evidence, absent the explanation, would have been capable of amounting to a prima facie case under stage one of the Igen test.
- (f) It is implicit in the concept of discrimination that the claimant is treated differently than the statutory comparator is or would be treated. The determination of the comparator depends upon the reason for the difference in treatment. The question whether the claimant has received less favourable treatment is often inextricably linked with the question why the claimant was treated as she was. However, as the EAT noted (in *Ladele*) although comparators may be of evidential value in determining the reason why the claimant was treated as he or she was, frequently they cast no useful light on that question at all. In some instances, comparators can be misleading because there will be unlawful discrimination where the prohibited ground contributes to an act or decision even though it is not the sole or principal reason for it. If the Employment Tribunal is able to conclude that the respondent would not have treated the comparator more favourably, then it is unnecessary to determine the characteristics of the statutory comparator.

12. The relevant case law in relation to unfair dismissal is to be found in the Employment Rights Act (“ERA”) 1998 at section 98:

“General

- (1) *In determining for the purpose of this part whether the dismissal of an employee is fair or unfair it is for the employer to show—*
- (a) *the reason (or if more than one, the principal reason) for the dismissal, and*
- (b) *that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*
- (2) *A reason falls within this subsection if it-*

- (a) *relates to the capability or qualifications of the employee for performing work of the kind which he was employed to do,*
- (b) *relates to the conduct of the employee,*
- (c) *is that the employee was redundant, or*
- (d) *is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.”*

When the alleged reason for dismissal is misconduct, then the Tribunal should ask itself the following questions

1.1 What was the reason (or, if more than one, the principal reason) for the Claimant’s dismissal? The Respondent asserts that the Claimant was dismissed for a reason related to his conduct (s.98(2)(b) ERA).

1.2 If the Tribunal is satisfied that the Claimant was dismissed for a reason relating to her conduct:

1.3.1 Did the Respondent’s managers believe the Claimant to be guilty of gross misconduct?

1.3.2 Did the Respondents’ managers have in mind reasonable grounds upon which to sustain that belief?

1.3.3 At the stage at which that belief was formed on those grounds, had the Respondents’ managers carried out as much investigation into the matter as was reasonable in the circumstances?

1.4 Did the Respondents in the circumstances (including its size and administrative resources) act reasonably or unreasonably in treating said conduct as a sufficient reason for dismissing the Claimant, to be determined in accordance with equity and the substantial merits of the case.

1.5 In the particular circumstances of this case, did the decision to dismiss fall within the band of reasonable responses which a reasonable employer might have adopted?

Findings

13. Based on the evidence that we heard and read, the Employment Tribunal made the following primary findings of fact relevant to the issues that we had to determine.

14. The claimant was a warehouse team manager at the respondent's distribution centre in Daventry. He worked along with 12 other warehouse team managers at the site. The managers were responsible for about 350 warehouse operatives. The claimant had about 38 people under his supervision, including Ms Szabo, who had joined his team in 2020. He had worked for the respondent for 26 years, with a brief break due to redundancy. He was an experienced manager by his own admission. He is black and from a West Indian background. He had an unblemished disciplinary history with the respondent prior to these matters.
15. Mr Maloney became a night shift manager at Daventry in April 2021, before taking up his current role as Planning and Capability Manager, later that year. He had also completed his training to chair disciplinary hearings in April 2021. It was the Tribunal's view that Mr Maloney was at a disadvantage by reason of his relative inexperience of the disciplinary role, and of the Daventry site in general.
16. Mr Maloney and the claimant had not met prior to April 2021. It was our view that upon arrival at Daventry, and having spoken to a number of managers and other staff at the site, that he would have been aware of the commonly held belief that the claimant and Miss Szabo, were in a relationship. It has not been necessary for the Tribunal to come to a view as to whether this view was correct or not. In any event, it was the cause of general ill feeling amongst other managers and staff. This was why it had been felt necessary to have the claimant investigated by a team manager from another depot.
17. In or around May 2021, Mr Maloney was privy to information that the claimant was allegedly showing favoritism towards Ms Szabo in the sense that she was being swapped to premium bank holiday shifts without good reason. He investigated WFC data for Ms Szabo. He concluded that there were anomalies which justified further investigation in relation to the swapping of bank holidays, late amendments, and 'delays'. Mr Maloney accepted that his witness statement was wrong when he suggested he had referred the matter for investigation only in relation to bank holidays. This is apparent from the investigation checklist which starts at page 69. In other words, Mr Maloney's investigation went beyond the rumours he had heard i.e. which relates only to practices in relation to bank holiday shifts. We think this was important.
18. On 15 June 2021, the claimant was suspended pending investigation of the aforesaid matters. We accept that this was on the basis that he might interfere with evidence on the WFC if he were allowed to remain at work. The investigation was carried out by Mr D Berkshire. He spoke to the claimant on 22 June 2021 [100]. This meeting lasted for 3.5 hours. His findings appear at page 116 of the bundle. This process appears to have been reasonably thorough, clear, and fair. The Tribunal is satisfied that Mr Berkshire was independent and without bias. Further, we find no evidence that his investigation was tainted by race discrimination. Not coming from the same depot, and not really being associated with anyone there, we see insufficient evidence that he would have any reason to single out the

claimant on the grounds of race or for any other reason. We were impressed in particular by Mr Berkshire's findings at [116-117] which are thorough, and were largely unchallenged before us.

19. However, we are satisfied that it was inappropriate for Mr Maloney to have chaired the disciplinary hearing. Firstly, he had investigated the matters initially, and had come to conclusions which were adverse to the claimant. He had then referred the matter to an individual outside of the depot because he was satisfied that to do otherwise would not have seemed impartial. It is our view that this logic should have been applied to the appointment of the disciplinary officer. We note that there was a lack of suitably qualified managers at Daventry to assume the role. However, it should have been obvious that as the person who first investigated the matter, and who suspended the claimant, that he would not be viewed as impartial, no matter how long he had been at the Daventry depot.
20. The Tribunal also note that he made the following observations in his witness statement as to his thoughts when assuming the role of chair [paragraph 21]:

“The allegations made against Clifton were not something I usually see, and it is not behaviour I would expect to see from a manager. I had no doubts in my mind as to the seriousness of this both for Tesco and for Clifton.
21. It struck the Tribunal that this was not the language of someone who was coming to the matter with an open mind. In other words, the Tribunal was satisfied that by his actions and thought processes, Mr Maloney had come to a view as to the validity of the allegations, albeit perhaps on a provisional basis, and that it was unfair for him to assume the role of chair of the disciplinary process. We also note that the respondent's own disciplinary policy at paragraph 7 [58-59] requires that the chair will be “impartial”. This is later defined as follows: “*Being impartial means that the manager has no other involvement in the matter (e.g. they're not a witness to any events) and have no interest in the outcome of any meeting. Effectively they are a neutral party.*”. It was our view that Mr Maloney had been heavily involved, and could not reasonably bring himself within this definition. The respondent is, to say the least, a large organisation, with massive resources. There was no need for Mr Maloney to chair the disciplinary hearing.
22. The process that followed was in many ways fair. At the three hearings that took place, the claimant was invited to respond to the allegations, and was giving a reasonable opportunity to argue his case. The Tribunal was satisfied that the claimant was invited to a disciplinary process on the grounds of the suspected misconduct, and not on the grounds of race. In this respect, it is noteworthy that the claimant did not himself raise the issue of race discrimination during the disciplinary process, notwithstanding that he raised other perceived shortcomings and unfairness of the disciplinary process. If the claimant had suspected that he was being singled out on the

grounds of him being a black man, then it is reasonable to assume that he would have raised it. The tribunal infer from his failure to do so that at the time he did not suspect any such motivation.

23. The Tribunal was satisfied that the notes of the disciplinary hearings are in broad terms an accurate record of what took place. They reveal that the claimant was able to make the points that he wished to make in large part. It was suggested by Mr Maloney that the claimant's comments during the disciplinary process "consisted of obfuscation, evasion and attempts to throw other managers under the bus". The Tribunal has some sympathy with this observation. It was the Tribunal's experience of the claimant that he struggled to understand the essential nature of the allegation that was being made against him, namely favouritism. Rather he viewed them as three discrete allegations of failing to apply company policies. The claimant was consistent in the view that he could not be culpable if other managers were also failing to implementing the rules. In our view, this was flawed. It was our view that if he was found to have breached rules and/or showed favouritism towards a single member of staff under his supervision, it would simply mean that others were at fault as well.
24. The Tribunal also found the claimant to be often reluctant to grapple with the nature of the relevant company rules, and the highlighted anomalies in the way he was implementing those policies. The claimant was often evasive during the hearing. However, with perseverance, it became apparent that there was little disagreement between the claimant and the respondent as to the basic facts of the alleged misconduct. The claimant accepted that he had swapped Ms Szabo shifts to bank holidays on a number of occasions, and that he had done so without what might be described as a business justification. It was his view that such a reason had never been required and that it was a question of keeping staff happy.
25. The Tribunal notes that when the claimant gave evidence before us, he stated that he had swapped Ms Szabo to the bank holiday shift in May 2021 because there had been Covid related staff shortages, and that there was accordingly a business justification. This had not been raised before, not even in his witness statement. We were satisfied that the claimant had made up this evidence on the spur of the moment, out of a sense of desperation to justify his actions. Perhaps he had realised that his position on this point was untenable. Whatever the reason, we did not accept this part of his testimony.
26. In relation to the 'delays' for the shifts in June 2021, the claimant accepted that he had keyed in 'delays' of several hours in duration, when the length of the meetings that had actually taken place was limited to 1-2 hours. It was the claimant's testimony that it was acceptable to "artificially inflate" performance in this way so as to avoid performance management. Indeed, it was suggested this was common practice. Consistent with the respondent, we found insufficient evidence of this.

27. In relation to late amendments, the claimant accepted that he had, on a number of occasions, changed WFC to remove a record of the claimant arriving late, sometimes by several hours, such that there would be no record at all of her turning up late for work. Indeed, on one occasion, another manager had recorded that Ms Szabo had arrived late by entering the words “late and acknowledged” on the system. We find that this was the correct approach. However, on this occasion, the claimant accepted that he had changed his fellow managers entry by removing the “late and acknowledged” record, again completely removing any note that Ms Szabo had attended work late. Try as we might, we could find no satisfactory explanation for this practice by the claimant. To this extent, we agreed that there was, in this regard, a lack of ownership of fault on the part of the claimant.
28. The Tribunal was satisfied that to some extent, the respondent investigated the claimant’s arguments. At all steps in the process, it was apparent that Mr Maloney, and then Ms Fairbrother, spoke to other members of staff who had been named by the claimant, and also interrogated relevant company records. Both Mr Maloney and Ms Fairbrother were, to some extent, prepared to adjourn hearings to carry out these investigations. To this end, there were three disciplinary hearings (29th and 30th June, and 6th July) and three appeal hearings (5th August, 24th September, and 18th October 2021). To some extent, there was a preparedness to consider the claimant’s submissions.
29. For instance, Mr Maloney investigated whether the claimant had dealt with late attendance by other staff in the same way as for Ms Szabo. The evidence was that he had not. There were similar findings in relation to the claimant’s arguments in relation to ‘delays’ and bank holiday shifts. The evidence demonstrated bias towards Ms Szabo. Mr Maloney could find nothing to corroborate the claimant’s position. Mr Maloney’s thought processes and findings are set out in some detail at [137-140]. The Tribunal is satisfied that this document demonstrates a genuine attempt to properly investigate the matters, and to come to sound conclusions. It is less than ideal that this document, which forms the basis of his decision to dismiss the claimant, was written prior to the final disciplinary hearing on 6th July 2021. This does demonstrate that he had taken the decision to dismiss prior to to this meeting. This is to be viewed along side the rather abrupt way that Mr Maloney concluded this meeting. The notes at [196] demonstrate that the claimant wished to respond to a point. Mr Maloney refused, stating that he was at the decision making stage. To this extent, we find that the decision to dismiss was predetermined and that Mr Maloney had not remained fully open to the claimant’s submissions to the end of the process.
30. In relation to the appeal process, as stated above, there were some positive features. The fact there were three hearing reflected Ms Fairbrother’s general willingness to explore avenues opened up by the claimant. She spoke to several members of staff named by him. We are satisfied that there were genuine attempts to investigate the alleged misconduct. The Tribunal finds that Ms Fairbrother did not single the claimant out, whether on the grounds of his race or otherwise. We find that she had had next to no contact

with the claimant prior to the appeal process, having joined the Daventry depot only a few weeks before.

31. The Tribunal was however surprised at how she dealt with the allegation of race discrimination, when it was finally made by the claimant. This occurred not until the second of the three appeal hearings on 24th September 2021. We are satisfied that the claimant read out a document during this hearing. It is the one which appears at [299-305]. This contains reference to race discrimination on two occasions. At [303], it refers to “*a clear element of racial discrimination and or institutionalised racism here....*”. Notwithstanding the gravity of the allegation, Ms Fairbrother does not appear to deal with it at all during the meeting of 24th September.
32. On 18th October 2021, the issue of race discrimination is dealt with at the start of the meeting in a rather cursory fashion by Ms Fairbrother [328] where she expresses the view that there is insufficient evidence of discrimination. Surprisingly, this part of the claimant’s case is not even mentioned in the appeal letter at [337]. It was the Tribunal’s view that this was a significant failing of the process. We accept that there was insufficient evidence of race discrimination in this case. However, it remained incumbent on the respondent to investigate this allegation in the same way as other aspects of the claimant’s case.

Reasons and Decision

Discrimination

33. We began our considerations by looking at the race discrimination allegations.
34. We applied the guidance set out in the case of *Ladele* above. In our judgment that there was not even prima facie evidence of discrimination in this case. It was our view that the sole reason for the dismissal, and for bringing disciplinary proceedings in the first place, was a belief that the claimant had engaged in misconduct. There was clear evidence raising the issue of favoritism, and the three separate facets of that allegation. Moreover, as stated above, the claimant largely accepted the factual basis of the respondent’s case. This was certainly not a situation where the respondent had fabricated a misconduct case against the claimant to conceal underlying race discrimination. What the claimant suggested (eventually) was that these were matters would not have been the subject of disciplinary proceedings but for his race, and would not have resulted in dismissal. I will return to the question of comparators shortly.
35. We also came to this view in part because the claimant was so late to raise discrimination himself. It was not until the second appeal hearing that he mentioned that he had been singled out on the basis of his race. It appeared to be something of an afterthought, and by reason of this, lacked authenticity in our judgment. This was clearly the view taken by the respondent at the time. When asked about this at the hearing, the claimant

said he had always had discrimination as an issue in the back of his mind but had been reluctant to explicitly raise it. I am afraid we did not accept this evidence. On a balance of probabilities, if the claimant had genuinely thought he was being singled out on the grounds of race, then he would have raised it much earlier in the process. We therefore dismiss the claim for discrimination.

36. In support of both the discrimination and unfair dismissal claim the claimant raised a number of potentially relevant comparators. As I will touch upon below, the Tribunal found some of these comparators helpful in the context of the unfair dismissal claim. In essence, there was some inconsistency in the way the certain aspects of the disciplinary process had been applied by Mr Maloney in the cases of some of the comparators (see below). However, for the reasons already set out above in some detail, we could find insufficient evidence of any racial motive on the part of Mr Maloney, or any other member of the respondent. As stated, this interpretation was reinforced by the fact that there was clear uncontested evidence of misconduct.

Unfair Dismissal

37. We then addressed the claim of unfair dismissal. For all of the reasons set out above, we were satisfied that the principal reason for the dismissal was misconduct, and specifically the favourable treatment of Ms Zsabo by the claimant. The fundamental facts were not significantly in dispute. The need for the respondent to act in the light of the evidence was pressing and obvious. We are satisfied, having heard the witnesses for the respondent, that the reason for dismissal was misconduct.
38. The next issue for us to decide was whether the Respondent's managers believe the Claimant to be guilty of gross misconduct? Did the Respondents' managers have in mind reasonable grounds upon which to sustain that belief? We are satisfied that they did genuinely believe that misconduct had taken place, and that they had reasonable grounds for doing so.
39. We found the witnesses to be credible on this point. There was little dispute about the basic premise of the investigation. Our findings on this question are set in some detail in the paragraphs above. The claimant agreed that he had swapped Ms Szabo to a bank holiday shift without a business justification. Further, that he had keyed in 'delays' for three shifts in June which exceeded the length of the discussions he had had with Ms Szabo (setting aside whether they were legitimate business meetings). The claimant also agreed that he had updated the WFC to remove records of Ms Szabo attending work late. We were satisfied that both Mr Maloney and Ms Fairbrother both had a genuine belief in misconduct, and that there were reasonable grounds for such a belief.
40. At the stage at which that belief was formed on those grounds, had the Respondents' managers carried out as much investigation into the matter as was reasonable in the circumstances? Had they carried out a fair

procedure? There was much to be said that was positive about the investigation and the procedure adopted. It is difficult to say that any investigation is without flaw. Both the disciplinary hearing and the appeal was thorough (in large part) and lengthy. Both displayed a preparedness to engage with the claimant's case to varying degrees. Both sought further information at certain stages. Ms Fairbrother in particular, spoke to several potential witnesses who were people raised by the claimant as having something relevant to contribute to the process. Both Mr Maloney and Ms Fairbrother produced their internal checklists which demonstrated a methodical approach to the process in which they were engaged.

41. We also agree with Miss Wheeler that the lack of factual disagreement as to what had occurred between the claimant and Ms Szabo, meant that there was reduced need for a high degree of investigation, given that the evidence spoke for itself to some extent. The claimant case was that it was being taken out of context to some degree. In large part, we were satisfied that there had been a reasonable investigation of these allegations.
42. Where we have reservations is in the fairness of the procedure adopted. As stated, we could not understand why Mr Maloney had assumed the role of disciplinary chair. It was, in our judgment, contrary to the respondent's own policy in terms of impartiality, and was inconsistent with his own approach, having initially delegated the investigation to someone outside of the depot.
43. It was wholly apparent to us that everyone involved in this matter was convinced that the claimant had had a relationship with Ms Szabo and/or another member of staff. In our judgment, this included Mr Maloney and Ms Fairbrother. They both asked questions about it. We did not accept their testimony that they had taken the claimant's refusal at face value. It was clear to the Tribunal that this belief tainted the whole process. It underlay the view that the claimant was treating Ms Szabo in a favourable way i.e. because they were in a relationship. There was clearly a commonly held view that in doing so, the claimant was compromising his function as a manager. The attempt to separate the suspicion of a relationship, from the allegation of favouritism, seemed to the Tribunal to be wholly artificial, puzzling, and disingenuous.
44. As stated, it is not necessary for the Tribunal to come to a view as to whether there was a relationship between the claimant and Ms Szabo. It was not part of the misconduct allegation, and was not precluded by the respondent's rules. It is relevant only because it was clear to the Tribunal that Mr Maloney believed there was a relationship, and that this ought to have precluded him from having any further role in the disciplinary hearing. It ought to have been delegated to someone out of depot. The respondent's resources made this perfectly practicable. It had already been done in respect of the investigation. Regrettably, this was a crucial decision which tainted the fairness of the whole process, and created at least the reasonable perception of partiality in the eyes of the claimant.

45. But it goes beyond simple perception. The Tribunal was concerned that Mr Maloney applied the respondent's disciplinary policy in a way which was inconsistent when compared to other members of staff. The Tribunal was told about a member of staff called Luke Elliston. We were told that this was a potential disciplinary matter which was dealt with by Mr Maloney in 2021, shortly after the claimant's dismissal. The accusation was that as a manager, Elliston had sought sexual favours from a female member of staff in return for keying in delays to inflate her performance. We were told by Mr Maloney that the matter never came to a disciplinary hearing. The alleged victim had been moved to another depot. Mr Elliston had not been spoken to or suspended because this would have revealed to him that the victim had made a complaint. It was felt by Mr Maloney that this was inadvisable. In short, Mr Elliston continued to work at the Daventry depot until December 2021, when we were told he had found other employment.
46. The first thing to observe is that this was a very different case to the claimant's, with a myriad of differing considerations for an employer. That being said, we were satisfied that there were some relevant observations to be drawn from this comparator. Firstly, it was a case dealt with by Mr Maloney. Secondly, whilst it is clearly a more serious case, the way Mr Maloney dealt with it is very different to the claimant's case. The speed with which the claimant was suspended, investigated, disciplined and then dismissed stands in stark contrast to Mr Elliston, who was never suspended or disciplined in several months. We could not see the sense of Mr Maloney's explanation for his approach to Mr Elliston. It may well have been possible that by alerting Mr Elliston, that problems might be created for the victim. But this risk had to be balanced against the ongoing risk to other female members of staff whilst Mr Elliston remained at work. In our judgment, it was a puzzling and rather outdated approach to sexual allegations in the work place.
47. The second relevant comparator was a case involving staff called Cox and another colleague. They were both management staff who were alleged to have been in the habit of leaving before the end of their shifts. In essence, they were failing to carry out mandatory security searches of staff prior to them leaving the premises. Mr Maloney also dealt with this allegation, again some time in 2021. He was told about it by two other managers, one of whom gave him a memory stick which provided evidence of Cox and the other manager leaving before the end of shifts. Mr Maloney was asked about this at the Tribunal hearing. He told us he had not looked at the memory stick because he had already been told about it earlier by another manager. He took the view that it was misconduct but not gross misconduct. Neither manager was suspended or disciplined. Instead, he called managers together on an informal basis and advised them (including Cox and the other manager) that this conduct was unacceptable.
48. In the Tribunal's judgment, this represented a material inconsistency in the way the respondent's disciplinary rules were being applied by Mr Maloney. This was a serious allegation of misconduct involving managers abusing their role. The misconduct related to time keeping, and to that extent was

not dissimilar to the claimant's case. We could accept that it might have led to a differing outcome under the procedure, but again it was significant that the matter was not investigated, the participants were not suspended, and the formal disciplinary process was not invoked. It was, in our view, impossible to see a thread of fairness in terms of consistency running through Mr Maloney's application of the disciplinary process during this period.

49. In this regard, we were satisfied that the failures were the result of Mr Maloney's inexperience in disciplinary matters, and not bad faith. We were also satisfied that this explained why he refused to hear any further submissions at the conclusion of the final disciplinary meeting, when it would have been prudent to allow the claimant and representative to exhaust the points they wished to make. We were satisfied that this was because he had already made his decision, a matter which his borne out by the document at [137-140].
50. The same applied to the appeal process. We find that Ms Fairbrother, for all of the other positive features of the process she adopted, almost completely failed to engage the claimant in relation to his allegation of race discrimination. For it not to be even mentioned in the appeal letter, if only to dismiss it with brief reasons, was in our judgment perplexing. It was extraordinary that a household brand like Tesco could be seen to disregard an allegation of institutionalised racism no matter how flimsy they felt the evidence in support of it might be. However, we were satisfied that this was the result of inexperience, together with the fact that the complaint was raised so by the claimant, and not because of his racial background.
51. For all of the aforesaid reasons, we are satisfied that the process adopted was not fair.
52. We were however satisfied that, had the process been fair, that the dismissal fell within a band of reasonable decisions that an employer might have taken. We accepted the evidence we heard from Mr Maloney and, to a lesser extent, Ms Fairbrother on this issue. Firstly, the claimant had expressed very limited contrition or ownership for his actions, which as stated were largely admitted. Secondly, we agree that it was acceptable for the respondent to take the view that to have not dismissed would have been to set a dangerous precedent to other managers. Thirdly, when looked at in the round, these matters alleged were serious. Fourthly, the claimant was a senior and experienced manager who should have known better than to have engaged in such conduct. In this sense, his length of service was a double edged sword for the claimant.
53. We accept the argument made by the claimant that the rules he was alleged to have breached were not written. There seemed to be a tendency at the Daventry depot to deal with what might be regarded as important rules in this way. This could have placed the respondent in difficulties. However, the rules we were concerned with here were not obscure in terms of principle. It was, in the Tribunal's view, blatantly obvious that what the claimant was

said to have done was in breach of rules. Try as hard as we might, we could not follow some of the claimant's logic in this regard. It was obvious that to key in 'delays' in excess of the duration of meetings was unacceptable. The claimant admitted that the effect of what he had done was to "artificially inflate" Ms Szabo's performance. We could see insufficient evidence or logic to support the suggestion this was either acceptable or common place at the Daventry depot.

54. We did of course have regard to the inconsistency of approach to disciplinary matters by Mr Maloney. However, we took the view that the cases of Cox and Elliston were examples of overly lenient treatment, and which never reached the disciplinary process or sanction. It was the Tribunal's view that sanction adopted in this case did fall within a band of reasonable decisions that an employer might take.
55. We were not asked to make a decision as to remedy, contributory fault or 'Polkey' deductions. These will be dealt with at the remedy hearing, if necessary, in respect of which further directions will follow.
56. In summary, the claim of unfair dismissal is allowed. The claim of discrimination is dismissed.

Employment Judge R Wood

Date: 3 April 2023.....