



EMPLOYMENT TRIBUNALS

Claimant: Mr Gregory Truswell

Respondent: TFS Stores Limited

Record of an Attended Hearing at the Employment Tribunal

Heard at: Leicester

Heard on: 11, 12, 13 and 14 March 2024

15 March 2024 in chambers

Before: Employment Judge M Butler

Members: Ms B Tidd
Ms J Dean

Appearances:

Claimant: In person

Respondents: Mr J Roddy, Consultant

RESERVED JUDGMENT

The unanimous Judgment of the Tribunal is that:

1. The claim of unfair dismissal is well founded and succeeds;
2. The claims of age discrimination, sex discrimination and discrimination on the

grounds of sexual orientation are not well founded and are dismissed.

3. The claim of breach of contract is not well founded and is dismissed.
4. There will be a remedy hearing to determine compensation which will be listed in due course.

REASONS

Background

1. The Respondent operates a number of stores in the UK under the name the Fragrance Shop. The Claimant was employed by the Respondent as a Store Manager at one of three stores in Leicester from 14 November 2019 until his summary dismissal for gross misconduct on 5 October 2022. By a claim form presented on 24 October 2022 the Claimant brought claims of unfair dismissal and direct discrimination on the grounds of age, sex and sexual orientation. The Respondent defended the claims by denying any discrimination and stating that the Claimant was summarily dismissed for the principal and only reason that he committed acts of gross misconduct.

The Issues

2. The issues to be determined by the Tribunal were set out by Employment Judge Broughton at a Preliminary Hearing on 21 March 2023. They are not repeated here but are appended to this Judgment.

The Evidence

3. The Claimant gave evidence and submitted a number of written witness statements from his former colleagues who did not attend to give evidence at the hearing. Accordingly, since they were not present to be cross examined, we attach no weight to their witness statements.
4. For the Respondents, we heard evidence from Ms O MacLoughlin, Northern Region Area Manager and Investigating Officer, Mr S Brant, Retail Regional Director and Dismissing Officer, and Ms L Thomas, Retail Regional Director and Appeal Officer.
5. All of the witnesses produced witness statements and were cross examined.
6. Each party produced a bundle of documents which resulted in somewhat wasteful duplication. The Respondents bundle ran to 208 pages and the Claimant's also to 208 pages. References to page numbers in this Judgment are to page numbers in the bundles with pages from the Claimant's bundle being prefixed with the letter C.

The Facts

7. In relation to the issues before us, we find the following facts on the balance of probabilities:
- i. The Respondent runs the Fragrance Shop retail stores of which there are three in close proximity to each other in Leicester. The Claimant was employed as a Store Manager at one of these stores on 14 November 2019.
 - ii. Initially, the Claimant had a positive impact on sales and profitability which was acknowledged by the Respondent with various certificates. However, the Claimant had a difficult relationship with the Area Manager, Ms S Sheldon and some other colleagues.
 - iii. In particular, he had issues with his Assistant Manager, Ms G Ravalia who considered spent too much time on her mobile phone while in his shop, did not complete paperwork and was generally lazy with poor attention being given to customers.
 - iv. Sometime in 2020, all witnesses were vague as to the actual date, the Respondent replaced its internet, which contained its staff policy documents, with the ATTENSI Portal which was accessible to all staff. On its introduction, the Respondent's written policies were updated.
 - v. The Claimant attempted to raise the issues related to Ms Ravalia's performance and attitude with her informally and with the Regional Director but, as far as the Claimant was concerned, nothing happened apart from the continued deterioration of his relationship with her.
 - vi. Around the end of December 2020/beginning of 2021, the Claimant's wife was, on his recommendation, appointed as Interim Store Manager of one of the Leicester stores on a fixed term contract as maternity cover for the Store Manager. The Claimant spent time at that store on a number of occasions helping his wife with various processes and operational matters as she was given virtually no training.
 - vii. The Claimant was also in the habit of having informal chats with staff at a local café as the shop he managed was very small and cold. The store's stockroom was in another building close by. The Claimant would ensure that if he left the store for any reason, he would tell the staff where he was going in the event he was needed.
 - viii. One of the staff members appointed by the Claimant, Ms H Bekirova, had personal issues at home and was at times emotional at work. She eventually confided in the Claimant as he had severally lengthy conversation with her in the stockroom at his store in which he listened to her and tried to give helpful

advice.

- ix. During 2022, Ms Sheldon held several “job chats” with the Claimant which lasted a few minutes and forms were completed and signed by both of them but no copy was given to the Claimant (page 160).
- x. On 27 May 2022, the Claimant attended work early, primarily to restock the shelves of his shop he scanned in at approximately 10.30am whereas his shift that day was not due to commence until 11.30am. He also took the opportunity to have a lengthy conversation with Ms Bekirova in the stockroom. There is no allegation, and nor do we find, that the Claimant expected or claimed payment for coming into store early on that day.
- xi. On the same day, on walking back into the store, the Claimant found Ms MacLoughlin waiting for him. She had been tasked by Mr Brant to carry out an investigation as, in his words, it had become apparent that the Claimant and Sarah Sheldon – the Claimant’s Area Manager – had a few problems and Ms MacLoughlin was “neutral”. Ms MacLoughlin had been made aware of the issues that needed to be discussed which included the Claimant’s failure to follow company procedures and the fact that a few female employees had said they felt uncomfortable particularly were the Claimant and Ms Bekirova’s relationship was concerned.
- xii. The notes of the investigation meeting are at pages 70–85. They were taken by Joanna Hardy an assistant to Ms Sheldon. Ms MacLoughlin had with her a number of witness statements from female employees and screenshots of messages the Claimant had sent to some of them. She did not show the statements to the Claimant but did share some of the screenshots. The Claimant guessed which employees had complained about him.
- xiii. No written witness statements were handed to the Claimant because, Ms MacLoughlin said, the Claimant was the Manager of the witnesses, was still employed by the Respondent and the witnesses had requested anonymity at this stage. The statements are at pages 147-159.
- xiv. Ms MacLoughlin first addressed the failure to follow Company procedures alleging the Claimant had failed to notify HR about the job chats he had carried out. The Claimant said he was unaware he had to make HR aware of job chats which were informal meetings. Despite the Respondent’s witnesses initially insisting otherwise, the Job Chat Policy is not on the ATTENSI portal nor could they point to anywhere else such a written policy could be found. Accordingly, we find on the balance of probabilities there was no such written policy.
- xv. The Claimant was questioned about why he had been in store an hour before he was due to start work that day and also as to why, as alleged in the witness statements, he spent a lot of time out of the store when he was supposed to be working there. He replied that he was moving stock to the store that morning and denied spending the majority of his working time out of the store.

- xvi. Ms MacLoughlin asked the Claimant about the WhatsApp messages (pages 147-149) and in particular his message to staff that no assistance should be given to another manager coming from Scotland to give training on click and collect and said they should raise any breaches of GDPR with that manager if they happened (page 154). He has also used a WhatsApp message to criticise Ms Ravalia which was sent to junior staff members (page 152). The Claimant replied that his message regarding the Scottish manager had been misconstrued and the comments about Ms Ravalia were made in the interests of the welfare of other staff members as she was not fit for her role as Assistant Manager.
- xvii. One of the witnesses had one day walked passed the store when only the Claimant and Ms Bekirova were working and there were no customers present. The Claimant was observed “massaging” Ms Bekirova’s neck and shoulders in the shop in view of passers-by. The Claimant confirmed this had happened as Ms Bekirova had asked him to do this because she was in a lot of pain.
- xviii. The Claimant also admitted taking Ms Ravalia’s mobile phone from her when she was at work and locking it in the safe as she was breaching company policy in constantly using it on the shopfloor.
- xix. The Claimant indicated to Ms MacLoughlin that Ms Ravalia had tried to turn the staff against him and was a negative influence in the store. The Claimant spoke to Ms MacLoughlin privately to dispel rumours surrounding his relationship with Ms Bekirova which he said was nothing more than a working relationship. He also advised her that Ms Bekirova had mental health problems and relied on him as a friend and manager.
- xx. Ms MacLoughlin suspended the Claimant on full pay at the end of the meeting “*as he had failed to follow policy and procedure*” (her witness statement paragraph 42). She said he had openly admitted to this in the meeting and “*therefore suspension given the number of breaches was the only outcome*”. Her evidence was that she then submitted the meeting notes and her decision to suspend the Claimant to HR. In answer to the Tribunals questions she said that she called HR and said she had found grounds to suspend the Claimant in that he failed to follow policy and procedure, had touched a staff member inappropriately and sent inappropriate WhatsApp messages. She did not speak to the witnesses again nor did she speak to any other staff members. For the avoidance of doubt, we do not find Ms MacLoughlin accused the Claimant of only appointing young attractive females. We also note she did not seek to interview Ms Bekirova nor did she find any fraudulent timekeeping by the Claimant whereby he sought to claim wages for scanning into the store before his shift was due to start.
- xxi. On 30 May 2022, a letter confirming the Claimant’s suspension and inviting him to a disciplinary hearing on 1 June 2022 was emailed to the Claimant and signed on behalf of Mr Brant who was to conduct the disciplinary hearing (page

86). The reason for the disciplinary hearing was an allegation of gross misconduct as follows:

- Inappropriate conduct and behaviour directly, in person and on group chats towards Geena Ravalia, Imogen Kyprianou, Nisha Walele which is reflected in the statements, investigation notes and screenshots.
- Bullying and threatening behaviour, threatening team members with their jobs if they speak to Geena Ravalia. Also confiscating and locking Geena Ravailia's mobile phone in the store safe.
- There is a consistent pattern of bullying and harassment towards Geena Ravalia.
- Racist behaviour, there are six different examples of racism from five different team members.
- Fraudulent use of time – spending hours away from site in either the stockroom, Soho Café and in particular Leicester 3 in which you spend time throughout the day helping your wife, leaving team members alone trading in Leicester 2. The morning of 27 May 2022 you had scanned in at 10.25am however you were nowhere to be seen until the start of the investigation. It has come to light that you were in the stockroom with Hristina who was also not due to start her shift until much later in the day. This has previously been discussed in a job chat on 13 May 2022 by Sarah Sheldon, Area Manager.
- Unprofessional conduct with a team member, Hristina, such as massaging her on the shopfloor and spending long periods of time out of store with her in the coffee shop and the stockroom in which you have admitted to.
- Failure to follow policy and procedures in relation to people management. Mr Brant then added *“You should be aware that the above allegations are extremely serious and could potentially result in your dismissal from the Company on the grounds of gross misconduct. We would therefore encourage you to prepare fully for this hearing”*.

Sent with this invitation letter were the Respondent's Disciplinary “Procedures” and the investigation notes from the meeting with Ms MacLoughlin on 27 May 2022. The witness statements were not sent to the Claimant.

- xxii. Ms Bekirova attended the disciplinary hearing with the Claimant and asked to speak privately to Mr Brant before the hearing started. Mr Brant agreed to see her and she told him of the positive impact the Claimant had on the staff. Despite Ms Bekirova's being involved in one of the allegations against the Claimant, Mr Brant did not take the opportunity to ask her about the Claimant's

allegedly inappropriate behaviour.

- xxiii. Mr Brant records in his witness statement that all of the statements from staff who complained about the Claimant and screenshots of all relevant WhatsApp messages were on his laptop for both parties to refer to within the hearing (witness statement paragraph 10). There is no evidence that the statements were referred to in the disciplinary hearing.
- xxiv. The notes of the meeting with Ms Bekirova are at pages 87a to 87f and the notes of the disciplinary hearing are pages 88 to 104. At the end of the hearing Mr Brant confirmed to the Claimant that he was summarily dismissed for gross misconduct. He said (page 103) *“The reason for this is I believed you fall short of what we expect from a store manager. My overall opinion is that you have fallen short against the majority of the points raised in the investigation meeting the screenshots in my opinion are highly inappropriate and show an inability to manage your team effectively and consider them to be unprofessional. I know you do not believe that and that has come across today, however, it is not acceptable in my opinion. I don’t think Gima has been managed within guidelines, your behaviour towards her as (sic) been angry and unjustified and on a basis on this she feels bullied and harassed. I do not believe that the factors are racial so don’t uphold that view, it has been flagged been (sic) by a number of people but do not feel that I can uphold these allegations. You have not seeked (sic) at any point to resolve the issues through the means I would consider to be normal business practice. I am uncomfortable with some of the defence you have put forward that you feel are justifiable but in my opinion are not. I believe that due to your manner and approach this would happen again in the future and I do not trust you not to do this again and deliver what we need from you as a business”*.
- xxv. The decision to summarily dismiss the Claimant was confirmed by Mr Brant in a letter dated 6 June 2022 (page 105). Mr Brant in this letter considers all of the allegations against the Claimant and upheld all of them except that of racist behaviour. He also upheld the allegation that the Claimant had committed “fraudulent use of time” despite the fact that Ms MacLoughlin had concluded there was no such fraudulent use of time, ie claiming payment for time not spent at work. At page 108 in summarising his conclusion in relation to “failure to follow policy and procedures in relation to people management” where he said, *“You have made it clear that you are an experienced member of the store manager team which I can acknowledge showed in some areas considerable skill so the decision to ignore all the information held on the portal is unacceptable”*. None of the witnesses before the Tribunal were able to point either in their oral evidence or within the bundle to any policy in relation to job chats and reporting them to HR.
- xxvi. Having been given the right of appeal, the Claimant duly exercised that right by email dated 9 June 2022 (page 110). The appeal hearing was conducted by Ms Thomas on 8 July 2022. The notes of the hearing are at pages 120 to 126.

xxvii. By letter dated 27 July 2022 (pages 127 – 139) Ms Thomas dismissed all points of the Claimant's appeal. In relation to the fraudulent use of time allegation, Ms Thomas said, *"You have admitted spending time in the stockroom, coffee shops and also the Leicester 3 stores where GT's wife is employed before considerable amounts of time when he should be managing the team in store. To scan into the time and attendance scanner and then leave the store unmanaged for considerable amounts of time is fraud as GT was being paid for time not spent in his own store. The trust that the Company bestows on a store manager includes the fact that the time spent in between scanning in and out should be spent in the store and managing the team"*.

xxviii. In her oral evidence, Ms Thomas confirmed she had not spoken to any of the witnesses or to Ms Bekirova. In relation to the incident with Ms Bekirova she said it was inappropriate behaviour and she would not want anything like that to happen to her own daughter.

Submissions

8. Both parties made submissions. We do not rehearse those submissions here but confirm that we have taken full account of them in our deliberations and reaching our conclusions.

The Law

9. Section 98 of the Employment Rights Act 1996 provides:

"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

- (a) the reason (or, if more than one, the principal reason) for the dismissal, and*
- (b) that it is either a reason falling within subsection (2) or some other substantial reason 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 by the employer 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.*

(3) *In subsection (2)(a)—*

(a) “capability”, in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b) “qualifications”, in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

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

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

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

10. Section 13 Equality Act 2010 provides:

“Direct Discrimination

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

(2) If the protected characteristic is age, A does not discriminate against B if A can show A’s treatment of B to be a proportionate means of achieving a legitimate aim.

(3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.

(4) If the protected characteristic is marriage and civil partnership, this section applies to a contravention of Part 5 (work) only if the treatment is because it is B who is married or a civil partner.

(5) If the protected characteristic is race, less favourable treatment includes segregating B from others.

(6) If the protected characteristic is sex—

(a) less favourable treatment of a woman includes less favourable treatment of her because she is breast-feeding;

(b) in a case where B is a man, no account is to be taken of special treatment afforded to a woman in connection with pregnancy [F1, childbirth or maternity].

(8) This section is subject to sections 17(6) and 18(7)."

11. Section 136 of the Equality Act 2010 provides:

"Burden of proof

(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.

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.

(5) This section does not apply to proceedings for an offence under this Act.

(6) A reference to the court includes a reference to—

(a) an employment tribunal;

(b) the Asylum and Immigration Tribunal;

(c) the Special Immigration Appeals Commission;

(d) the First-tier Tribunal;

(e) the [F1 Education Tribunal for Wales];

(f) [F2 the First-tier Tribunal for Scotland Health and Education Chamber] ."

12. We have also had regard to the ACAS Code of Practice in relation to discipline and grievances at work which provides, inter alia, that good disciplinary procedures should then:

- Require employees to be informed of the complaints against them and supporting evidence, before a disciplinary meeting.
- Require management to investigate fully before any disciplinary action is taken.
- Further, the ACAS Code of Practice provides in relation to investigating cases, *“When investigating a disciplinary matter take care to deal with the employee in a fair and reasonable manner. The nature and extent of the investigations will depend on the seriousness of the matter and the more serious it is then the more thorough the investigation should be. It is important to keep an open mind and look for evidence which supports the employees case as well as evidence against.”*

It is not always necessary to hold an investigatory meeting (often called a fact finding meeting). If a meeting is held, give the employee advanced notice of it and time to prepare.”

13. We have considered the case law to which we were referred and also case law which we consider to be relevant to the issues in this case.

Discussion and Conclusion

14. We firstly consider the claim of unfair dismissal. This was a conduct dismissal, the Claimant being alleged to have committed acts of gross misconduct as set out in detail above. The Tribunal’s task is to determine whether taking all circumstances into account the decision to summarily dismiss for gross misconduct the Respondent acted reasonably or unreasonably in treating the Claimant’s conduct as a sufficient reason for dismissing him and we must determine this issue in accordance with equity and the substantial merits of the case.

15. In considering this issue we have borne in mind the decisions in ***British Home Stores Limited v Burchell [1980] ICR303 EAT*** and ***J Sainsbury Plc v Hitt [2003] ICR111 CA***. We also bear in mind that we must not substitute our own views for those of the reasonable employer (***Iceland Frozen Foods Limited v Jones [1983] ICR17 EAT***). In Sainsbury, the Court of Appeal made clear that the range of reasonable responses test applies not only to the decision to dismiss but also to the procedure by which that decision was reached. This includes an investigation.

16. The Tribunal considered in some detail the investigation carried out by Ms MacLoughlin. She arrived unannounced at the Claimant’s store and effectively can be said to have hijacked him. He had no idea there was to be an investigatory meeting and no idea of the allegations which were to be discussed. He had no time to prepare for this meeting which is contrary to the ACAS Code of Conduct.

Further, Ms MacLoughlin did not share the various witness statements she had taken from those members of staff who had complained about the Claimant. Whilst he could make a reasonably good guess as to the identity of these complainants, that is not the same as having their statements in front of him.

17. We heard during the course of the hearing that there were those members of staff who did not share the view of the complainants. Ms MacLoughlin is an experienced manager and a reasonable employer would have taken steps to seek the views of those who had not complained about the Claimant. Of some prominence in the allegations against the Claimant was his relationship with Ms Bekirova, and in particular, the incident where he was seen massaging her neck and shoulders. She concluded that this was inappropriate behaviour and did so without attempting to talk to Ms Bekirova who was in store that day. Further, Ms MacLoughlin failed to consider whether this was potentially a case where a group of employees had taken it upon themselves to complain about the Claimant for their own purposes. Other than taking the word of the complainants at face value, Ms MacLoughlin failed to investigate herself precisely how many times the Claimant had left the store to assist his wife at a store close by or for job chats with members of staff.
18. The Claimant was then given 2 days' notice of his disciplinary hearing before Mr Brant. He was sent the Respondent's disciplinary procedure but nothing else. Mr Brant seemed content to have the witness statements complaining about the Claimant on his laptop but the reality is the Claimant was investigated and then attended a disciplinary hearing (and, indeed, then an appeal hearing) without ever seeing the statements made against him. This is most certainly a breach of the ACAS Code of Practice in that the evidence against the Claimant should have been sent to him with his invitation to the disciplinary hearing.
19. Returning to the incident with Ms Bekirova, Mr Brant actually saw her on the morning of the disciplinary hearing and spoke to her in private. Even then, he failed to ask her about the incident where the Claimant was seen massaging her neck and shoulders.
20. Contrary to the conclusion of Ms MacLoughlin, Mr Brant and then Ms Thomas found that the Claimant had acted fraudulently in being paid for conducting meetings with staff members off the premises, in the stockroom or assisting his wife at one of the Respondent's nearby stores.
21. Ms Thomas suggested that it was fraudulent because he was doing these things while being paid by the Respondent. Fraud is a serious implication and it is difficult to comprehend how this can effectively be classed as a criminal activity when both Mr Brant and especially Ms Thomas accepts that the Claimant was undertaking his duties as a manager whilst out of his store.
22. This is not to say that the Claimant's conduct at times was not in keeping with his status as a manager. In particular, the WhatsApp messages would not be expected of someone in the Claimant's position. But the ACAS Code suggests that attempts should be made to resolve matters informally if possible. We do not accept that Ms

Sheldon's "job chats", which we accept lasted only a few minutes and the record of which had been written before the meeting, come close to an attempt to informally resolve any issues with the Claimant.

23. Continuing that theme, the Claimant was found guilty of not following the Respondent's policies and procedures in that he did not send a record of his job chats with staff to HR. We were told that all policies and procedures were on the Respondent's ATTENSI Portal. That policy was not produced nor could any of the witnesses tell us precisely where it was.
24. The decision in *British Homes Stores* provides that the employer must genuinely believe in its stated reason for dismissal, having conducted a reasonable investigation showing reasonable grounds for the decision to dismiss. In failing to conduct a reasonable investigation and breaching the ACAS Code of Practice in several ways we find the decision to dismiss for gross misconduct was not within the range of responses of a reasonable employer.
25. We have also considered the fact that the Respondent has given multiple reasons for dismissal but has not indicated for the purposes of Section 98(1)(a) of the Employment Rights Act 1996 which one of the reasons for dismissal was the principal reason. Following the Judgment in ***Smith v Glasgow City District Council [1987] ICR796, HL***, not identifying the principal reason for dismissal may be unfair. Accordingly, we must review each of the reasons for dismissal all of which were expressed by Mr Brant "*to be part of the reason for your dismissal*" and, therefore, none of which are said to be the principal reason for dismissal.
26. Mr Brant refers to inappropriate conduct and behaviour directly to certain staff members as "*reflected in the statements...*". Those statements were never supplied to the Claimant. Bullying and threatening behaviour and threatening team members with their jobs if they speak to Geena Ravalia is based on WhatsApp messages and there must be some doubt as to whether a reasonable employer would, as Mr Brant suggests, threaten all members of staff with dismissal if they associated with Ms Ravalia. This reason for dismissal is linked to a pattern of bullying and harassment towards Ms Ravalia and Mr Brant says that in terms of the Claimant's concerns about her performance the Claimant had taken no formal action nor contacted anyone from Mr Brant's team for advice over a long period of time. However, the screenshots and messages in the bundle fall short of threatening all staff with dismissal if they associate with Ms Ravalia.
27. In relation to "fraudulent use of time" it does not appear that any consideration has been given during the investigation, disciplinary hearing or appeal hearing to the fact that the Claimant was conducting company business when away from his store. The unprofessional conduct with Ms Bekirova has been dealt with in detail above. Neither the Investigating Officer, Dismissing Officer or Appeal Officer deemed it necessary or desirable to speak to Ms Bekirova before concluding that the Claimant was guilty of unprofessional conduct.
28. Finally, the failure to follow policy and procedures in relation to people management

is a conclusion reached in circumstances where not one of the Respondent's witnesses could tell the Tribunal where the policy in question could be located.

29. In failing to investigate important aspects of the allegations against the Claimant, and putting all of the allegations together as being part of the reason for his dismissal, the Respondent has not identified the principal reason for dismissal or that a reasonable employer would have identified any individual reason as being worthy of summary dismissal for gross misconduct. Accordingly, we do not consider it appropriate to conclude that the Claimant contributed by his conduct to his dismissal or that he would have been dismissed regardless of the Respondent's failure to investigate the allegations properly or the unreasonable procedure they followed.
30. We now consider the Claimant's claims of discrimination. We bear in mind Section 136 of the Equality Act and the Judgment in ***Igen Limited & Others v Wong [2005] EWCA Civ 142***. The burden of proof in discrimination cases initially rests with the Claimant to establish facts from which the Tribunal could decide, in the absence of any other explanation, that discrimination on the grounds of a protected characteristic has taken place. Where there is a prima facie case of discrimination, the burden of proof would then shift to the Respondent.
31. At the Preliminary Hearing on 21 March 2023 before Employment Judge Broughton, the Claimant based his age and sex discrimination claims on the comment of Ms MacLoughlin, Mr Brant and Ms Thomas (all or one of them) that his conduct was inappropriate because he is an "older male" and Ms Bekirova was "a young girl" and that Ms MacLoughlin also said that the Claimant only employs attractive young girls.
32. At the relevant time, the Claimant was 48 years old, married to his wife and identifies as heterosexual. Ms MacLoughlin, Mr Brant and Ms Thomas made no reference to the Claimant's age, sex or sexual orientation in concluding his actions were inappropriate. This is apart from Ms Thomas referring in the appeal outcome to "*massaging a younger and junior member of the team whilst at work*" as being not acceptable behaviour for a store manager. In her oral evidence, Ms Thomas said that, if she had been Ms Bekirova's parent she would not want that to happen to her. She went on to say that the age of a store manager is irrelevant when considering the appointment of staff but it is relevant in the context of massaging a junior member of staff.
33. We bear in mind that Employment Judge Broughton directed the Claimant to provide details of his age group and with whom he compares himself and in what age group. As far as we can see, the Claimant has failed to provide this information. Bearing in mind the guidance given in *Igen* we have considered whether the Claimant has established facts from which we could find the Respondent discriminated against him on any ground. Certainly on our findings, neither Ms MacLoughlin nor Mr Brant did so and, reviewing the evidence of Ms Thomas, we struggle to see how we can conclude that the Claimant has cleared

this hurdle. The evidence of the Respondent, which we accept, that the Claimant was older than Ms Bekirova and that is all. The Claimant explained at the commencement of the hearing that his sexual orientation was relevant in that, had he not been heterosexual or male, there would have been no issue with the touching of Ms Bekirova. We found this to be a step too far in clearing the hurdle of presenting facts from which we could find discrimination had taken place. The only references in evidence were to the Claimant being older which is insufficient to the burden of proof to pass to the Respondent.

34. As for Ms MacLoughlin’s alleged comment that the Claimant only employed attractive young girls, we accept her evidence that she did not say this so it cannot be the basis of a discrimination claim. But even if we accepted Ms MacLoughlin had uttered these words, the Claimant has not identified the protected characteristic it considers has been discriminated against.

35. In the circumstances, the Claimant’s discrimination claims are not well founded and are dismissed.

36. Finally, we consider the breach of contract claim. There is no evidence before us that there is any contractual term in force in this case whereby the Claimant would have been entitled to receive as a gift a designer handbag because his birthday was close in time to the Respondent’s conference. There is thus no guarantee he would have received the handbag had his employment continued. It was, therefore, merely a gesture by the Respondent affecting a few employees. During the hearing the Claimant accepted that this was the case and that his breach of contract claim must fail.

Employment Judge M Butler

Date: 17 May 2024

JUDGMENT SENT TO THE PARTIES ON

....21 May 2024.....

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FOR THE TRIBUNAL OFFICE

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APPENDIX

“The Issues

51. The issues the Tribunal will decide are set out below.

1. Unfair dismissal

- 1.1 If the claimant was dismissed, what was the reason or principal reason for dismissal?
- 1.2 Was it a potentially fair reason?
- 1.3 Did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant, including following a fair procedure?
- 1.4 What was the reason or principal reason for dismissal? The respondent says the reason was **conduct**. The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.
- 1.5 If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:
 - 1.5.1 there were reasonable grounds for that belief;
 - 1.5.2 at the time the belief was formed the respondent had carried out a reasonable investigation;
 - 1.5.3 the respondent otherwise acted in a procedurally fair manner;
 - 1.5.4 dismissal was within the range of reasonable responses.

2. Remedy for unfair dismissal

- 2.1 Does the claimant wish to be reinstated to their previous employment?
- 2.2 Does the claimant wish to be re-engaged to comparable employment or other suitable employment?
- 2.3 Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.

- 2.4 Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.
- 2.5 What should the terms of the re-engagement order be?
- 2.6 If there is a compensatory award, how much should it be? The Tribunal will decide:
 - 2.6.1 What financial losses has the dismissal caused the claimant?
 - 2.6.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
 - 2.6.3 If not, for what period of loss should the claimant be compensated?
 - 2.6.4 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
 - 2.6.5 If so, should the claimant's compensation be reduced? By how much?
 - 2.6.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
 - 2.6.7 Did the respondent or the claimant unreasonably fail to comply with it by [specify alleged breach]?
 - 2.6.8 If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?
 - 2.6.9 If the claimant was unfairly dismissed, did s/s/he cause or contribute to dismissal by blameworthy conduct?
 - 2.6.10 If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?
 - 2.6.11 Does the statutory cap apply?
- 2.7 What basic award is payable to the claimant, if any?
- 2.8 Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?
3. **Direct age, sex and/or sexual orientation discrimination (Equality Act 2010 section 13)**

3.1 The claimant's age /age group is [] and he compares herself with people of the age/ in the age group/below the age of []. The claimant to confirm.

3.2 Did the respondent do the following things:

3.2.1 In connection with an incident on the shopfloor when the claimant was manipulating a muscle in a colleague's neck (Ms Bekirova) which was 'knotted'; did Oonagh McLoughlin, Steve Brant and Lisa Thomas during the disciplinary investigation on 27 May 2022, insist that his conduct was inappropriate because he is an "older male" and Ms Bekirova was a "young girl".

3.2.2 Did Ms Oonagh also allege on 27 May 2022 that the claimant only "employs attractive young girls".

3.3 Was that less favourable treatment?

The Tribunal will decide whether the claimant was treated worse than someone else – a "comparator" – was treated. There must be no material difference between their circumstances and the claimant's.

If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated.

3.4 If so, was it because of his age, his sex (male) and/or his sexual orientation (heterosexual).

3.5 Did the respondent's treatment amount to a detriment? The claimant complains that these allegations have impacted on his professional reputation within the industry.

3.6 *Age only:* Was the treatment a proportionate means of achieving a legitimate aim?

4. **Remedy for discrimination**

4.1 Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?

4.2 What financial losses has the discrimination caused the claimant?

4.3 Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

4.4 If not, for what period of loss should the claimant be compensated?

- 4.5 What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?
- 4.6 Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?
- 4.7 Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?
- 4.8 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
- 4.9 Did the respondent or the claimant unreasonably fail to comply with it by [specify breach]?
- 4.10 If so is it just and equitable to increase or decrease any award payable to the claimant?
- 4.11 By what proportion, up to 25%?
- 4.12 Should interest be awarded? How much?"