



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Shoaib Razaq

v

Tesco Stores Limited

Heard at: Cambridge

On: 26, 27 and 28 February 2024 (and 29 February 2024 in chambers)

Before: Employment Judge de Silva KC, Ms W Smith, Ms H Gunnell

Appearances

Claimant: In person

Respondent: Mr Sam Way, Counsel

RESERVED JUDGMENT

1. The Claimant's claim for unfair dismissal pursuant to section 98 of the Employment Rights Act 1996 succeeds.
2. The Claimant contributed to his dismissal by giving a vibrator to a colleague as a Secret Santa gift and sending WhatsApp messages to Ms Donna Spriggs in which he sought to persuade her to come into work when she was ill.
3. The Claimant's complaint that the Respondent discriminated against him because of his race pursuant to sections 13 and 39(2)(d) of the Equality Act 2010 by failing to investigate his concerns about Mr Liam Wigg's racism and his conduct/honesty succeeds.
4. The Claimant's complaint that the Respondent discriminated against him because of his race pursuant to sections 13 and 39(2)(c) of the Equality Act by dismissing him succeeds.

5. The Claimant's other complaints that he was discriminated against by the Respondent because of his race are dismissed.
6. All remedies issues, including the issue of what deduction if any should be made to any compensation for contributory fault will be heard at a Remedies Hearing which will be listed by the Employment Tribunal.

REASONS

THE PROCEEDINGS

1. By Claim Form presented on 27 August 2022, the Claimant made claims for unfair dismissal pursuant to section 98 of the Employment Rights Act 1996 and direct race discrimination pursuant to section 13 of the Equality Act 2010.
2. At a telephone case management hearing on 31 January 2023, at which the Claimant was present but represented by a lay representative, the Tribunal identified the issues in the case, gave case management directions and listed the present hearing on liability only.
3. The case management directions included a direction for exchange of witness statements by 28 July 2023. These were exchanged only in September 2023 and the Claimant's representative exchanged only an email from the Claimant which was not compliant with the directions (e.g. to have numbered paragraphs and be cross-referenced to the bundle) and focused mainly on remedies issues. The Claimant told the Tribunal at the Final Hearing that this was the document that he wished to rely on as his witness statement, which he did. This was rightly agreed by the Respondent.
4. At the outset of the present hearing, the Employment Judge informed the parties that he was a part-time Judge and in his role as a barrister had been instructed by Tesco in an employment matter and had also appeared against Tesco in an employment dispute. Neither party objected to his hearing the case and, in particular given the lack of objection and the fact that he had no ongoing professional relationship with Tesco or any party acting against Tesco, the Employment Judge did not think it necessary to recuse himself from hearing the case.
5. The parties jointly applied for the Tribunal not to sit on the second day of the hearing as the Claimant had a family funeral that day and one of the Respondent's witnesses had a post-surgery medical appointment. The Tribunal granted this application on the basis that the evidence and submissions would be completed by the end of the third day, which was consistent with the estimates that the parties had given. The Tribunal treated the second day as a reading day and started at 9.30am on the third day to enable evidence and submissions to be completed.

6. The parties agreed that the liability issues for the present hearing were as set out in the List of Issues in the Case Management Summary of 31 January 2023, including the issues of whether to make a deduction to compensation for contributory conduct (paragraph 7(vi)) and whether a **Polkey** reduction should be made (paragraph 7(vii)), although the question of the amount of any such deductions was identified in the List of Issues as being a matter for any remedies hearing (paragraph 7(xi)(c)-(d)). The parties also agreed that the Claimant's evidence would be heard first. On the first day of the hearing, the Claimant gave oral evidence, including being cross-examined by the Respondent and then asked questions by the Employment Tribunal. On the third day, the Tribunal heard from Hal Jenkins on behalf of the Claimant and he was cross-examined by the Respondent.
7. On the third day, the Respondent called Simon Renwick (Area Manager), Lisa Lewis-Fowkes (Store Manager, who carried out the disciplinary procedure and dismissed the Claimant) and Kevin Chestnutt (Area Manager, who carried out the appeal procedure and dismissed the appeal). They all submitted witness statements, were cross-examined by the Claimant and asked questions by the Tribunal.
8. The Tribunal was referred to a bundle of documents running to 438 pages and further documents from the Claimant (which had previously been disclosed) which were handed up during the hearing with the consent of the Respondent. The Tribunal was also shown CCTV footage which is referred to below. Closing submissions were heard on the third day and the Tribunal deliberated on the remainder of the third day and on fourth day.
9. The Tribunal records its gratitude both to Mr Way and to the Claimant for the professional and courteous manner in which the hearing was conducted.

FINDINGS OF FACT

10. The Tribunal makes the following findings of fact on the chronology of events which are relevant to the issues between the parties. Where there was no dispute between the parties as to a particular fact, the findings are recorded below without further explanation. Where there was a dispute between the parties on the evidence, the Tribunal explains why it made its findings of fact.

The Claimant's Employment

11. The Claimant was originally employed as a Store Manager by One Stop Stores Limited, which is a Tesco subsidiary, from 2 January 2017 pursuant to a statement of terms and conditions signed by him on 14 December 2016. On 19 January 2020, he became an employee of the Respondent with the job title Express Store Manager. The Claimant identifies his race as British Pakistani.

Tesco Policies

12. Tesco has a Disciplinary Policy which lists breaches of Tesco rules/standards which are likely to constitute gross misconduct. The list includes *“An act of discrimination, harassment or bullying (Dignity at Work)”*. The Policy further states that a disciplinary investigation will *“explain what allegations will be discussed”*. It further states: *“Any issues raised during the disciplinary process, regarding the investigation or any matters linked, will either be considered during the disciplinary hearing itself, or at an appeal hearing”*.
13. The Bullying and Harassment Procedure defines bullying as *“offensive, intimidating, malicious or insulting behaviour which may involve the misuse of power and could make you feel; vulnerable, undermined, threatened, humiliated or upset”*. The Procedure goes on: *“Bullying can take the form of physical, verbal and non-verbal conduct”* and gives a list of examples of bullying.
14. It defines harassment as *“unwanted physical, verbal or non-verbal conduct that has the purpose OR effect of violating your dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment”*. It goes on to say: *“A single incident can amount to harassment and if the actions could reasonably be considered to have caused offence then the harasser is in the wrong, even if that was not the intended purpose of the harasser”*.

Racist Comments to the Claimant by Members of the Public

15. Prior to 2 December 2021, the Claimant was manager of the Hampton Vale Express store and his line manager was Mr Renwick.
16. In August 2021, there was incident involving the Claimant and a member of the public during an early morning delivery at the Hampton Vale Express store. The member of public was apparently angry at being woken up by noise from a delivery lorry and, when the Claimant tried to intervene to calm the situation, the member of public made a comment about the Claimant living in an area populated by people of Pakistani origin and then called him a *“Paki wanker”*. When the incident was raised with Mr Renwick, he suggested that the Claimant inform HR about it in writing, which he did, and said that if the Claimant wished to pursue it as a police matter, the Respondent would support him.
17. In October 2021, there was an incident in the Hampton Vale Express store when a customer racially abused the Claimant. After she was banned, she brought the incident to the attention of the Tesco Customer Services team who informed Mr Renwick about it. He then told the Claimant that the matter could be raised with the police but that she was willing to apologise. He asked the Claimant whether he would agree to lift the ban as it was her local store. The Claimant said that he was agreeable to this. The Claimant did not recall this incident but we accept what Mr Renwick said about it as he had a clear recollection of the incident, having wrongly been told by Customer Services that the surname of the perpetrator was Satsuma and having called her this, when the surname was in fact Sultana.
18. The Tribunal was concerned by the lack of support offered by Tesco to the Claimant in relation to these incidents. It was left to him to decide what to do about it (for example, Tesco did not independently decide to pursue either perpetrator or to

uphold the ban on the customer). Moreover, no support was offered to the Claimant in relation to these two deeply unpleasant incidents. We are told that Tesco has a list of behaviours towards staff by customers that it considers to be unacceptable but that there is no policy for actually preventing such behaviours, for example to determine what sort of treatment is unsuitable for informal resolution, or supporting staff when they are victims of this. Tesco does not even appear to log such racist incidents itself which would at least enable monitoring of racism against its staff.

19. Although the parties each raised one of the incidents where racist comments were by members of the public in the present proceedings (the Claimant raised the August 2021 incident, Mr Renwick raised the October 2021 incident), they are essentially background matters and did not impact the Tribunal's conclusions on the pleaded issues.

Store Visit on 11 September 2021

20. On 11 September 2021, Mr Renwick brought his own line manager Natasha Jesuvant (Store Director) to visit the Hampton Vale Express store. To make a good impression, the Claimant wore a full business suit. This was unusual as managers' typical day-to-day attire was smart casualwear. It is agreed that Mr Renwick said that the Claimant was the smartest store manager he had ever seen.

21. The Tribunal finds that Mr Renwick also told the Claimant that he only ever saw people wearing a suit for Court or going for an interview. Although the Claimant says that Mr Renwick said that he looked like he had come from Court, we prefer the evidence of Mr Renwick who was clear and consistent on the point. We accept that Mr Renwick was merely commenting on the Claimant's smartness in a business suit. This is consistent with Mr Renwick, in a group call on 13 September 2021, specifically telling those attending that the Claimant had been the smartest manager that day.

22. Further, the Claimant made no complaint about Mr Renwick's reference to being dressed for Court - including in the disciplinary process - until it was referred to in box 8.2 of the Claim Form dated 27 August 2022.

Claimant's Move to St Ives Express and Stukeley Meadows

23. Towards the latter end of 2021, the Claimant asked Mr Renwick for an opportunity to develop his career. When store manager vacancies came up at the Respondent's St Ives Express and Stukeley Meadows stores, Mr Renwick took the view that the Claimant was capable of managing two stores and gave him the opportunity to do so, while relinquishing his responsibility for the Hampton Vale Express store. The Claimant moved to the new role on around 2 December 2021.

Grievances About the Claimant

24. On 6 December 2021, Liam Wigg, an employee in the Hampton Vale Express store, raised a grievance about the Claimant. Mr Wigg said that his "*real grievance*" concerned an incident on 25 November 2021 when he had gone into the office to look at his personnel folder and the Claimant had come into the office angrily and

grabbed the folder, grabbing his finger in the process. The background to this was that Mr Wigg, being contracted to work Sundays, had taken up an opportunity to opt out of this. After the Claimant had said that other shifts would be cut, Mr Wigg had allegedly been advised by USDAW to look in his folder for his contract. He also said that USDAW had advised him to bring the grievance.

25. Mr Wigg's grievance made further allegations about the Claimant, including his "*allowing members of staff and [sic] take part in sexual endeavours*", having staff members on his lap in the office and taking money from charity tins (though he expressed uncertainty about whether the Claimant was providing reimbursement for this).
26. On 7 December 2021, Donna Spriggs, another employee in the Hampton Vale Express store, also raised a grievance about the Claimant. She was a friend of Mr Wigg and his partner, outside work. Her grievance focused on the Claimant allegedly having pressurised her to come into work when she was ill, in the face of medical advice. She said that she had asked for some time off for her birthday which had been refused by the Claimant and that the Claimant had then messaged her to ask her to do a shift, saying that he would give her time off for her birthday if she worked the shift.
27. She made further allegations including that the Claimant messed about with "*young girls*" in the office and pulled them on to his lap and buying a female colleague an inappropriate toy for her birthday. She also alleged that the Claimant used money from a charity box to take younger staff to McDonald's and that he had a "*charity pot*" from selling cigarettes and stock that Tesco no longer sold which would be used for a Christmas meal.

Claimant's Visit to Hampton Vale Express Store on 23 December 2021

28. Mr Renwick and the Claimant spoke about the grievance in mid-December 2021. Mr Renwick said not to interfere with the investigation and that he had nothing to worry about if he had done nothing wrong. We do not accept that he specifically told the Claimant at this time that he should not to go into the Hampton Vale Express store, as the Claimant was not suspended at this time.
29. On 23 December 2021, the Claimant visited the Hampton Vale Express store. As set out above, he was not suspended from the Respondent at this time. Although he knew that Ms Spriggs was one of the individuals who had complained about him and although there were express checkout tills available there, he went to the checkout where Ms Spriggs was working in order to pay for his purchases. She asked him whether he wanted a receipt and he said that he needed it. He told the Tribunal, as we accept, that he said that he needed the receipt as he was a purchasing a gift for Mr Jenkins, who worked in the store.
30. On 17 January 2022, Ms Spriggs made a written complaint that the Claimant had intimidated her by saying that the receipt was needed in case the Claimant was accused of stealing. The Claimant denies saying this and we accept this.

Grievance Investigation

31. A grievance investigation was then carried out on behalf of the Respondent by Susan Clarke (a Store Manager). She interviewed Mr Wigg on 22 December 2021, Ms Spriggs on 22 December 2021, Mr Jenkins on 29 December 2021, Chloe Smalley on 29 December 2021, Luke Stephenson on 29 December 2021, Mr Renwick on 21 January 2022, and also the Claimant himself on 19 and 28 January 2022.
32. There is also an undated note of an interview with Kerry Cliffe who was the recipient of the inappropriate gift, a vibrator. She said it was a secret Santa gift and that *“we all had random gifts, butt plugs and dildoes were bought but this was done in a joking manner”*. She said that she had experienced this in other stores. In a WhatsApp message (the date of which is not apparent), Ms Cliffe told the Claimant that Mr Renwick had insisted to Ms Clarke that the Claimant be named in her statement in relation to the vibrator but Ms Clarke did not feel the need to name anyone as it seemed that everyone was gifting things like that.
33. In the Claimant’s first interview on 19 January 2022, at which allegations against him were discussed, the Claimant asserted that there was a ‘witch hunt’ against him and that he had evidence that Mr Wigg was racist. As recorded in the note of the meeting, the Claimant showed Ms Clarke images of reposts from Mr Wigg’s Facebook page.
34. This included a post of a photo of a crowd of individuals of Asian origin in a large hall which Mr Wigg had reposted with the words *“More coming to Lincoln Road”*, which the Tribunal was told is an area where many people of Asian origin live, and three laughter emojis.
35. Another was a repost of a photo of Sir Tom Moore with the word *“LEGEND”* printed on it, next to a photo of Sir Lewis Hamilton in a Black Lives Matter t-shirt, with the word *“BELLEND”* printed on the photo. Another post had a photo of two elderly people above what looked like a refugee boat with the words *“OUR ELDERLY MUST COME BEFORE THIS LOT”*. Another reposted a photo of refugees on a small boat with the words *“Harry Potter and the Prisoners of Afghanistan”*.
36. In her *“summing up”* toward the end of the meeting, Ms Clarke said that there was some training needed and some things around behaviours. The Claimant was also told by Ms Clarke that he would get a ‘slap on the wrist’.
37. On 21 January 2022, the Claimant asked to speak to Mr Renwick at the St Ives store. They then spoke in the office for around 15 minutes. The Tribunal watched a recording which had been made on the Claimant’s phone of the CCTV footage of the meeting. There was no sound recorded. Both the Claimant and Mr Renwick accuse the other in these proceedings of being aggressive at this meeting. They are both animated at points but it is not apparent from the footage that either was being aggressive. The Claimant expressed disappointment that Mr Renwick had not made the disciplinary issue go away.
38. Mr Renwick also described the Claimant as idiotic in going to the Hampton Vale store. The Claimant put to him in cross-examination that he had said that he was

a *“fucking idiot”*. Mr Renwick denied that he had sworn and we accept this. The Claimant told Mr Renwick at the meeting that he (the Claimant) could be a *“dick”* on Tesco’s Every Voice Matters system (**“EVM”**), where employees can raise internal complaints, but he wanted to speak to him personally. The Claimant has been consistent about this and what he was saying makes sense, in particular as he would have no sway over other managers

39. Mr Renwick told the Tribunal that the Claimant made a threat to the effect that if the disciplinary was not resolved, the Claimant would cause trouble for Mr Renwick using EVM (involving other managers). We do not accept this. The Claimant was simply trying to engage Mr Renwick personally rather than use EVM.

40. At the second interview with Ms Clarke on 28 January 2022, the Claimant was suspended by Ms Clarke on full pay. She also commented: *“you have been honest and admitted to what you have done, you have been remorseful and understanding”*.

41. By letter of the same date from Ms Clarke, the suspension was confirmed in writing and the Claimant was told that a disciplinary would be held.

Grievance Outcomes

42. By letters dated 4 February 2022, Ms Clarke informed Mr Wigg and Ms Spriggs that their grievances had been upheld.

43. In her Investigation Report of 4 February 2022 she set out four allegations and made findings in relation to each, including proposed next steps:

- a. In relation to the first allegation, *“Absence – ask to work when sick on a number of occasions, even when suspected of having covid”*, she said that the next steps were to complete retraining;
- b. In relation to the second allegation, *“Charity money/funds for Xmas party”*, she concluded that the next steps were for retraining;
- c. In relation to the third allegation, *“Bullying and harassment”*, she said that looking at the CCTV evidence (that is the CCTV of the incident between the Claimant and Mr Wigg on 25 November 2021) and statements, the visit from the Claimant to the store on 23 December 2021, this was a disciplinary matter;
- d. In relation to the fourth allegation, *“conduct and behaviours in store”*, She concluded from the evidence gathered from colleagues, general behaviours of the team the investigation with the Claimant and his *“honesty”* with regard to certain situations, an *“overfriendly relationship with all staff”* which had also been moved to a disciplinary meeting.

44. It was not stated what the issue of his *“honesty”* was (although it is apparent that it was not related to *“Charity money/funds for Xmas party”* which was dealt with

separately in allegation two and was a matter to be addressed by retraining) and the “*certain situations*” where his honesty was in issue was not identified.

Disciplinary Letter dated 7 March 2022

45. By letter dated 7 March 2022, Ms Clarke informed the Claimant that Ms Lewis-Folkes would be chairing a disciplinary hearing on 10 March 2022, the purpose of which was to discuss allegations of:

- a. “*bullying and harassment*”, which was a plain reference to the third allegation referred to in the Investigation Report. This encompassed Mr Wigg’s allegation about the incident of 25 November 2021 for which there was CCTV footage and Ms Sprigg’s allegation about the incident of 23 December 2021. It was not clear from the documentation what other factual allegations if any were included;
- b. “*conduct and behaviour within the store*”, which was a plain reference to the fourth allegation referred to in the Investigation Report, which included “*overfriendly relationship with all staff*” but it was not clear what else.

First Disciplinary Hearing on 10 March 2022

46. In her disciplinary checklist, Ms Lewis-Fowkes mentioned both misconduct limbs set out in the letter of 7 March 2022; however, she started the disciplinary hearing on 10 March 2022 by stating that they were there to discuss allegations of bullying and harassment (without mentioning the second limb, conduct and behaviour within the store).

47. Ms Lewis-Fowkes and the Claimant discussed the inappropriate gift which the Claimant explained was a ‘secret Santa’ gift in 2020, i.e. more than a year earlier, to a female colleague of a vibrator and chocolates. He said that he should not have bought the gift and he got that it was a wrong gift to buy. He was asked what his colleagues and his wife would think about this and he said that his wife did not know and she was jealous. When asked what he would think if someone bought his partner a gift, he said that he would be angry. He accepted that it was wrong and could cause problems.

48. They discussed the incident with Mr Wigg on 25 November 2021. The Claimant said that he did not see how taking a folder from someone’s hands amounted to bullying. Ms Lewis-Folkes asked a number of questions such as why the Claimant did not give the contract to Mr Wigg, why he did not contact the duty manager, why Mr Wigg was in the office and why the office was not locked. When asked why he grabbed the folder, the Claimant accepted that he could have handled it better. She later asked him whether it looked intimidating to which he replied that he should not have taken the folder from Mr Wigg but it does not look aggressive on the CCTV. When asked why he followed Mr Wigg to the toilet, the Claimant stated that he was telling Mr Wigg that he (the Claimant) was wrong and that he was not losing his Sundays. They also discussed the timing of the Claimant’s suspension.

49. The Claimant was asked which colleagues he saw out of work. When the Claimant gave four names in response (Hal, Danielle, Kas and Chloe), Ms Lewis-Fowkes asked him if he was having an affair with Chloe. The Claimant said that he was not. He said that Kas and Chloe came out with him when he was making deliveries for a Chinese restaurant, which he did as a second job.
50. The Claimant was asked whether he had one rule for some and another rule for others. The Claimant addressed the allegation about a woman sitting on his lap, saying that someone called Sue fell on his knee. Ms Lewis-Fowkes said that there are times when it was *"taking the piss"*.
51. The Claimant was asked about smacking someone's backside and he told Ms Lewis-Fowkes that it was Mr Wigg who had done this. When she asked what he had done about this, he said that he had looked for the CCTV but there was none and it was left in the hands of Karen Hawkins, the Colleague Resources Partner for the store.
52. At his meeting, the Claimant again alleged that Mr Wigg was a racist and had seen things on his Facebook, which included a post referring negatively to more Asian people moving to Lincoln Road. Ms Lewis-Fowkes was not shown these posts, as Ms Clarke had been, and she said it would be good to see them.
53. The Claimant also said that Mr Wigg had referred to a *"Paki"* working in a chip shop nearby and that the Claimant had told him not to be like that. The Claimant explained to the Tribunal that he had asked Mr Wigg whether the chip shop was halal and Mr Wigg had replied that it must be, as he had been served by a *"Paki"*. This was confirmed by Mr Jenkins in his evidence and we accept that Mr Wigg had used this racist word when speaking to the Claimant about the chip shop.
54. Ms Spriggs's grievance was also discussed, as well as the Claimant's conversation with her on 23 December 2021. The Claimant accepted that he should have kept away. He said that Ms Spriggs had asked whether he wanted a receipt for his purchase and he had said yes as it was a present for Mr Jenkins, who worked in the store. The Claimant also addressed the WhatsApp messages about Ms Spriggs coming to work when she was ill.
55. At the end of the meeting, the Claimant said that he would like to raise a grievance about Mr Renwick's alleged bullying. Ms Lewis-Fowkes said: *"I will look into Simon and as you have brought it to the meeting a grievance will happen"*. When the Claimant expressed guilt about submitting a grievance about Mr Renwick, she said *"let's do it the right way. I will be in contact"*.
56. Although Ms Lewis-Fowkes told the Tribunal that no formal grievance had been raised by the Claimant, it is clear from the meeting note quoted above that Ms Lewis-Fowkes was saying that she was treating a grievance about Mr Renwick as having been raised orally and that she would look into it and be in contact. This is what the Claimant understood and we conclude that his understanding is correct. However, she did nothing about it.

57. Following the first disciplinary meeting, the Claimant submitted a number of WhatsApp messages between him and Ms Spriggs and between him and Mr Wigg.

WhatsApp Messages between the Claimant and Ms Spriggs

58. Ms Spriggs had health issues which caused her to have frequent absences. This was a matter on which the Claimant had sought assistance from HR.

59. The WhatsApp messages show Ms Spriggs calling in sick on a number of occasions, in light of medical evidence, and the Claimant nonetheless trying to persuade her to come in. For example, he says *"Is there no way you can push yourself to come in as we are stuck for people"; "...you sure your not gonna be able to make it as it will be a 3rd occasion of abs in a short period of time!! Is there no way you can make it in"* and *"...unfortunately for the first 3 days you won't get paid, I do believe we can get you a chair behind the till and serve the customers plus next shift is sat which means you could get a lot better"*. It was Tesco policy that staff on sick leave would not be paid for the first three days of absence.

60. Ms Spriggs asked for time off as her children had booked something for her fiftieth birthday in February 2022. The Claimant replied that he could not give the holiday as they had had to tighten holidays. When she asked for them as days off, he said that they would try but as it was a long way off, he could not say now, later adding that he was sorry about it. The language of the messages between them is friendly and some end with an "x".

WhatsApp Messages between the Claimant and Mr Wigg

61. The WhatsApp messages between the Claimant and Mr Wigg concern Mr Wigg's having opted out of Sunday working and a dispute between them about whether he had to work on Tuesdays. In this context, the Claimant said that if Mr Wigg supported him, he would support Mr Wigg in relation to having Tuesdays off. Mr Wigg said that he felt that it was always him whom the Claimant was not accommodating. The Claimant said that he had and asked Mr Wigg to ask himself whether Mr Wigg had accommodated the business by working Sundays.

Disciplinary Interviews

62. On 16 March 2022, Ms Lewis-Fowkes interviewed Mr Wigg. In relation to the incident on 25 November 2021, he said that the Claimant had grabbed his wrist. Based on the CCTV footage of this incident, which the Tribunal watched during the Final Hearing, it is apparent that the Claimant did not grab Mr Wigg's wrist (or his finger, as alleged in Mr Wigg's grievance letter).

63. Ms Lewis-Fowkes also asked about the Claimant's behaviour in the store, including in relation to female colleagues, for example one who was alleged by Mr Wigg to have been lifted up by the Claimant and one whom Mr Wigg alleged the Claimant used to buy gifts for. However, she did not mention the Claimant's allegations of racism against Mr Wigg (including whether he had used the word *"Paki"* or posted racist things on Facebook) or question him about race at all. The Tribunal asked

Ms Lewis-Fowkes in evidence why she had not mentioned the Claimant's allegations and she said that she did not know.

64. On 16 March 2022, Ms Lewis-Fowkes also interviewed Ms Spriggs. They discussed the way in which the Claimant had dealt with Ms Spriggs's sickness and Ms Lewis-Fowkes asked her whether she felt as though the Claimant questioned anyone else's sickness, to which she replied that the Claimant questioned Mr Wigg's sickness when he had to be off because of his heart.
65. They also discussed the reason for her grievance, the culture in the store, the incident of 23 December 2021 and the allegations of Claimant lifting staff and putting a colleague on his lap.
66. On 16 March 2022, Ms Lewis-Fowkes interviewed Ms Clarke. She told Ms Clarke *"[the Claimant] also believes that one of the colleagues is racist - this is why Liam put in the grievance about [the Claimant]"*. She asked if anything had been done about it, to which Ms Clarke replied *"No but I haven't closed the door on this"*.

Further Disciplinary Meeting on 24 March 2022

67. A second disciplinary meeting was arranged on 24 March 2022. During this meeting, the Claimant apologised if he had offended Mr Wigg and Ms Spriggs. When he was asked whether he believed that the way that he had spoken in the WhatsApp messages was right, the Claimant accepted that it was not. He said that he had *"made a mistake"* in the incident with Mr Wigg on 25 November 2021 and that he *"could have done things differently"*.
68. At one point, he said (as recorded in the note) *"I would put my hands up about things I had done wrong"* and at another point he said *"I am not saying I've done nothing wrong..."*. He also said: *"I understand that I did wrong with the vibrator..."* and later said it was a *"terrible decision buying the gift"*. Re the allegation of harassment he said *"I can't apologise enough I tried to protect anyone"*.
69. In the course of the meeting, Ms Lewis-Fowkes said that the racism raised by the Claimant needed to be dealt with and then asked the Claimant why he had allowed it in his store. She then said *"I will be looking into this"* and then *"what I want you to believe is that I will deal with it"*. The last thing the Claimant said before the decision is given is *"I would like to apologise to them and there is a lot I can learn and I know I am not perfect"*.

The Claimant's Dismissal

70. At the conclusion of the meeting, Ms Lewis-Fowkes dismissed the Claimant. As set out in her notes in the Disciplinary Checklist, she said that he had:
- a. Abused his position of trust as a manager;
 - b. Managed some of his team through fear and intimidation;
 - c. Not treated colleagues equally;

- d. Built a culture in that if staff worked for his rules it was okay;
 - e. Hidden behind excuses of lack of training when he had had the relevant training;
 - f. Intimidated colleagues with no thought of their mental health or wellbeing.
71. She said that the content and tone of the WhatsApp messages showed no care to colleagues and that the Claimant also felt it was acceptable to challenge medical advice.
72. She said that he had abused his position of power and subjected colleagues to harassment by inappropriate banter and circulating offensive material. She said that it was her decision to dismiss the Claimant for harassment and bullying.
73. The Tribunal asked Ms Lewis-Fowkes in her oral evidence what the “*inappropriate banter*” referred to in her outcome was and she said that it was the Claimant having female colleagues sit on his lap. The Tribunal does not accept that this is what was intended by “*inappropriate banter*” first because the word “*banter*” does not naturally refer to physical contact (as opposed to words), second because there is no evidence of Ms Lewis-Fowkes considering relevant disputed evidence on this matter (e.g. whether someone simply fell on the Claimant’s lap as he alleged) and thirdly because there is no express reference to her having considered this as part of her decision to dismiss the Claimant.
74. The Tribunal also asked her in evidence what the “*offensive material*” was that was circulated and she said that it was giving the vibrator to a colleague. The Tribunal does not accept that this is what was intended by “*circulating offensive material*” first because the word “*material*” does not naturally refer to a physical object such as a vibrator and the word “*circulating*” does not naturally refer to giving such an object as a present. There is again no evidence of Ms Lewis-Fowkes considering relevant disputed evidence on this matter, for example whether it was a Secret Santa gift (rather than a birthday gift as alleged by Ms Spriggs) and whether gifts of this sort were given by others in a joking manner, as alleged by Ms Cliffe. Further, there is no express reference to her having considered this allegation as part of her decision to dismiss the Claimant.
75. There was no mention in her disciplinary outcome of the remorse shown by the Claimant in the disciplinary meetings (or the grievance meeting, as recorded by Ms Clarke). In her witness statement for the Final Hearing, Ms Lewis-Fowkes said that the Claimant had refused to take full responsibility for his actions or to accept that his behaviour was intimidating or inappropriate. The Tribunal takes the view that this statement is deliberately false as it is clear from the meeting notes that the Claimant repeatedly took responsibility for his actions and apologised for them, including as set out above, even accepting that he should be given a warning.

The Dismissal Letter

76. The dismissal letter dated 26 March 2022 referred only to bullying and harassment and made no mention of the second limb stated in the disciplinary invitation letter dated 7 March 2022, i.e. conduct and behaviour within the store. The Respondent has not explained why this was and it appears that no thought was given to the precise way in which the allegation of misconduct for which the Claimant was dismissed was formulated to him.

The Appeal

77. By letter dated 3 April 2022, the Claimant appealed raising four grounds of appeal: the outcome was too harsh, the investigation was not complete, he was not given a fair hearing and his version of events was not adequately considered.

78. The appeal meeting took place on 10 June 2022. Mr Chestnutt gave his decision in the appeal meeting. The note states that he said *“I would have sacked you as well, after spending two days with you, it is everyone else’s fault and never yours. So I am not going to change Lisa’s decision”*.

79. He set out his reasons in writing by letter dated 23 June 2022 as follows:

- a. *“Based on the allegations, interviews and statements given into your conduct as the store manager of Hampton Express I would agree with Lisa that you have bullied and harassed the colleagues that you lead”*;
- b. *“Your appeal was based solely on discrediting the integrity, honesty and ability of every statement and interview including the managers conducting the interviews and disciplinary meeting”*.

80. When he was asked by the Tribunal which allegations were upheld by Ms Lewis-Fowkes (and therefore formed the basis of the decision to dismiss), he mentioned three factual matters, emphasising in answer to a further question that it was these three things that had led to the dismissal:

- a. Ms Spriggs being persuaded to come to work when she was ill;
- b. The purchase of the vibrator; and
- c. The conversation with Mr Renwick on 21 January 2022.

81. In relation to the matter of Ms Spriggs being persuaded to come to work, he said in oral evidence that she had been *“coerced”* into coming to work in return for being allowed leave for her sixtieth birthday celebration. However, it was clear from the WhatsApp messages (which he was taken to in evidence) that this was incorrect. There was no discussion in the WhatsApp messages between the Claimant and Ms Spriggs about her coming into work in return for being allowed leave for a birthday celebration.

82. As for the conversation with Mr Renwick on 21 January 2022, contrary to Mr Chestnutt’s understanding, Ms Lewis-Fowkes did not suggest that her decision to dismiss the Claimant was at all based on this incident.

83. The appeal outcome letter dated 23 June 2022 further stated that the appeal was based on discrediting the integrity, honesty and ability of every statement and interview including the managers conducting the interviews and disciplinary meetings. This is at best an exaggeration and is in any event wholly misleading. The Claimant had accepted wrongdoing and was not challenging the integrity of managers conducting the interviews.
84. Mr Chestnutt stated in his witness statement that the fact that the Claimant had not taken any action in relation to Mr Wigg showed that the Claimant was trying to “*dredge up an old incident*” to discredit Mr Wigg. He said that he was “*disappointed to hear*” that the Claimant had not addressed the issue of Mr Wigg’s racist motivation. As explained by the Claimant, the Claimant did not know about the Facebook posts when he was at the Hampton Express store. The Claimant had also explained at the first disciplinary meeting that he had told Mr Wigg not to be like that.
85. Mr Chestnutt neither investigated these matters nor recognised that there had been a failure to investigate these as part of the disciplinary process. He did not engage at all with the Claimant’s point that Mr Wigg was motivated by racism which affected the credibility of his allegations (for example about the altercation in the office).

Liam Wigg

86. The Tribunal was told by Mr Renwick that at no point was Mr Wigg investigated by Tesco or subjected to any disciplinary proceedings, for example for using discriminatory or offensive language, before he left the company in 2022.

RELEVANT LAW

Unfair Dismissal

87. Section 98(1) of the Employment Rights Act 1996 states that it is for a respondent to show the reason (or principal reason) for the dismissal. A potentially fair reason for dismissal is the conduct of the claimant.
88. If a potentially fair reason for dismissal is established, the Tribunal will consider whether the respondent acted reasonably or unreasonably in treating the reason as sufficient reason for dismissing the claimant. In a misconduct dismissal, this requires consideration of whether the respondent had a genuine belief that the claimant was guilty of misconduct, whether there were reasonable grounds for this belief and whether it carried out as much investigation as was reasonable (***BHS Ltd v Burchell*** [1978] IRLR 389 EAT).
89. The Tribunal must consider whether dismissal was within the range of reasonable responses for a reasonable employer (and it is not for the Tribunal to substitute its own decision as to whether it would have dismissed the Claimant). The ‘range of reasonable responses’ test applies to the issue of whether the respondent followed

a reasonable procedure, just as it does to the decision to dismiss itself (**Sainsbury's Supermarkets Ltd v Hitt** [2003] IRLR 23 CA).

90. The employer should be even-handed and focus on potential evidence which exculpates the employee as much as evidence directed towards proving the disciplinary charges (see e.g. **A v B** [2003] IRLR 405). The employer is not required to investigate every line of defence, what is important is the reasonableness of the investigation as a whole.
91. The Respondent referred the Tribunal to the case of **Mbubaegbu v Homerton University Hospital** UKEAT/0218/17 at para 32, in which Chaudhury J held that: *"It is quite possible for a series of acts demonstrating a pattern of conduct to be of sufficient seriousness to undermine the relationship of trust and confidence between employer and employee. That may be so even if the employer is unable to point to any particular act and identify that alone as amounting to gross misconduct. There is no authority to suggest that there must be a single act amounting to gross misconduct before summary dismissal would be justifiable or that it is impermissible to rely upon a series of acts, none of which would, by themselves, justify summary dismissal. As stated in Neary, conduct amounting to gross misconduct is conduct such as to undermine the trust and confidence inherent in the relationship of employment. Such conduct could comprise a single act or several acts over a period of time"*.

Direct Race Discrimination

92. Section 13(1) of the Equality Act 2010 states: *"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"*. Section 4 of the Equality Act provides that race is a protected characteristic.
93. Section 23(1) of the Equality Act states: *"On a comparison of cases for the purpose of section 13 ... there must be no material difference between the circumstances relating to each case"*.
94. Section 136 of the Equality Act states: *"(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"*.
95. In **Igen Ltd v Wong** [2005] IRLR 258, the Court of Appeal explained that a claimant must first prove on the balance of probabilities facts from which the tribunal could conclude (in the absence of an adequate explanation) that the respondent has committed an act of unlawful discrimination. The burden of proof then passes to the respondent to prove that it did not commit that act, demonstrating on the balance of probabilities that the treatment was in no sense whatsoever because of the protected characteristic (here, race).
96. In **Madarassy v Nomura International plc** [2007] IRLR 246, the Court of Appeal held that the bare facts of difference in status and difference in treatment are not,

without more, sufficient material from which a tribunal could conclude that a respondent had committed the act of discrimination.

97. In **Royal Mail Group Ltd v Efofi** [2021] UKSC 33, the Supreme Court, confirming the application of the two-stage approach to the burden of proof, held that a Tribunal may consider all the evidence from whichever party raises it when coming to the conclusion as to whether the burden has shifted.

THE TRIBUNAL'S CONCLUSIONS

Unfair Dismissal

(1) The principal reason for dismissal.

98. The Tribunal accepts that the principal reason for dismissal was misconduct.

(2) The genuineness of the Respondent's belief

99. The Tribunal accepts that the Respondent, in particular Ms Lewis-Fowkes, did genuinely believe that the Claimant was guilty of misconduct, including giving the vibrator as a gift, the Claimant's WhatsApp messages to Mr Wigg and Ms Spriggs and the incident between the Claimant and Mr Wigg in the office on 25 November 2021, as well as not treating colleagues equally.

(3) Did the Respondent hold that belief in the Claimant's misconduct on reasonable grounds?

100. The Tribunal concludes that there were reasonable grounds on which to sustain the Respondent's belief in relation to some of the misconduct on the part of the Claimant, in particular giving a vibrator to a colleague and the WhatsApp messages between the Claimant and Ms Spriggs in which he sought to persuade her to come to work when she was ill.
101. Based on the CCTV footage, the Tribunal concludes that the incident with Mr Wigg in the office at Hampton Express did not constitute reasonable grounds for believing that there was misconduct. Mr Wigg had taken his file from a cabinet which he was not permitted to do. When the Claimant found him looking at his file he took it back from him. The CCTV shows that the Claimant did not grab Mr Wigg's finger or wrist, as Mr Wigg alleged.

(4) Whether the procedure followed by the Respondent was within the range of reasonable responses

102. The Claimant's main challenge to the reasonableness of the investigation is that the Respondent failed to investigate his concerns over the racism of Mr Wigg and whether this motivated the grievance against the Claimant.
103. This was an important pillar of the Claimant's defence to the misconduct allegations. If the motivation for the grievance was racist, this would undermine Mr

Wigg's credibility in relation to the allegations he made about the Claimant, for example about the incident between them on 25 November 2021 and about colleagues sitting on the Claimant's lap. If it were established that he had raised his grievance (and persuaded his friend Ms Spriggs to raise her grievance) because of the Claimant's race, as the Claimant believed he had, this would have put the grievance complaints in a very different light.

104. The Claimant's concerns were supported by evidence, that is to say Mr Wigg's use of the word "*Paki*" when speaking to the Claimant at work as well as the Facebook posts referred to above (in particular the one about the numbers of people of Asian origin moving to Lincoln Road).
105. Although Ms Lewis-Fowkes asked Mr Wigg about the motivation and timing of his grievance in her meeting with him on 16 March 2022 (and accepted what Mr Wigg said about this), she did not ask him about the evidence of his racist motivation, despite the Claimant having made this point to her in clear terms in his first disciplinary meeting on 10 March 2022. She did not assess whether Mr Wigg had in fact used the word "*Paki*" and she did not ask to see the Facebook posts after this was discussed at the first disciplinary meeting on 10 March 2022 (despite having said at that meeting that it would be good to see them). Moreover, she did not give any consideration throughout the disciplinary process to Mr Wigg's potentially racist motivation.
106. The same is true of Mr Chestnutt who treated the Claimant with hostility when to raised the issue of Mr Wigg's racist motive, saying that he was trying to "*dredge up an old incident*" to discredit Mr Wigg and was "*disappointed to hear*" that the Claimant had not addressed the issue of Mr Wigg's racist motivation.
107. The Tribunal considers this to be a form of victim-blaming and it was in any event based on a lack of understanding of the true position as to the Claimant's knowledge and conduct: the Claimant did not know about the Facebook posts when he was at the Hampton Vale Express store and, as he had explained at the first disciplinary meeting, he had told Mr Wigg not to be like that when Mr Wigg had used the word "*Paki*".
108. In any event, Mr Wigg using the word "*Paki*" in a conversation with the Claimant is something that could show racist motivation, even if it was an "*old incident*". The Respondent nonetheless failed to investigate this matter or to recognise that there had been a failure to investigate these as part of the disciplinary process.
109. Whilst an employer is not required to investigate every line of defence, The Tribunal is of the view the Respondent failed to carry out a reasonable investigation by failing properly to investigate this defence which was highly pertinent to the disciplinary allegations and on which the Claimant had placed considerable weight.
110. This was symptomatic of an investigation which, at both the disciplinary stage and the appeal stage, lacked even-handedness and was unfairly focused on establishing the guilt of the Claimant rather than on giving proper consideration to all the evidence, including exculpatory evidence. This is apparent from the following.

111. Although the allegations of misconduct were identified at the outset of the process as being (a) bullying and harassment and (b) conduct and behaviour within the store, the specific acts which were alleged to fall within these descriptions of behaviour were not identified to the Claimant and we find that Ms Lewis-Fowkes was not even clear in her own mind what the factual allegations which were being investigated.
112. When it was suggested to Ms Lewis-Folkes in the course of her oral evidence that it was unclear from the letter to the Claimant dated 7 March 2022 what the factual allegations of *“bullying and harassment”* and *“conduct and behaviour within the store”* were, she said that allegations were set out the papers which the Claimant was sent, which included the grievances, the interview notes and the Investigation Report. However, it was not clear from the documentation provided that every factual allegation was intended to be relied on as misconduct potentially justifying or contributing to dismissal for gross misconduct.
113. Indeed, the following allegations were not stated in Ms Clarke’s Investigation Report following the grievances to be disciplinary matters (they were stated only to be matters for retraining and were not referred to under the headings *“bullying and harassment”* or *“conduct and behaviours in store”*):
- a. *“Absence – ask to work when sick on a number of occasions, even when suspected of having covid”*. However, this was pursued as an allegation of harassment in the disciplinary process (it was in fact the only factual matter expressly referred to in the outcome);
 - b. *“Charity money/funds for Xmas party”*. However, it was unclear whether this was pursued as a disciplinary allegation (the Claimant understood that it was and addressed it in the first disciplinary meeting but it does not appear to have been raised again).
114. Although an employee may be fairly dismissed for a series of acts demonstrating a pattern of conduct which is sufficiently serious to undermine the relationship of trust and confidence, they must still be sufficiently informed as to the acts under consideration to be able to put forward their side of the story and that is not the case here.
115. Furthermore, Ms Lewis-Fowkes gave no proper consideration to evidence which undermined the allegations in the grievances, such as the following:
- a. The evidence of Ms Cliffe that the vibrator was given as a Secret Santa gift rather than a birthday present and that gifts of this sort, such as ‘butt plugs’ and dildoes, were given by others at Tesco;
 - b. The evidence that someone fell on to the Claimant’s lap rather than him encouraging someone to sit on his lap (and the Claimant had himself asked Ms Lewis-Fowkes on 10 March 2022 why the person in question had not been interviewed);

- c. The WhatsApp messages which discussed Ms Spriggs's birthday leave but did not support Ms Spriggs's assertion that the Claimant offered to give her leave for her birthday if she came in to work a shift he wanted her to work.
116. It is also unclear which acts of alleged misconduct the dismissal was ultimately based on. In Ms Lewis-Fowkes oral and written conclusions, there was no explanation of and no examples given of what she meant by abusing the Claimant's position of trust as a manager; managing some of his team through fear and intimidation; not treating colleagues equally; building a culture where if staff worked for his rules it was okay (which was not even an allegation in the Investigation Report) or intimidating colleagues with no thought of their mental health or wellbeing.
117. As set out above, the Tribunal does not accept that "*inappropriate banter*" was intended to refer to the issue of staff sitting on the Claimant's lap or that "*circulating offensive material*" was intended to refer to giving a vibrator as a gift.
118. In explaining her decision in her witness statement, Ms Lewis-Fowkes referred to the Claimant harassing colleagues, creating a culture of fear within the Hampton Vale Express Store and intimidating colleagues. However, other than referring to the WhatsApp messages to Ms Spriggs, there was again no explanation of what was allegedly meant by these things, specifically which alleged factual matters were proven which supported these conclusions. In the view of the Tribunal, the evidence did not explain the hostile language she used in the disciplinary outcome.
119. At no point did Ms Lewis-Fowkes set out any conclusions on the specific factual allegations which were expressly identified as "*bullying or harassment*" in Ms Clarke's Investigation Report, still less explain these:
- a. **Incident of 25 November 2021 with Mr Wigg:** the evidence about this incident was disputed. Although the Claimant accepted that he acted inappropriately, he denied that he had grabbed Mr Wigg (and in this he was supported by the CCTV footage) and there was also a dispute about what was said. Further, he did not accept that Mr Wigg was intimidated and he alleged that the reason for the grievance was Mr Wigg's racism towards him. At no point did Ms Lewis-Fowkes address these matters. Despite all of this (including her failure to deal with the Claimant's allegation about Mr Wigg's racism), Ms Lewis-Fowkes stated in her evidence to the Tribunal that she was satisfied that Mr Wigg had been intimidated by the Claimant;
 - b. **Incident of 23 December 2021 with Ms Spriggs:** In her witness statement for the Final Hearing, Ms Lewis-Fowkes refers to this incident in her account of her interview with Ms Spriggs on 23 December 2021 but it does not appear that this formed part of her reasoning in concluding that misconduct took place (there was a dispute about what had been said on that occasion - the Claimant said that the receipt was because the purchase was for Mr Jenkins who worked in store and Ms Spriggs said that the Claimant had said that he did not want to be accused of stealing - but Ms Lewis-Fowkes did not engage with this at all).

120. She also referred in her witness statement to the allegation that the Claimant took colleagues out in his car when making deliveries for the Chinese takeaway but it is unclear whether this contributed to her decision and, if it did, there is no explanation of how this might have amounted to misconduct. She appears to have thought so at some point as she asked him about this in the first disciplinary meeting on 10 March 2022, also asking whether he was having an affair with a colleague Chloe which was not even one of the disciplinary allegations.
121. The Tribunal draws the conclusion from the matters set out above that Ms Lewis-Fowkes did not properly investigate the misconduct allegations and that she had little concern with what the precise allegations were against the Claimant, what the Claimant had to say about the allegations or the truth of the allegations themselves. Her decision was based on a general sense that there was misconduct on the part of the Claimant, considerably influenced by the allegations of Mr Wigg and Ms Spriggs about what had happened and how they felt about this, without addressing whether the disciplinary allegations were true. No reasonable employer would have acted in this way.
122. As for the appeal, the statement in the outcome letter dated 23 June 2022 that the appeal was based on discrediting the integrity, honesty and ability of every statement and interview including the managers conducting the interviews and disciplinary meetings was not a fair or accurate summary of the Claimant's appeal. Moreover, Mr Chestnutt did not address the points that were raised in the appeal in any detail in his conclusions, in particular about Mr Wigg.
123. As set out above, Mr Chestnutt thought that one of the misconduct allegations concerned the Claimant's conduct at the meeting with Mr Renwick on 21 January 2022 when it was apparent that this formed no part of Ms Lewis-Fowkes's decision to dismiss.
124. The Tribunal draws the conclusion from the matters set out above that Mr Chestnutt also had little concern with what the precise allegations were against the Claimant, what the Claimant had to say about these allegations or the grounds of appeal. His decision was based on a general sense that there was misconduct on the part of the Claimant without giving proper consideration to the evidence and what the Claimant had to say. No reasonable employer would have carried out an appeal process in this way.
125. The Claimant also complains in these proceedings about the delays in suspension outside normal process. It was only on 28 January 2022 that the Claimant was suspended by Ms Clarke (from whom the Tribunal did not hear evidence), almost two months after the grievances were raised against him by Mr Wigg and Ms Spriggs. Even if, as the Claimant believes, the reason for this related to his conversation with Mr Renwick on 21 January 2021, this does not impact upon the overall fairness of the process.
126. The Claimant also alleges that there was a disparity of treatment between him and Mr Renwick. The Claimant had raised complaints about Mr Renwick's behaviour as part of the disciplinary process. This was investigated as part of the appeal process, for example a statement from Mr Renwick was taken and the CCTV

footage of the incident was viewed. This incident did not relate to the disciplinary allegations, i.e. the Claimant's conduct during the discussion with Mr Renwick on 21 January 2022 was not one of the disciplinary allegations. In all the circumstances, this matter does not affect the overall fairness of the dismissal.

(4) Was the decision to dismiss within the reasonable range of responses for a reasonable employer?

127. Ms Lewis-Fowkes did not refer in her oral or written outcomes to the remorse shown by the Claimant in the course of the disciplinary meetings. Despite not mentioning the issue of remorse in her outcomes at the time of the dismissal, she asserts in her witness statement that she had in fact considered his alleged refusal to take responsibility for his actions and his alleged always trying to blame others, concluding that, although the Claimant had apologised for offending people on occasion, he refused to accept that the behaviour was intimidating or inappropriate.

128. This is untrue. The Claimant expressed remorse about a number of incidents throughout the disciplinary process, for example giving the vibrator, the WhatsApp messages and the incident on 21 November 2021. Indeed, Ms Clarke had taken particular note of the remorse shown by the Claimant in the grievance investigation, telling him *"you have been honest and admitted to what you have done, you have been remorseful and understanding"* (also telling him that the outcome would be some additional training and a 'slap on the wrist'). We find therefore that Ms Lewis-Fowkes did not give any proper consideration to the considerable remorse shown by the Claimant, which any reasonable employer would have.

129. Ms Lewis-Fowkes told the Tribunal that she could not see any circumstances in which the Claimant could have changed his behaviours, even on a final warning, and that she *"knew"* it would not be too long before the Claimant was sitting in front of a disciplinary manager again. This is not a conclusion that any reasonable employer would have come to in particular in light of his remorse.

130. In light of the failures in the disciplinary and appeal process to fairly investigate the allegations of misconduct against the Claimant, including failing to consider his point about Mr Wigg's racism, and the failure to give fair consideration to the considerable remorse that he showed, the Tribunal finds that the decision to dismiss the Claimant was outside the band of reasonable responses for an employer.

(5) If the dismissal was unfair, did the claimant contribute to the dismissal by culpable conduct?

131. The Tribunal finds that the Claimant contributed to the dismissal by the following conduct which was culpable: giving a vibrator to a colleague as a Secret Santa gift and the WhatsApp messages to Ms Spriggs seeking to persuade her to come into work when she was ill. Following the structure set out in the List of Issues from the Case Management Preliminary Hearing, the Tribunal will decide what percentage to reduce any compensation by at the Remedies Hearing, having heard any submissions on this from the parties in light of the findings in this Judgment.

(6) Does the respondent prove that if it had adopted a fair procedure the Claimant would have been fairly dismissed in any event? And/or to what extent and when?

132. In light of the failings set out above, in particular the lack of proper investigation of the allegations and what the Claimant said about these, the Respondent has not proved that, had it adopted a fair procedure, the Claimant might have been dismissed fairly in any event.

Direct Race Discrimination

133. The Tribunal addresses each allegation of race discrimination below, considering whether the alleged treatment took place, whether it was unfavourable treatment and whether it was because of the Claimant's race.

Allegation 1: On or around 11th September 2021 Simon Renwick commenting to the Claimant in front of Natasha Jesuvant that "have you just come from Court" as the Claimant was wearing a suit.

134. As set out above, the Tribunal has found that Mr Renwick did not use these words. The comment about the Claimant wearing a suit that Mr Renwick did make - that he only ever saw people wearing a suit for Court or going for an interview - was not in any sense whatsoever because of the Claimant's race.

135. The comment was made only because the Claimant was dressed smartly and it was intended to be supportive and complimentary, as is apparent from Mr Renwick's statement in the group call on 13 September 2021 that the Claimant had been the smartest manager that day.

136. In the circumstances, there is no need to consider whether the complaint in relation to this matter is in time (and the Respondent correctly accepts that the complaints addressed below are in time).

Allegation 2: Failing to investigate the Claimant's concerns about Liam Wigg's racism and his conduct/honesty; (Mr Wigg (White British) being one of those who raised a grievance about the Claimant which turned into the disciplinary process)

137. The Claimant's concerns about Mr Wigg arose from Mr Wigg having used the word "Paki" in a conversation with the Claimant and the various Facebook posts referred to above. Neither Ms Lewis-Fowkes nor Mr Chestnutt investigated the Claimant's concerns about Mr Wigg's racism or his conduct/honesty which was less favourable treatment.

138. The Tribunal is of the view that there is a prima facie case of discrimination in relation to their failure to investigate the Claimant's concerns based on the following matters:

- a. Mr Wigg's comments and (re)posts could at least be perceived to be racist. A failure to investigate a complaint about racism is not necessarily racially discriminatory itself. However, the fact that the point that the Claimant was making in the disciplinary process was about race discrimination, gives rise

to the possibility that the Respondent's failure to address this was an act of race discrimination;

- b. The Claimant's allegations were highly relevant to the disciplinary process. If Mr Wigg had made or circulated racist comments, it might be that he was making up or exaggerating his allegations about the Claimant and that he persuaded Ms Spriggs to bring her grievance and make up or exaggerate her allegations;
- c. Ms Lewis-Fowkes recognised the relevance of the allegedly racist Facebook posts, informing the Claimant on 10 March 2022: "*I think it would be good for us to see these messages*";
- d. Ms Lewis-Fowkes had the opportunity to raise the matter with Mr Wigg as she interviewed him on 16 March 2022, after the Claimant made the allegations about him. Mr Wigg made a number of allegations about the Claimant, including that he was a predator to women and that he treated certain people less favourably than a group of people that he favoured. However, she failed even to raise with Mr Wigg the Claimant's concerns about Mr Wigg's racism or the evidence which supported this;
- e. Ms Lewis-Fowkes and Mr Chestnutt both treated the Claimant's allegation of racism on the part of Mr Wigg with hostility. Both expressed the view that he was at fault in failing to deal with the racism (for example Ms Lewis-Fowkes told the Tribunal that it was for the Claimant to deal with this in store, either informally or formally), which again the Tribunal considers to be a form of victim-blaming. This was factually misconceived as the Claimant did speak to Mr Wigg informally at the time of the use of the word "*Paki*" and the Claimant did not know about the Facebook posts until after he had left the Hampton Vale Express store. Moreover, even if the Claimant had failed to deal with it, Mr Wigg making racist comments would still be relevant to the credibility of the allegations of misconduct;
- f. More generally, the Tribunal considers the failures to properly consider the allegations of misconduct were so fundamental that they also go towards establishing a prima facie case of race discrimination in relation to the failure to deal with the Claimant's concerns about Mr Wigg's racism. It would have been straightforward for Ms Lewis-Fowkes, an experienced manager who had been trained to deal with disciplinary procedures, to identify each factual allegation (for example about someone sitting on the Claimant's lap), put it to the Claimant, consider the evidence in relation to this and set out her conclusions on the allegation and her reasons for this. These basic steps were not taken;
- g. Equally, Ms Lewis-Fowkes gave no weight to the considerable remorse shown by the Claimant for his actions. This is not mentioned at all in her conclusions given in the meeting of 23 March 2022. Moreover, when she dealt with this in evidence before the Tribunal, her evidence was misleading; As set out above, it is not at all the case that the Claimant refused to take responsibility for his actions or refused to accept that his behaviour was

inappropriate as she alleges. He repeatedly accepted responsibility for his actions, as Ms Clarke had expressly acknowledged;

- h. Mr Chestnutt also failed to consider the remorse shown by the Claimant. He concluded at the appeal meeting as follows: *"I would have sacked you as well, after spending two days with you it is everyone else's fault and never yours. So I am not going to change Lisa's decision"*. However, the statement that it was everyone else's fault and never the Claimant's was an inaccurate summary of the Claimant's position, given the remorse repeatedly shown by him. Using such sweeping and unjustified language as "it is everyone else's fault and never yours" in the view of the Tribunal betrays a hostility to the Claimant;
- i. Nothing was ever done about the Claimant's allegation that Mr Wigg was racist, despite the evidence which supported this. It was not escalated and Mr Wigg was never investigated by Tesco (even though a number of managers were aware of the allegation).

139. For these reasons, the burden shifts to the Respondent to show on the balance of probabilities that the treatment was in no sense whatsoever because of the Claimant's race.

140. Ms Lewis-Fowkes justifies her not dealing with the allegation in her witness statement, stating that she could not understand what the Claimant's complaint was in this regard. However, it was very clear what the Claimant's complaint was, which was that Mr Wigg had raised complaints and been dishonest about them because of racism towards the Claimant.

141. She further alleges that if Mr Wigg's conduct deserved action, then it would have been for the Claimant to deal with this within the store and it felt as though the Claimant was bringing up Mr Wigg's behaviour to divert attention from his own behaviour. However, as set out above, if Mr Wigg had raised the allegations and been untruthful about them this would have been a relevant consideration whether or not the Claimant addressed the matters at the time (and again, the Claimant did not know about the Facebook posts until after he had left the Hampton Express store and he did speak to Mr Wigg about using the word "Paki").

142. The same point is made by Mr Chestnutt when he alleges in these proceedings that the Claimant was dredging up an old incident to discredit Mr Wigg. Again, this is no answer whatsoever to the Claimant's concerns that Mr Wigg was motivated by race and was being untruthful and Mr Chestnutt does not provide a plausible explanation for why it was not dealt with.

143. Ms Lewis-Fowkes knew that the allegation of racism was not being dealt with. As set out above, she told Ms Clarke *"[the Claimant] also believes that one of the colleagues is racist - this is why Liam put in the grievance about [the Claimant]"* and asked if anything had been done about it to. Ms Clarke replied *"No but I haven't closed the door on this"*. Ms Lewis-Fowkes told the Tribunal that she understood from this that something was going to be done about this but the Tribunal does not accept this. There was no suggestion from Ms Clarke that she or anyone else was

pursuing this allegation (and the fact that Ms Lewis-Fowkes did not at any point check what was being done about this shows that she knew that nothing was in fact being done about it).

144. It was Ms Lewis-Fowkes who had the opportunity to address the allegation directly with Mr Wigg but she failed to do so. As set out above, she was unable to offer any reason for this in evidence before the Tribunal.
145. For these reasons, the explanations put forward by the Respondent are not accepted as being true and it has not proved that the treatment was in no sense whatsoever because of the Claimant's race.
146. In the circumstances, the Tribunal finds that the Claimant was discriminated against by the Respondent failing to investigate the Claimant's concerns about Liam Wigg's racism and his conduct/honesty.

Allegation 3: Disparity of treatment between the Claimant for his conduct offences and that of his manager Simon Renwick (White British) on 21 January 2022 towards the Claimant.

147. The Claimant in essence complains that he was treated unfavourably as he was made the subject of a disciplinary process after complaints were made about him, but Mr Renwick was not made subject of a disciplinary process after the Claimant complained about his conduct at their meeting on 21 January 2022.
148. However, the Tribunal finds that the situations are materially different. The Claimant was the subject of two formal written grievances which were partially upheld following a grievance investigation. The decision to instigate disciplinary proceedings was made by Ms Clarke and not Ms Lewis-Fowkes.
149. The Claimant's grievance about Mr Renwick was made in the context of his own disciplinary process and in the first instance as a complaint about the process itself, including his suspension. The Claimant said that the attitude to him changed from it looking like he was getting a 'slap on the wrist' to facing disciplinary proceedings after the conversation with Mr Renwick on 21 January 2022.
150. Ms Lewis-Fowkes should have treated this as a formal grievance as she said "*I will look into Simon and as you have brought it to the meeting a grievance will happen*" and the Tribunal did not accept her evidence that she thought that no grievance had been raised. However, the position of Mr Renwick was not similar to that of the Claimant for the reasons set out above. Therefore, the Tribunal finds that this complaint of race discrimination fails.

Allegation 4: Dismissal

151. The Claimant alleges that he was dismissed by Ms Lewis-Fowkes because of his race. The Tribunal finds that he has established a prima facie case of race discrimination based on the matters set out at paragraph 139 above, so far as they relate to Ms Lewis-Fowkes. While the Tribunal accepts that the principal reason

for dismissal was the Claimant's conduct, the Respondent has not established that the dismissal was in no sense whatsoever because of the Claimant's race.

152. Her failure to investigate the Claimant's concerns about Liam Wigg's racism and his conduct/honesty was itself an act of race discrimination as set out above.
153. Ms Lewis-Fowkes was an experienced manager who was trained in dealing with disciplinary procedures. As set out above, her decision to dismiss the Claimant was based on a general sense that there was misconduct on the part of the Claimant considerably influenced by the allegations of Mr Wigg and Ms Spriggs about what had happened and how they felt about this, without properly addressing whether the allegations were true, including failing to consider evidence which supported the Claimant's case as set out above. There was no justification for this.
154. Ms Lewis-Fowkes' conclusions given orally to the Claimant are particularly telling in this regard. She fails to deal with any of the factual allegations, save for the WhatsApp messages to Ms Spriggs which Ms Clarke had concluded was only a training issue rather than an issue of misconduct. She nonetheless criticised him in unjustifiably hostile language, wholly failing to recognise the considerable remorse he had shown.
155. As set out above, Ms Lewis-Fowkes' evidence before the Tribunal was that she could not see any circumstances under which the Claimant could have changed his behaviours, even on a final warning, and that she "*knew*" it would not be too long before the Claimant was sitting in front of a disciplinary manager again demonstrate a hostility to the Claimant which was not justified by his approach to the disciplinary investigation, in particular the level of remorse that he had shown, as well as the fact that he was a store manager whose performance was sufficiently strong that he had been promoted only a few months earlier.
156. In all these circumstances, the Respondent has failed to prove that the dismissal was in no sense whatsoever because of the Claimant's race and the Tribunal finds that it was in some sense because of the Claimant's race.
157. A one-day Remedies Hearing will be listed by the Employment Tribunal to consider all remedies issues arising, including the issue of what deduction should be made to any compensation for the Claimant's contributory fault as set out above.

Employment Judge de Silva KC

Date: 30 May 2024

Sent to the parties on: 3 June 2024

For the Tribunal: