



EMPLOYMENT TRIBUNALS

Claimant: Mr S Khan

Respondent: Adidas UK Ltd

Heard at: East London Hearing Centre

On: 12-15 April 2016

Before: Employment Judge

Members: Mrs S Amatuzzi
Mr S Dugmore

Representation

Claimant: In person (assisted in part by Mr I McCabe)

Respondent: Miss C Lord (Counsel)

JUDGMENT

The unanimous judgment of the Employment Tribunal is that:-

- (i) The Claimant's claim of unfair dismissal fails and is dismissed.**
- (ii) The Claimant's claim of harassment related to his age fails and is dismissed.**
- (iii) The Claimant's claim of harassment related to his religion fails and is dismissed.**

REASONS

1 The Claimant brought claims of unfair dismissal and of harassment related to his age and religion. His claim form had included other complaints over which the tribunal does not have jurisdiction and which were dealt with by Employment Judge Prichard and Employment Judge Jones at two preliminary hearings on 26 October 2015 and 21 January 2016 respectively. Following those preliminary hearings the issues before this Tribunal at the final hearing were as follows:-

- 1.1 Whether the Claimant was unfairly dismissed by the Respondent.

- 1.2 Whether the words spoken by one of the Claimant's colleagues during a grievance investigation interview in response to being asked why she thought he behaved in the way that she had described, in stating: "I think because he's from a Muslim country, so where women get treated badly." amounted to discrimination under the Equality Act 2010.

At the preliminary hearing held on 21 January 2016 this was identified as a claim of harassment contrary to section 26 of the Equality Act 2010.

- 1.3 Whether the same colleague, in the same grievance investigation interview, along with Mr Cooke the interviewer, using the phrase: "you can't teach an old dog new tricks" about the Claimant amounts to harassment related to the Claimant's age contrary to section 26 of the Equality Act 2010.

2 The Claimant attended on the first two days of the hearing along with Mr I McCabe who was providing him with assistance with his case. Mr McCabe was a lay person with no legal experience who had volunteered to assist the Claimant. Mr McCabe did not appear on the last two days of the four-day hearing. The Tribunal wish to record their gratitude to Mr McCabe for his efforts and for the assistance he provided to Mr Khan.

Preliminary matters- case management

3 On 12 April 2016 a preliminary hearing was held by Employment Judge Lewis, without the members, immediately before the start of the full merits hearing. At that preliminary hearing the Claimant's application to admit various documents that would disclose the content of without prejudice discussions was unsuccessful. The Tribunal members therefore did not see those documents, nor were they made aware of their contents.

The issues:

4 The issues the Tribunal had to decide were as follows:-

Unfair dismissal

5 In respect of the dismissal:

- 5.1 Whether the reason put forward by the Respondent for his dismissal, namely his misconduct, was the real reason for his dismissal.
- 5.2 Whether the Respondent had a genuine belief in that conduct at the time that he was dismissed.
- 5.3 Whether that belief was based on reasonable grounds following such investigation as was reasonable in all the circumstances.
- 5.4 Whether dismissal was an appropriate sanction i.e. whether the dismissal was fair or unfair in the circumstances within the meaning of section 98(4) of the Employment Rights Act 1996.

6 The Tribunal's assessment of that decision was to judge the Respondent's actions against the standard of whether the employer acted reasonably, that is the band, or range, of reasonable responses open to a reasonable employer and not to substitute its own view for that of the Respondent; (*Iceland Frozen Foods v Jones* [1983] ICR 17, *BHS v Burchell* [1978] IRLR 379 and *Sainsbury's Supermarkets v Hitt* [2003] IRLR 23). If the Claimant was successful in his claim for unfair dismissal The Tribunal also had to consider the questions of contribution: whether he had by his conduct contributed to his dismissal; and *Polkey*: whether the Respondent could have fairly dismissed him at a later date or if a fair procedure had been followed.

Harassment claims

7 It was not disputed that the comments relied on by the Claimant as the basis of his harassment claims were made; they came to the Claimant's attention when he was sent the record of the interview notes. The question for the Tribunal is whether they amounted to harassment under section 26 of the Equality Act 2010, namely whether they amount to unwanted conduct related to a relevant protected characteristic which had the purpose or effect of violating his dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for him.

8 In deciding whether the conduct has the effect referred to above each of the following were to be taken into account: the Claimant's perception, the other circumstances of the case, whether it is reasonable for the conduct to have that effect.

Evidence

9 The Tribunal heard evidence from Mr Tony Cooke, Ms Corinne Facey, Ms Kelly Durndell and Ms Margaret Atkinson on behalf of the Respondent and from the Claimant on his own behalf.

10 The Respondent's witnesses were cross-examined by Mr McCabe, the Tribunal having made clear to Mr Khan that it was either he or Mr McCabe who could ask questions but not both of them.

11 The Claimant wished to refer to various incidents arising during his employment which were not relevant to his dismissal, nor to the two discrimination complaints before the tribunal. The Tribunal reminded the Claimant of its role and jurisdiction in respect of the unfair dismissal complaints, on a number of occasions; in particular that it is not for the tribunal to substitute its own view for that of the employer but rather to apply the test of the reasonable employer, or range of reasonable responses.

12 During the course of the hearing the Claimant handed up a statement of fitness to work dated 9 March 2016 which stated that the Claimant was unfit for work for two months. This had been sent to the Tribunal previously in support of an application for a request to postpone the hearing. That application has been refused by the Regional Employment Judge. The Claimant was reluctant to be cross-examined drawing attention at the outset of his evidence to the Doctor's fitness to work note; he stated that he had been suffering from stress and that pursuing the claim itself was stressful. This was noted by the Tribunal, the Judge had already explained to the Claimant that a sick note stating that he was unfit for work was not sufficient reason to postpone the

hearing and that, as he had been informed in correspondence prior to the hearing, medical evidence to support a postponement would need to be specifically addressed to the inability to attend the Tribunal hearing and give evidence

Findings of fact

13 The Claimant was employed by Adidas UK Ltd as a Sales Assistant at its store in Stratford, London from 1 December 2012 until his dismissal took effect on 7 July 2015. He had a contract for eight hours a week. The Claimant was in his early 30s. A number of his colleagues were younger, in their early 20s and one (Ms Khanam) was 19 when they first worked together.

14 On 10 September 2014 and 16 October 2014 the Claimant raised a grievance alleging incidents with fellow colleagues in relation to bullying, victimisation and harassment.

15 On 24 October 2014 the Claimant attended a grievance hearing conducted by Daniel Henderson, one of the Respondent's District Managers. The minutes of that meeting were in the Tribunal bundles; they ran from page 232 to page 323, some 92 pages. The meeting was recorded as commencing at 10:32am and concluded at 3:15pm.

16 Mr Henderson wrote to the Claimant on 17 December 2014 informing him of the outcome of his grievance. That letter was at page 457 to 470 of the bundle. The Claimant was dissatisfied with the outcome and he appealed. It was at this stage that Mr Cooke was asked to deal with the matter. Mr Cooke is the Respondent's Vice President HR for North Europe, he has been employed by Adidas for around 15 years. He did not know the Claimant before he became involved in his grievance appeal.

17 The Claimant was invited to attend a meeting with Mr Cooke on 2 February 2015. The Claimant arrived late for that meeting. Mr Cooke waited for him to attend, as the Claimant had contacted the Respondent to say he was on his way, and once the Claimant arrived the meeting lasted around two hours. The meeting was adjourned because the Claimant had to leave to attend an appointment elsewhere. The meeting was then continued by telephone on 5 February 2015.

18 The telephone conference on 5 February lasted for a further one and a half hours. Following his meeting with the Claimant Mr Cooke decided that he wanted to speak to a number of the Claimant's colleagues himself, to try to understand what had gone on. He arranged to go to the Stratford store to interview the relevant staff and tried his best to speak to everyone that the Claimant had mentioned.

19 As a result of those interviews Mr Cooke concluded there was no evidence to support the Claimant's allegations that he had been discriminated against or treated less favourably than other colleagues for any reason. He was satisfied the Claimant's age, race or any other protected characteristic had not been a factor in any behaviour towards him; and in most of the situations the Claimant had instigated the problem or provoked the reactions from his colleagues. He did not uphold the Claimant's appeal. However, Mr Cooke was concerned that the evidence that he had gathered raised a

number of serious allegations regarding the Claimant's behaviour towards his colleagues including potentially aggressive behaviour and inappropriate comments which Mr Cooke did not feel should be ignored. He duly advised the Claimant in his grievance appeal outcome letter that the allegations would be dealt with separately and that the Claimant would receive a separate letter in relation to the investigation of those counter-allegations. Mr Cooke's letter is at page 631 to 637 and is dated 13 April. At page 638 to 639 in the bundle was a letter also dated 13 April 2015 inviting the Claimant to an investigation meeting as part of a disciplinary process. The matters to be investigated were:-

"Alleged breach of confidentiality during the grievance investigation process.

Alleged actual behaviour towards your colleagues with the intent to provoke an aggressive or violent reaction.

Alleged serious breach of trust and confidence, by deliberately creating an environment of mistrust between yourself and the store management/colleagues.

Alleged inappropriate sexual and offensive remark to a female colleague."

20 The Claimant was reminded that at that time, i.e. 13 April 2015, he had a live first written warning dated 20 May 2014 for lateness; he was informed that depending on the outcome of the investigation he may be invited to a disciplinary hearing to discuss the allegations, that the allegations may be viewed as gross misconduct and that if they were found to be substantiated the company would be entitled to terminate his employment without notice. He was further informed that no decision would be taken in respect of those issues until he had had an opportunity to attend a disciplinary hearing to give his account of events. He was also informed that he would be entitled to appeal against any disciplinary decision.

21 We are satisfied that Mr Cooke had genuine concerns following his interviews with the Claimant's colleagues and that he communicated those concerns to his HR colleague Vanessa Morrissey. Mr Cooke believed that the disciplinary process should be commenced against the Claimant. We are also satisfied that he took no further active role in that process and he did not seek to influence the process going forward.

The investigation

22 Ms Kelly Durndell was appointed as the investigation officer. She was asked by Vanessa Morrissey, HR Manager, in around April 2015 if she would carry out a disciplinary investigation into allegations which had come to light about the Claimant. An investigation meeting was arranged for Tuesday 12 May 2015 at the Respondent's Covent Garden office. Vanessa Morrissey sent a letter to the Claimant on 7 May to explain the purpose of the meeting and identified four potential acts of misconduct as set out above.

23 Ms Durndell was provided with the outcome of the grievance appeal, that is the letter from Mr Cooke, and the witness statements which he had taken as part of the grievance appeal process. These statements run to some 108 pages of the Tribunal's

bundle. Ms Durndell read through all of those in order to understand the allegations against the Claimant. She had worked in the Stratford store in the past but was no longer involved in that store. We accept Ms Durndell's evidence that she was shocked when she read the witness statements, in particular the statement of Yasmin Khanam who is someone that she had met, but not so shocked that she had formed a closed mind about the Claimant's alleged conduct..

24 Ms Durndell prepared a list of questions to go through with the Claimant at their meeting. She was made aware shortly in advance of the meeting that the Claimant would not be attending but had been strongly urged to do so by Vanessa Morrissey.

25 It was put to Ms Durndell that that meeting ought not to have taken place in the Claimant's absence when it was known to the Respondent that he was not well enough to attend and that he had been absent from work in the period before the meeting. We were taken to an email exchange between the Claimant and Vanessa Morrissey on 11 May, the day before the meeting, in which the Claimant informed Ms Morrissey that he was still waiting for voice recording notes of a meeting of 24 April 2015 and that he required those before he could attend any further investigation meetings. (The meeting on 24 April was a separate meeting between the Claimant and Mr Cooke held on a without prejudice basis). In his email to Vanessa Morrissey the Claimant stated that he was not fit enough to take any further stress by HR, but signed off the last sentence:

"kindly send me the voice notes asap I then will be able to attend any further meetings you require".

26 Ms Morrissey responded on 11 May stating that the minutes that he requested from 24 April were not related to the investigation, they were a separate matter and not part of the investigation process. She informed him that the investigation meeting was due to go ahead on 12th which was his opportunity to present any information that he deemed should be considered as part of the investigation, but that if he chose not to attend, the company would be prepared to take into account any written submissions that he would like to make provided they were received by Kelly Durndell by no later than 1:30pm on 12 May.

27 The Claimant did not make any written submissions nor did he contact Ms Morrissey to say he would not be attending the meeting because of ill-health or any other reason. We were taken to a fitness to work note which was dated 5 May 2015 which stated that the Claimant was unfit for work from 5 May to 19 May 2015. We were also provided with the investigation note that Ms Durndell prepared in respect of her meeting on 12 May 2015. The questions were not asked because the Claimant did not attend. Ms Durndell considered the papers before her and decided that, in the absence of any representation from the Claimant to the contrary, there was a case to answer in respect of his behaviour and the matter should go forward to a disciplinary.

28 The email exchanges between Ms Morrissey and the Claimant continued after the meeting of 12 May. On 13 May the Claimant informed Vanessa Morrissey that he was not well and was off sick due to stress. In her response on 15 May (page 662) Ms Morrissey acknowledged that the Claimant was absent from work due to ill-health but informed him that:

"Equally, given the serious nature of the allegations that have been raised I feel that it is important that the investigation is concluded promptly. I also appreciate from your email below that you feel you have already made your position very clear in relation to those allegations. Finally, whilst I sympathise with your comments about your health and recognise there is always a balance to be struck, it is often preferable in these cases and better for an individual's well-being, to deal with such matters rather than leave them outstanding for a prolonged period of time.

Accordingly, I feel that it is appropriate for the investigating meeting to proceed in your absence as previously advised.

I have passed your comments onto the investigating officer, including in particular that you strongly deny the allegations and believe them to have been fabricated. The investigating officer will take these into account and will write to you separately with her conclusions and whether or not any further action is to be taken."

29 We are satisfied that those comments were passed on to Ms Durndell, despite Ms Durndell not recollecting any specific comments being passed on to her by Vanessa Morrissey when giving her evidence. We considered the question put to Ms Durndell in evidence rather confused and confusing and did not find her inability to answer it directly to be any assistance in deciding whether those comments were passed on to her. Rather we note that Ms Durndell wrote an email to the Claimant on 17 May 2015 [at p. 664] in the following terms, indicating that she was aware that the Claimant denied the allegations:

"Dear Shahrukh

I write to advise you of my findings of the investigation meeting that took place in your absence.

Having considered all the evidence, including the fact that you deny the allegations, I have concluded that there is a case to answer and that this matter should proceed to a disciplinary hearing.

In accordance with our Disciplinary Rules and Procedure, a Disciplinary Manager will be appointed and you will receive a separate letter inviting you to a disciplinary hearing."

The disciplinary hearing

30 Ms Corrine Facey was appointed as the Disciplinary Manager. She wrote to the Claimant on 18 May 2015 inviting him to a disciplinary meeting on 27 May 2015, informing him that he was entitled to bring with him a trade union official or colleague as a companion and setting out the conduct which was to be considered, namely:-

- (i) An alleged inappropriate sexual and/or offensive remark made to a female colleague.

(ii) Alleged harassment of a female colleague.

(iii) Alleged breach of confidentiality during the grievance investigation process.

(iv) Alleged inappropriate provocative/antagonistic behaviour towards colleagues with the intent to provoke a hostile reaction from those colleagues.

(v) Alleged serious breach of trust and confidence, in that it is alleged that you have deliberately, and without excuse, sought to foster or encourage an environment of mistrust between yourself and store management/colleagues.

31 The Claimant was informed that the company considered these allegations individually and collectively as potentially amounting to gross misconduct under clause 15.2 j, o and w of the company disciplinary rules and procedure. The letter informed the Claimant specifically that:

"Accordingly, if any of the allegations are found to be substantiated, the Company would be entitled to consider terminating your employment without notice."

32 The Claimant was informed that no decision would be taken in respect of this until he had had the opportunity to give his account of events and/or put forward any mitigating factors that may be relevant. He was also informed that he would retain a right of appeal.

33 By the time of informing the Claimant of the invitation to the disciplinary meeting no reliance was being placed upon the previous warning he had received on 20 May 2014 in respect of lateness.

34 The Claimant was sent the disciplinary rules and procedure together with the summary of investigation held in his absence; the grievance appeal investigation minutes of Mr Cooke's meeting with the Claimant dated 2 February 2015 and 5 February 2015; notes of Mr Cooke's meeting with Mr Noble dated 18 February 2015; the notes of his meeting with Ms Baida dated 18 February 2015; with Mr Dailey dated 18 February 2015; with Ms Elkington also 18 February 2015; Ms Khanam dated 2 March 2015; and Ms Follen dated 2 March 2015.

35 On receiving these notes the Claimant became aware of the content of the conversation between Mr Cooke and Ms Baida upon which he places reliance in respect of his complaints of discrimination before this Tribunal.

36 The disciplinary hearing was conducted by Ms Corrine Facey. Ms Facey is no longer employed by the Respondent. Ms Facey had carried out a number of disciplinary hearings for the Respondent during her employment with them. She carried out a number at the Stratford store, including the disciplinary hearing with the Claimant in May 2014 as a result of his persistent lateness. The Claimant sought to suggest that this somehow tainted her approach to his disciplinary in May 2015, this is

a suggestion that we do not find to have any basis in fact. Having heard Ms Facey's evidence we found her to be an impressive witness who was telling us the truth. We have found that she based her decision on the evidence before her in respect of the allegations she had to decide and not any previous warning.

37 The disciplinary hearing was arranged for 27 May, the hearing was due to start at 10am, however the Claimant was late and the hearing started at 11:03. That hearing was recorded and a transcript was produced by the Respondent, which we have read [pages 684 to 772]. A second meeting also took place on 7 July (the transcript of that hearing is at pages 812 to 889 of the bundle).

38 At the outset of the hearing on 27 May the Claimant queried whether the previous disciplinary would have any bearing on the outcome of this hearing. Ms Facey explained that his previous disciplinary had nothing to do with this disciplinary, (that is recorded at page 690). Ms Facey confirmed that the disciplinary lies on the file for 52 weeks, as the 52 weeks had passed the sanction was over, that is, the warning would no longer be taken into account. The Claimant sought to clarify that this meant he could not be dismissed as a result of the current disciplinary proceedings; Ms Facey explained that because of the severity of the [current] allegations they could be seen as gross misconduct and he could potentially be dismissed from the company (page 690). We are satisfied that it was made clear to the Claimant that he was facing disciplinary proceedings on the basis of the allegations set out in the letter of 18 May 2015 and that as a result of those allegations dismissal was a potential outcome.

39 We are also satisfied having read the transcript of the hearing on 27 May and 7 July 2015 that Ms Facey did everything she could to provide the Claimant with an opportunity to put his side of events and to explain or mitigate his conduct. His explanation, or defence, was that his colleagues had made up the allegations against him, that the allegations were 'fake', that his colleagues were lying and that he behaved perfectly at work; if there were any incidents then according to the Claimant it certainly was not him who was to blame.

40 During the course of the disciplinary hearing on 27 May the Claimant asked Ms Facey to look into his personnel file, which he said would show that he was correct in his assertions. The hearing was adjourned at 5.14pm and Ms Facey did as the Claimant had requested and checked his personnel file. In his file she found some further information that she considered was relevant to the misconduct allegations but which did not support the Claimant's versions of event. Ms Facey sent copies of the relevant documents to the Claimant in advance of the reconvened hearing (those documents are also in the bundle at page 778 to 778gg). There were some delay in reconvening the hearing, firstly at the Claimant's request and then due to Ms Facey's absence (for a dental operation and then as a result of a subsequent infection).

41 At the outset of the reconvened hearing on 7 July the Claimant raised some questions in respect of the role of the HR adviser/note-taker and demanded to see a copy of Ms Facey's sick certificate justifying her absence from work. The Tribunal found that this gives a fairly typical flavour of the Claimant's approach.

42 The matters contained in the Claimant's personnel file were discussed on 7 July. As far as the Claimant was concerned these documents were from "months ago" and had been investigated by the store manager, Michael Noble. Ms Facey explained that no outcome had ever been given in respect of those investigations, that his file showed that he went off sick before the investigations were concluded and then his grievance had intervened and that those allegations were still outstanding. The Claimant did not understand, then, nor did he before us, how matters that had been raised before he put in his grievance could then be addressed in disciplinary proceedings. Ms Facey repeated the explanation that the Claimant's grievance had intervened and therefore halted the investigations into the complaints against him, but those complaints had been recorded on his file together with notes of relevant investigations but no findings or outcomes.

43 The Claimant also wanted to know why the CCTV footage had not been retained as he believed this would show the incidents did not occur as his colleagues had described. According to the Claimant Mr Noble, the store manager, had viewed some CCTV footage and as a result had decided that one of the incidents had not taken place as alleged, namely an incident involving words alleged to have been said to Yasmin Khanam.

44 We are satisfied that Ms Facey spent a considerable amount of time considering the evidence before her and that she gave the Claimant every opportunity to respond to the allegations; his answers were not, in her view, satisfactory or even explanatory of the alleged conduct.

45 At the end of the hearing on 7 July Ms Facey adjourned to consider her decision. Having reached a decision she checked with Head Office that it was in accordance with the Respondent's policy before informing the Claimant of the outcome. We are satisfied having heard Ms Facey's evidence that it was her decision and her decision alone; she was not simply rubber stamping a decision that had been made by somebody else.

46 After adjourning and reaching her decision Ms Facey informed the Claimant of her decision and the reasons for her decision at the hearing. Having been given the reasons the Claimant was not satisfied and demanded that Ms Facey justify the reasons that she had given and queried her conclusions and the evidence upon which she had based them.

47 Of the five allegations against the Claimant Ms Facey did not uphold two. She did not uphold the first allegation that an inappropriate sexual and/or offensive remark had been made to a female colleague. The third allegation of breach of confidentiality during the grievance investigation was also not upheld.

48 The allegation of harassment of a female colleague was upheld: this related to his behaviour towards Yasmin Khanam which she found to have been targeted and offensive and inappropriate. There was evidence in witness statements of others to support this allegation. There were several incidents involved, in particular, inappropriate comments made to Yasmin Khanam in relation to her grandmother's death which the Claimant admitted had taken place as she described; comments made to Yasmin Khanam alleging she was in a relationship with another employee, which he

knew to be untrue; and threatening violence towards Ms Khanam, to which there was a witness.

49 The allegation of inappropriate provocative and antagonistic behaviour towards colleagues with intent to provoke or cause a reaction was upheld based on a number of incidents. Ms Facey placed particular reliance on the comment by Mr Noble during the investigation that although he had complained about the conduct of others in his grievance, it was the Claimant who was normally the instigator. Ms Facey was satisfied that the Claimant had sought to provoke a reaction in incidents including in respect of Yasmin Khanam and Rohain Dailey.

50 The fifth allegation of serious breach of trust and confidence in that he deliberately and without excuse sought to foster or encourage an environment of mistrust between himself and his store manager and colleagues. Ms Facey found that allegation to be true based on numerous incidents (which are recorded in the transcript at p.879) and which were set out in the dismissal letter: specifically, the incident with Rachna Baida where he refused a management instruction to go to front of store, and where the Claimant became aggressive with Lucia Follen and Roishin Elkington giving a customer their names and telling the customer to complain about them; and going to Yasmin Khanam's father's place of work to discuss Yasmin and to create a hostile environment for her at home. This last incident referred to a conversation with Yasmin Khanam's father at his place of work (a local restaurant) in which the Claimant alleged that Ms Khanam flirted at work and had a boyfriend at work, both of which it was considered were known to him to be likely to cause problems with her family and particularly her father.

51 We have considered the hearing transcript which records what was said by Ms Facey to the Claimant in respect of her decision and the reasons for that decision (at pages 878-879). We are satisfied that those were the reasons in her mind at the time that she decided to dismiss him. We are also satisfied that she had a genuine belief in the misconduct found against the Claimant. Despite the Claimant's assertions to the contrary we find that the reasons she provided do provide support for her decision. The reasons are ones that any reasonable employer would be entitled to rely upon.

52 In her evidence to the Tribunal Ms Facey told us that the Claimant's behaviour in his meetings with her matched, to a large extent, what his colleagues had been saying about his behaviour towards them: that he showed aggressive behaviour, including banging on the desk; that she felt uncomfortable during the disciplinary, that he was quite intimidating; that many, or most, of his answers were not sincere; and that he did not acknowledge that he might be at fault in any way. We accept that that was her genuine assessment of the Claimant's response to her and to the allegations. We also find that is consistent with his conduct before us in Tribunal where he on many occasions, talked over questions that were being put to him; did not answer the questions that were put to him but instead chose to make some other point; he raised his voice frequently, although apparently not being aware that he was doing so; did not accept that he might be at fault, or have done anything wrong, during his employment, unless, he said, by mistake or unknowingly.

53 We also found the Claimant evasive in many of his answers: for instance, refusing to accept that the 92 page transcript from Mr Henderson's hearing into his

appeal demonstrated that Mr Henderson had considered that carefully and spent considerable time with him. The Claimant's assessment of the chronology of when complaints had arisen and whether complaints had been made about him prior to his initiating his grievance was at best mistaken and his portrayal of events was misleading.

The appeal

54 The Claimant's appeal was dealt with by Margaret Atkinson. The Claimant had expressed a preference for the appeal to be dealt with by Mr Mann and the hearing was rearranged to a date on which Mr Mann had made himself available, however the Claimant was unable to attend on that occasion and the hearing was reassigned to Ms Atkinson. We do not find anything sinister or unfair in respect of that procedure.

55 Ms Atkinson was provided with a pack of papers, including the disciplinary hearing notes, the minutes of the disciplinary hearing meetings, the decision letter dated 13 July 2015, the grievance appeal investigation notes from the Claimant and the witnesses, the outcome letter and his grounds of appeal.

56 The Claimant's grounds of appeal were in the bundle before us (at page 898 to 901). It is to be noted that a substantial part of the Claimant's grounds of appeal was taken up with attacking Ms Facey's conduct of the hearing. At ground 7 the Claimant alleges that she 'deliberately started ignoring him' and 'not listening' to him. He described her as 'unprofessional', 'ill-mannered', 'childish' and 'trying to provoke him'. By way of contrast the Claimant described the HR officer, Georgette, as 'very professional'. Ground 9 alleges that Ms Facey was 'never listening to' him, that she 'had not read statements and his own proofs'. In ground 11 he alleges that she was again 'unprofessional' and 'lacked homework and research investigation' and also alleged that the decision had already been made before she heard from him.

57 In paragraph 15 of his grounds the Claimant asserted that Mr Noble had found the allegation that he had threatened to slap Yasmin Khanam to be false after he had looked at the CCTV which proved that it did not happen.

58 The appeal meeting was arranged for 12 August 2015. Ms Atkinson travelled to the Covent Garden office to meet with the Claimant. The Claimant did not arrive at the appointed time, 12 o'clock. The HR adviser tried to contact him by telephone a number of times with no response, leaving messages for him. The hearing eventually continued in the Claimant's absence. Ms Atkinson double checked all the documentary evidence and cross referenced it to the evidence relied upon by Ms Facey. She was satisfied that the proper procedure had been followed by Ms Facey and the process had been carried out correctly. Ms Atkinson concluded that Ms Facey had a genuine belief that the allegations of the Claimant were true and that this was supported by the documentary evidence.

59 One of the Claimant's ground of appeal was that more allegations had been added during the hearing. Ms Atkinson was satisfied that this was not the case. There was evidence that had been relied on in support of each particular allegation, however the allegations considered were those set out in the invitation to the hearing and were addressed accordingly. The further evidence referred to the evidence found on the

Claimant's personnel file, which Ms Facey requested after being urged to do so by the Claimant. This was sent to the Claimant before the reconvened hearing.

60 Ms Atkinson was satisfied that the allegation that Ms Facey had not properly explained the reasons for her decision and not considered the responses he had given to her questions was not supported by the evidence. In her view Ms Facey had clearly explained her conclusions both in the reconvened disciplinary hearing and the outcome letter and she was satisfied that Ms Facey had taken the Claimant's comments into account, including adjourning the original hearing and carrying out further investigation.

61 In respect of the Claimant's contention that Mr Noble had satisfied himself there was nothing in the allegation that the Claimant had threatened to slap Yasmin Khanam Ms Atkinson wanted to clarify Mr Noble's account. The Claimant was alleging that the CCTV had been checked and Mr Noble had told him he had found nothing. Ms Atkinson asked Ms Morrissey to speak to Mr Noble, which she duly did on 27 August. Ms Morrissey provided Ms Atkinson with her note of that conversation (page 914). Mr Noble confirmed he recalled the incident. The Claimant had asked him to check the CCTV footage, he had checked it but because the incident had been in the fitting area it was not possible to see it on the CCTV. Mr Noble had told the Claimant this. He confirmed to Ms Morrissey that he did not tell the Claimant that he had agreed with the Claimant's versions of events, but rather had explained that the CCTV did not assist either in proving or disproving the incident took place or what happened. It was not disputed that there was no audio recording on the CCTV.

62 As part of his appeal the Claimant complained that he had not been provided with Mr Mann's email address. This aspect of his appeal was upheld, Ms Atkinson acknowledged that it would be good practice to have provide him with this. Apart from this one aspect the Claimant's appeal was not upheld.

63 The Claimant maintained before us his insistence that Mr Noble had investigated the CCTV and found it provided evidence that he was 'innocent' and had not sought to provoke Ms Khanam. Despite the evidence in Ms Atkinson's witness statement and the note in the bundle of Ms Morrissey's conversation with Mr Noble the Claimant did not accept that Mr Noble had said there simply was no evidence on the CCTV that would assist either way. The Claimant referred time and again to the CCTV evidence and how it would be crucial in exonerating him.

64 We are satisfied from hearing Ms Atkinson and seeing her as a witness that she was giving a truthful account of her involvement and that she applied her mind to the appeal independently and professionally. She was not simply rubber stamping a decision taken elsewhere within Adidas, whether by Mr Cooke or anybody else. We are satisfied that she considered the decision taken by Ms Facey in the manner that she described in her evidence before us and reached a conclusion that Ms Facey's decision had been the right one to reach based on the evidence before her.

Harassment

65 In bringing complaints of unlawful harassment contrary to s26 of the Equality Act 2010 the Claimant relies upon two comments made by Ms Baida during Mr Cooke's investigation into his grievance appeal. The transcript of the interview records that Ms

Baida was told by Mr Cooke that it was a private and confidential meeting between Mr Cooke and Ms Baida and that everything was to be said in confidence. We find that when she made the comments Ms Baida did not expect the Claimant to become aware of them.

66 The first comment arose when Mr Cooke asked Ms Baida why she thought the Claimant behaved in the manner that she had described that he did. She had expressed the view that he seemed to mainly have a problem with the female employees in the store. When asked why she thought he might have a problem with female colleagues Ms Baida replied, "I think because he's from a Muslim country, so where women get treated badly."

67 Mr Cooke explained to us he understood her remark to be made from her experience of having grown up in a place with a large Muslim population; in her own experience, in the region where she was from, women were not necessarily treated well. She considered that might be a factor in his treatment of his female colleagues. That was the context in which Mr Cooke understood her remark and he did not challenge it, believing it to be her personal view based on her experience, rather than simply repetition of a negative stereotype. The Respondent pointed out Ms Baida is of Nepalese Hindu origin.

68 The second comment, "You can't teach an old dog new tricks" was said in the same meeting. The context again was in respect of the Claimant's conduct towards his colleagues. Having described how the Claimant had made a number of his female colleagues cry on a number of occasions and how he had described himself as being the "King" in the store, Ms Baida was asked by Mr Cooke whether she thought he could change his way of doing things; her response was "No he would not" and she went on to say:

"it's like we have a saying in my country, 'You can never make a dog's tail straight'. He's already born with it, he's already raised with it, he's already grew up with it, so you can't change it. ...You can't teach"

Mr Cooke interjected: "A dog new tricks", to which Ms Baida replied: "Yeah, an old dog new tricks." Mr Cooke responded: "We got there in the end, didn't we? Okay, fine. I'm comfortable with that, there's nothing else I need to know."

69 Mr Khan has brought a complaint of age discrimination, namely harassment related to his age, based on the reference to an 'old dog'. In his evidence he was very clear that he had taken that exchange to be a reference to him being a dog and that he found it offensive to be referred to as a dog. However he maintained his complaint was of harassment related to the protected characteristic of age. In cross examination Ms Lord suggested to the Claimant that Mr Cooke was simply expressing the equivalent of the phrase Ms Baida had used from her country, of not being able to straighten a dog's tail, an equivalent phrase in English being you "You can't teach an old dog new tricks"; and that the comment itself had nothing to do with age. The Claimant did not accept that.

70 Ms Baida and the Claimant did not work on a shift together after the date upon which he became aware of the comments that had been made during her interview with Mr Cooke. In the Claimant's view the comments were indicative of the Respondent's attitude towards him generally. We do not find there to be any evidence

that this was the case. We also find that the Claimant was keen to seize upon the remarks to point the finger at his colleagues and seek to deflect attention from his own conduct; which included being found to have caused a number of his female colleagues to be reduced to tears and/ or to refuse to work with him anymore.

The law

Unfair dismissal

71 The Employment Rights Act 1996 section 98(4) provides:

- “(4) Where the employer has fulfilled the requirements of sub-section (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.”

72 As set out above the relevant authorities are *Iceland Frozen Foods v Jones* [1983] ICR 17, *BHS v Burchell* [1978] IRLR 379 and *Sainsbury’s Supermarkets v Hitt* [2003] IRLR 23.

Harassment

73 Section 26 of the Equality Act 2010 provides:

- “(1) A person (A) harasses another (B) if –
 - (a) A engages in unwanted conduct related to a relevant protected characteristic, and
 - (b) the conduct has the purpose or effect of –
 - (i) violating B’s dignity, or
 - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

...

- (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account –
 - (a) the perception of B;
 - (b) the other circumstances of the case;
 - (c) whether it is reasonable for the conduct to have that effect.
- (5) The relevant protected characteristics are –

purposes was investigating the Claimant’s grievance, also contained his colleagues’ evidence as to his conduct and as well as the Claimant’s own account of events. The Claimant was clearly told the nature of the evidence against him before the disciplinary hearing, he was sent the interview notes and relevant documents in advance of the

- age;
- disability;
- gender reassignment;
- race;
- religion or belief;
- sex;
- sexual orientation.”

Ms Lord referred us to the case of *Insitu Cleaning Co Ltd v Heads* [1995] IRLR 4. We also took into account the well-known guidance from the then President of the EAT, Underhill P (as he then was) in the case of *Richmond Pharmacology v Dhaliwal* [2009] IRLR 336, including the following the following:

“We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person’s dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase.”

Conclusions

Unfair dismissal

74 We find that the Respondent acted reasonably in concluding that the allegations about the Claimant’s conduct, made by his colleagues during the investigation of his grievance, amounted to potentially serious misconduct which ought to be investigated. The Claimant was informed of the allegations against him and had every opportunity to meet those allegations.

75 Ms Facey found the Claimant was guilty of misconduct in respect of three out of the five allegations based on the evidence before her. We are satisfied that she had a genuine belief in the Claimant’s misconduct in respect of those three allegations for the reasons she gave to the Claimant at the time of her decision and set out in the dismissal letter. We find that she reached her own decision on the evidence before her and was not influenced by anyone else. We are also satisfied that she had reasonable grounds for her belief following an investigation that was reasonable in the circumstances. Although the Claimant did not attend the investigatory meeting, the investigation officer was aware he denied the allegations. She had before her the transcripts of the interviews conducted by Mr Cooke which, whilst their original purposes was investigating the Claimant’s grievance, also contained his colleagues’ evidence as to his conduct and as well as the Claimant’s own account of events. The Claimant was clearly told the nature of the evidence against him before the disciplinary hearing, he was sent the interview notes and relevant documents in advance of the

meetings, and had every opportunity to put his case at the two disciplinary meetings with Ms Facey. We are satisfied that the investigation and the disciplinary overall satisfy the standard expected of a reasonable employer.

76 We find that the reason for the Claimant's dismissal was misconduct. The conduct relied upon fell within the Respondent's disciplinary procedure at 15.2 j, o and w, under gross misconduct. The Respondent concluded that he was guilty of three incidents of gross misconduct, any one of which would have justified his dismissal under its procedure. The Respondent did not rely on only one allegation but on each of the three separately and taken together. The Claimant did not put forward any mitigation that would detract from the seriousness of the conduct or reduce the sanction. We find that that dismissal was within the range of reasonable responses in all the circumstances.

77 We therefore find the dismissal to have been fair.

78 We also accept the Respondent's alternative submission that it would have been able to justify dismissing the Claimant for some other substantial reason in any event, based on the complete breakdown in trust and confidence between him and his colleagues and their inability to work with him any longer.

Harassment

Harassment related to age

79 We do not find that the phrase "you can't teach an old dog new tricks" was related to the Claimant's age in the context in which it was used. Ms Baida had used the phrase in explaining why, in her view, the Claimant would not be able to change his behaviour. In his evidence before us the Claimant confirmed that this was his understanding of what the phrase meant, namely that somebody was unable to change their behaviour. The word "old" was inserted into the phrase whilst Mr Cooke was trying to find the equivalent saying in English to the one Ms Baida had used. We do not find that the comment was related to the Claimant's age in this context.

80 Even if the comment could be taken as being related to the Claimant's age we do not find that in using that phrase there was any intention to violate the Claimant's dignity, or to create an intimidating hostile, degrading, humiliating or offensive environment for him.

81 Having taken into account the circumstances in which the comment was made, and the Claimant's perception of the comment, we do find that it would be reasonable for it to have had the effect of violating the Claimant's dignity, or to create an intimidating hostile, degrading, humiliating or offensive environment for him. We find that any such perceived offence on the part of the Claimant falls into the category of "hypersensitivity" as referred to by Underhill P (as he then was) in the case of *Richmond Pharmacology v Dhaliwal* [2009] IRLR 336.

82 We accept that the remark "I think because he's from a Muslim country, so where women get treated badly", is potentially capable of being offensive, it could be seen as relying on negative stereotyping. We also accept the Respondent's

submission the context is key in this case, the allegations were remarks made not directly to the Claimant but during the course of a meeting that Ms Baida was assured was private and confidential; she had been encouraged to be open and honest in her responses.

83 We find that the purpose of the remark was not to violate the Claimant's dignity, or to create an intimidating, hostile, degrading, humiliating or offensive environment for him. Nor, having taken into account the perception of the Claimant, the circumstances of the case and whether it should reasonably be considered as having that effect, do we find that it had that effect. We do not find that the remark created an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. Having read the grievance investigation interviews and the grievance outcome as well as the disciplinary material we are satisfied that the only hostility towards the Claimant was as a result of his unacceptable conduct towards his colleagues.

84 We are satisfied that in the circumstances of this case the remark complained of does not constitute harassment.

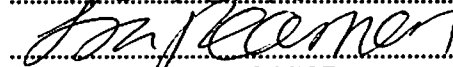
85 The Claimant's complaints of harassment related to age and religion contrary to s26 of the Equality Act 2010 are therefore dismissed.



.....
Employment Judge Lewis

JUDGMENT & REASONS SENT TO THE PARTIES ON

01/06/2016



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FOR THE TRIBUNAL OFFICE