



# EMPLOYMENT TRIBUNALS

BETWEEN

**Claimant**

and

**Respondent**

Mr Mariusz Banasiak

Ocado Central Services Limited

**Held at:** Watford

**On:** 17-19 January 2017

**Before:** Employment Judge Southam

**Appearances:**

**Claimant:** In Person

**Respondent:** Mr W Greensides, Solicitor

## JUDGMENT

1. The claimant's dismissal from his employment was not unfair, nor was it wrongful.
2. The claim is dismissed.

## REASONS

### Claim and Response

1. This claim is recorded as having been received by the tribunal on 5 April, 2016. Before the proceedings were commenced, the claimant approached ACAS for the purposes of early conciliation on 15 February 2016. The ACAS certificate of early conciliation was issued by email on 15 March, 2016.
2. In its original form, the claim form was presented without any particulars of claim and section 8.2 the claim form was blank. It is clear that on 14 April, the solicitors for the claimant presented Particulars of Claim, which themselves are dated 6 April, and which were treated by the tribunal as part of the claim. Notice of the proceedings was sent to the respondent on 7 April, 2016, at a time when the tribunal was not in possession of the

Particulars of Claim. The parties were also given notice that there would be a preliminary hearing for case management purposes on 7 June.

3. In the claim, the claimant indicated that he was presenting complaints about unfair dismissal, wrongful dismissal and race discrimination. He said that he had been dismissed, purportedly on the grounds of gross misconduct, because of inappropriate behaviour towards a work colleague on three occasions. He said he had a clean disciplinary record but there had been conflict between two groups of employees going back over a period of six months. He contended that the allegations against him were motivated by his sexual orientation, by colleagues who are practising Muslims, intolerant towards the claimant, who is gay. The claimant alleges that the investigation process was not fair or even-handed. There were inconsistencies in the evidence and credibility issues affecting certain witnesses. Notwithstanding this, the claimant was dismissed and, although he appealed against his dismissal and there was an appeal meeting on 21 January, 2016, the claimant had not heard the outcome of his appeal.
4. On the basis of those facts, the claimant alleged that his dismissal was unfair. There was insufficient evidence to determine that the claimant was guilty of the allegations and the allegations were not themselves sufficiently serious to amount to gross misconduct. In the alternative, the respondent did not act reasonably. Previously he alleged, the respondent had failed to resolve complaints by the complainant, which were about the claimant, and the team manager had been rude to the complainant when she complained. The claimant also alleged that his dismissal was wrongful. His conduct was not sufficiently serious for him to be dismissed without notice. He also alleged that his dismissal amounted to an act of race discrimination. That allegation would subsequently be withdrawn.
5. The claim was resisted. The respondent contended the tribunal did not have jurisdiction to consider the claim because no Particulars of Claim were presented, either in section 8.2 of the claim form, or separately but attached to the claim form. They also contended that the claim was submitted out of time having regard to the date of dismissal, which was 30 November, 2015.
6. In relation to the substance of the claim, the respondent said that it was an online grocery retailer and the claimant was employed as a Personal Shopper at one of its Customer Fulfilment Centres. There were complaints about the claimant's conduct. It was alleged that the claimant had touched the bottom of a fellow Personal Shopper on three occasions, that he and another employee had laughed at the same employee and with each other because she was wearing a hijab and that he and the other employee had taken photographs of the other Personal Shopper and that they looked at their phones and laughed. The other Personal Shopper had recently married and was practising Islam. She began to wear a hijab at work for the first time on 14 October, 2015. She submitted a grievance about the claimant's conduct towards her. There were investigations, described in detail, and the claimant was suspended from his duties.

There was a disciplinary hearing, at which the claimant denied the allegations. There were further investigations and the disciplinary hearing was reconvened.

7. The respondent concluded that the particular allegations referred to above were substantiated. The claimant's actions were, they thought, motivated by the fact that the other Personal Shopper had been wearing a hijab. His actions amounted to serious discrimination and harassment. This was gross misconduct and it was appropriate to terminate his employment. There was an appeal and there were further investigations. In the end, the respondent chose to uphold the decision to dismiss the claimant.
8. On the basis of those matters, the respondent contended that they acted reasonably in dismissing the claimant for gross misconduct. They said that the respondent held a reasonable belief as to the claimant having committed gross misconduct following a reasonable investigation. In the alternative, they pleaded that, if the tribunal were to find that the dismissal was procedurally unfair, the claimant would still have been dismissed even after a fair process, and his compensation should be reduced accordingly. In the further alternative, any compensation awarded to the claimant should be reduced to reflect his contributory conduct. The complaint of race discrimination was denied.

### **Case Management**

9. After the filing of the response, the claim was referred to an Employment Judge for initial consideration under rule 26 Employment Tribunals Rules of Procedure 2013. The parties were directed to agree a list of factual and legal issues before the case management hearing in June. However, that hearing was postponed on the application of the respondent and was relisted to take place on 20 July, 2016. A request on the part of the claimant's representatives for the hearing to be conducted by telephone was refused. The respondent contended that there were jurisdictional issues to be considered.
10. At the preliminary hearing on 20 July, Employment Judge Henry identified the complaints which were being pursued, which then included a complaint of race discrimination, and agreed with the parties' representatives the issues which would have to be determined at the full merits hearing. He also recorded in the notes and orders sent to the parties after the hearing, a discussion regarding the question whether or not the claim was submitted in time. Without making any decision to this effect, his observation was that the claim was in time. The matter was not thereafter pursued. The claim was listed for full merits hearing over three days on 21-23 November, 2016. That hearing was postponed on the application of the claimant, not opposed by the respondent. On 15 September, the respondent sought to make minor amendments to the response as regards the dates of certain of the allegations against the claimant as regards his conduct.
11. On 2 November, the claimant withdrew his complaint about race discrimination. That complaint was formally dismissed by a judgment sent

to the parties on 27 November. At the same time as the withdrawal, a request was made on behalf of the claimant for an interpreter in Polish to be present throughout the hearing. The hearing was relisted for three days: 17-19 January, 2017.

12. The day before the hearing, the claimant sought a postponement. One week prior to the hearing, his solicitors had informed the tribunal and the claimant that they would not be acting for him at the hearing. The reason the claimant sought a further postponement was, he said, because he was no longer represented by solicitors and because, he said, he needed further time to prepare for the hearing. He said that the solicitors had not provided him with all of the relevant documents.
13. The application was referred to me as I was the judge allocated to hear the case. I refused the application because the claimant did not approach the tribunal with his application as soon as he was informed by his solicitors that they would not be acting for him. Instead, he had left his application to the day before the hearing.

### **The Hearing**

14. At the hearing, before me, the claimant appeared and represented himself, although, on the first day only, he had the assistance of a litigation friend. There was also an interpreter in Polish available to assist him throughout the hearing. The claimant made a further application for postponement of the hearing. I refused to consider any such application because the claimant was not able to identify any new circumstances which had arisen since the making of the application which I had refused the previous day. Accordingly, the hearing proceeded.
15. There was an agreed bundle of documents. Although the claimant was in possession of documents, he had not been provided with the bundle by his solicitors. There was a spare copy available, and the claimant had time, whilst I read the witness statements and relevant documents, to familiarise himself with the bundle. References in these reasons to page numbers are references to the pages of the agreed bundle.
16. I read the witness statements and a substantial number of the documents in the agreed bundle, which comprises 269 pages. Having done that, I heard the evidence. The parties' witnesses were not required to read out the witness statements. They were cross-examined. I had some questions of the witnesses. Thereafter, the parties make closing submissions. The witnesses from whom I heard were, of behalf of the respondent, Kristina Borise, a Senior Operations Manager, and Basharat Hussein, an Operations Manager. The claimant gave evidence on his own behalf. He did not call any witnesses. He told me that there were other witnesses, but that his solicitors had not made any arrangements for them to be interviewed. I established that the claimant had not produced the statements of any other witnesses for exchange with the statements tendered by the respondents, at the time of exchange of those statements or otherwise.

## Issues

17. It was agreed at the start of the hearing that the issues I would have to decide were the issues set out at paragraphs 6.1-6.6, and, if the claimant succeeded, at 7.1-7.2, of the list of issues agreed and adopted by Employment Judge Henry. For convenience those issues are reproduced here:

### Unfair dismissal

- 6.1 What was the reason for the dismissal? The respondent asserts that it was a reason related to conduct which is a potentially fair reason for the purposes of s.98 (2) of the Employment Rights Act 1996.
- 6.2 Has a fair procedure been followed, in that:
- 6.2.1 Did the respondent have a genuine belief in the misconduct of the claimant?
  - 6.2.2 Has there been a reasonable investigation?
  - 6.2.3 Following that investigation, did the respondent hold a reasonable belief that the claimant committed the acts complained of?
  - 6.2.4 Was the decision to dismiss a fair sanction, that is, was it within the reasonable range of responses for a reasonable employer?
  - 6.2.5 If the dismissal was unfair, did the claimant contribute to the dismissal by culpable conduct?
  - 6.2.6 If there was an unfair dismissal, can 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?
  - 6.2.7 Has there been a failure to follow Acas guidelines and, if so, should there be an adjustment pursuant to s.207(1) of the Trade Union and Labour Relations (Consolidation) Act 1992.

### Wrongful dismissal

- 6.3 Has there been conduct of the claimant such as to amount to a repudiatory breach of the employment relationship for which the respondent was entitled to summarily terminate the employment relationship?
- 6.4 Was the claimant's employment terminated as a result of the repudiatory breach?
- 6.5 If not, what is the period of notice to which the claimant is entitled on termination of employment?
- 6.6 Is the claimant entitled to damages for breach of contract?

### Remedies

- 7 If the claimant succeeds, in whole or in part, the tribunal will be concerned with issues of remedy, being:
- 7.1 Compensation on unfair dismissal, being a basic award and a compensatory award.
  - 7.2 On a claim for wrongful dismissal, the tribunal will be concerned to award damages in respect of the termination of employment without notice.

## Relevant Law

18. In reaching my decisions I considered the following provisions of law and case law.
  - 18.1 Section 98 Employment Rights Act 1996 provides that it is for the employer to show the reason for the dismissal and that it is one of the potentially fair reasons set out in sections 98(1)(b) or 98(2) of that Act. A reason related to the conduct of the employee is one of those reasons and is provided for at section 98(2)(b).
  - 18.2 When that requirement has been fulfilled the determination of the question whether the dismissal is fair or unfair 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. That question is to be determined in accordance with equity and the substantial merits of the case: section 98(4) Employment Rights Act.
  - 18.3 The leading authority on misconduct dismissals remains British Home Stores v Burchell [1978] IRLR 379, save that, since that case was decided, the burden of proof as to the matters set out in that decision as requirements became (on 1 October 1980) a neutral one (Employment Act 1980). Therefore, recasting the requirements set out in that case in neutral terms, the decision of the Employment Appeal Tribunal is to the effect that, where an employer has dismissed an employee for an act of misconduct, for the dismissal to be found to be not unfair, the tribunal has to make findings about three matters. First the tribunal must find that the employer's officers believed the employee to be guilty of the misconduct alleged. Secondly, the tribunal must find that the employer had in his mind reasonable grounds upon which to sustain that belief. Third, the tribunal must find that the employer carried out as much investigation into the matter as was reasonable in the circumstances. If the tribunal finds these matters, then the employer must not be examined further. It is not necessary that the tribunal would have shared the same view. Nor should the tribunal examine the quality of the material the employer had before him, for instance to see whether it was the sort of material which, objectively considered, would lead to a certain conclusion on a balance of probabilities.
  - 18.4 In Sainsburys Supermarkets Ltd v Hitt [2003] IRLR 23, the Court of Appeal held that the range of reasonable responses test (which is applied to determine the reasonableness of the sanction adopted by an employer in relation to misconduct, see below), applies as much to the question of whether an investigation into suspected misconduct was reasonable in all the circumstances as it does to procedural and other substantive aspects of a decision to dismiss

an employee for a conduct reason.

- 18.5 As regards dismissal itself, the case of Post Office v Foley [2000] IRLR 827 and other authorities show that the Tribunal's responsibility is to determine whether or not dismissal in the particular circumstances fell within the band of reasonable responses that a reasonable employer might have adopted. The Court of Appeal said, in that case, that the tribunal must not substitute its decision as to what was the right course for the employer to adopt. The Court of Appeal recognised, in Foley, that, if application of the reasonable responses test led the tribunal to conclude that the dismissal was unfair, they would, in effect, be substituting their view for that of the employer, but the process must be conducted by reference to the objective standards of the hypothetical reasonable employer, and not by reference to their own subjective views.
- 18.6 The claimant had become aware of the decision of the Employment Appeal Tribunal in Brito-Bapapulle v Ealing Hospital NHS Trust [2013] IRLR 854. I was aware of this decision of the Employment Appeal Tribunal and so was Mr Greensides. In that case it was held that, in relation to matters which are classed by the employer, or which appear to the tribunal to amount to gross misconduct, dismissal is not an inevitable conclusion. A logical jump from gross misconduct to the proposition that dismissal must then inevitably fall within the range of reasonable responses gives no room for considering whether, though the misconduct is gross and dismissal almost inevitable, mitigating factors may be such that dismissal is not reasonable. In assessing the employer's conduct and the question of fairness, the tribunal should have regard to whether long service, the previous unblemished record and the consequences of dismissal should have played any part.
- 18.7 Mr Greensides submitted that the facts in that case were not similar to the facts in this case, although he accepted the principle in that case that, even if an employer is held to be right to conclude that an employee was responsible for gross misconduct, the employer still has a duty, despite the gravity of the conduct, to consider whether or not dismissal is the appropriate sanction.

### Findings of Fact

19. Having heard the evidence, I reached the following findings of fact:
- 19.1 The respondent is an online retailer. It has a large automated warehouse in Hatfield, called a Customer Fulfilment Centre. I was told that the respondent employs at least 1914 employees there, of whom 1634 are Personal Shoppers, but that number appeared from later evidence to be an under-estimate. The precise number does not matter. This is a large employer, by any standard.

- 19.2 The claimant began his relevant employment with a company called Gist Limited. That employment commenced on 14 March, 2005. He was transferred to the respondent in April 2007 under the Transfer of Undertakings Regulations 2006. In his contract of employment with Gist Limited, clause 8 states that the full terms and conditions of his employment were contained in the employee handbook, and, by clause 16 he would all times be subject to the rules and regulations relating to the company's employees, which can be found in the employee handbook.
- 19.3 An extract from the Gist employee handbook stated that it was the right of every employee to be treated with respect and dignity. Harassment is the abuse of an individual's dignity and is therefore regarded as unacceptable behaviour. It is the duty of all employees to ensure that their colleagues are treated with respect and dignity: see page 49L. In that company's disciplinary procedure, at page 49P, serious bullying or harassment and abusive or threatening behaviour are listed in a non-exhaustive list of examples of conduct which are considered to be gross misconduct. It is said that that, if such an act is committed, the employee will be liable to summary dismissal.
- 19.4 The claimant agreed that he became subject to the respondent's own site rules and policies, as contained in its staff handbook, after his transfer to the respondent in 2007.
- 19.5 The site rules, page 38A, preclude the use of electronic devices including phones and cameras in the operational areas. In the case of the claimant, the only exception could be if it had been agreed with a manager.
- 19.6 The respondent's harassment and bullying policy, page 39-41 states as follows:

"If we find you either directly or indirectly responsible for harassment or bullying, ... we will treat it as misconduct under the disciplinary procedure. In some cases this may be treated as gross misconduct leading to summary dismissal.....

Under the Equality Act 2010, harassment is any unwanted physical, verbal or non-verbal conduct which has the purpose or effect of violating the recipient's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them. A single incident of unwanted or offensive behaviour to one individual can amount to harassment. Harassment often (but not exclusively) targets the sex, sexual orientation, marital or civil status, gender reassignment, race, religion, colour, nationality, ethnic or national origin, disability or age of the victim.

Bullying is offensive, intimidating, malicious or insulting behaviour which, through the abuse or misuse of power, makes the recipient feel vulnerable, upset, humiliated and threatened, and can include acts such as excluding an individual on purpose. ....Bullying is often a form of



harassment and can undermine an individual's self-confidence, competence and self-esteem. As with harassment, bullying can take the form of physical, verbal and non-verbal conduct".

- 19.7 There are then examples of what the respondent considers to be bullying or harassing behaviour. These include:

"Ridiculing or demeaning someone, for example picking on them or setting them up to fail", and

"Unwelcome sexual advances, for example touching, standing too close, the display of offensive materials, ...[etc not relevant]".

- 19.8 The policy ends by saying this:

"If you are proven to have harassed any other worker on the grounds of their sex, marital status, sexual orientation, gender reassignment, pregnancy and maternity, religion or belief, race, disability or age, or otherwise acted in breach of this policy, you will be subject to disciplinary action. In serious cases, such behaviour may constitute gross misconduct and, as such, may result in summary dismissal".

- 19.9 In its disciplinary policy, at pages 45-49, in a non-exhaustive list of conduct which would be regarded as amounting to gross misconduct, which are said usually to result in summary dismissal, the respondent includes the following:

"A serious breach of any of your obligations under your terms and conditions of employment or any Ocado policies and procedures issued to you from time to time;

"Use of abusive, threatening, discriminatory or derogatory language or behaviour with colleagues, customers, suppliers or third parties;

"Serious cases of discrimination, harassment or bullying in contravention of the Equality Act 2010; and

"Any form of conduct during work or outside of working hours that brings Ocado into disrepute".

- 19.10 There is, immediately following the section, a further section headed "Alternatives to dismissal". This states that, in some cases, the respondent may consider alternatives to dismissal and examples include: demotion; transfer to another department or job; loss of seniority; reduction in pay; loss of future pay, increment or bonus; and loss of overtime.

- 19.11 The respondent produced a list of nationalities of employees working in its Customer Fulfilment Centre, which suggested a larger number of employees there than I was told otherwise. This lists 2267 employees, of whom 775 are Polish, 645 British, 371 undisclosed and much lower numbers of a variety of other nationalities.

20. The next group of findings of fact are findings which the employer made in relation to the events I had to consider, which occurred during three night shifts commencing respectively on 14 October, 2015, 15 October, 2015 and 21 October, 2015.
  - 20.1 There was a team briefing conducted by Melvin Bond in the part of the warehouse where the claimant worked on the evening of 15 October. A Personal Shopper called Syed Ali reported to Mr Bond at the end of the briefing that, during the briefing, the claimant and a friend called Justyna had been taking photographs of Paulina Brylinska, a Polish woman employed as a Personal Shopper, who had recently married another Personal Shopper called Muhammad Naseer, and who had converted to Islam. She had started wearing a hijab the previous evening, 14 October. Mr Ali reported the taking of photographs of Paulina. Later, he would give evidence as to having observed the claimant and Justyna laughing at Paulina the evening before, because she was wearing a hijab for the first time. It does not seem to me that he included this in his oral report to Mr Bond on the evening of 15 October.
  - 20.2 Mr Bond spoke to the claimant about the matter informally, and he denied taking any photographs.
  - 20.3 Later that evening, Mr Naseer complained on behalf of his wife to Mr Bond, who was already aware of the matter from Mr Ali. Mr Bond said he would escalate the matter to his manager Gary Thompson.
  - 20.4 Mr Naseer and his wife Paulina then submitted a joint grievance, pages 50, 51. These are different versions of the same grievance. They were persuaded to remove from the first version a statement that there had been no response and no investigation to their complaint when they made it to Mr Bond. In the grievance, they complain about the claimant and Justyna making fun of Paulina and laughing at her on the evening of 14 October, that being the first day that she had started to wear a hijab, and about the taking of photographs on the evening of 15 October. They thought that the claimant and Justyna were taking photographs of Paulina and then laughing at the photographs that were taken. They said that the respondent was aware that Paulina has schizophrenia and is recovering. They said that, because of this racist behaviour, Paulina was feeling stress and tension. They suggested this was an attack on their religion. The claimant and Justyna were spreading racism in the company. They wanted the matter investigated.
  - 20.5 There was then a further complaint from Paulina on the evening of 21 October. She was interviewed at 2330 by Robert Stolcman about an incident which had taken place that evening. The respondent's notes are at pages 52-54. Paulina said that she was

working near to the claimant and they were placing bags within boxes called totes, which then had to be placed on pallets behind them. Paulina alleged that the claimant touched her bottom with one of the totes he was carrying and that it was accidental. She then alleged that as he turned around and put totes onto the pallets he touched his hip and right leg to her bottom. She thought it was wrong. Later he came back with two totes to put on a pallet and, she alleged, he touched her bottom with the tote and with his hand. She complained and said to him: if he needs space then he should let her know because he was touching her bottom. Paulina's husband was present during this interview but he did not see anything. Mr Stolcman established that the only previous incident involving the claimant and Paulina had been where he used to sit next to her at a break without asking and try to talk to her. She told him that she did not want to talk to him and the claimant had suggested this was because her husband refused to allow it and he asked her if her husband was beating her. Paulina then referred to the subject of her earlier written complaint about the events of 14 and 15 October.

- 20.6 Within 30 minutes of the completion of the interview with Paulina, Robert Stolcman interviewed the claimant about the allegation of that evening. The notes are at pages 55-56. He was not asked about the incidents of 14 and 15 October. Even before the manager Mr Stolcman was able to explain what was alleged to have happened, the claimant said: "it is not true". It was then that Mr Stolcman put the allegations to the claimant. He denied touching Paulina, and he said that, when he was moving the totes, there was a rubbish bin in his way so he had to lift his hands up with the tote and it was therefore impossible for him to touch Paulina. He then said "I would not touch her anyway. Even if she was naked I would not touch her with a broomstick".
- 20.7 Mr Stolcman also interviewed Justyna: see pages 57-58. She said that the space available to the claimant was limited and she saw him with his hands raised holding two totes to be placed in the empty pallets and that the claimant placed the totes in an empty pallet behind Paulina. He had his hands above his head and was moving sideways but she noticed that, as the claimant went back to his station, Paulina was strongly gesticulating and spoke to the claimant, who shook his head. Soon after that, Paulina went to report something to Gary Thompson.
- 20.8 The only other person interviewed that evening was Edyta Janas: page 59. She gave evidence similar to that which Justyna had given and said that when the claimant was behind Paulina he was back to back with her and she did not notice him touch her with any part of his body or with the tote, but she did overhear the conversation Paulina had with the claimant and she saw Paulina gesticulating rapidly.

- 20.9 Nothing then happened until Mr Hussain conducted, on 29 October, a grievance meeting attended by Paulina and her husband Mohammed. They gave accounts (pages 61-68) similar to what they had previously said about the events of 14 and 15 October. In particular, Paulina said she had observed the claimant taking photographs of her and that Justyna did so also. Mohammed said that, at the end of the briefing, the claimant and Justyna were looking at their phones.
- 20.10 Mohammed said that he asked Mr Bond whether he had done anything about the matter and Mr Bond had replied that he could not force them or take their phones away from them. He then reported the previous incident when Paulina had worn her hijab for the first time and the claimant and Justyna were laughing at her. He complained that Mr Bond did not deal with the matter properly. There was a discussion about how the grievance letter came to be changed. Then, after a short break, Mr Hussain asked Paulina and Mohammed whether they wished to add to their grievance a complaint about the event of the evening of 21/22 October. They confirmed that they did. Before doing that, Paulina gave some further evidence about the events of 14 October. She said that a group of staff were "all Polish and the culture is horrible, they hate me because I married a Muslim man". This was a reference to the claimant, Justyna and Edyta. There was a discussion about the working relationship. Paulina then gave an account, consistent with her earlier account about the incident of 21/22 October. She drew a diagram showing the relative positions of where she and her colleagues were working that evening.
- 20.11 There was then a series of further interviews, conducted by different managers with witnesses to any of the three matters which were now the subject of the grievance from Paulina and her husband
- 20.12 On 29 October, Mr Buller interviewed Prabhjot Singh: page 71-74. He was a witness to the incident of touching on 21/22 October, although he said it had taken place the previous evening. He said that he saw the claimant taking notes with both hands and as he walked behind Pauline and her husband he noticed his hand brush her bottom as he was walking past. It was the outside of his hand. He did not think it was done deliberately and Paulina did not react. There was enough room for him to get through. He then said that, on his way back, the claimant touched Paulina's bottom with his hand inappropriately and said something in Polish. Paulina went to see the manager straight away. In the second incident, the claimant's hands were empty and he brushed the palm of his hand sideways on her bottom, according to Mr Singh.
- 20.13 Mr Singh was also a witness to the earlier events. He said that when, a few days earlier, Paulina had started to wear the Muslim scarf, the claimant, Justyna and Edyta kept looking at her and

laughing. They were also laughing at her on the day of the briefing. He was not a witness to the taking of any photos.

- 20.14 Mr Bond was interviewed on 2 November by Kelvin Smith (pages 83-85), and he gave evidence consistent with other reports about his involvement in the reporting of the incident when it was alleged that the claimant and Justyna had taken photographs of Paulina, which he did not see himself. He agreed that, when he put it to the claimant, the claimant denied it. He said that he reported the matter to Gary Thompson, who said he would look into it.
- 20.15 Mohammed Janjua was interviewed on 2 November about the events of 15 October: page 90-91. When he gave his account, he referred to the evening of 14 October. He thought that he could see the claimant and Justyna laughing at something very loudly while they were looking at Paulina and Mohammed. He thought it was suspicious. He had asked Mohammed and Paulina if they knew why the claimant and Justyna were laughing and they said that they thought it was because of Paulina's scarf.
- 20.16 The claimant was suspended from his duties on 3 November. A written record of the suspension meeting is at page 92-93. A formal notification of the suspension is at page 94. By this stage, the claimant was aware of the allegation of the events of 21 October, but not any allegation about the earlier events. He was not told in this meeting any detail of the allegations against him. He said however that he did not feel guilty of any of the things that were said because the person who accused him is in his opinion, mentally disabled. The claimant refused to sign the notification of his suspension because, he said, the person who accused him is mentally ill and has been hospitalised. The notice of suspension refers to an allegation of sexual and racial harassment.
- 20.17 Joe Pickley was interviewed on 3 November; pages 95-96. He reported that Paulina had said to him that the claimant had walked past her and touched her bottom. He said that he informed Gary Thompson and Mr Thompson then asked him to separate the claimant from Paulina. He said that Paulina looked very distressed, not her usual self and upset.
- 20.18 Zama Thomas was interviewed on 5 November: pages 105-106. He saw the claimant and Justyna at the team briefing on 15 October taking photographs of Paulina because she had a headscarf on. They had their phones up by their shoulders and were taking photographs, laughing, giggling and showing each other and then taking some more photos. He was sure that it was to do with Paulina's headscarf. He was sure that they were pictures of Paulina because, as soon as they saw Paulina, they were laughing and they were stood directly opposite to her during the briefing. Their cameras were pointed to Paulina and Mohammed.

- 20.19 Syed Ali was interviewed on 6 November: pages 107-109. (He is the brother of Syed Shah, who was also interviewed, but who did not see anything). Syed Ali gave evidence about the taking of photos on 15 October. The claimant came into the briefing and took his jumper off. He had his phone by his shoulder and was taking pictures of Paulina. Justyna did the same. He reported the matter to Mr Bond at the end of the briefing. He was asked why he thought they were taking pictures of Paulina and he said it was because of her scarf. When asked how he knew that it was about her, he said that, on the day before, the claimant and Justyna had been laughing at Paulina because she was wearing the hijab and it was her first day wearing it. He also made reference to someone from AZP Delta coming to the area where they were working and having a conversation with the claimant and Justyna and that they were laughing. I infer that he is here referring to Ms Gibala. He said that her conversation with the claimant lasted for about seven minutes.
- 20.20 Grazyna Gibala was interviewed on 6 November, (page 111-114), because Paulina had alleged that she was present with the claimant and Justyna on 14 October and having a conversation with them for about 15 minutes during the course of which they looked at her and laughed. Ms Gibala denied this. She said that she went to see the claimant to have a discussion about getting a lift to the airport, that the discussions were no longer than one or two minutes and that, if she was laughing, it was to do with the size of her suitcase she takes with her, when she flies to Poland. She and the claimant come from the same Polish city.
- 20.21 Gary Thompson was interviewed 6 November: pages 115-116. The incident of 15 October was reported to him, but he said that he was not able to deal with it because of the lack of cover on the shift that night. The incident of 21 October was also reported to him and he said that he suggested to the claimant that the matter could be dealt with informally if he would apologise to Paulina. The claimant would not apologise.
- 20.22 Finally, Ewan McNulty was interviewed on 6 November: page 117. He was a witness to Paulina being distressed when she reported to Gary Thompson that someone had walked past her and brushed against her and touched her bottom while she was working.
21. The next group of findings of fact are concerned with the procedure that was followed by the respondent once the investigation had been concluded. These paragraphs include further findings that the respondent made:
- 21.1 An HR adviser wrote to the claimant, page 118-119, on 6 November, requiring him to attend a disciplinary hearing on 11 November at Hatfield. There were four allegations. The first charge was:

"The incident on 14th into 15th of October 2015 where you allegedly behaved inappropriately towards a colleague, namely laughing, which is a breach of the Ocado Bullying and Harassment Policy and which may constitute an act of gross misconduct".

21.2 The second was:

"The incident on 15th into 16th October where you allegedly used your mobile phone to take photographs of the same colleague, which is a breach of the Ocado Site rules and a breach of the Ocado Bullying and Harassment Policy and which may constitute an act of gross misconduct".

21.3 The third charge was not in the end substantiated.

21.4 The fourth matter was:

"The incident on 20th into 21 October, 2015 where you allegedly touched the same colleague inappropriately, which is a breach of the Ocado Bullying and Harassment Policy which may constitute an act of gross misconduct".

21.5 The claimant was told that he could be accompanied at the meeting by a work colleague or trade union official. He was also advised that the meeting was a formal one which could result in disciplinary action up to and including dismissal. He was provided with a copy of the investigation meeting notes which were listed at the end of the letter. These included all of the interviews referred to above, as well as copies of the Bullying and Harassment Policy, site rules and disciplinary rules and procedures.

21.6 The meeting was then postponed by one day and began on 12 November. The meeting was not concluded that day. The respondent's notes of this meeting are at pages 120-145. The meeting was conducted by Mrs Borise, as she is now known. The meetings were before her recent marriage and change of name. The claimant was assisted by a representative, Adam Gornicki.

21.7 Mrs Borise was concerned to get the claimant's explanation as to the events and the allegations made against him. Although the claimant said that he wanted to deal with the four matters together, Mrs Borise wanted to deal with them separately. The claimant spoke first about the incident on 21 October. He said that he was ready to do a reconstruction to show how it would not be possible for him to have touched Paulina's bottom when his hands were above him. He said that he is gay and has been married to a man for the last 10 years and is not interested in women. He also said that the work environment was not very good and that they were required to work in a small and enclosed area. There should be more space to let people go around the areas and there should not be two rows of totes behind the back of the baggers. He denied all of the allegations.

- 21.8 Mrs Borise put the evidence from the witness statements directly to the claimant for him to comment upon. He continued to deny for instance the taking of photographs on 15 October. The claimant raised the question of his sexuality. He suggested that the allegations were made up because Muslims do not allow homosexuality. When he was asked how he knew that, the claimant's reply was that he was accused that he was laughing because Paulina was wearing her hijab. In effect, the allegations were discrimination on the grounds of his sexual orientation. He suggested that there was a plan to remove him from his employment by the complainant Paulina and the witnesses. He was asked about his previous relationship with Paulina and Mrs Borise established that the claimant and Paulina had not been speaking for more than one and a half years. He said that it was Paulina who no longer wished to speak to him. The claimant suggested it was wrong if it was Paulina's husband who told her that she should not speak to the claimant. The claimant was surprised when he noticed that Paulina was wearing a headscarf. He denied any laughing.
- 21.9 In relation to the event of 15 October, the claimant said that he probably had his phone with him that day but he did not use it and did not take photographs of Paulina but later he said that he did not remember whether he had his phone with him on that particular shift. He agreed that Ms Gibala had come to see him to discuss a lift to the airport. The conversation was brief and they were laughing about the size of her hand luggage. The claimant was asked extensive questions about where everybody stood at the time of the briefing on 15 October.
- 21.10 Mrs Borise then went on to discuss with the claimant the event of 20/21 October, as she put it. The claimant said that Paulina swapped places with Prabhjot Siongh. Later, after he filled his station he started filling pallets behind his back. The only space was behind Paulina. He demonstrated how he had transferred the totes to the pallet by lifting his arms up, one tote in one hand and the second tote in the other hand. He was moving sideways to avoid a rubbish box. He denied touching Paulina. He was a hundred percent sure. He denied that he could have touched her with the totes.
- 21.11 Mrs Borise then concluded the meeting which had lasted for just over 3 1/2 hours. They agreed to resume the meeting on 16 November. They did so. However, on this occasion the claimant said that he wanted to postpone the meeting until a grievance that he now wished to submit, about discrimination on the grounds of sexuality, could be dealt with. Mrs Borise said that she would investigate any matters that he raised about him being treated differently because of his sexual orientation. She said that the meeting had not been finished. The claimant insisted that he was not prepared to continue the meeting. Mrs Borise said that she had the right to carry on the meeting without the claimant being present.



The disciplinary hearing did not progress that day. The claimant said that he was not prepared to co-operate. Mrs Borise said that, whatever decision she made, the claimant would have a chance to appeal. She was not forcing him to stay and if he did not wish to go ahead, that was fine.

- 21.12 Mrs Borise then conducted a further series of interviews. She saw Paulina on 18 November. She asked her if she knew the claimant was gay. She appeared to be aware but said that if that was the case, she did not understand why the claimant wanted to speak to her. She said that she changed stations because he was very rude. She did not think that he was treated differently from anyone else.
- 21.13 Mrs Borise interviewed Mohammed Janjua on 18 November. He confirmed his earlier evidence about witnessing the claimant and Justyna laughing loudly and looking at Paulina and Mohammed. It was the occasion when Paulina was wearing a scarf for the first time. They were looking past him at Paulina and he said that it was not normal. Mrs Borise tried to establish if there was any previous tension between the Polish group and Paulina and Mohammed but Mr Janjua was not aware of it.
- 21.14 On 17 November the claimant complained by email that the meeting the previous day did not take place because, as he put it, of the unreasonable behaviour of Mrs Borise. He said that he was happy to come to the meeting but that he wanted confirmation of the acceptance of his grievance. A reply was sent to him to say that Mrs Borise would investigate the allegations that he put forward before she would reconvene the disciplinary meeting and he was asked to give his consent to the company speaking to the witnesses regarding the allegations that he had made. I infer that this was intended to refer to the claimant's allegation that there was a conspiracy on the part of Paulina and Mohammed at least, motivated by the claimant's sexual orientation. The claimant did consent to such an investigation.
- 21.15 On 23 November Mrs Borise interviewed Syed Ali again. She asked him about what phone claimant was using. Mr Ali thought that it was a Samsung phone with a black pouch. He saw him taking pictures with it. The flash did not work. He was convinced that the reason why the claimant took photographs of Paulina was because she was wearing the hijab for the first time at work. He was unaware of the claimant's sexual orientation. He thought that he was married to a woman. He denied treating the claimant differently. He said that the claimant had treated him differently because he is not Polish.
- 21.16 The same day Mrs Borise interviewed Zama Thomas. He confirmed his earlier evidence about the claimant and Justyna taking photographs of Paulina. The claimant did this first and then Justyna took pictures. There was nothing obstructing his view.

They were holding the phones, looking at Paulina then at the phones then showing the phones to each other and laughing. She was aware of the claimant's particular sexual orientation.

- 21.17 The same day, Mrs Borise also interviewed Mohammed Naseer and Prabhjot Singh, separately.
- 21.18 The claimant was then invited to a resumed disciplinary hearing on 30 November, and he was provided with copies of the further interview notes. He attended the disciplinary hearing. Mrs Borise was again chairing the meeting, and the claimant was assisted by the same representative. She explained that she was not accepting the claimant's grievance but was treating what he had said as part of his defence: see page 172.
- 21.19 She then asked the claimant why he made the comment referring to a broomstick. The claimant replied that there was no chance of him touching Paulina. If it had happened by accident, then he would apologise straightaway. The reference to broomstick was because he wanted to emphasise that he had no wish to touch her. There was no chance that he would do so in a sexual way. Mrs Borise asked the claimant about his conversation with Gary Thompson about the possibility to resolve the matter by his apologising to Paulina. His reply was that he would apologise if anything happened accidentally but that he was 100% sure that nothing had happened. In a similar situation, he would not apologise. Mrs Borise then became concerned about language being used by the claimant and his representative, which is not minuted.
- 21.20 The claimant then said that he did not have a phone with a black pouch. He has three phones and they are all white; none of them has a black case. He agreed that there were things on his phone that he would have been showing to Justyna such as text messages, which might have been funny. That was probably the reason why he was laughing, if he was. The claimant denied treating people differently on the basis of different nationalities or religions: see page 180. He denied any prejudice.
- 21.21 Towards the end of the meeting, Mrs Borise asked the claimant if he would be interested in seeing whether the dispute with Paulina could be resolved by means of mediation. She said that, if she decided that she did not wish to dismiss anyone, she would want to make the right decision so nothing else could happen between them in the future. The claimant said that he could take part in a mediation session but that he would be afraid of working with Paulina every day because he thinks that she is dangerous to him. Even if he worked in a different area he would be afraid that he would be accused again, that she would see him talking and laughing at someone and would think that they were talking about her. He did not think that they could work together again. He did not understand how Paulina could complain about the culture of

Polish people at work at the respondent. The claimant then denied the allegations and there was an adjournment for just under two hours.

21.22 When they reconvened, at 1458, Mrs Borise gave her conclusions. She had found that, in relation to the first matter, two witnesses had confirmed that the claimant and Justyna were laughing and talking about Paulina. In relation to the second matter Syed Ali and Zama Thomas had seen the claimant and Justyna taking photos of Paulina and discussing them with Justyna. She believed that it happened and she was satisfied that it had happened. As to the third matter, although, it seems to me, she gave an incorrect date, she was satisfied that there had been two separate contacts between the claimant and Paulina. Mrs Borise thought that the first incident described by Prabhjot Singh was accidental. She was not satisfied that the second matter alleged by Paulina occurred. However, in relation to the third matter where Prabhjot Singh had said that the claimant touched Paulina's bottom, she concluded that this was deliberate, not an act of sexual harassment, but it was done by the claimant because he tried to trigger something, a conflict, whether it is race or religious harassment, but there was clearly a problem between them. The claimant had refused to apologise. She was satisfied that there was sufficient evidence in respect of those three matters and her decision was that the claimant be dismissed from his employment summarily, without notice.

21.23 In her decision letter, dated 7 December, page 187, she merely recited the three matters relating to the claimant's conduct. She said that, in respect of those matters, the decision was to terminate the claimant's employment with immediate effect. She explained to the claimant his right to appeal against the decision and she gave some details about his final pay.

21.24 The claimant did appeal against the decision to dismiss him. The appeal was routed through his solicitors in a letter dated 18 December, 2015. There were appeal hearing meetings on 26 January and 29 April 2016. In a letter dated 31 May 2016, the respondent informed the claimant that the decision to dismiss him was upheld.

## **Conclusions**

22. I now give my conclusions. I am satisfied that that the respondent has established that the reason for the claimant's dismissal was a reason relating to his conduct (issue 6.1). This was not controversial.
23. I am also satisfied that Mrs Borise believed that the claimant was responsible for the three acts of misconduct she found to be substantiated at the conclusion of her investigations (the "belief" part of issue 6.2.3). Mrs Borise gave evidence before me and I was impressed with the way in

which she was able to deal with the questions from the claimant and confidently explain her reasons for the decisions that she made. She was a cogent witness. I bore in mind also the analysis which she provided at the end of the disciplinary meeting in coming to this particular conclusion.

24. The next question I have to decide is whether or not that belief was based on reasonable grounds (which is the “reasonable” part of issue 6.2.3) after a reasonable investigation (issue 6.2.2). I will deal with the investigation first. It is necessary that the investigation was conducted at least to the standard of the reasonable employer. In my view, this was an extremely thorough investigation. Not only did Mrs Borise carefully analyse the material that was presented to her, she conducted further interviews of her own. Even though she said, when the claimant refused to participate in the resumed disciplinary hearing on 16 November, that she was entitled to conclude the matter without his further involvement, she nevertheless conducted further investigations and put the results of those investigations to the claimant at the resumed hearing on 30 November. Mrs Borise followed leads that were suggested by the claimant and was prepared to consider the possibility of the allegations having been made because of the motivation to undermine the claimant because of his sexual orientation. She conducted particular enquiries in relation to that between 16 and 30 November. I am satisfied that this was a very thorough investigation and one which more than meets the requirements of the reasonable employer.
25. Did that investigation yield evidence upon which Mrs Borise could reasonably find that the claimant was responsible for the alleged misconduct? I am satisfied that it did. In relation to the first charge, Mrs Borise had the evidence of the joint grievance, Mohammed Janjua, Prabhjot Singh and Syed Ali. Mr Janjua was asked about something which happened on the morning of 15 October, but his evidence related to the events of the immediately previous evening, earlier in the shift. The evidence from Syed Ali suggested a line of enquiry which led to the evidence of Ms Gibala. If Mrs Borise thought that Ms Gibala had a conversation with the claimant about a lift to the airport and that during the course of that conversation, they laughed about the weight of Ms Gibala's hand luggage, that would not prevent their having been laughing on the part of claimant and Justyna in respect of Paulina. The one does not rule out the other. I should say in relation to the evaluation of this evidence, that it is not for me to conduct my own evaluation and substitute my view. It is sufficient if the evidence before the employer is capable of founding a reasonable belief that someone is responsible for an act of misconduct. I am satisfied that this is the case in relation to the first charge.
26. As regards the second charge, Mrs Borise had the evidence of the grievance submitted by Paulina and her husband. Mr Bond received a complaint about the taking of photographs but had not seen anything because he was busy dealing with the briefing. The evidence of Zama Thomas and Syed Ali was clear. There is no reason for me to think that Mrs Borise was not entitled to hold the view that this charge was substantiated.

27. With regard to the third charge, Mrs Borise had the evidence of Paulina herself and of Prabhjot Singh. It is true that there is an inconsistency between their respective evidence. Paulina describes three incidents, and Prabhjot Singh just two. They agree that the first of those incidents, when the claimant apparently brushed past Paulina on his way to deliver the totes to the palate, was probably not deliberate. Prabhjot Singh did not substantiate the second allegation by Paulina and Mrs Borise did not uphold it. As regards the third matter, which Mrs Borise found was a deliberate act of touching, their accounts differ slightly. Prabhjot Singh said the claimant had nothing in his hands when he brushed Paulina's bottom with the palm of his hand. Paulina herself said that the third incident took place when he was going to the palate and carrying a tote. It is not for me to make my own assessment of this inconsistency of evidence. It was for Mrs Borise to resolve any inconsistency and she did so by holding that the incident took place. She bore in mind, as she was entitled to do, the evidence of Joe Pickley and Ewan McNulty, who both said that the claimant was distressed and upset, and the evidence of Garry Thompson, to whom the matter was reported. She might also have borne in mind the fact that the witnesses record there being an altercation between Paulina and the claimant immediately after the incident and that Paulina reported it straight away. Despite the inconsistency, I cannot hold that there was not evidence from which Mrs Borise could reasonably conclude that this incident occurred.
28. The claimant argued that Mrs Borise should have taken into account his denial of the events. I have no doubt that she considered matters carefully, but it is almost to state the obvious that, just because the employee denies allegations of misconduct, does not mean that the employer should find in the employee's favour. It was Mrs Borise's responsibility to decide on the allegations.
29. Mrs Borise drew on the evidence about the difficulties in the relationship between the claimant and Paulina, and the fact, as she had found it, that the claimant had taken photographs of Paulina wearing her hijab in order to ridicule her because of an expression of her recently acquired religious beliefs, to conclude that the motivation for the touching was related to Paulina's religious belief. She was entitled to come to that view on the evidence available to her.
30. It is clear that all of these matters amount to harassing behaviour within the meaning of the respondent's policy. The claimant is right to say that laughing on its own could not possibly amount to harassment or misconduct of any kind. But laughing at someone because of a manifestation of their religious belief falls into a different category. I think that Mrs Borise was entitled to think that all of these matters amounted to harassment.
31. Was the decision to dismiss the claimant in the range of reasonable responses (issue 6.2.4)? So long as the decision is not one that no reasonable employer would take, the employment tribunal may not interfere. The band of reasonable responses test means that, in relation to

any proved misconduct, there may be more than one reasonable outcome. It is only if dismissal is not one of those reasonable outcomes may the tribunal find that the dismissal is unfair. The matter is to be judged by reference to what a reasonable employer may do. In the light of the statement in the respondent's policy and indeed in the claimant's previous employer's policy, the respondent is entitled to seek to protect the dignity of its employees. I cannot say that dismissal lies outside the range of reasonable responses.

32. It is also clear that Mrs Borise considered alternatives to dismissal. She discussed with the claimant the possibility of resolving his dispute with Paulina by way of mediation. The claimant said that he would not be able to work with her. So, even though Mrs Borise thought that the claimant's conduct amounted to gross misconduct, she did not immediately move from that conclusion to a decision that the claimant should be summarily dismissed without considering other possibilities. She thereby, it seems to me, met the requirement expressed in Brito-Bapapulle.
33. I have not dealt in any detail with the appeal, either in my findings of fact or in my conclusions. That is because I was of the view that there were no defects at the dismissal stage and it was therefore not necessary for me to consider the appeal, which is only relevant if I found the dismissal process to have been conducted unfairly. Then I would have had to consider whether or not the matter was rectified on appeal, but that was not necessary in this case.
34. For all of those reasons I find that this dismissal was not unfair.

#### Wrongful Dismissal

35. I will deal very briefly with wrongful dismissal. I am entitled to come to my own view about whether or not I think the claimant was in fact responsible for conduct so serious as to justify his summary dismissal. I have available to me the same evidence that was available to the employer. For the reasons which they gave, in particular, those to which I refer at paragraphs 23-30 above, I come to the same conclusion. On the evidence, I think the claimant not only committed the acts of misconduct that were found to be established by Mrs Borise, but that this was sufficiently serious conduct to justify summary dismissal.

#### Outcome

36. For all of those reasons, this claim must be dismissed.

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Employment Judge Southam

Date: 10 February 2017

JUDGMENT SENT TO THE PARTIES ON:

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FOR THE TRIBUNAL OFFICE