RM

EMPLOYMENT TRIBUNALS

Claimant: **Mr M A Mahmud**

Respondent: **Tesco Stores Limited**

Heard at: **East London Hearing Centre**

On: **12, 13, 14 & 15 December 2017**

Before: **Employment Judge Tobin**
Members: **Mr N J Turner OBE**
Ms J Owen

Representation
Claimant: In person
Respondent: Mr J Newman (Counsel)

JUDGMENT

The unanimous judgment of the Tribunal is that:-

1. **The Claimant was not unfairly dismissed.**

2. **The Claimant was not discriminated against on the grounds of his race.**

3. **The Claimant was not subject to less favourable treatment on the basis of being a part-time worker.**

REASONS

1 These are written reasons confirming the judgment and reasons given on 15 December 2017, pursuant to Rule 62(3) of Schedule 1 the Employment Tribunal Rules of Procedure of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

2 The Claim Form was presented on 24 March 2017. The Claimant said: that he was constructively dismissed; that he was discriminated on the grounds of his race; and that he was victimisation for being a part-time worker. The Respondent denied all of these claims through a Response, which was received by the Employment Tribunal on 3 May 2017. The Claimant clarified his case at the Preliminary Hearing on 5 June 2017. This was recorded in a Case Management Summary by Employment Judge O'Brien and is a matter of record.

3 The parties presented an agreed List of Issues at the commencement of the hearing. The Employment Judge went through these issues with the parties and refined the issues to be determined as follows:

Jurisdiction

3.1 [There was no contention that any claim was brought out-of-time.]

3.2 [Deleted]

Factual allegations

3.3 Did the Respondent:

a. Fabricate allegations against the Claimant?

b. pursue a biased investigation against the Claimant?

3.4 Was the dismissing officer influenced by a biased investigation?

3.5 Did the Claimant:

a. Complain to his trade union representative about being treated less favourably than a full-time worker, about 3 to 6 months prior to his dismissal?

b. Complain to his trade union representative about being discriminated against on the grounds of his race, about 3 to 6 months prior to his dismissal?

c. Did the trade union representative raise the concerns in (a) and/or (b) above? If so, to whom and when?

Unfair dismissal

3.6 Was the dismissal unfair?

a. Has the Respondent established that the reason for the dismissal was misconduct: section 98(2)(b) Employment Rights Act 1996 ("ERA")?

i. If so, did the Respondent act reasonably in the circumstances (including the size and administrative resources of the Respondent) in treating the misconduct as a sufficient reason for dismissing the Claimant: s98(4) ERA?

1. Did the Respondent have an honest belief at the time of the dismissal that there was a fair reason to dismiss;

2. Did the Respondent have reasonable grounds for holding that belief; and

3. Were the Respondent's reasonable grounds based on a reasonable investigation: *British Home Stores v Burchell [1978] IRLR 379*?

Direct Race Discrimination

3.7 Did the Respondent treat the Claimant less favourably in:

a. Fabricating allegations against him;

b. Pursuing a biased investigation;

c. [deleted]

3.8 If so, did the Respondent treat the Claimant less favourably because of his race (Bangladeshi): s13 Equality Act 2010 ("EqA")?

3.9 If so, did the Respondent take all reasonable steps to prevent such discrimination from occurring?

Victimisation

3.10 Did the Claimant do a protected act by complaining to his trade union representative about being discriminated against on the grounds of race, about 3 to 6 months prior to his dismissal: s27(2) EqA?

a. If so, did the Claimant's representative inform the Respondent of this complaint?

3.11 Was the above allegation false and made in bad faith: s27(3) EqA?

3.12 If so, did the Respondent subject the Claimant to a detriment in:

a. Making the Claimant the subject of a biased investigation?

3.13 If so, did the Respondent do the above because the Claimant had done

the protected act: s27(1) EqA?

Less favourable treatment on the grounds that the Claimant was a part-time worker

3.14 Did the respondent treat the Claimant less favourably in:

a. Fabricating allegations against him;

b. Pursuing a biased investigation;

c. [Deleted]

3.15 If so, was the treatment less favourable treatment compared to that of a full-time worker: Regulation 5(1) Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 ("PTWR")?

3.16 If so, was this treatment afforded to the Claimant on the grounds that the Claimant was a part-time worker: Regulation 5(2) PTWR?

3.17 If so, can the Respondent justify the above treatment on objective grounds: Regulation5(2) PTWR?

Victimisation on the grounds that the Claimant is a part-time worker

3.18 Did the Respondent subject the Claimant to a detriment in holding a biased investigation: Regulation 7(2) PTWR?

3.19 If so, does complaining to his trade union representative about being treated less favourably than a full-time worker, about 3 to 6 months prior to his dismissal, amount to a ground under Regulation 7(3) PTWR?

3.20 If so, was the allegation true and made in good faith: Regulation 7(4) PTWR?

3.21 If so, did the Respondent subject the Claimant to the above detriment on the grounds that the Claimant had done that at paragraph 19 above: Regulation 7(2) PTWR?

The relevant law

4 The Claimant claims that he was unfairly dismissed, in contravention of s94 ERA. S98 ERA sets out how the tribunal should approach the question of whether a dismissal is fair. First, the employer must show the reason for the dismissal and that this reason was one of the potentially fair reasons set out in s98(1) and s98(2) ERA. If the employer is successful at that first stage, the tribunal must then determine whether the dismissal was fair under s98(4):

> Where the employer has fulfilled the requirements of subsection (1), the determination of the question of 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.

5 The s98(4) test can be broken down to two key questions:

a. did the employer utilise a fair procedure?
b. did the employer's decision to dismiss fall within the range of reasonable responses open to a reasonable employer?

6 The Respondent said that it dismissed the Claimant for a conduct-related reason pursuant to s98(2)(b) ERA. Although the Claimant denies the misconduct alleged, there is no dispute that this was a conduct-related matter. For misconduct dismissals, the employer needs to show:

a. an honest belief that the employee was guilty of the offence;
b. that there were reasonable grounds for holding that belief; and
c. that these came from a reasonable investigation of the incident(s).

These principles were laid down in *British Home Stores v Burchell [1980] ICR 303.* The principles were initially developed to deal with dismissals involving alleged dishonesty. However, the *Burchell principles* are so relevant that have been extended to provide for all conduct-related dismissals. Conclusive proof of guilt is not necessary, what is necessary is an honest belief in guilt or culpability based on a reasonable investigatory process.

7 Accordingly, the emphasis of the case at the hearing was whether the Tribunal could be satisfied that, in all the circumstances, the Respondent was justified in dismissing the Claimant for the reasons given, i.e. in relation to the Claimant's misconduct.

8 ACAS has issued a Code of Practice under s199 Trade Union and Labour Relations (Consolidation) Act 1992. Although the Code of Practice is not legally binding, in itself, Employment Tribunals will adhere closely to the relevant Code when determining whether any disciplinary or dismissal procedure was fair. The ACAS Code of Practice represents a common-sense approach to dealing with disciplinary matters and incorporates principles of natural justice. In operating any disciplinary procedure or process, the employer will be required to:

- Deal with the issues promptly and consistently;
- Established the facts before taking action;
- Make sure the employee was informed clearly of the allegation;
- Allow the employee to be accompanied and to state their case;
- Make sure that the disciplinary action is appropriate to the misconduct alleged;
- Provide the employee with an opportunity to appeal.

9 In *West Midlands Cooperative Society Limited v Tipton [1986] ICR 192* the House of Lords determined that the appeals procedure was an integral part of deciding the question of a fair process. Indeed, a properly conducted appeal can properly reinstate an unfairly dismissed employee or remedy some procedural deficiencies in the original hearing.

10 In judging the reasonableness of the employer's decision to dismiss, an employment tribunal must be careful to avoid substituting its decision as to what was the right course of action for the employer to adopt for that which the employer, in fact, chose. Consequently, the question for The Tribunal to determine is whether the Respondent's decision to dismiss the Claimant fell within the band or range of reasonable responses of a reasonable employer: see *Foley v Post Office; HSBC Bank plc v Madden 2000 ICR 1283*. The range of reasonable responses test applies not only to the decision to dismiss but also to the procedure by which that decision is reached: *J Sainsbury plc v Hitt 2003 ICR 111 CA* and *Whitbread plc (t/a Whitbread Medway Inns) v Hall 2001 ICR 669 CA.*

11 So far as the Claimant's race discrimination complaint, Under s4 EqA, a protected characteristic for a Claimant includes race, which includes: (a) colour; (b) nationality; and (c) ethnic or national origin. The claimant described himself as Bangladeshi.

12 S13(1) EqA precludes direct discrimination:

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

13 The examination of *less favourable treatment because of the protected characteristic* involves the search for a comparator and a causal link. When assessing an appropriate comparator, "there must be no material difference between the circumstances relating to each case": s23(1) EqA.

14 S136 EqA implements the European Union Burden of Proof Directive. This requires the Claimant to prove facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the employer has committed an act of unlawful discrimination, and it is then for the employer to prove otherwise.

15 The cases of *Barton v Investec Henderson Crosthwaite Securities Ltd [2003] ICR 1205* and *Igen Ltd v Wong [2005] EWCA Civ 142, [2005] ICR 931* provided a 13-point form/checklist which outlined a two-stage approach to discharge the burden of proof. In essence, this can be distilled into a 2-strage approach:

a. Has the Claimant proved facts from which, in the absence of an adequate explanation, the tribunal could conclude that the Respondent had committed unlawful discrimination?

b. If the Claimant satisfies (a), but not otherwise, has the Respondent proved that unlawful discrimination was not committed or was not to be treated as committed?

16 The Court of Appeal in *Igen* emphasised the importance of *could* in (a). The Claimant is nevertheless required to produce evidence from which the tribunal could conclude that discrimination has occurred. The Tribunal must establish that there is prime facie evidence of a link between less favourable treatment and, say, the difference of race and that these are not merely two unrelated factors: see *University of Huddersfield v Wolff [2004] IRLR 534*. It is usually essential to have concrete evidence of less favourable treatment. It is essential that the employment tribunal draws its inferences from findings of primary fact and not just from evidence that is not taken to a conclusion: see *Anya v University of Oxford [2001] EWCA Civ 405, [2001] ICR 847*.

17 Victimisation under s27(1) EqA is defined as follows:

> *A person (A) victimises another person (B) if A subjects B to a detriment because –*
> *a. B does a protected act, or*
> *b. A believes that B has done, or may do, a protected act.*

18 A "protected act" includes bringing proceedings under the EqA, as well as giving evidence or making allegations that a person has contravened the EqA. There is no need to find a comparator for victimisation as it is only the treatment of the victim that matters in establishing causation;

19 Part-time workers have the rights under the PTWR 2000 not to be treated less favourably than their employer treats a comparable full-time worker. There thus needs to be a comparison with a full-time worker, defined generally as one who is employed by the same employer under the same type of contract, engaged in the same or broadly similar work, and working or based at the same establishment as the part-time worker. This cannot involve a hypothetical comparator.

20 A "worker" (which is a definition wider than an "employee") can complain to an employment tribunal if he contends the employer has treated him less favourably or has dismissed him or has subjected him to a detriment for a reason related to the exercise of rights under the PTWR 2000. There is a defence available to the employer if the unfavourable treatment can be justified on objective grounds.

Witnesses

21 We (i.e. the Tribunal) heard evidence from Mr Asim Hussain and Mr Amin Siddique, the claimant's work colleagues. We heard evidence from Ms Maria Vinent who was the Lead Night Manager and the investigating manager. The dismissing officer was not available for the hearing as he has left Tesco employment and the Respondent had not had any contact with him. Ms Elizabeth Gorte-Clarke (People Manager) gave evidence in respect of the dismissal hearing and the dismissing officers reasons because, she said, he discussed his reasons with her, which we accept.

22 We heard evidence from the Claimant. Given that the Claimant contended that he raised his protected act for victimisation with his trade union representative, we were surprised that his identified representative, Mr Brian Wellard, did not attend the hearing or, alternatively, submitted a statement or letter. The appellant gave no explanation why Mr Wellard could not give evidence.

23 In respect of the salient points of dispute, we preferred the evidence of the Respondent's witnesses. This was backed up by near contemporaneous notes arising from the disciplinary investigation. We were particularly impressed by Mr Hussain and Mr Siddique who were both credible and honest. That said, all of the Respondent witnesses gave their evidence in a clear and straightforward manner that did not seek to embellish their accounts. In evidence, despite the weight of witness statements gathered from his colleagues during the disciplinary investigation, the Claimant was unwilling to accept that he had done anything wrong. He strongly believed that he had been treated unjustly to the extent that he did not feel the need to justify himself. In evidence the Claimant regarded the mere fact that the respondent called him to explain himself as an

attack upon his integrity. This is a remarkably disproportionate response to an initial trivial dispute, which seem to have spiralled out of all proportion.

Our findings of fact

24 We set out the following findings of fact, which we determined were relevant to finding whether or not the claims and issues identified above have been established. We have not resolved all of the points of dispute between the parties, merely those that we regarded as relevant to determining the issues of this case as identified in the List of Issues. When determining certain findings of fact, if our reasoning was not obvious and where we consider this appropriate, we have set out why we have made such findings.

25 The claimant commenced work with the Respondent as a Customer Assistant or general assistant from 27 October 2007. The Claimant worked at the Respondent's Tesco Extra Store at Gallions Reach. The Respondent is a larger employer and employed 400-500 staff at the Gallions Reach store at the time of the Claimant's dismissal.

26 On Sunday 14 August 2016 the Claimant came to work at 11pm. His duties essentially involved replenishing the stock on the shelves of his designated section. The Claimant commenced his work one hour after the night shift had commenced at 10pm.

27 The staff would normally start their shift with a short meeting on the shop floor and then proceed to unpack their designated stock, which was called "splitting". This involved 9 members of the staff in the Claimant's section. By the time the Claimant arrived at work the delivery had been largely "split" and the Claimant was left with mostly his stock to replenish the items in his designated section.

28 Sometime after commencing his work, and relatively early in the shift, the Claimant came across an empty box for a food processor on the floor in his section. This item should not have been in that vicinity; so the Claimant moved (or threw) the empty box to a nearby section where a colleague, Ms Izabela Sedzielewska, worked. Ms Sedzielewska was a Customer Assistant, which was the same job description as the Respondent described the Claimant undertaking. Ms Sedzielewska returned the box to the Claimant's section and she remarked that the Claimant should not leave his "put backs" for her to return.

29 At this point the Claimant became angry and threw the box back into Ms Sedzielewska's section. Ms Sedzielewska said to the Claimant that he was lazy, which provoked a verbal attack. The Claimant said that Ms Sedzielewska was "rubbish", "lazy" and he proceeded to say that Ms Sedzielewska "need[ed] a bamboo" and "a cucumber" as a reference to the performance of a sexual act. The Claimant then became embolden and even more explicit and shouted at his colleague that she should get "a big cucumber to fuck [her]self". Although the precise words spoken varied according to the witnesses' recollection, the intention was clear and explicit. Ms Sedzielewska became upset by both the words used by the Claimant and also by his aggressive tone. She said in her written complaint that she was also humiliated. We are satisfied that this was the Claimant's intention.

30 Ms Sedzielewska accused the Claimant of having mental problems, which we find consistent to her response to such an unprovoked and disproportionate verbal attack by the Claimant. We reject the contention that Ms Sedzielewska provoked this exchange.

31 Mr Siddique (another Customer Assistant) was in the vicinity. He heard the Claimant's initial outburst, but he did not hear Ms Sedzielewska's comments. We find that this was because the Claimant was agitated and was swearing profusely, and he was also very loud. Mr Siddique interrupted the Claimant after some minutes and following the Claimant's reference to the big or strong cucumber. He objected to the Claimant using these words towards his female colleague. Mr Siddique involvement angered the Claimant and the Claimant repeatedly told him to "fuck off", he called him a "pussy" and referred to him and to other colleagues as "dickheads".

32 Mr Asim Hussain (a Customer Assistant) also witnessed these events, although he did not intervene at this stage. He confirmed the vulgar and unacceptable language used by the Claimant, which was consistent with our findings as outlined above.

33 Ms Sedzielewska became so upset that she left the area. The exchange was prolonged taking many minutes, up to 15–20 minutes.

34 The outbursts then somewhat abated although the Claimant continued swearing and was talking and singing to himself for the rest of the shift. Such were the words that he muttered to himself or sung that we are satisfied that it was his intention to provoke his colleagues although they distanced themselves from him, in effect, giving him a wide berth.

35 Ms Sedzielewska complained about the Claimant's behaviour during the course of her shift to her shift manager, Mr Nadeem. Mr Nadeem asked Ms Sedzielewska to put her complaint in writing which she did at the end of her shift.

36 At the end of his colleague's shift, there was a further altercation between the Claimant and Mr Hussain and Mr Miah. This altercation became heated and threats were exchanged although it was never translated into actual violence.

37 The Claimant also made a written complaint to the day shift manager and provided a written complaint about the events that occurred towards the end of the shift to the day shift manager either at the end of that shift or early the Monday morning.

38 At this stage there were two incidents and two separate complaints. Ms Vinent investigated these complaints. On 18 August 2016 she spoke to Ms Sedzielewska, Mr Hussain, Mr Renu Miah, Ms Nisha Gomez, Mr Shakeel Ahmed and Mr Jo Koszyk (all Customer Assistants). On 19 August 2016 Ms Vinent spoken to Mr Siddique.

39 On 20 August 2016 the Claimant returned to work. This was the first time he had been back at work following the incidents. Ms Vinent met with the Claimant to ascertain his version of events. She was unable to make any headway with her interview, so she suspended the Claimant pending further investigation.

40 Ms Vinent then met with the Claimant a second time on 4 September 2016. The

Claimant identified two further witnesses, Mr Nicholas Ammisha and Mr Seva Raia (both Customer Assistants). A Mr or Ms Chidda was interviewed by Ms Phillips on 1 October 2016 but she had little to add because he/she did not see the incident. Mr Ammisha was interviewed on 1 October 2016 and Mr Raia was interviewed on the following day.

41 The Claimant was interviewed for a third time on 2 October 2016. At this time the Claimant was told that no further action was to be taken in respect of the second incident (i.e. the altercation between the Claimant and Mr Hussain Mr Miah) and that he would be referred to a disciplinary hearing for his behaviour in respect of the first incident.

42 A disciplinary hearing was held on 30 October 2016 before Mr Dan Haffenden (the Store Manager). Ms Gorte-Clarke was present in a HR Advisory capacity. Prior to this the Claimant had been given copies of all of the witness statements. He had been told of the allegations or the charges against him and that this could result in his dismissal. Throughout the process the Claimant was represented by various trade union officials.

43 The disciplinary hearing lasted two hours. The Claimant was given the opportunity to put his case and at the end of the hearing the Claimant was dismissed.

44 The letter confirming the Claimant's dismissal was sent out on 31 October 2017 and this provided for the Claimant's summary dismissal with pay in lieu of notice. The Respondent said that this was in error and the dismissal should have been summarily (i.e. without notice pay). We accept that the termination of the Claimant's employment was immediate because we have read the notes of the meeting carefully and this was clearly the intention of the dismissing officer at the hearing, Mr Haffenden relying upon the Claimant's repudiatory breach of contract. In any event, nothing turns on the fact that the Respondent paid notice play as the Claimant was told that he was dismissed for gross misconduct at his disciplinary hearing and the confirmation letter records the correct effective date of termination as 30 October 2016.

45 The Claimant did not appeal his dismissal. We do not accept his proffered explanation as to why he did not appeal this dismissal, which is not supported by any corroborative evidence of ill health. The Claimant had opportunity to appeal his dismissal, but he chose not to.

Our determination

46 In respect of the "factual allegations", the Respondent's written confirmation of the Claimant's suspension of 21 August 2016 stated that Ms Vinent was investigating allegations of:

> Abusive language and language of a sexual nature towards another colleague.
> Aggressive, threatening behaviour towards another colleague.

47 The disciplinary hearing was convened by letter dated 10 October 2016 to address exactly the same allegations, so the Respondent was consistent in identifying and responding to the allegations made against the Claimant.

48 These allegations arose directly from Ms Sedzielewska's complaint. Although we did not hear from Ms Sedzielewska, we did hear from two of her work colleagues who

were present at the time of the incident and, when they intervened, were subjected to foul, aggressive abuse. We also heard from the senior manager and human resources manager, one investigated the matter and the other who attended the disciplinary hearing. We read Ms Sedzielewska's letter of complaint and her signed investigatory interview notes. We are satisfied that the Respondent did not fabricate the allegations against the Claimant.

49 The Claimant was very challenging. Ms Vinent undertook a thorough investigation. She interviewed the two people at the centre of the incident. In fact, she interviewed the Claimant three times. She interviewed six witnesses, plus two further witnesses that the Claimant identified. She pursued all salient lines of enquiry. Written records/statements were produced for all witnesses interviewed and these were made available to the Claimant in advance of the disciplinary hearing. We had careful regard to the ACAS Code of Practice in respect of disciplinary investigations. Ms Vinent dealt with matters promptly and took detailed and appropriate notes of all interviews, which was made available to the Claimant. Other than stating that the investigation was biased, the Claimant was not able to identify any breach of the disciplinary procedure, any significant breach process or any substantive unfairness.

50 During the disciplinary hearing the Claimant raised that there had been collusion or coercion in the formulation in the case against him. Although these arguments appear to be without foundation, essentially, he said the case against him was fabricated, which was also his case was at the Employment Tribunal hearing. Mr Haffenden, the disciplining officer, dismissed this contention out-of-hand. He chose not to speak to the witnesses about this. The position was that he was presented with a clear and reasonably consistent case against the Claimant, which the Claimant said had been made up. Any enquiry into the substance to the Claimant's response could not determine the truth of his contention by re-reading statements or documents; it required the disciplining office to satisfy himself that there was no conspiracy or coercion of the witnesses. A simple enquiry directed to the witnesses would have served the purpose. Mr Haffenden did not ask Ms Sedzielewska, Mr Saddique or Mr Hussain or any other witnesses whether they had been coerced into making their complaint's or statements. He did not make any enquiries about whether there had been any collusion between the witnesses and, if there had been, whether this could have made any difference. The absence of such an enquiry troubled us. Ms Gote-Clarke said there was not a single corroborating feature to support the Claimant's allegation and that the Claimant merely raised this to support his position that he had done nothing wrong. We note that the Claimant did not appeal against his dismissal, so Mr Haffenden's error or sloppy approach was not corrected or remedied.

51 Having heard the substance of this dispute and having made findings of fact, we regard the Claimant's allegations as conjuncture. His claims were baseless. They were not supported by any evidence that suggested a conspiracy, which Mr Newman said was "outlandish". We do not accept that such allegations were "outlandish". The Claimant's allegations were extremely serious and should have been dealt with by Mr Haffenden as they went to the root of a fair investigation. These allegations should not have been dismissed out of hand. That said in the circumstances of this case we are satisfied that these allegations, although not "outlandish", were unsupportable.

52 We have had the benefit of hearing from two key witnesses and the investigating officer and the allegation of collusion and conspiracy are incredible. The Claimant was

awkward and uncooperative. He was evasive and truculent throughout the process. He disparaged witnesses, he was inconsistent, and he was argumentative throughout. This was the evidence of the witnesses and it was reinforced as our impression because of the Claimant's conduct at the hearing. Nevertheless, addressing such points was not merely lip service as asserted by Mr Newman in submissions and we dismiss the Respondent's submissions on this point. If the focus of the case was on unfair dismissal only then the Claimant's assertion may well have had greater impact on our decision. Nevertheless, because the discrimination case has involved us in making primary findings of fact, we, unlike Mr Haffenden, are in a position to say that the Claimant's contentions of collusion and cohesion were capricious. The case against him was overwhelming and there was no coercion or collusion between witnesses.

53 As we find that there was no biased investigation, we do not find that Mr Haffrerden, the dismissing officer, could have been influenced by a biased investigation. We have registered our concerns that Mr Haffenden did not make necessary enquiries, and he did not attend the hearing to explain why he did not make such enquiries as to whether the complainant and witnesses were coerced or colluded in their accounts of the Claimant's behaviour. Nevertheless, we are satisfied that had these enquiries been made it would have made little difference to the final outcome. The statements reflect different perspectives and different memories so that there is some variation between the accounts. This is normal and what we would expect in such circumstances. The disciplinary evidence is still sufficiently consistent to ascertain a compelling case of gross misconduct against the Claimant. Indeed, if Mr Harrenden would have made appropriate enquiries it would have strengthen the disciplinary case against the Claimant. If the dismissing officer's error was a fundamental breach of process – which we do not think was the case in this particular context – then we are sure that such addition enquiries would have made no substantive difference.

54 The Claimant said that he raised the fact that he was being treated less favourably with his trade union representative about 3 to 6 months prior to his dismissal. He identified two detriments. First, the lack of sufficient staff coverage in the non-food section meant that the Claimant had to work harder than some of his colleagues. Second, he also complained that the non-food night shift manager, Nadeem, distributed work favourably to his fellow countryman, who were of Pakistani origin. The Claimant said that these detriments amounted to less favourable treatment both in respect of his part-time working status and his race.

55 These appear to us to amount to serious allegations and the Claimant said that he raised these issues with his (lay) trade union representative, Mr Wellard, who was also a Customer Assistant at the store. Mr Wellard did not attend the hearing; nor did he provide a statement or correspondence confirming that the Claimant had raised these complaints to him. Both Ms Vinent and Ms Gorte-Clarke denied that any complaints of this nature were raised with management by the Claimant or anyone else, either on an informal or a formal basis, either before the incident in question or before the Claimant's dismissal. Ms Gorte-Clarke said that, during the course of the disciplinary hearing, the Claimant did raise an issue in respect of "mismanagement on nights". The Claimant said that he had raised this with his trade union representative, who (the claimant said) had advised him to raise a grievance. The Claimant did not say when this exchange with his trade union representative took place. Ms Gorte-Clarke was adamant that this matter had not been taken up with any manager either by the Claimant or through trade union channels. The

Claimant confirmed that he did not take this further than referring it to Mr Wellard. We are satisfied that Mr Wellard did not pursue this matter on the appellant's behalf or at all, because there is no documentary reference to any complaint or concerns and Mr Wellard provided no evidence or information suggesting that he did anything about these matters, or even that he knew anything about these purported concerns.

56 In any event, we are satisfied that both Ms Vinent and Ms Gorte-Clarke made appropriate enquiries and that the Respondent was not made aware of any complaint or concerns raised by the Claimant, either in respect of his race or his part-time worker status. Accordingly, we can establish no causal link between any "protected act" and any less favourable treatment suffered by the Claimant. That said, we also do not believe that the Claimant raised this detrimental treatment with his trade union representative. These are serious complaint and we do not believe they would have been ignored by his trade union representative. If Mr Wellard could not deal with such complaints, then we are satisfied, the Claimant's trade union representative he would have referred them to a trade union full-time officer to progress. The Claimant's evidence of raising such complaints was not corroborated to any extent and, we determine, his account is not credible. The Claimant was generally unsatisfactory in his evidence and his account in this regard lacked any specifics for such an important matter. The Claimant's allegations on this point were vague and self-serving. We reject the Claimant's contention that he made such complaint or complaints to his trade union representative. Accordingly, we dismiss all of the Claimant's complaints in respect of victimisation.

57 In respect of unfair dismissal, the Respondent has to show the reason for the dismissal. The Claimant was dismissed for "gross misconduct" which was potentially a fair reason pursuant to Section 98(2) ERA.

58 The *Burchell* principles outlined above demonstrate that conclusive proof is not necessary. In misconduct dismissal, the employer merely has to satisfy us that there was a honest belief in culpability at the time of the dismissal; that the employer had had reasonable grounds for believing that the employee was guilty of the misconduct; and that these grounds came from a reasonable investigation. The Respondent has also to demonstrate that the Claimant's dismissal was within the range of reasonable responses available to the dismissing officer.

59 We state above that we find Ms Vinent undertook a thorough investigation. This was reasonable in terms of the serious allegations made against the Claimant, his reasonably long service with the Respondent, the likelihood that he would be dismissed if the allegations were found proven against him. The investigation was reasonable in terms of the size and administrative resources available to the respondent, which were significant.

60 Although Mr Haffenden was not present, we are satisfied from reading the disciplinary hearing transcript and the dismissal letter, and also from hearing Ms Gorte-Clarke that the dismissal officer formed an honest belief in the Claimant's guilt and we are satisfied there was fair reason to form such a view.

61 To launch a tirade – whether provoked of unprovoked – against a female colleague shouting that they needed to insert a bamboo or a cucumber or a strong cucumber to "fuck" themselves is inexcusable in any workplace. Then to continue on a

tirade of foul abuse to another colleague who confronted this behaviour calling him a "pussy", and then telling him and other colleagues to "fuck off" and calling him and others "dickheads" is wholly unacceptable in any workplace.

62 We note that the Claimant had some disciplinary warnings previously, but irrespective of previous warnings, such behaviour warranted dismissal, even if this was a first offence. The Claimant proffered some mitigation, but this was surprisingly limited, particularly as he offered no apology or displayed no serious contrition. It may have required extraordinary mitigation for the dismissing officer to resile from dismissal in the circumstances; however, such mitigation was absent in this case. We find the decision to dismiss was within the band of reasonable responses available to a reasonable employer.

63 So far as the discrimination is concerned, the Claimant relied upon the following factual matrix:

(a) That the Respondent fabricated the allegations against the Claimant.
(b) That they pursued a biased investigation.
(c) That this resulted in the Claimant's dismissal.

64 We heard evidence in respect of the breakdown of the workforce generally and we asked the Respondent's human resources representatives to identify the employment status and ethnic background of all of the individuals identified above. We conclude that this is a remarkably diverse workplace. Staff were employed in full-time and part-time capacities. This diverse workplace represented the diverse community in East London and it also reflected the relatively low skill and low paid employment undertaken. As stated above, the Claimant had never raised any concerns in respect of race or his part-time status prior to disciplinary action being undertaken. It is noticeable that the Claimant raised no grievance during his employment nor did he raise any appeal against his dismissal. The only complaint made at any stage throughout the process was at the disciplinary/dismissal hearing where the claimant talked about discrimination and victimisation, but we are satisfied that this was not in the context of his subsequent claims and bore little or no relation to the case that he now presents.

65 The Claimant was not able to present a shred of evidence that his dismissal was related to anything other than his misconduct. We can make no primary findings of fact that which, in the absence of an adequate explanation, we could conclude that the Respondent had committed unlawful discrimination. Consequently, there is no basis which could possibly shift the burden of proof to the Respondent that the allegations, disciplinary proceeding and ensuing dismissal, amounted to unlawful discrimination. We have examined the allegations against the Claimant, the investigatory process and the decision to dismiss the Claimant and we cannot see how this could have possibly been motivated, even in part or to any possible extent by the Claimant's Bangladeshi race or his part-time working status. The burden of proof has not shifted pursuant to *Barton* and *Igen.* The Claimant was subject to a disciplinary investigation, and was ultimately dismissed, because of his foul, abusive, aggressive and threatening language and behaviour to his work colleagues.

Conclusion

66 The Claimant's claims are not made out and the case is now dismissed.

Employment Judge Tobin

22 February 2018