EMPLOYMENT TRIBUNALS

Claimant	**Respondent**
Mr D Thompson	**J Sainsbury Plc**

Heard at: Watford **On**: 8 May 2018

Before: Employment Judge Manley
Mr R Leslie
Mr C Surrey

Representation

For the Claimant: In person

For the Respondent: Mr N Roberts, Counsel

RESERVED JUDGMENT

1. The claimant was not less favourably treated because of his sex.

2. There has been no unlawful deduction of the claimant's wages.

3. His claim fails and is dismissed.

REASONS

Introduction and issues

1. This matter was listed to hear the claimant's claims of direct sex discrimination and unlawful deduction of wages brought by a claim form presented on 23 May 2017.

2. The issues were outlined in a summary at a preliminary hearing on 24 November 2017 as follows:.

1. ***Direct discrimination on grounds of sex***

1.1 *Has the respondent subjected the claimant to the following treatment falling within section 39 of the Equality Act, namely;*

1.1.1 *Challenged the claimant as to his shoes being noncompliant with the respondent's dress code;*

1.1.2 *Sent the claimant home for wearing incorrect footwear;*

1.1.3 *Disciplined the claimant for wearing incorrect footwear.*

1.2 *Has the respondent treated the claimant as alleged less favourably than it treated or would have treated a comparator? The claimant relies on the following comparators;*

I. Praven
II. Sakina
III. Simone Whyte
IV. Shiela
V. Caroline
VI. Mallet

1.3 *If so, has the claimant established primary facts, from which the tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic of sex?*

1.4 *If so, what is the respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?*

2. ***Unauthorised deduction from wages***

2.1 *What was the claimant's wage?*

2.2 *Did the respondent make deductions from those wages?*

2.3 *If so, were those deductions required or authorised to be made by virtue of the claimant's contract?*

2.4 *If not, has the claimant previously signified in writing his agreement or consent to the making of the deduction?*

2.5 *If not, has the claimant suffered an unlawful deduction from his wage?*

The hearing

3. At the hearing we heard evidence from the claimant and from two witnesses for the respondent; Mr Michael King, who is the checkout and commercial department manager and Mr Eddie Aylward, who is the store manager both at Pinner. The comparators mentioned above in the issues at 1.2 are

referred to by initial as follows- 1. = PM; 11. = SS; 111. = SW; 1V. = SP; V. = CS; V1. = M. throughout the rest of this judgment.

4. We had a short bundle of documents which contained some of the respondent's policies relevant for this matter, notes from meetings and photographs of various people's footwear.

The facts

5. The claimant commenced his employment as a Grocery Assistant working at the Pinner store on 15 September 2007. We heard no evidence about any previous issues involving the claimant.

6. The respondent is a well-known and substantial retail organisation employing over 160,000 people.

7. The claimant worked at the Pinner Store. His department manager for roughly the last three years was Mr King. Mr King told us he managed two departments, the checkout operators and commercial and those together totaled around 51 members of staff. There were also store managers.

8. The relevant dress code policy to which we were referred is contained within the Handbook which the claimant accepts he read and signed for.

9. The heading is "*Working in Stores*". Underneath the sub-heading "*Clothes and shoes"*, it reads;

> *"Wear study, low heeled shoes or trainers that are black, brown or navy blue. Flip flops, sandals or peep toes aren't suitable".*

10. Later it reads;

> *"If you come to work and your appearance does not meet our standards we'll ask you to go home and change. The time this takes will be unpaid. If this happens repeatedly it will become a disciplinary matter".*

11. The policy goes on to include some information about people in different positions to the claimant, namely "*Senior Managers in stores*". There is no mention specifically there of footwear but reference to *"being well-groomed and wearing business dress"*.

12. The respondent also has a grievance procedure which the claimant later followed.

13. On 18 February 2017 the claimant told us that he met a store manager Mr Cahill, who asked him a few questions about what he was doing in the training room. He was asked to return to the shop floor and was then approached by Mr King who asked to speak to him. Mr King made a short

note which included three matters, two of which we do not need to refer to. The first is recorded as follows:

> *"Not wearing the correct footwear for work*
> *– his trainers were black with a white sole and fluorescent stripes*
> *– I explained that he didn't come to work the next shift in acceptable footwear he would be sent home with no pay".*

14. Mr King gave evidence that he explained to the claimant that he did not believe the footwear was compliant with the policy. He also accepted there was a discussion where the claimant indicated he could not afford to buy anymore footwear and asked whether he was allowed for four weeks to get appropriate footwear. Mr King may have indicated that that was acceptable but later, because he said he realised he needed to be consistent, he returned to the claimant to say that he had to come to his next shift with the correct footwear. The main concern about the trainers was that they had a white sole, which the claimant accepts and fluorescent stripes, which he does not accept. The claimant was also spoken to by Paul, a department manager about his shoes on that day.

15. The claimant was next due at work on 24 February. He attended that day with a different pair of trainers which had a white trim. This led to a further discussion with Mr King which is set out in a handwritten note. The claimant was told that his trainers were not appropriate for work and he was offered a pair of size 12 black shoes or boots to work in. The claimant said his size was 11 ½ and he declined to try them on raising Health and Safety as an issue. Given that the claimant had been warned about such trainers Mr King felt he had no option but to send him home.

16. On 3 March the claimant attended wearing brown Timberland boots. He now describes these as being plain brown although at the time he said that they were "*wheat coloured*". Another manager saw him and said that these were not compliant and sent him home. A note appears of that conversation as told to Mr King by that other manager.

17. On 10 March the claimant attended work wearing black trainers. Mr King described them as black with a white/clear sole with an air bubble although he wrote that the claimant described them as *"black with white*". The claimant believed that he described them as black with a clear sole. In any event, Mr King was still of the view that these were not compliant with the policy, having a lighter sole than the rest of the trainer.

18. The claimant's evidence was that on the same day he came in and saw a female colleague "PM" arriving in the canteen with black trainers with a white Nike tick on it and we have seen a photograph of that. He did not mention that to Mr King at the time.

19. On 17 March the claimant arrived in the same trainers as he had been wearing on 18 February which he had already been told were not compliant. His evidence was that he saw "PM" again wearing the black trainers with a

white Nike tick. Again, the claimant was offered a pair of size 12 Sainsbury's black shoes or boots but he did not try them on. Mr King mentioned that there may need to be an investigation and he needed to give the claimant the formal invitation letter. He therefore asked a member of staff "SS" to attend while this was done. The claimant's evidence that he was that he noticed "SS" was wearing pink socks and that her shoes had grey soles. He took a picture of this but he did not mention it to Mr King. Mr King said that he did not notice that and, if he had, he would have spoken to SS and told her, as he does in other circumstances, to make sure that she arrived in compliant footwear on the next shift.

20. On 24 March there was an investigation meeting and there are notes of this in the bundle. There was considerable discussion about compliance with the policy. The claimant made it clear that he believed that at least some of his footwear was compliant as the policy did not mention what colour sole footwear should have. Mr King told the claimant that he was speaking to everyone at work about footwear and the claimant was the only one who had not complied with his request. Mr King decided that he would have to refer the matter for a disciplinary action.

21. In the meantime, the claimant put in a grievance on 27 March which is relatively short. He wrote to an HR Manager "SW", as follows:

> *"I would like to raise a grievance against Michael King namely for evidence of clear victimisation and a lack of respect for my individuality".*

22. He also asked for the disciplinary to be delayed while this "fair treatment issue" was addressed and that was agreed.

23. "SW" arranged to meet with Mr King to discuss the claimant's concerns and she did so on 3 April. She asked Mr King what he did about people wearing incorrect footwear and he said he asked them to change before the next shift. He said he would then check the footwear on the next shift and he gave some examples. He gave examples of two people with trainers, one member of staff with Ugg boots and a male member of staff without PPE compliant footwear. He also referred to two people who the claimant now says are comparators. These are "CS" and "PM". Mr King said he had seen both of those people and had spoken to them and they had not worn non-compliant footwear again.

24. On 7 April "SW" met with the claimant to talk through his grievance and the notes appear in the bundle. There was considerable discussion about the policy and the claimant's belief that he was being unfairly treated. He did show some photographs of colleagues being in what he considered to be similarly non-compliant footwear but he made no specific reference to the fact that these were female colleagues. His evidence was that he also pointed out that "SW" was wearing black and silver shoes and she replied that she was a manager.

25. "SW" gave an outcome to the claimant of his grievance in a three and a half page letter of 12 April. She found no evidence of victimisation and gave detailed reasons. She indicated that the disciplinary matter would continue and informed the claimant of his right to appeal.

26. The claimant appealed on 20 April and set out that he said he was unhappy with the grievance outcome because:

> *"My uniform is compliant disregarding Michael's opinion. Still yet to be provide sufficient evidence to support his claim. No evidence has been presented to support the unlawful withholding of pay."*

27. The claimant was then invited to an appeal meeting which was somewhat delayed but eventually heard on 13 May before Mr Aylward. Mr Aylward discussed, again in some detail, the implications of the policy. He agreed that, to some extent there was ambiguity in the written policy, but believed it was therefore a judgment call for the manager as to whether the footwear was compliant or not. The claimant was not successful in that appeal and he then returned to work in June in compliant footwear.

28. During June and July, the claimant took a number of photographs of female colleagues wearing footwear that he said was not compliant. One of these was "PM" and his evidence was that she wore the same trainers that she had been told not to wear earlier. Another member of staff "M" was, he said, wearing sandals though that is not entirely clear from the photographs. He also said "SP" was in incorrect footwear. Some of these items of footwear may be non-complaint but it is not always clear what date the photographs were taken. The claimant did not make Mr King aware of what he said were similar breaches of the policy. Mr King's evidence, which the tribunal accepts, was that he was unaware and, if it had been brought to his attention, he would have dealt with it as he had before. In short, he has a large number of staff and does not always notice their footwear unless it is brought to his attention or, as in the claimant's case, it has become a real issue.

29. The claimant resigned on 14 August 2017.

Law and submissions

30. The claimant brings a claim of direct sex discrimination under s.13 of the Equality Act 2010. That section and section 136 which provides for so-called shifting burden of proof read as follows:-

> *"13 Direct discrimination*
>
> *(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.*
>
> *(2)-*

136 Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

(2)If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3)But subsection (2) does not apply if A shows that A did not contravene the provision.

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

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

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

(a)an employment tribunal;

31. The tribunal is mindful that it is unusual for there to be clear, overt evidence of sex discrimination and that it should consider matters in accordance with S136 EQA. In addition, the tribunal accepts the guidance of the Court of Appeal in *Igen v Wong [2005] IRLR 258.* This may be considered through a staged process. We first have to make findings of primary fact and to determine whether those show less favourable treatment and a difference in sex. The test is: are we satisfied, on the balance of probabilities, that this respondent treated this claimant less favourably than he treated or would have treated a female employee. When establishing whether there has been less favourable treatment, comparisons between two people must be such that the relevant circumstances are the same or not materially different. The tribunal must be astute in determining what factors are so relevant to the treatment of the complainant that they must also be present in the real or hypothetical comparator in order that the comparison which is to be made will be a fair and proper comparison.

32. Guidance on the burden of proof can be found in Madarassay v Nomura International plc [2007] ICR 867. It is settled law that the claimant needs to show more than a difference in status and a difference in treatment. It is important to consider the motivation of the decision maker and consider whether a reasonable worker would take the view that the treatment amounted to a detriment (Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] 2 All ER).

33. There is also an unlawful deduction of wages complaint under Part 11 of the Employment Rights Act 1996. The question arises as to what the claimant

was entitled to be paid, given that he was not at work at the times he had been sent home. This depends upon the terms of the claimant's contract with the respondent. The tribunal needs to consider whether the respondent was entitled to exercise its discretion under the clause quoted above at paragraph 10 not to pay an employee who is sent home to change. It may also be that the claimant himself was in breach of the employment contract wearing shoes that were arguably non-compliant. Of course, if the claimant can show that the respondent's actions were discriminatory, sending him home would not have been a lawful instruction.

34. The respondent's representative had prepared short written submissions and added to them orally. The claimant made oral submissions. There is no dispute about the legal tests to be applied. In short, the claimant's case is that he was not in breach of the policy because of the ambiguity about the colour of shoes and what he had observed about a number of female colleagues.

Conclusions

35. We do this by reference to the list of issues and start with the first questions set out at 1.1.1 – 1.1.3 above. The respondent did challenge the claimant as to his shoes being non-complaint with the respondent's dress code and on four occasions he was sent home for wearing incorrect footwear. What is less easy to determine is that the claimant was "disciplined" for wearing incorrect footwear. It is true that the claimant was investigated under the disciplinary process but it went no further than that after his grievance was dealt with and he then attended work wearing what the respondent considered to be compliant footwear. Strictly speaking, that cannot be said to be a matter of discipline. However, giving it a very wide interpretation, we accept that the claimant could consider the investigatory meeting to be disciplinary action.

36. The next question at 1.2 is whether the claimant has been treated less favorably than any of the named comparators. These are as follows: PM, SS, SW, SP, CS and M.

37. As sated above, an appropriate comparator's circumstances should not be materially different. There are some initial difficulties for the claimant here because some of the people the claimant has referred to would seem not to be bound by the same part of the dress code. Certainly, SW was not "working in stores" as she was HR Manager. It also seems that SP was someone who was not managed by Mr King. Their circumstances were materially different.

38. Turning then to the other named people, we are also of the view that these were in materially different circumstances. The claimant took photographs of these individuals arguably wearing non-compliant footwear but there was no evidence that this had been seen by Mr King and ignored. Indeed, in relation to two of those people, PM and CS, Mr King gave evidence, which we accepted, that he had spoken to those individuals and they had returned

to their next shift with compliant footwear. He could not comment with respect to PM's later alleged breach as it had not been brought to his attention. We accept that Mr King could not have noticed all members of staffs' footwear on every shift. To some extent the claimant was subject to scrutiny because his footwear had been noticed and he had been spoken to and it was more likely therefore that it would be checked when he returned on the next shift. What is more, there is no evidence that any of these people were spoken to on more than one occasion which, of course, was not the position with the claimant who was spoken to on a total of five occasions and on four of those occasions was told to go home. The claimant has not made out the primary facts that he has been treated less favorably than any of these named comparators because of their circumstances were materially different.

39. If we are wrong about that, we turn to the question at 1.4 and consider the respondent's explanation. We are satisfied that the explanation is a non-discriminatory reason. We accept that those who needed to be spoken to had been spoken to earlier and Mr King had not seen any alleged infringements that the claimant had noticed and photographed. The claimant did not give the information to Mr King.

40. The claimant therefore fails in his claim for direct sex discrimination.

41. We turn then to the unauthorised deduction from wages claim. It is accepted that the respondent made deduction from wages when the claimant was sent home and received no pay. On the face of it the deductions were authorised by the contract which makes it clear that people might be sent home to change. It appears to envisage a return to work on that shift.

42. This is somewhat different from what happened to the claimant as he did not attempt to return. It is clear to the tribunal that, if he had done so, with compliant footwear, he would have been able to work and would have been paid. We say this particularly as the respondent attempted to keep him at work by offering him a pair of shoes which were very close to his shoe size. We do not quite understand why the claimant refused even to try them on as they may well have fitted, shoe sizes not being as precise as the claimant seems to suggest.

43. Whilst we accept, as Mr Aylward did, that there is some ambiguity in the written policy, we also accept that Mr King was applying the policy as he honestly believed it should apply. It was within his discretion to ask the claimant to wear footwear that was more compliant or to use that which was being offered to him. It cannot be said that the decision that Mr King made to send the claimant home was made in bad faith or was irrational. The respondent was entitled by virtue of the contractual term to ask him to go home and change and to not pay him for time when he was not attending work. That claim must therefore fail and is dismissed.

44. The claimant's claims fail and are dismissed.

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Employment Judge Manley

Date: 31 May 2018

Sent to the parties on: .....

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For the Tribunal Office