EMPLOYMENT TRIBUNALS

Claimant: Mr B Roberts

Respondent: Voodoo Doll Limited

HELD AT: Manchester **ON:** 12-15 February 2018

BEFORE: Employment Judge Grundy
Mrs A Jarvis
Mrs A Ramsden

REPRESENTATION:

Claimant: In person
Respondent: Ms C Widdett of Counsel

RESERVED JUDGMENT

The judgment of the Tribunal is as follows:

1. The claimant's claim in respect of unfair dismissal succeeds.

2. The claimant's claim in respect of age discrimination succeeds in part relating to comments made but not in respect of the reason for the dismissal.

REASONS

1. The claimant brings claims of unfair dismissal and age discrimination. The age discrimination claims relate to both his dismissal and in relation to comments allegedly made to him. The Tribunal has benefitted from the Case Management Orders of Employment Judge Howard and Employment Judge Feeney on 7 December 2017 and 3 October 2017. Until his dismissal, the claimant worked as a door supervisor at premises known as " Mojo's" in Bridge Street in Manchester.

2. On 7 December 2017 Employment Judge Howard at page 51 of the bundle of documents that was provided to the Tribunal identified the issues to be determined with the parties. Those issues are as follows:

Unfair Dismissal

(1) Can the respondent establish a potentially fair reason for dismissal falling within section 98(1) of the Employment Rights Act 1996? The respondent relies upon conduct. Mr Roberts disputes this maintaining that his age was the real reason for his dismissal.

(2) If so, was the dismissal fair in all the circumstances applying section 98(4) of the Employment Rights Act 1996?

(3) If Mr Roberts has been unfairly dismissed, do the **Polkey** principles apply to limit any compensatory award?

(4) If Mr Roberts has been unfairly dismissed, did he contribute to his dismissal to any extent?

Age Discrimination

(5) Mr Roberts pursues claims of direct discrimination under sections 5 and 13 of the Equality Act 2010.

(6) The less favourable treatment relied upon by Mr Roberts is –

(i) Discriminatory comments made to him which are particularised in the statement provided by email of 2 October 2017 entitled “Age Discrimination Statement from Barry Roberts”.

(ii) Mr Roberts’ dismissal.

(7) Mr Roberts relies upon (i) as an act continuing over time, and the respondent raises a time limit issue which will be determined at the hearing.

(8) Mr Roberts relies upon a hypothetical comparator. He is aged 50 and believes that if he had been in a younger age bracket of below 50 he would not have been dismissed and/or those comments would not have been made to him.

(9) Was Mr Roberts treated less favourably by being subject to the alleged comments and/or being dismissed because of his age by reference to a hypothetical comparator?

(10) Were the claims brought within the relevant time period?

(11) If not, is it just and equitable to extend time to allow those claims to proceed?

(12) Potentially proportionality, although that has not been relied upon.

3. The parties also agree that the disputes of fact in respect of Neil McAllister were:

(a) Whether he had given an instruction to Mr Roberts to close up early; and

(b) Whether he had the authority to do so i.e. was he acting manager? (Or as this Tribunal clarified whether the claimant believed he had the authority to give the instruction).

Evidence

4. The Tribunal has heard evidence over three days and submissions and deliberations on the fourth day of the listing. The Tribunal benefitted from a bundle of documents, which at the outset numbered some 436 pages. Until the hearing was underway, the respondent failed to disclose the disciplinary hearing minutes and other documents relating to Rebecca King whom the respondent asserted was the manager on 30 January 2017. It transpired that she was disciplined and given a first written warning for choosing to close the bar on the date the claimant was allegedly dismissed for so doing. Those were added to the bundle on day three of the hearing.

5. The Tribunal also observed the CCTV clips produced by the claimant of the bar area and of the door to the night club premises on 30 January 2017, and the Tribunal had the benefit of listening to the appeal audio minutes which were tape recorded without the consent of the respondent by the claimant on 27 March 2017, but the respondent did not take issue with the Tribunal listening to them. In fact the minutes did not record the extent of the matters discussed in the Appeal. These remain in the claimant's and respondent’s possession.

6. The Tribunal heard sworn oral evidence on behalf of the claimant from Barry Pagent who was a doorman at the premises; from Matthew Bonham who also held that position; and from Savo Keleman who is now the head door supervisor at the premises. The Tribunal heard evidence out of order to accommodate the child care needs of the claimant's witnesses, other personal circumstances of Miss King and to accommodate the travel arrangements for the respondent's witness Ms Dhiman.

7. The Tribunal heard evidence from the claimant; from Seema Dhiman who is the respondent’s Operations Director; from Rebecca King who was a bartender at the relevant time; from Neil McAllister who was also a bartender at the relevant time; and from Adam Binnersley who is now Operations Manager and has since the dismissal of the claimant been promoted, but was at the time a manager at the Mojo premises in Manchester.

8. The claimant had wanted to call Dylan Selman as a witness but he was unable to attend and the Tribunal did not admit the unsigned statement he produced on his behalf as it was unsigned.

Comments on the witness evidence

9. The Tribunal found the evidence of Barry Pagent, Matthew Bonham and Savo Keleman to be credible and genuine.

10. The Tribunal found the claimant's evidence to be reliable in the main save that because of the challenges presented by the conduct of the dismissal and the appeal process, (which the respondent conceded in submissions on the last day of this hearing to have been unfair in certain particulars) and due to his ill health, it being the case that the claimant has suffered depression and having developed a level of anxiety, the Tribunal considers that he may have over thought some things due to his anxiety.

11. So far as the respondent's witnesses were concerned, the Tribunal found Seema Dhiman, the Operations Director, to be honest about her failings although she was over defensive of the company and also of Adam Binnersley. The Tribunal found Rebecca King to be straightforward and clear in her evidence and the Tribunal found Neil McAllister to be an honest and credible witness, and when he was put on the spot and asked by the claimant for proof that he was in Berlin on 4 and 5 February he was willing to provide photographs from his mobile phone which seemed genuine to the Tribunal. He had a recall of being asked for a statement about the key events, "in a pizza place in Berlin" which held the ring of truth.

12. The Tribunal was not impressed by the evidence of Adam Binnersley. He was at times evasive, particularly when asked about the Managing Director Martin Greenhow's involvement in matters, and the Tribunal considers this to have been most unhelpful. He was asked directly about conversations and contact with him and he did not answer the Tribunal's questions. He was also not entirely truthful in the Tribunal's view, in particular regarding comments made about age to the claimant about which several different corroborative witnesses supported the claimant's evidence in the face of his denials of having made comments to the claimant.

Fact Finding

13. The Tribunal has set out in the previous paragraphs dealing with evidence the background in relation to its view of the evidence of the witnesses and will now set out the chronology of its findings of fact in relation to the claimant's employment. The Tribunal has not found it necessary to determine every issue of fact that has been put before it but those issues, which it is necessary to determine in order to reach conclusions as to the claimant's claims.

14. The claimant's date of birth was 29 October 1966 making him 51 years of age now. He commenced employment as a door supervisor with the respondent on 20 November 2014. He worked on a zero hours contract and tended to work 4-6 nights a week on shift from between 22:00 to 03:30 or to 4:30 depending on the night of the week and the days upon which the club was open.

15. The respondent is a company which operates restaurants and night clubs with premises in Manchester where the claimant worked exclusively; with premises in Leeds, Liverpool and post the claimant's dismissal at Nottingham opening in July

2017 with Harrogate about to come on stream now. The company has 70 or so employees and a turnover of between £4million and £7million. The opening hours appear at page 198 of the bundle.

16. The employees in Manchester who were on salary at the relevant time were Adam Binnersley, the General Manager, since promoted to Operations Manager; Aled Sion, Assistant General Manager; and Chris Siddall, Assistant General Manager. The bartenders included Rebecca King and Neil McAllister, and the cleaner Benji Wasansau. The door staff were on zero hours contracts, which included Barry Pagent and the claimant at the relevant time, and also Dylan Selman who was also dismissed at the same time as the claimant and has brought no claim. Anthony Plaistow was also a senior door supervisor who was in a salaried post. In management there was a small team based at Head Office including at the time Samantha Fish, Seema Dhiman under the control of the Managing Director, Martin Greenhow, and the other director, Mal Evans. The directors had a knowledge of alleged events through email communications and senior management discussed things, as Seema Dhiman made clear to the Tribunal in her oral evidence. Certainly the email on page 313 showed that Martin Greenhow, the Managing Director, was not going to put up with behaviours he considered to be inappropriate (email on page 313 on 5 February 2017 at 18:52 re subject Monday 30 January):

> "Thanks Ads,
>
> Just remind them they are not empowered to make company policy and doing so won't be tolerated."

17. Senior management were aware of concerns shortly after 30 January 2017 arising from the nightly report, which is at page 303 of the bundle of documents, which Rebecca King compiled. Trading date 30 January 2017 copy of nightly report dated 31 January:

> "Very quiet night. No industry. Closed the doors at 2.40 due to bar being empty. Took £586.62 and cash was down a fiver."

18. The events of that night caused the claimant and Dylan Selman to be suspended on 31 January 2017 and the events of the night culminated in their dismissal, but Rebecca King was not suspended despite it being the case she was the Manager in charge on that night on the respondents case and Neil McAllister who the claimant believed to have been in charge and was salaried staff, was not asked about matters until 5 February. He was neither suspended nor disciplined and the rota shows him in work on 31 January. He was not asked about matters on 31 January. The rota showing him in on 31 January from 17:00 to 04:00 appears at page 410 of the bundle. He was asked when he was on holiday in Berlin on 5 February and sent by email his recollection to Adam Binnersley, which appears at page 316. He said:

> "Apart from a couple of groups at around 11.00pm it was very quiet all night. When his friend was refused entry for being too drunk the last remaining guest left the venue at around 2.40am. I have worked very few night shifts at the start of the week as a bartender as I am usually put on the Monday clean

> and Tuesday delivery shifts. Therefore I assume that the policy regarding last entry time, 30 minutes before the bar shuts on a weekend, applied to all nights of the week as I had never been advised otherwise. As there was no guests left in the bar and based on my knowledge as stated above I believed no more would be let in. I was going downstairs to smoke anyway so *I SUGGESTED THAT I CLOSE THE FRONT DOORS WHILE I WAS THERE. I WAS NOT TOLD BY THE MEMBER OF STAFF THAT I BELIEVE TO BE MORE SENIOR THAT I SHOULDN'T DO SO*. I understand now that this was the wrong thing to do and the last entry time that I thought was in place is more of a guideline rather than set in stone policy. Now that I know this I can assure you that it won't happen again." (Tribunal's capitals and underlining)

19. His email reflects the events of the night. Although the claimant contends that he believed that Neil McAllister was the manager and that would be borne out by the work app, extracts of which were featured in the bundle 383-422 and did tend to suggest he was the Manager and the claimant is entitled to view him as having some authority over him, in any event. In fact the person in authority was Rebecca King as confirmed by her in her evidence and that of Mr McAllister and Mr Binnersley, and the Tribunal so finds, - she was the more senior member of staff, she was the shift leader and cashed up on that night (30.1) and she wrote up the nightly report.

20. However, the claimant would have viewed Neil as having authority if he took his instruction from Rebecca, and he was the person who on any view instigated the closing and locking of the doors, and Rebecca King accepted she did not challenge him for doing this. The claimant believed that Neil McAlister had the authority to tell him that the doors should be closed at that time, and he gave the instruction so to do. The claimant did not physically close the door; Neil McAllister closed and locked the door.

21. Within the respondents' extensive procedures and policies at the time prior to the claimant's dismissal, there was a lack of clarity about the last entry time, which was reiterated to staff after the claimant's suspension. Although the Tribunal accepts the claimant knew the timings for closure and indeed on the evidence of Neil McAllister the claimant did on 30.1.17 rightly challenge him about closing the door early. It seems this was in fact ignored by the respondent.

22. The suspension letter at page 429 was handed to the claimant and purported to be from Seema Dhiman. The letter at page 304 was amended and was only a draft at the time. The revised letter charged the claimant with:

> "(1) Choosing to close the bar before the permitted and agreed closing time on multiple occasions without prior consent from a director.
>
> (2) That you have seriously damaged the business interests of the company by your actions."

23. The letters were unsigned at that stage and Seems Dhiman confirmed that she had not even seen the letter that had gone out in her name, and she was unhappy and raised this at a management meeting. The charge was similar to that made against Rebecca King save her charging letter at page 437 also included the

allegation that she was “not offering the service that was expected to our guests or a company standard”.

24. The claimant was invited to a disciplinary hearing scheduled to take place in Manchester per the letter at page 306 on 6 February. At that stage page 308 was relied upon by the respondent as part of its investigation, although this is misleading because Rebecca King had produced the 30 January nightly report and that was used selectively, only referring to the first two lines, which referenced 30 January and at that stage there was no statement that the respondent had from Neil McAllister.

25. Mr Binnersley suggests that CCTV may be used at the hearing in a letter at page 308A. At page 308D on 4 February the claimant seeks further disclosure and at page 308C disclosure of CCTV between 6 February and 12 February. The respondent indicated through correspondence that inexplicably is not in the bundle that they then required the claimant to go to Leeds for the disciplinary hearing.

26. The claimant takes issue at page 324B and asserts that this is of huge detrimental psychological impact on his health. At page 326 the respondent asserts that the Head Office in Leeds is an appropriate venue and Manchester is not private. The respondent has held previous disciplinary hearings in Manchester. The CCTV would have been located in Manchester. By the evidence of Adam Binnersley it was possible to lock one of the doors to make a room private for a meeting to take place at Manchester.

27. The events of 30 January led to Adam Binnersley having "a quiet word" in Manchester with Neil McAllister who closed the doors on the relevant night and made the decision that the doors should be closed. In respect of the shift leader and person in authority Rebecca King; although she did go to Head Office in Leeds for her disciplinary, that led to a first written warning for her accepting the decision to close the doors when she was shift leader on the night (pages 441-442).

28. The Tribunal finds that the investigation into the claimant's actions was lacking in direction and substance and was carried out by the dismissing officer, who held a closer social connection to Miss King and Mr McAllister than to the claimant and Mr Selman. This was despite the existence of others who could have carried out the investigation in the management structure, those individuals being Aled Sion or Chris Siddall, the other assistant managers.

29. The extent of possible relevant CCTV coverage was not retained beyond 31 days. It was requested in early course by the claimant. Mr Binnersley did not give it the significance it deserved and was very lax in failing to ensure its availability. Mr Binnersley was inexperienced and untrained and never even read basic employment law guidance such as the ACAS Code on Disciplinary and grievance procedures.

30. He failed to investigate the appropriateness of customers having been refused entry on 9 January, which he claimed to have observed from the CCTV. He made assumptions about the CCTV coverage and responsibilities of the staff on duty. As the dismissing officer he said he held the disciplinary but there was not even a hearing with a note. There was no note of any disciplinary hearing regarding the

claimant at all. In fact he said the disciplinary hearing took place “in his head”. It is not clear if this was in Manchester or Leeds. He said he weighed up the evidence and the best option was dismissal. He did not weigh up the evidence. He had one conclusion in his mind. When asked the reason, the reason he gave the Tribunal was:

> “Guests were refused entry on 9 January and 30 January. For me that was enough. I was clear in my mind there was not a policy to refuse a half an hour before closing.”

31. The respondent appears at times to have relied on the document at page 302 which was described in the index as "spreadsheet re bar closing times" but this put the claimant on duty with Mr Selman on all the nights listed and this was contradicted by the trading date information for 2.1 and 3.1 in the report so called on page 308.

32. The respondent concedes that there was confusion amongst the staff, including the shift leader and Mr McAllister, about refusing guests entry half an hour before closing as previously referred to, although Mr Binnersley seems to have missed the significance of this and factored it in to how it may effect what the claimant would say. There was no inquiry into the validity of the claimant and Mr Selman refusing entry to customers, which is also of some importance.

33. The dismissal procedure was farcical. The dismissal letter appears at page 331 of the bundle of documents. It purported to terminate the claimant’s employment for gross misconduct. The reasons given are that:

> “On 30 January and 9 January you knowingly closed the bar prior to the agreed closing time without the prior consent of a director. As a result of this closure you have seriously damaged the company’s business interests and reputation. In the light of this serious and repeated misconduct the company has no choice but to summarily dismiss you.”

34. Adam Binnersley accepted that there was no evidence that the company’s business had been seriously damaged, nor its reputation, and there was no actual evidence that the claimant had closed the bar. Neil McAllister on 30 January 2017 gave the instruction to and closed the doors, and Rebecca King was shift leader and closed the bar.

35. On page 332A the claimant appealed the decision to dismiss him, not having attended the disciplinary hearing supposedly to be held in Leeds for the reasons given in relation to the venue. At page 332A he set out the reasons:

> “(1) You have refused to accommodate me a fair hearing.
>
> (2) I’ve done nothing wrong apart from do my job under the instruction from your newly appointed manager;
>
> (3) I feel I’ve been discriminated against.
>
> (4) I feel I’ve been targeted by yourself and other Mojo staff.”

36. He also says he would find it emotionally difficult to travel to Leeds or other long distances for any future hearings and asked that he be accommodated in a more reasonable location. The claimant asked for Skype. That was rejected because it is not secure. There was a further email discussion about a companion but the respondent was bound by legal requirements as the claimant did not understand the meaning of "companion" within the legal provisions as to being accompanied.

37. The appeal hearing was in fact held in Leeds and the minute appears at page 354 of the bundle of documents. The Tribunal had the benefit of listening to the audio of that appeal where Seema Dhiman stressed her independence and indicated she would look into the matters raised by the claimant. In fact she was not independent and in fact she did not look into all matters. The claimant plainly raises the potential for age discrimination because he says, as the full minute should have recorded, "because I'm coming to the end of my doorman career, in your eyes…", and on page 357 as the minute does record he says he is targeted because of his age.

38. Although it is not recorded that the claimant did concede within the appeal that it was "the best door he had worked on". He put that into context to the Tribunal saying it was the best door because he had been shot at and stabbed whilst working at others.

39. Seema Dhiman has had no training in employment relations nor does she hold any human resources qualification and she has never held an appeal meeting before. She was wholly inexperienced and inadequate for the task ahead of her. She accepted that the appeal was not thorough and the respondent could have done better and should have followed up the claimants points more thoroughly and it was a slack appeal.

40. The appeal confirmed the decision to dismiss, which was in itself flawed, at page 361. It was an appeal in name only and it was an exercise in going through the motions. Seema Dhiman only had the claimant's letter of appeal and had not got the statements. She said she did not rely on the events on 9 January 2017 as there was no evidence.

41. The Tribunal also finds on her evidence that there was no evidence of damage to the company's business interests and reputation; such was based on assumption. Seema Dhiman did consult with an Employment Consultant but whatever this advice was the appeal was fatally flawed and did not in any way rectify the faults of the disciplinary process.

42. At the stage prior to drawing conclusions she did not interview Anthony Plaistow and did not look at all the CCTV; she spoke to the consultant and the Managing Director for their views and to Sam Fish. She did not consider the age discrimination allegations worthy of any investigation as she did not believe and did not have an open mind to the fact that they could be true, at the very least they required further investigation.

43. The letter at page 361 is inaccurate. There was no fair procedure. There are still errors on page 362 claiming that the claimant had closed the doors early, which

is not true, and it wrongly asserts that the claimant did not raise age discrimination as he had done so twice in the appeal hearing.

44. The door staff who were subsequently recruited, first Savo Keleman who is 39, 40 in July, was approached in October 2016 by Anthony Plaistow regarding whether he was intending to work in Mojo's and approached again in February 2017 when the offer was repeated. He is now the head doorman. Michael Scholes who is 32 was also approached in October 2016 and after the claimant's dismissal and started work before the appeal but then left. There are other door supervisors employed by the respondent of a similar age bracket to the claimant. In Manchester Mojo's Rob Barrett is 48. In Leeds Mojo's (which was not managed by Adam Binnersley at the time) Martin Heddon is 48 and Mark Valentine is also 48. Mark Bowland is 44 and Ian Mallison is 54. There is also a bar back/cleaner at Manchester named Benji Wasansau who is 50 years of age.

45. The claimant raised in his ET1 at page 7 comments raised by Adam Binnersley about calling him a "granddad" and being the "oldest bouncer he knows" and "bloody hell, that's old for the job, isn't it". He raised further allegations in the statement to the Tribunal. Barry Pagent worked at Mojo's from July 2016 to March 2017 and he alleges that when the claimant was working Adam Binnersley had randomly made inappropriate comments about his age.

46. The Tribunal accepts that Barry Pagent's evidence is true and that Adam Binnersley made comments such as "granddad", "you're too old to be a doorman", "how long can you stay on the doors, you old bastard, shouldn't you be retired by now", "will you be able to make it up the stairs if something happens, old man", "we will have to get you a stair lift" and those comments were up until around December 2016 and given that the claimants employment ended in January 2017 were likely to have continued after the New Year prior to the ending of his employment.

47. The Tribunal accepts Matthew Bonham's evidence before he left at the end of 2015 and find that Adam Binnersley said, when Barry Roberts was first being employed in November 2014 "where did you get this fossil from, Matt?" and he said the name "granddad" was used and also "it's time to pack it in old man".

48. The "granddad" comment was made to the claimant after a conversation about having children and the claimant indicated he had a daughter in his 30s and this was randomly repeated in the presence of others as witnesses in a demeaning way to the claimant.

49. In the summer of 2015 Adam Binnersley had said to the claimant, "You're 50 soon. How long do you think you'll be working on the doors when you hit the age of 50?". He said it was a joke and gave further expletives, "At least you can get a job as a lollipop man they start work when they are 65".

50. The claimant made no comment or complaint at the time comments were made, but Adam Binnersley was the manager and the claimant was in fear of losing his job. The night club had a culture of banter within the staff which at times has led to inappropriate and derogatory comments, relating to being ginger- hair and being overweight.

51. Given the nature of the employment and of the claimant describing himself suffering these comments when on the door of the premises in a random way (save the timing of the being 50 comments preceding his 50th birthday), the Tribunal finds on a balance of probabilities that the comments continued throughout his employment and given Mr Pagent's employment continued throughout the timeframe of the claimants; the Tribunal considers the comments to have been part of a continuous act basis up until the claimant' s dismissal.

The Relevant Law

Unfair dismissal

52. So far as the law is concerned, the Tribunal had specific regard to section 98 of the Employment Rights Act 1996, in particular section 1:

> "In determining for the purposes of this part whether the dismissal of an employee is fair or unfair, it is for the employer to show (a) the reason, or if more than one the principal reason, for the dismissal; and (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as justify the dismissal of an employee holding the position which the employee held".

53. The reason is in dispute. The burden of proving the reason lies on the Respondent on a balance of probabilities. Conduct was argued hence **BHS v Burchell** was considered.

54. The Tribunal had regard to section 98(4) which is as follows:

> "Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair, having regard to the reason shown by the employer, (a) depends on whether in the circumstances, including the size and administrative resources of the employer's undertaking, the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and (b) shall be deemed in accordance with equity and the substantial merits of the case".
>
> The Respondent conceded in submissions that this was an unfair dismissal as the Respondent's evidence did not sufficiently satisfy the provisions of section 98(4).

55. The Tribunal considered whether the claimant "contributed" to his dismissal in the sense that he had in some way been "blameworthy".

Age Discrimination

56. The Tribunal considered the relevant provisions of the Equality Act 2010, in particular section 13 of the Equality Act, subsection 1, which provides:

> "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."

It is clear that the protected characteristic relied upon by the claimant is age.

57. The Tribunal were obliged to consider whether the treatment of the claimant was "because of" the protected characteristic. The Equality Human Rights Commission Code of Practice states that:

> "Whilst a protected characteristic needs to be a cause of the less favourable treatment, it does not need to be the only or even the main cause."

58. The Tribunal applied the appropriate burden of proof in **Igen v Wong & Others [2005] IRLR 258** confirmed by the Court of Appeal in **Madarassey v Nomura International PLC [2007] IERLR 246** and from those authorities the Tribunal had to consider whether the claimant raised facts from which the Tribunal could conclude that the claimant had been treated less favourably on the grounds of age and whether or not if that was the conclusion the burden shifted to the respondent to refute the allegations of the claimant. The Tribunal considered the totality of the evidence in looking at this matter.

59. This included evidence of the operation of the respondent, the interaction of the Manchester staff and the hierarchy of the staff and the motivation of Adam Binnersley.

60. In relation to age discrimination, section 5 provides:

> **"Age**
>
> (1) In relation to the protected characteristic of age —
>
> (a) a reference to a person who has a particular protected characteristic is a reference to a person of a particular age group;
>
> (b) a reference to persons who share a protected characteristic is a reference to persons of the same age group.
>
> (2) A reference to an age group is a reference to a group of persons defined by reference to age, whether by reference to a particular age or to a range of ages."

61. The Tribunal considered whether the comments raised by the claimant amounted to a " continuing act" of discrimination and therefore should be treated as within time at the end of the claimant's employment, considering section 123(3)(a) Equality Act 2010. If not whether the Tribunal should exercise its discretion to extend the time- limit considering it just and equitable under the provisions of section 123.(1)(b).

Submissions

62. The parties made oral submissions at the conclusion of the hearing.

63. The Respondents asserted this was a dismissal for a reason related to conduct and tests set out in the **BHS v Burchell** case should be applied. They conceded that the investigation by the Respondent was not reasonable and therefore this could not be a fair dismissal. They asserted that Mr Binnersley had a genuine belief in the guilt of the Claimant in closing doors early. They accepted that parts of the procedure applied by the Respondent were unfair but did not consider it unfair to move the venue of the disciplinary hearing. They remained critical of the claimant for not attending.

64. Contributory fault was alleged in contending the claimant was part of the team which closed the door early. Although it was accepted that the rules were not clear. The breaches of the Code of Practice which were acknowledged did not amount to a full % uplift, as the claimant did not attend the disciplinary and was not wholly co-operative. The Respondent in Tribunal offered the claimant an apology for procedural failures in dealing with the matter.

65. In relation to the age discrimination claim the Respondent submitted that the claimants claims were out of time. It was suggested the last comment relied upon dated back to December 2016 and the claim was brought arising from dismissal in January 2017.It was submitted there was no evidence upon which to extend the "just and equitable" test to extend the time limit.

66. The comment of “Grandad" was accepted to be inherently ageist and actionable in the context of the evidence heard by the Tribunal. The Tribunal was invited to reject the credibility of that evidence, partly because the Claimant did not raise it in his appeal, nor was it prominent in his claim. Further it was submitted the claimant could not rely on the Hendricks case to bring the comments in time. There was no "continuing act" per the Respondent. Barry Pagent used the phrase “Old man" rather than Grandad and therefore this was unreliable. It was submitted the claimant had made the comments in retaliation.

67. In relation to the direct discrimination allegation that the reason for the dismissal was age discrimination, the Respondent referred to section 136 and **Igen v Wong** and the following other authorities known to the Tribunal including:

Shamoon v RUC 2003 UKHL 11

London Borough of Islington v Ladell

Law Society v Bahl 2004 IRLR 799

Nagaranjan v London Regional Transport. 1999 IRLR 572

68. The Respondent submitted that the allegation that the dismissal had been a sham had fallen flat, and that as there had been disciplinary action taken against others, the dismissal was not related to age. Further that the claimant had in the appeal identified the reason for the dismissal as a lack of flexibility. It was contended generally the Respondent had other staff of similar age to the claimant doing the same job and that the Respondent preferred maturity in its door staff.

69. The Respondent was invited to clarify the reason for dismissal asserted by the Respondent and it was said that, “The claimant shut the doors early and he was part and parcel of the team, under instruction to do that on 9.1 and 30.1 although it was accepted at the appeal there was no evidence for the 9.1 so it could only be said to apply on 30.1.18”.

70. The Respondent also clarified their submission it was Anthony Plaistow head of security who had looked to head hunt door staff from other premises rather than Mr Binnersley.

71. The Claimant made submissions in his own right.

72. He said he had not understood the comments to be acts of discrimination when they were said, he had no thought to put them in a claim. But there were things said such as regarding weight and being ginger (haired) and this supported that things were said. He had not thought to look for a reason for the comments until he was dismissed. He felt vulnerable because he had a zero hour contract. He had suffered depression and bottled things up, He believed the reason he lost his job was a “stitch up from the start". He contended the evidence he submitted was ignored and the CCTV ended up being conveniently unavailable and could not be looked at.

73. He suggested that he was not in on many of the nights as someone else even shut the door on 30.1 it was all sinister and underhand and did not feel right. Mr Binnersley ignored the fact that the claimant had not shut the door on 30.1 despite the claimant making that clear throughout in emails.

74. The Claimant was clear that the door staff had discretion re customers on the door there was not a new policy. He was unhappy his pay was docked on the 30.1 as he did not feel he did anything wrong in following others instructions. He felt Mr Binnersley painted himself as a "fun guy" but he did not really know the claimant and did make jokes about "Big 50". “Grandad" was regularly used and Barry Pagent supported this had been ongoing. He referred to an alleged conversation about his daughter being in her 30s, and Mr Binnersley's alleged response regarding him "being a Grandad". He reminded the Tribunal of the corroborative evidence of Savo Keleman who now works for the Respondent.

75. The Claimant questioned Neil McAllister's statement at 317 and his submission it did not match footage on the CCTV. He was convinced that the timings on the CCTV had been spiked and interfered with. He asserted the video time did not fit on the bar and the door timings in other documents.

76. He made submissions regarding the poor investigation of the Respondent and the unfairness of not holding the disciplinary at his place of work in Manchester. He referred to the fact the Respondent copied in Seema Dhiman and then asked him to go to Leeds when he was suffering from depression and had never even been there. He complained about being dismissed in his absence. He believed Neil McAllister to have been in charge hence the door shadowing records. He contended documents at 429 and 430 were altered.

77. He submitted Seema Dhiman had come to the Tribunal to try to take the blame from others and he believed she showed a contemptuous attitude to the Tribunal. He believed that Neil acting as Manager was kept secret from her. The claimant questioned Neil McAllister's evidence and indicated he would have preferred further evidence such as his passport to potentially show his trip to Berlin. He said Mr Binnersley was aware of the head hunting.

Conclusions

The Tribunal, having heard evidence over three days, and submissions was able to use most of the fourth day for deliberations in reconsideration of all of the papers, the notes of evidence taken, the law applicable and the submissions made. The judgment was reserved to give proper time for that process and judgment. The conclusions reached are as follows:-

Reason for the dismissal

78. The respondent has not established a potentially fair reason for the dismissal on a balance of probabilities to the Tribunal's satisfaction. The claimant was not responsible for closing the door on 30 January. Rebecca King was the shift leader and Neil McAllister was a bartender. They were in greater authority than the claimant on 30 January. Neil McAllister was challenged by the claimant and agreed that the claimant and Mr Delman were surprised that the door was being closed early. Adam Binnersley reached a perverse conclusion, that the claimant was responsible and in asserting that he had a genuine belief that the claimant was guilty of gross misconduct.

79. There is no evidence before the Tribunal which justifies the conclusion that Adam Binnersley could genuinely believe that the claimant was responsible for closing the bar early on 9 January or 30 January, and the Tribunal rejects what Adam Binnersley says he had in his head, having carried out a wholly defective investigation and a disciplinary when there are no written documents showing what Adam Binnersley asserts. He did not follow appropriate ACAS procedure and he has not held any kind of meeting. All staff involved in this sorry affair have no employment law or HR training and knowledge.

80. The Tribunal considers the principal reason for the dismissal in this case was that Adam Binnersley was seeking promotion, did not have time to properly investigate the claimant's concerns and was acting under the authority of the Managing Director who had indicated in an email at page 313 that this door closing early so to speak, "would not be tolerated". Mr Binnersley decided that the scapegoats for that would be the door staff who were on zero hour contracts, namely Mr Selman and the claimant.

81. The evidence of Mr Binnersley included that he had counted Rebecca King as a friend and he used to go drinking with Neil McAllister. The claimant did not drink and was not part of those who socialised together and who participated in the "banter" relating to being overweight or having a ginger beard. The Tribunal regarded this as significant in rejecting the respondent's evidence on the reason for the dismissal.

82. In the Tribunal's view age was also not the cause of the dismissal. The Claimant and Dylan Selman were dismissed at the same time and the Tribunal considers the reason was that they were "carrying the can" for the management's perception that the doors were closed early. The dismissal was a sham but it was not a sham because of the claimant's age. Age was not causal factor. It was a sham to avoid salaried staff being dismissed and to cover up for Mr Binnersley's poor investigation and favouritism to other staff. Also Mr Selman is several years younger than the claimant but he was a zero hours member of staff and he was dismissed at the same time.

83. As the Respondent has failed to demonstrate a fair reason for the dismissal within section 98(1) the dismissal is unfair. If the Tribunal is wrong in concluding that the respondents failed to establish a fair reason for the dismissal and conduct was the reason, then in any event the respondent conceded that the dismissal itself was unfair.

Fairness of the Dismissal

84. The respondent made this concession in submissions. They conceded that Neil McAllister closed the door on 30 January. The Tribunal considers it should draw conclusions in relation to the unfairness because of the severity of the impact on the claimant. The Tribunal considers that changing the location of the disciplinary from Manchester to Leeds was done in a fit of pique rather than a proper consideration of what is reasonable. There was a fit of pique on Mr Binnersley's part because he was being asked for disclosure of significant amounts of CCTV which may have further proved the claimant's innocence. There was no issue in respect of privacy. Manchester could have held that meeting. The respondent did not take into account the psychological impact of travelling to Leeds on the claimant, which had been raised by that time. The industry holds meetings in nightclubs. This was one of those that could have been held there. Furthermore, the CCTV, which was at the heart of this, could more easily have been accessed in Manchester if it had been saved by Adam Binnersley, this is of grave concern to the Tribunal although it was under played by Mr Binnersley.

85. There was a lack of investigation as set out in the findings. There was a lack of qualification and capability to conduct such procedures as set out in the findings. There was a lack of attention to detail and that permeated through the disciplinary process and the appeal. There were serious breaches of the Code of Practice relating to the disciplinary and the appeal, all of which was slack, lax and inadequate.

86. There was also a considerable amount of unfairness in the parity of treatment of Rebecca King who received a first written warning when she was the shift leader in charge on 30 January, and Neil McAllister who instigated the door closing and closed the door on 30 January, who was given "a quiet word" in Manchester not even documented by Adam Binnersley. This feeds into the Tribunal's conclusion Mr Binnersley was protecting his own. The roles of investigator and disciplinary officer were taken by the same person when in this situation there were others available who could have adopted those roles. This was unfortunately a catalogue of failures in how to conduct a disciplinary investigation, hearing and appeal.

87. In answer to the question on **Polkey** principles no argument was put before the Tribunal.

88. In respect of contribution the Tribunal does not consider the claimant to have been "blameworthy" for the train of events, which culminated in his dismissal. On our findings of fact and in fact as the respondent argued others were in charge on 30 January. It is not sufficient to say that the claimant was part of a team; he challenged Neill McAllister, which the Tribunal accepted in its findings, The " punishment" visited on Neil McAllister was a quiet word and no note of the same, and Rebecca King was given a first written warning when there was on the respondents case a lack of clear instruction as to the closure of the doors. In the circumstances the Tribunal does not apportion any blame on the claimant and finds that, there is no contributory fault on the part of the claimant.

UPLIFT FOR BREACH OF THE ACAS CODE

89. Furthermore in relation to the percentage uplift due to breach of the ACAS Code, the Tribunal considers firstly for some of the staff concerned in events, the respondent's rules were unclear. Much more significantly though to the Tribunal, the respondent's managers breached procedure in all of the ways that have previously been set out extensively in the fact finding set out above and there is no redeeming feature in respect of that. The ACAS Code was breached substantially by the respondent. In those circumstances in the light of the findings at paragraphs 27-42 the Tribunal considers that the respondent should bear the brunt of a 25% uplift.

AGE DISCRIMINATION CLAIMS

90. In relation to age discrimination, the claim is pursued under sections 5 and 13 Equality Act 2010. The Tribunal has found that comments, regarding age were made by Adam Binnersley to the claimant and the respondent concedes these would be discriminatory if made out, however the respondent takes a time point regarding these.

91. In relation to those comments the respondent contends that the age discrimination claims are out of time. The comments continued, on the Tribunal's findings, through on the evidence of Mr Pagent to the end of January 2017. The claimant's claim is in time in relation to his dismissal within three months plus one month and therefore in time in relation to the Equality Act claim regarding the comments.

92. If they are not part of a continuous act the Tribunal would extend the time limit for them to be brought. The respondent has fought the age discrimination claim; it has brought evidence in respect of the matters pertaining to the comments. It will be just and equitable in the circumstances that the claimant is in person; he has particularised them and he made them originally in his ET1.

93. In all the circumstances the Tribunal finds that the comments were discriminatory and were made. The aspect of them being age discriminatory is conceded by the respondent, but they deny that they were made and they say they are out of time. The Tribunal rejects both of those defences. The Tribunal believes

they formed part of a continuous act towards the claimant. They amount to less favourable treatment by reason of age.

94. The Tribunal did not conclude the reason for the dismissal was age even accepting the comments were made. The Tribunal considered the primary reason for the dismissal to be as found in those paragraphs under the heading "Reason for the dismissal as above.

95. The primary cause of his dismissal relates back to the eagerness of the Mr Binnersley to dispense with those employees who were on the face of it easily dispensable when a problem arose. Mr Binnersley pointed out to the Tribunal the other employees who continue to be employed by the respondent of a similar age in a similar role. Looking at a similar hypothetical comparator we cannot say the claimant received different treatment due to his age in the light of the motivations of Mr Binnersley to those dispensable employees.

96. Although the comments the Tribunal found were made could lend support to the conclusion the claimant seeks, the Tribunal considers a younger man on a zero hours contract would have been treated in the same way. OIder door staff do remain employed. Mr Binnersley has now been promoted. The Tribunal therefore considers the respondent discharged the burden of proving the reason for the dismissal was not by reason of age, although the reason found by the Tribunal is not an attractive conclusion.

97. The Tribunal orders the claimant to produce a revised Schedule of Loss by 1 May 2018 to include injury to feelings relating to the comments made and loss of statutory rights and the date for the remedy hearing is set for **24 July 2018** at **Manchester Employment Tribunal, Alexandra House, 14-22 The Parsonage, Manchester, M3 2JA** commencing at **10.00am**.

Employment Judge Grundy

Date 11 March 2018

RESERVED JUDGMENT AND REASONS