RM

EMPLOYMENT TRIBUNALS

Claimant: **Mr M Brahimi**

Respondent: **Repertoire Culinaire Ltd**

Heard at: **East London Hearing Centre**

On: **1 – 3 February 2017**

Before: **Employment Judge Barrowclough**

Members: **Mr T Brown**
Mrs A Labinjo

Representation

Claimant: In person
Respondent: Mr W Young (Counsel)

JUDGMENT having been sent to the parties on 14 February 2017 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

1 The Claimant raises three complaints for determination by the Tribunal namely victimisation, unfair dismissal and wrongful dismissal, the last being limited to his notice pay. The issues to be determined by the Tribunal in relation to those complaints were clearly identified at a Preliminary Hearing by Employment Judge Brown on 16 January 2017. We heard this case over the course of a three day hearing where the Claimant represented himself and gave evidence in support of his claim and also called one of his former colleagues, Mr John Edwards, as a witness; and in addition we read and have taken into account the witness statement of Mr Harris, another former colleague, who was unfortunately unable to attend the hearing due to his wife's illness. The Respondent was represented by Mr Young of Counsel who called as witnesses Ms Hickey, the Respondent's Accounts and Finance Manager, and Mr Preece, its General Manager.

2 The Respondent operates a business importing and distributing food products, mostly to what can best be described as high end outlets including a number of well-

known and prestigious hotels and restaurants. Their business is based in Hackney and the food orders, many of them including chilled or frozen materials, are delivered on a daily basis to their destinations by a fleet of drivers employed by the company using leased refrigerated vans or similar vehicles. Most of those destinations and deliveries are within the Greater London area but there are a number of regular trips further afield, including to destinations in Portsmouth, Sheffield and Birmingham. The Claimant was one of the Respondent's drivers. He started working for them on 16 June 2008. He was then employed on the basis of an enhanced hourly rate with no uplift for any overtime he undertook. We were told and it was not disputed that he was one of three drivers who were employed on that basis, which had been introduced by the Respondent's former general manager, albeit only for a brief period. All the Respondent's other drivers, both before and after that brief period, were employed on the basis of a flat hourly rate, which was less than that enjoyed by the Claimant and his two colleagues, but with payment at the rate of time and a half for any overtime which they undertook.

3 It is agreed that one way or the other the Claimant first became or was made aware of that difference in the basis of the Respondent's drivers' payment in about October 2014. It is once again agreed that the Claimant then moved from the remuneration basis that he had previously enjoyed (an enhanced hourly rate for all hours worked) to that which by then applied to most if not all the Respondent's other drivers; and at a late stage in the hearing before us a fresh contract of employment signed by the parties in January 2015 was produced which we presume reflects that changed situation, although we were not taken to its terms. In any event the Claimant then submitted a formal grievance by way of a solicitor's letter on 9 March 2015 in which he complained that the earlier difference in treatment in relation to pay as between himself on the one hand and most if not all his fellow drivers on the other hand was attributable to his race, and that the Respondent had thereby discriminated against him. The Respondent disputed that allegation, and refused to pay the sums that the Claimant said he was owed as a result; and the Claimant then presented a claim to this Tribunal alleging race discrimination by the Respondent in relation to those issues of pay. That claim was heard and determined by a full Tribunal in October 2015, when the claim was dismissed as having being presented out of time and with no reasons having been advanced as to why time should be extended to in effect justify or validate its late presentation; although the Tribunal then went on to indicate in its Full Reasons that even if the claim had been presented in time, or if time had been extended, the Claimant's discrimination complaint would not have succeeded and been dismissed on its merits.

4 In broad terms and as is reflected in the list of issues, the change in the basis of the Claimant's pay also forms the starting point for his current complaints before this Tribunal which we must determine. The Claimant says in effect that his complaint of race discrimination and accompanying threats of legal action in late 2014, followed by the issue of his earlier claim, amount to protected acts, and that the Respondent victimised him as a result in giving him formal disciplinary warnings in circumstances where it would not or did not do so with other drivers, secondly in requiring him to undertake additional deliveries once again in circumstances where others would not have been asked to do so, and finally in dismissing him for no good, or at least no adequate, reason following his accident at work on 4 January 2016.

5 The Respondent disputes all those allegations and contends that not only did it not victimise the Claimant, but that any such claim is out of time and that, as before, no

reason has been advanced by the Claimant as to why it would be just and equitable to extend time to enable the Tribunal to determine that complaint on its merits. Additionally and in any event the Respondent contends that its reason for dismissing the Claimant was misconduct, and that in accordance with the well-known test in **British Home Stores v Burchell [1980] ICR 303** it had a genuine belief based upon reasonable grounds and after having conducted an appropriate investigation that the Claimant was guilty of misconduct; and that it adopted a fair disciplinary procedure, with dismissal falling within the range of reasonable responses open to it as an employer. Finally, the Respondent contends that the Claimant's conduct amounts as a matter of fact to gross misconduct and that accordingly the Respondent was entitled to dismiss the Claimant without notice.

6 It follows that in many ways the complaints of unfair dismissal and victimisation are inherently linked. The factual background to the Claimant's complaints can be summarised as follows. The Claimant is a British national of Algerian ethnic origin who, as noted, had been employed by the Respondent as a van driver from June 2008 onwards. On 4 January 2016, he slipped and fell whilst carrying loaded boxes and exiting the walk-in freezer at the Respondent's premises. The accident was partially witnessed by two of the Claimant's work colleagues, Mark and Nick, who were interviewed during the following weeks and asked what they had seen. The Claimant attended his GP's surgery later on 4 January and was signed off work for a period of two weeks, until 19 January, his sick note indicating that he would not need to be seen again by a doctor. However, he subsequently provided a second sickness note dated 21 January signing him off for a further two weeks. During his absence from work, the Respondent tried to contact the Claimant on the company mobile phone with which he had been provided, but was unable to do so. Additionally, Mr Preece went to the Claimant's address to check if he was alright; but found no-one there. During his absence from work, the Claimant informed the Respondent (in an email) that his phone was not working since he had accidentally dropped it in some water. However, records provided by Vodafone, the Respondent's mobile telephone provider, confirmed that the Claimant's phone was in fact working and active and was located in Algeria during his sickness absence. Further investigation of those phone records revealed that the Claimant had contacted a travel agency in London on both 26 and 29 December, and that he had also contacted his GP surgery on 31 December 2015. The Respondent's holiday year commences in June, and as at 4 January 2016 the Claimant had exhausted all his leave entitlement until June 2016.

7 On the Claimant's return to work on 3 February 2016, Ms Hickey held a return to work meeting with him, during which the Claimant claimed that he had only contacted his GP to arrange a blood test, which he did regularly, and flatly denied having been in Algeria during his sickness absence. The Claimant was suspended on full pay on 4 February on suspicion of misconduct, namely staging an accident at work in order to go away on holiday, and a disciplinary investigation was then conducted by Mark Fearnehough, the Respondent's transport supervisor. As part of that investigation, Mr Fearnehough interviewed the Claimant, who then admitted that he had in fact been in Algeria during his sickness absence, but failed to provide documentary evidence of his air tickets and when they had been booked, as was requested. Mr Fearnehough also contacted the Claimant's GP surgery (with his permission), who informed him that the Claimant did not have regular blood tests.

8 A copy of Mr Fearnehough's disciplinary investigation report was provided to the Claimant, who was invited to attend a disciplinary hearing on 4 March 2016 to answer

allegations of gross misconduct, told that he could then be accompanied by a companion, and warned that dismissal was a possible outcome of the hearing. Ms Hickey conducted the disciplinary hearing, when the Claimant once again accepted that he had travelled to Algeria, but refused to provide any of the relevant travel details or documents, and said that he had telephoned his GP on 31 December for a consultation on a personal matter which he declined to elaborate on, rather than for a blood test as previously stated.

9 Ms Hickey adjourned the hearing having heard all the Claimant had to say to consider her decision, and wrote to him later that day saying that she had decided to summarily dismiss him on grounds of gross misconduct in having staged his accident at work and in providing what she considered to be inconsistent and untruthful answers in relation to his actions, whereby the Respondent's trust and confidence in him as his employer had completely broken down. The Claimant was informed that he was being dismissed without notice with effect from 4 March, and that he had a right of appeal.

10 The Claimant submitted an appeal, which was heard by Mr Preece on 16 March, when the decision to dismiss him was upheld and his appeal was dismissed. The Claimant produced no additional evidence or documentation on his appeal, and still failed to provide details of his travel to and from Algeria. The Claimant was informed of the decision to dismiss his appeal in Mr Preece's letter of 21 March.

11 Having outlined the background to the Claimant's claim, we go on to consider in greater detail the specific issues identified by Employment Judge Brown at the Preliminary Hearing, when both parties were present and indeed represented as before us.

12 The first two identified issues are whether the Claimant said to either or both Mr Preece and Ms Hickey in November 2014 that he had been subjected to race discrimination by the Respondent, in that he had been paid less than his colleagues and that he would be taking action in the Employment Tribunal against the company as a result. Mr Young submits that these were issues before the first Tribunal in October 2015, that they were integral to the Claimant's then complaint of race discrimination, and that they were fully explored and determined by that Tribunal, which decided that in fact the first intimation by or on behalf of the Claimant of any such claim of discrimination was in the Claimant's solicitors' grievance letter dated 9 March 2015; and that we are thereby estopped from going behind that conclusion or revisiting those facts and matters. We agree. It seems to us that these were matters that were an essential part of the Claimant's first Tribunal claim, and that the judgment of the Tribunal is definitively determinative of both those issues. We would only add that we heard evidence that there was in fact a more or less animated discussion between the Claimant and Ms Hickey, probably during October 2014 although it is difficult to be precise and it is now some time ago, when the proposed change to the basis of the Claimant's pay was first mooted and raised with him by Ms Hickey on behalf of the Respondent, and that that conversation was overheard at least in part by Mr Edwards, whose account on this point we accept. However, that finding and that evidence does not alter or ultimately impact on the findings of the first Tribunal on these issues, which in any event we would be minded to follow.

13 It therefore follows that we also agree with Mr Young that the issue identified at paragraph 3.1.4 in the Preliminary Hearing Summary (that there were a series of verbal complaints of race discrimination put forward by the Claimant between November 2014 and March 2015, coupled with his assertions that he would be taking formal action against

the company) has also been definitively determined by the first Tribunal in their finding that the first communication of the Claimant's complaints and his claim was under cover of the letter of 9 March, and in effect decided against the Claimant.

14 In respect of the last alleged protected act (paragraph 3.1.3 in the Preliminary Hearing Summary), it was not disputed and indeed is self-evident that the presentation of the Claimant's complaint of race discrimination to the Tribunal on 17 April 2015 amounts to a protected act.

15 Having so determined in relation to the protected acts asserted and relied upon by the Claimant, in our judgment it must follow as a matter of logic that the alleged detriments listed at paragraphs 3.2.1 and 3.2.3 in the Preliminary Hearing Summary (a warning following the Claimant's van receiving a parking ticket on 31 December 2014, and the Claimant being asked to undertake a second delivery run one day in either November 2014 or January 2015) cannot amount to detriments, since both predate the only protected act that we have found to be established. In other words, even if the Respondent acted as is alleged by the Claimant, it cannot have been in response to allegations of discrimination of which they were then unaware. For the avoidance of doubt however we will set out our factual conclusions on the evidence which we heard concerning all four alleged detriments.

16 In relation to the alleged detriment identified at paragraph 3.2.1, we accept that the warning that the Claimant was given after the van he was then driving (albeit parked outside his home at 11.19am on 31 December 2014) did not in fact relate to the parking ticket it then received (which would have been deducted from his monthly wages, as applied to all drivers in similar circumstances and as the Claimant accepts); but related to the fact that the Claimant was not then working during what were his normal working hours, but was in fact (as he admitted) shopping. We reject the Claimant's contention that he had already finished work and gone home on that particular day for three reasons. First the Claimant's eight hour shift had commenced at 6.00am, and did not expire until 2.00pm or thereafter, taking account of his 20 minute lunch break. Secondly it was not disputed that the Respondent operates a clocking on and off system for drivers, and it was not suggested and indeed there was no evidence that the Claimant had himself either clocked out, or that anyone else had been asked to do so on his behalf. Finally, although at an earlier stage in the Claimant's employment drivers had been permitted to keep their vans overnight, by December 2014 that policy had changed, and such a practice was no longer permitted. Accordingly if, as the Claimant asserts, he had in fact finished work for the day, the van he was driving would have had to be parked up in the Respondent's depot. In these circumstances, we accept Ms Hickey's letter to the Claimant dated 16 February 2015 containing a disciplinary warning for taking time off during working hours is factually accurate, as the Respondent contends; and there is no evidence to suggest that any other driver would have been treated differently in the same or similar circumstances.

17 The second detriment alleged in relation to the Claimant's victimisation complaint (albeit first chronologically) is his having been asked to undertake a second delivery run on a particular day, which the Claimant identified as being 6 November 2014. That is the date on which his first delivery run had been to a location in the Portsmouth area, where he had a relatively minor road traffic accident. Whilst that is the date relied upon by the Claimant, that is not supported by the evidence which he produced by way of a number of text messages, which would seem to confirm that the day that he was asked to undertake

a second run was sometime in January 2015 rather than November 2014, so there is a degree of uncertainty present. However, and whichever date it was, it predates notification of the Respondent of the Claimant's allegations of discrimination on 9 March 2015. Additionally we find as a fact that whilst drivers normally only did one delivery run per day, it was relatively common practice for them to be asked to undertake a second or additional run if a later delivery (particularly in the inner London area) arose or was necessary. The identity and availability of individual drivers to undertake a second delivery run on a particular day inevitably varied, depending on their original itineraries and any delays or holdups encountered, but it seems likely that all the Respondent's drivers would, sooner or later, be requested and expected to help out: so there is no question, we find, of the Claimant having been singled out in being asked to assist. We accept Mr Preece's evidence in relation to this issue, and also that as a matter of good sense and sensible organisation he or his staff would contact individual drivers whilst they were undertaking their first delivery runs, whether by telephone or by text, to check on their whereabouts and availability when a subsequent or later delivery run was required. We also accept that even though the second delivery run on the particular day in question was probably to a location very close to the Respondent's depot or premises, it would in normal circumstances be undertaken by a refrigerated van once one had returned to the depot, since the Respondent did not maintain a 'spare' vehicle of that type.

18 The third alleged detriment alleged by the Claimant relates to an incident on 1 May 2015, as a result of which the Claimant received a warning for inserting grossly inaccurate temperature readings for deliveries which he had undertaken that day on his 'run sheet', when the cooling/freezing elements in the vehicle he was driving stopped working due to a fault with its power steering system, resulting in significant rises in temperature in both the fridge and the freezer on board and potentially dangerous effects on the food items therein contained. Whilst this incident occurred after notification of the Claimant's discrimination allegations and therefore could amount to a detriment, it is convenient to set out here our conclusions in relation to the evidence we heard about it. In essence the Claimant says that his colleague Terry did not receive a warning when entering similarly inaccurate information on his own run sheet for the deliveries he undertook on another occasion, the details of which are at pages 120 and 121 in the agreed bundle. We reject that argument. There were we find very significant differences and in fact no real comparison between the two incidents. The issue with the Claimant's van arose towards the end of his working shift when for approximately the last two hours of that shift the cooling or freezing systems stopped working, giving rise to very high temperatures with obvious potential dangers to the foodstuffs being carried and subsequently delivered to the Respondent's customers. The incident relied upon by the Claimant involving his colleague Terry arose at the very start of his shift, and we accept is in reality a labelling or timing issue, in that the high temperatures he then recorded related to the time when he arrived for work and turned on the engine of his vehicle, and 20 minutes before food items were loaded, by which time the temperature in the cooling and freezing systems would have dropped significantly. It is a slightly confusing scenario, but we are satisfied that there was no question of perishable food items being loaded onto Terry's van at a time when inappropriate temperatures prevailed. There is we find no true comparison between the two incidents, and no discrepancy or inequitable treatment in the fact that the Claimant received a warning and Terry did not.

19 The fourth and final detriment relied upon by the Claimant is his dismissal, the details of which we consider hereafter when we address the Claimant's unfair dismissal complaint, since they are plainly linked, together with whether or not the protected act was

part of the reason for the detriment of dismissal suffered by the Claimant. For the time being however, we make plain that in our judgment the Claimant has succeeded in showing that there are facts from which the Tribunal could conclude in the absence of a satisfactory explanation that he has been subjected to a detriment (here, the warning in relation to the 1 May 2015 incident, and subsequently being dismissed) because of a protected act (raising and pursuing a claim of race discrimination), and that therefore the burden of proof passes to the Respondent to show that the Claimant's claim or complaint of discrimination played no part whatsoever in their decision to issue him with a disciplinary warning and/or subsequently dismiss him. If we are not so satisfied, then the victimisation complaint must succeed.

20 Before that however, we must address whether any or all of the detriments that make up the Claimant's victimisation complaint are in time, and if not whether it would just and equitable to extend time to in effect validate them. Mr Young accepts on behalf of the Respondent that the detriment of dismissal is in time, since the Claimant was dismissed on 4 March 2016, and his claim was presented to the Tribunal on 23 July that year. All the other alleged detriments are plainly out of time, since the most recent of them, the disciplinary warning arising from the 1 May 2015 incident was given on 11 May that year, almost exactly 10 months prior to presentation of the claim. We do not think that it would be just and equitable to extend time in relation to any of them, essentially for two reasons. First because, as was the case in relation to the Claimant's original Tribunal claim of race discrimination, no reason or explanation for his delay in presenting this claim has been put forward by the Claimant. Secondly because, whilst the Claimant is here acting in person and we believe has done so more or less throughout and should not be judged by the same standards which are normally applicable to a lawyer or other professional adviser, the fact remains that he was obviously heavily involved in his first claim to the Tribunal, and in particular aware of its outcome whereby it was dismissed in October 2015 as being out of time. In other words, by that time at the latest, the Claimant was or should have been fully aware of the importance of abiding by the Tribunal's time limits, yet he failed to present his current claim until approximately 9 months thereafter, and has put forward no reason or excuse to explain or justify that delay. The 'just and equitable' concept is applicable to both parties, not just the Claimant, and in our view no sufficient (or indeed any) reason has been shown whereby time should be extended. Accordingly the Claimant's victimisation complaint is out of time and the Tribunal has no jurisdiction to determine it, save in so far as it relates to events giving rise to the Claimant's dismissal.

21 We now turn to consider the Claimant's unfair dismissal complaint. In a nutshell, the Respondent says that it dismissed the Claimant because it believed that he staged an accident at work on 4 January 2016 in order that he could go on holiday to Algeria having by then used up all his available leave in the then current holiday year; because he extended his initial sick leave for a further period of two weeks, knowing that in fact he was not sick or unwell, in order to cover his extended stay in Algeria; and finally because the Claimant was evasive and untruthful about those events in his return to work interviews, thereby undermining his employer's trust and confidence in him.

22 We have no doubt that those were in fact and in truth the Respondent's reasons for dismissing the Claimant. All the evidence and all the documentation that we have heard and seen points in that direction, and nothing before us suggests the existence of any other reason. Secondly we are once again in no doubt that the Respondent had reasonable grounds for that belief. To take just one obvious example, the Claimant's

answers to questions and his overall behaviour in his return to work interview on 3 February 2016 was demonstrably and admittedly untruthful. We accept that the minutes of that interview (pages 147-8), which were read over to the Claimant at its conclusion and which he signed, are accurate, and that they are supported by the notes then taken by a third party who was present, Ms Janice Lamb. The Claimant flatly and repeatedly denied that he had actually been in Algeria during his sickness absence; which he subsequently had to accept had in fact been the case. He put forward explanations that were shown to be false as to why he did not contact, and was not contactable by, the Respondent after he had been signed off sick on 4 January. The reason first given by the Claimant for his telephoning his GP surgery on 31 December 2015 was to arrange blood tests: but that explanation was abandoned by the Claimant once it became clear that the surgery would not confirm it. Secondly and in our view critically, the Claimant steadfastly refused to provide information and documentary confirmation concerning his flights to and from Algeria, even after he had been confronted with proof and had to accept that he had in fact flown there on 6 January, two days after his accident at work; and indeed even in his evidence to the Tribunal was providing inconsistent and unsatisfactory reasons for his failure to have done so. The inescapable inference, which the Respondent duly drew, as it was we consider entitled to, is that the Claimant's failure to provide straightforward and readily accessible information about his flights was because those details would reveal that the Claimant's flights were booked before 4 January 2016, the date of his accident at work, and thereby prove that that accident was staged.

23 There can be no doubt that the disciplinary investigation undertaken by the Respondent was a reasonable one; and it has not been challenged by the Claimant. Accordingly, in our judgment the three point **Burchell** test in relation to an employee's alleged misconduct has been met.

24 There was no challenge to the fairness of the disciplinary procedure which the Respondent adopted in the Claimant's case, save only to the acknowledged failure by the Respondent to disclose to the Claimant copies of the interviews conducted by the Respondent as part of its investigation with the Claimant's two colleagues, Mark and Nick, who had been present and witnessed (at least to some extent) the Claimant's accident on 4 January, apparently slipping when leaving the walk-in freezer at the Respondent's premises. The Respondent says that this was just a mistake on their part. That is not accepted by the Claimant, who asserts that the real reason for such non-disclosure was because those interviews with his colleagues were not in fact conducted until after his dismissal and the submission of grounds of appeal. He says in effect that the records of interviews in the bundle are forgeries. We reject that allegation. As at 4 January 2016, the date of the accident, there would have been no reason to suspect or think that this was not a genuine incident, which should be (and was) recorded and investigated by the Respondent in its normal way, which is what we accept happened, including interviewing and obtaining statements from witnesses at the accident scene as soon as reasonably practicable. It was only later, when the Respondent could not contact the Claimant during his absence following his accident, and attendance at his home revealed that no-one appeared to be then living there, that the seeds of suspicion were planted. We find that the statements were signed on the dates they bear in January 2016. Furthermore no procedural defect of any substance or prejudice to the Claimant arises as a result of the non-disclosure of the statements/records of interview to him as part of the disciplinary pack, since in fact all they reveal and confirm is that both Mark and Nick had partial views of the accident and that the Respondent treated the Claimant's accident in an appropriate and proper manner.

25 Dismissal of the Claimant in these circumstances was plainly within the range of reasonable responses open to the Respondent. As has already been established, this was by no means the Claimant's first disciplinary warning, and it is arguable that he could have been fairly dismissed in May 2015 for deliberately entering false temperatures on his run sheet following the problem with his van on May 1, particularly given the potential health hazards arising and the possible impact on the Respondent's business, had they then done so. The Claimant's conduct in staging an accident at work in order to go on holiday and then lying about it, as the Respondent reasonably concluded, amounted to premeditated dishonesty, which in any disciplinary process cannot be anything other than gross or at least serious misconduct. We accept Mr Young's submission that the Respondent's drivers in particular undertake their work and duties with a considerable degree of independence, and that the Respondent needs to be able to trust them and rely on their word. Having reached the conclusions that Mrs Hickey did, that trust and confidence in the Claimant was irretrievably lost.

26 We are also satisfied that the fact of the Claimant's earlier allegation and claim of race discrimination had nothing whatsoever to do with the Respondent's adoption and conduct of disciplinary proceedings against him, their conclusion that the Claimant was guilty of gross misconduct, or their decision to dismiss him. There was no evidence before us to suggest any such link, and the facts and circumstances of the Claimant's conduct in January 2016 fully justified and explain the actions the Respondent took.

27 That takes us to the final issue of wrongful dismissal. We are satisfied on a balance of probabilities that what the Claimant did in arranging and taking leave by devious means when his annual holiday entitlement was exhausted, and in subsequently being evasive and untruthful in his explanations and return to work interview and thereafter, amounts to gross misconduct, and accordingly the wrongful dismissal complaint must fail and be dismissed.

28 Finally in the event that we were mistaken in reaching the conclusions we have about the Claimant's unfair dismissal complaint, we make clear that we would find that the Claimant's conduct contributed to his own dismissal, and that in in our view that contribution amounts to 100%, particularly bearing in mind that from the evidence we heard it seems that the Claimant had done exactly the same sort of thing before, namely going to Algeria whilst signed off sick, having exhausted his holidays for the year (2015) and without informing his employers in March that year.

29 In the result, the Claimant's three complaints fail and must be dismissed.

Employment Judge Barrowclough

10 April 2017