EMPLOYMENT TRIBUNALS

Claimant: Mr O Chipenzi

Respondent: IQuest Logistics Limited t/a Interlink Express

HELD AT: Manchester **ON:** 17, 18 and 19 July 2017

BEFORE: Employment Judge Feeney
Mr J Flynn
Mr A J Gill

REPRESENTATION:

Claimant: In person
Respondent: Ms J Duane, Advocate

JUDGMENT

The judgment of the Tribunal is that the claimant's claims of:

1. race discrimination fails and is dismissed;

2. unfair dismissal fails and is dismissed; and

3. wrongful dismissal fails and is dismissed.

REASONS

1. The claimant brings claims of unfair dismissal and race discrimination following his dismissal by the respondent on 26 July 2016.

The Issues

2. The issues to be determined by the Tribunal are as follows:

Direct Race Discrimination

(1) In dismissing the claimant did the respondent treat him less favourably because of his race than it would have treated a hypothetical or actual white comparator?

Unfair Dismissal

(2) Can the respondent show a potentially fair reason for dismissal, namely a reason related to the claimant's conduct?

(3) If so, was the dismissal fair or unfair?

Breach of Contract

(4) Can the respondent prove on the balance of probabilities that the claimant was guilty of gross misconduct which entitled it to dismiss him without notice?

Remedy

(5) If any of the above complaints succeed, what is the appropriate remedy?

Previous History

3. The respondent applied for a striking out or a deposit order in respect of the claimant's claims of race discrimination and unfair dismissal. This application was refused by Employment Judge Feeney on 27 March 2017 on the basis that the claimant had pointed out a number of things from which an inference of race discrimination could be drawn and there were a number of matters which required evidence. The claimant was then required to provide further and better particulars of any matters he relied on for inferences. As far as the claimant raised new matters in his further and better particulars he confirmed he was relying on those matters only as inferences, and also that he was not pursuing the bonus issue.

Witnesses

4. For the claimant we heard from the claimant himself and for the respondent Mr Adam Seed, HR Manager (now left); Mr Duncan Harris, Afternoon Supervisor; Mr Tony Austin, Senior Operations Manager.

Findings of Fact

The Tribunal’s findings of fact are as follows:

5. The claimant started working for the respondent on a temporary basis in 2013 and was made permanent on 14 January 2013. Interlink Express are a franchise providing a delivery and collection service. The owners have now accumulated three franchises and acquired the Eccles franchise in October 2014. The other franchises are based in Accrington and Preston.

6. There were no problems with the claimant's performance at work until August 2015 when a record was kept of an issue which arose regarding a missing parcel.

7. On 26 November 2015 there was evidence of a complaint from a client. Again this was dealt with, with just a meeting record form.

8. There was a further issue in February 2016 when the claimant was late clocking on, and he agreed he would improve his timekeeping.

9. On 21 March 2016 a meeting record form recorded a discussion between the claimant and Mr Harris regarding a late arrival/early departure and leaving the site without authorisation. The claimant stated he had left the site early because of childcare. He had to pick up his children from the afterschool club at 6.00pm. It was recorded that:

> "OB has agreed in principle to fulfil his working hours i.e. 7 o'clock till 6 o'clock. The main issue appeared to be on Monday and Tuesday when he has to collect his children from an afterschool club."

10. The same matter arose on 30 March and the upshot was that the claimant offered to work half an hour earlier to make up the time.

11. The claimant related various in incidents, the first one being in October 2014 when the claimant said the respondent allocated brand new vans to drivers and he was not issued with one but was given one of the driver's old vans. The claimant pointed out that different reasons had been given for why this had happened. The ET3 stated that vans were allocated according to the route, the number of collections on the route and the number of deliveries, the total mileage of the route and the distance from the depots. The respondent denied the claimant was the only driver driving a van aged between 0-4 years old. At the preliminary hearing the respondent stated that new vans were given to people whose leases had expired.

12. At the hearing Mr Austin, who was in charge of the allocation of vans from when he was appointed in November 2014, stated categorically that vans were allocated depending on the route as described in the ET3. The respondent also produced evidence that other employees had old vans and those employees were white. The evidence they produced, which covered various different weeks starting with the earliest in week 2 through to week 50 of the claimant's employment, did show him mainly driving a van number MJ60 7NV with occasionally some weeks being empty, presumably when the claimant was on holiday, and other drivers, possibly agency drivers, taking over his van, such as "Sven" and "M Greer". MJ60 vans were the "old" vans.

13. The respondent relied on Mr T Jackson who also had an MJ60 van (OMP) and throughout all these weeks apart from week 18 in 2016 he was driving this van. In addition other MJ60 vans were being driven by H Alexander and Jeff Lapham. The claimant was also seen to be driving another MJ60 van (MJ60 ZNN).

14. Accordingly in accepting that evidence we are satisfied that the reasons given by Mr Austin for allocating vans was correct. There was some less reliable evidence in the bundle which sought to match the acquisition of vans to establish that the

respondent was running at least four old vans at the same time, and whilst it did establish this it did not establish that there were only 11 new vans as other documentation showed a number of other new vans (with the references PK65). Mr Austin said he thought these might be from other depots, however he was not sure and although he had not been given notice of this question it was the respondent's own documentation that the claimant was relying on in cross examination. He said that in respect of any gap between the number of drivers compared to vans, which he said was 31, and the number of vehicles, these would be made up by leased vehicles.

15. In any event the evidence regarding the new vehicles purchased was not necessary for our determination. It was significant that there were white drivers with old vans.

16. The claimant also sought to argue that his van was in a parlous state and required serious repairs. We accept that but there was nothing to suggest it was any different for anybody else who simply had one of the four older vans.

17. The claimant complained that one day, he could not give a date, he had to use a white sprinter van brought over from Preston and while he was loading the van the MD, Louise Sadik, came over and said, "OB, you've scratched our van". He tried to protest his innocence, i.e. that it had already been scratched, but she walked away. Nothing else occurred.

18. The claimant said on another occasion in the morning between 7.00am and 8.30am he was getting ready to load his van and that Ms Sadik came up to him and said she had been timing him and his van had been in the warehouse for 30 minutes. He stated that there were lots of vans parked for 30 minutes in the warehouse before his but no-one else was spoken to.

19. The respondent provided evidence from its live witnesses that Ms Sadik would, from time to time, walk the floor and would raise issues, either directly or indirectly, with drivers.

20. Mr Harris, in questions from the panel, although this was not alluded to specifically in his witness statement, stated that Ms Sadik had raised issues regarding protective clothing with him in relation to Tom Jackson and Kevin Grimshaw.

21. There was also what we regarded as quite a significant email in the bundle, although again not referred to in the witness statements, dated 16 July 2015 from Duncan Harris to John Rimmer which stated as follows:

> "Hi John,
>
> Could you please have a word in OB's ear? As reported by Craig OB left his vehicle untipped with the key still in the ignition and not wearing high viz or boots. He has been told on numerous occasions about PPE and Louise has spotted him once or twice."

22. There was a note of 17 July signed by Mr Rimmer saying:

> "OB spoken to regarding above. He has to pick daughter up. Told proper procedure. Speak and explain to supervisor."

23. This, however, we thought was evidence that Ms Sadik did raise issues as and when she saw them, and that there was an indication here that Mr Harris was trying to protect the claimant against getting into trouble with Ms Sadik about the PPE in future.

24. We find that Ms Sadik was prone to being on occasions a hands on manager when she was at the depot and would raise matters as she felt fit, either directly or indirectly with the driver's manager.

25. The claimant then does not report anything until May 2016 when he received a letter to attend a disciplinary hearing on 9 May 2016 because he had taken four days off in 12 months. This letter stated:

> "I write to inform you you are required to attend a disciplinary hearing. The meeting has been arranged for Monday 9 May 2016 at 8.30am and is to be held at the Eccles Interlink depot. This meeting has been arranged to discuss unacceptable attendance levels and failing to follow procedure on 28 April 2016 by not contacting your line manager."

26. It set out the absences as:

> 1 June 2015 – one day
>
> 10 August 2015 – one day
>
> 16 December 2015 – one day
>
> 28 April 2016 – one day

27. All the absences were because his son was not well save for the absence in August 2015 which was to attend the dentist.

28. The respondent explained that they used the Bradford factor system for assessing absence which was a complicated system of assessing when absence reached the point where management of it was required. It was a fixed system and they would always invite somebody to a disciplinary hearing when they breached the trigger points. The claimant did not complain about being called to this meeting.

29. The meeting was held with Mr Austin and the minutes of this meeting showed that the claimant said that the three occasions were when his son was not well. Mr Austin asked if he could not make alternative arrangements to ensure he attended work. The claimant said he could if his partner was not working but if she was he had to look after him. Mr Austin commented, "Partner's job more important than your employment". The claimant replied that one of them had to take him to hospital. He was asked whether he had an ongoing medical condition and the claimant said "stomach problems, quite complicated". He was then asked why he had not contacted the depot. He said he texted the number he had. Mr Austin made it quite clear that was not acceptable and that he must phone and speak to Andy Fewtrell or

Tony Austin at least one hour before shift due to start. The claimant was asked whether he wanted to add anything, he said no.

30. Mr Austin decided to give the claimant a first written warning to remain on the file for 12 months and advised him he had the right to appeal. The first written warning was recorded in writing and was for absence levels and failing to follow procedure on 28 April. The claimant did not appeal.

31. At that stage there was one instance of the claimant failing to follow procedure and sending a text message to his boss.

32. The respondent's policy, in their handbook, on absence and lateness stated that:

> "If you are unable to get to work when expected to be present for whatever reason you should –
>
> - Notify the company as soon as possible on the mobile telephone number that is provided to you on induction no later than one hour before your start time on the first day of absence, then by 3.00pm of each day of absence to confirm attendance for the following day.
>
> - You must call and speak to your line manager in person or another supervisor, nor is texting or calling colleagues or manager's personal mobile phone either in or out of working hours. When calling before 8.00am you must call on the depot's mobile number. This should be obtained from your line manager on your induction.
>
> - It is your responsibility to keep the company informed of your continuing illness or otherwise. You must contact the company on the day that each sick note expires by 3.00pm whether or not you expect to return to work and inform them of your intentions. Failure to follow this procedure is classed as a breach of company procedures and may result in disciplinary action. If you fail to contact the company your absence will be classified as unauthorised absence. An unauthorised absence (without good reason) of more than one week may be classified as gross misconduct which could lead to dismissal."

33. The claimant questioned Mr Austin as to why Mr Austin had not advised him regarding emergency dependent leave which he was aware of and which was referred to in the respondent's policy. However, the respondent's policy, which did reflect the basic provisions of the law in this area, stated that:

- You are entitled to take time off in order to deal with an emergency involving someone who depends on you…

- An emergency could be due to illness, an accident or assault, unexpected breakdown or disruption in care.

- The time taken off will depend on how long it takes to deal with the emergency. The time should only be to sort out the emergency. The time

may be used to make care arrangements, for example due to a shortfall arising from an emergency.

- There is no legal requirement to receive any paid emergency leave. Any payments will be made at the discretion of the company.
- You should inform the company as soon as possible of the emergency and the expected time it will take to deal with it.

34. The claimant felt it unfair that Mr Austin had not mentioned this to him at the time, however he agreed he had signed a contract of employment stating that he had received the employee handbook and he could have made himself familiar with this at the time. However, although it is speculation the situation of the claimant his son may not have fallen within this dependent leave as if the son had regular hospital appointments this would not necessarily constitute an emergency. Further, that if it was an emergency the legal requirement is for time to organise alternative care. It seems to us given that this was a matter that was recurring the claimant should have asked to work flexibly in some way in order to encompass requirements of his childcare and his son's illness, however this did not occur. The issue of the claimant bringing a claim arising out of these events had been discussed at the case management discussion. The claimant had confirmed that he accepted these claims would be out of time and that he had not raised them already so that he decided not to pursue any claims in respect of these events. However for the future the respondent should be aware that the comments of Mr Austin regarding the claimant's partner could constitute sex discrimination.

35. The claimant also stated that the disciplinary procedure said he should have had a verbal warning for this issue. The respondent's disciplinary procedure stated:

> "Stage 1
>
> In the case of conduct, performance or attendance not reaching the required standard the problem will be discussed with you and you will be given the opportunity to provide a satisfactory explanation at a disciplinary hearing. If you are unable to provide a reasonable explanation and the hearing concludes reasonably that you are at fault a verbal warning will be issued. A written copy will be given to you and retained on file for up to six months.
>
> Stage 2 – Written Warning
>
> In the case where insufficient improvement has been made following the verbal warning or the conduct is potentially sufficiently serious to warrant bypassing the verbal warning stage, a disciplinary hearing will be held. As a result of this if your explanation for your conduct is unsatisfactory and the hearing concludes that your performance or conduct was at fault you will be issued with a written warning detailing the complaint and the required improvement or change in behaviour."

There was then Stage 3, final written warning and Stage 4, dismissal. The company also reserved the right to vary the disciplinary procedure according to the seriousness of the allegations of misconduct/capability.

36. Mr Austin was asked in cross examination why he issued a written warning and he said that it was mainly because of the failure to follow the correct procedure. Mr Austin stated that in their business they needed to know who was coming in and the failure to report it properly regardless of the reason made life more difficult. The respondent operated a franchise from Interlink and they could lose the franchise if they did not meet agreed targets. Further, the claimant was required to follow procedure whatever the reason for his absence. The claimant said "even though in hospital with a sick child?". The Employment Judge said to Mr Austin that the claimant was challenging the fact that he had been given a first written warning rather than a verbal warning. Mr Austin replied, "A written warning because he failed to follow reporting procedure. Not the first time. He didn't appeal against it". He acknowledged that the claimant's son might have had a stomach problem but he had no detail about that. He wanted to emphasise to the claimant that he must telephone rather than just text. He had to verbally let someone know he would not be coming in.

37. The next incident the claimant referred to he said occurred in May 2016. He said he was in Duncan Harris' office "when he asked me when I was going back to my own country. Being a black man of African heritage I feel that the remark was offensive and racist".

38. The claimant provided further detail to this but only as part of cross examination questions to Mr Harris. When he was questioning Mr Harris he could not believe Mr Harris did not recall this conversation. The claimant said that Mr Harris had first of all asked him where he was from because of his accent, he had replied Zimbabwe and then they talked about the political situation where he had said he was not interested in it and that then Mr Harris had made this comment. It was put to the claimant that this could be an inoffensive comment made by somebody who was interested in the situation as to was he going to go back to visit Zimbabwe (given the political situation). The claimant agreed that it could have been meant like that but he did not take it that way at the time.

39. Mr Harris' evidence was that there was no such conversation. The only thing he had ever said to the claimant was about his name, that he thought it was quite a good name. He said that he was from a liberal background and had been brought up by parents who were interested and supportive of civil rights movements and he was fully aware of the American Civil Rights movement and the South African one and that he would never make a racist comment.

40. The claimant provided more detail in cross examination and said "don't you remember saying to me in that conversation that your neighbour was Zimbabwean?". Mr Harris denied this although he agreed that his neighbour was black African.

41. On the basis of this we have made findings on the claimant's credibility, as the claimant could not have known that Mr Harris had a black African neighbour, Zimbabwean or not, without some conversation having taken place, and given Mr Harris' interest as he explained himself in such matters and his awareness of the situation in Zimbabwe it seems highly likely that such a conversation took place, but at the same time it seems highly unlikely that Mr Harris would have made a racist remark in these circumstances. We find that he questioned the claimant about

whether he intended to go back to Zimbabwe or not, and this was as far as it went and this was an inoffensive remark.

42. As to Mr Harris' credibility, we find whilst we would not say he was not telling us the truth he was a somewhat unreliable witness as he had no recollection of most of the events the claimant referred to, and whilst this is not entirely unexpected as obviously these events were more important to the claimant than to Mr Harris at the time, we would have thought he would remember some of them.

43. The claimant said in the same week he was outside the warehouse with six other drivers and that Mr Harris picked him out of the group, summoned him to his office and reprimanded him for being stood about, but he did not call the other drivers in who were also in the same position. The claimant was waiting outside Travis Perkins, an adjacent building, at 5.30pm waiting to clock off at 6.00pm. He said the other drivers were doing the same. Mr Harris stated it was highly unlikely that six drivers would be there at any one time because they all worked difference shifts. However, we did not really find this very convincing as there were only two shifts and there would be a considerable number of drivers who would be finishing at 6.00pm as the respondent was making great efforts to make sure they did all stay until 6.00pm rather than doing "job and knock". As Mr Harris could not remember this occasion either he could not advise us whether he spoke to any of the white employees about hanging around waiting to clock off.

44. Given that we found the claimant credible in respect of the Zimbabwean incident, we find that the claimant was credible in this respect. Whilst there may not have been six other drivers we believe there were a number of white other drivers. The claimant had not provided any detail in his witness statement as to who these drivers were but did in cross examination, saying it was "Bill" and the "chap with glasses", and then later he said that it was "Bill" and "Ian Harmby" who were there but he could not remember the names of the other two drivers. Accordingly we find that this did occur. We are supported in this conclusion by the fact that Mr Harris spoke to the claimant on another occasion (see below) about utilising his time between 5.30pm and 6.00pm.

45. The claimant then relayed another incident with the Managing Director, Louise Sadik. She was waiting by the door near the clocking machine and he was about to say good morning to her when she said to him, "So do you not know how to deliver a parcel to a neighbour. I am going to send you out with Billy for training". He felt she was shouting at him in front of work colleagues, which was belittling. However, we find that issues with deliveries would arise from time to time and that this was the MD acting in her usual hands on fashion.

46. In respect of her blanking the claimant when he said good morning the next day, as she did not give any evidence we cannot disbelieve the claimant on this. However, on one occasion on the balance of probabilities we find this is likely to be simply a random event rather than something deliberate.

47. The claimant stated another incident, although he could not provide a particular time but it was a day when he was finishing unloading his van and went to park it in the yard at around 5.30pm. As he had a bit of time left before clocking out he decided to clean out the cab of his car.

48. The claimant stated that as he was cleaning out h is van another driver parked next to him and then went into the warehouse. A few minutes later Mr Harris knocked on his window and summoned the claimant to his office and told him that he should start helping other drivers to tip their van because he had nothing better to do, to which he said he had no driver had ever tipped anybody else's van and he was not going to do so. Mr Harris had no recollection of this event either.

49. We find, however, the claimant's description is quite graphic and has its own internal rationale as it appears that the driver who parked next to him had then spoken to Mr Harris who had then remonstrated with the claimant i.e. that if he had time to clean his van he had time to help other drivers.

50. Mr Harris' evidence on this was confusing. His witness statement was not altogether clear in this regard. It stated that:

> "A further allegation raised by the claimant is that he was asked to tip his vehicle."

51. Firstly this is incorrect: this was not the allegation. (It should be explained that "tipping the vehicle" means unloading it from the parcels that had either been not delivered or collected, and that a warehouse staff member would help to do this normally). He then went on to say:

> "It is common practice within the organisation that drivers must tip their own vehicles and in the event that they would see others struggling then they would normally assist them with these duties.
>
> It is not exceptional for me to ask an employee to carry out this task and in fact I have asked several members of staff to carry out these duties when returning to their vehicle. It is a practice that has been carried out for a number of years and therefore I am unable to establish why this should constitute discrimination against the claimant or less favourable treatment. It is denied that such a request is made to belittle and embarrass the claimant and in fact it was simply a request to ask him to carry out his normal duties."

52. On reading this a number of times we could only conclude that the witness was talking about the claimant tipping his own vehicle and not the claimant helping out anyone else. In evidence Mr Harris said that in relation to tipping someone else's vehicle it was something a driver might do voluntarily. Further in his evidence he stated at one point that he would never ask another driver to tip another driver's vehicle but that it was absolutely a requirement to tip your own vehicle. He also said it would be "rare" for him ever to ask anybody else to top another driver's vehicle. However on the basis that the claimant was a credible witness that Mr Harris' evidence was confusing on this point and that the claimant's description was cogent and compelling the majority find in favour of the claimant's version of events here; the minority, Mr Flynn, feels that Mr Harris was so adamant initially that he would not ask anybody to tip another van that he accepted his evidence on this point.

53. The claimant said that in the same month one of his colleagues, Ian Harmby, confronted Mr Harris about his "antics" i.e. his treatment of the claimant, and told him

to “stop it”. However, the claimant did not call Mr Harmby as a witness and neither did the respondent.

54. The claimant raised one other issue regarding Ms Sadik which was not in his witness statement. This was that she told him to tidy up some parcels. In cross examination he had stated this was not his job it was the warehouse staff. It was put to him that if the parcels were in a situation of being a health and safety risk it was perfectly ok for Ms Sadik to ask him to do this. The claimant was reluctant to agree to this and repeated that it was the warehouse staff’s job.

55. Accordingly we prefer the context in which the respondent puts this issue, that it would have been raised because it was a health and safety risk and that it is inherently probable that this would have been raised with any member of staff as the respondent would not want to leave a health and safety risk unresolved.

56. Matters then developed following 1 June when the claimant said he injured his back at work and his symptoms became worse on 4 June so he attended North Manchester General Hospital A & E where he states he was diagnosed with a herniated disc in his lower spine. He was given a sick note on 5 June for one week which he sent to the respondent. The claimant again texted Tony Austin to let him know that he would not be attending work. We know this because in December after it had become known that the claimant was claiming he had suffered a work related injury and that there was a concern that he may make a personal injury claim, witness statements were taken, so although they were not absolutely contemporaneous they were nearer in time to what occurred than the Tribunal hearing and the witness statements prepared for it.

57. Mr Austin’s statement on 6 December said:

> “Mr Chipenzi reported to me he would be absent from work. He failed to follow company procedure by reporting his absence via text message. The text message was sent at 11.29pm on Sunday 5 June. It read ‘Hi, it’s OB, I’ve got severe back pain. Been to the doctor and been advised to take time off so won’t be in all week’. I replied at 4.22am on Monday 6 June ‘will need you to send doctor’s note into work’ and I reported his absence to members of the business.”

58. The sick note was due to run out on 12 June. On 13 June the claimant tried to ring Tony Austin but he went straight to voicemail. This was because Tony Austin had gone on holiday from 10 June to 27 June. As the claimant's department had not heard from him a “Craig” then rang the claimant and asked him what was going on. The claimant advised he had got a further sick note. He sent this sick note in which ran from 13 June to 27 June.

59. The claimant did ring the respondent on 24 June. However, the claimant gave no evidence of what he said on this occasion and the note from Chris produced as part of the December investigation only stated that the claimant asked him if his partner could come into the depot to report the accident, to which Chris said “no”.

60. Nothing further occurred and on 28 June the claimant was telephoned by the respondent. The claimant said he was rung by Duncan Harris but Duncan Harris did

not remember whether he had rung the claimant. Duncan Harris' evidence was that Adam Seed had rung the claimant, but Adam Seed's evidence was that he had just taken a note of the conversation.

61. There were three pages of notes in the bundle relating to this conversation. The claimant said this was all one conversation; the respondent thought it reflected two separate incidents. However, on reading them it is our view it is one conversation as it says, "Sick note ran out on Monday. It's now Tuesday". (This shows that this note related to 28 June). The respondent was making the point that the claimant had not contacted them to say when he would be in and he had not submitted a further sick note. The claimant said he would be going to the doctor on Friday and he would ring them and let them know what the doctor said on Friday. However, the claimant did not ring the respondent on that Friday. We know that he did attend his doctor on 30 June as he would later produce a sick note stating that he was assessed on 30 June (although the sick note was dated 5 September). The claimant said he sent this sick note into the respondent.

62. The claimant also saw the doctor on 15 July and obtained a sick note from 11 to 22 July. He said he also sent this to the respondent. However, it was the respondent's case that they had not received any sick notes since the one which expired on 27 June. Accordingly they sent the claimant a letter inviting him to a disciplinary hearing in respect of this absence. The letter was dated 18 July. We have no specific evidence as to when the claimant received this, but presumably it would have been 19 or 20 July. This letter stated:

> "I write to you in regards to your current absence from work. You failed to attend work or contact your line manager since 28 June 2016 in regard to your absence from work due to sciatica. We called you to discuss your absence on 28 June 2016 as your previous sick note had finished on 27 June and you not attended work or made contact. You stated that you were going to go to the doctor and let us know the outcome. We have received no further communication from you since that date.
>
> I now inform you that you are required to attend a disciplinary hearing arranged for Friday 22 July at 1.00pm to be held at the Eccles depot. The meeting has been arranged to discuss your absence from work without authority. The company classes an unauthorised absence from work for a period of five days with no contact as an act of gross misconduct. The disciplinary hearing will be chaired by Adam Seed and Duncan Harris will attend as a companion."

63. The claimant was advised that "due to the serious nature of this incident the hearing may lead to your dismissal from the company".

64. The claimant did not contact the respondent, ring them or in writing, prior to the hearing, but he did attend the hearing. Mr Harris said he saw the claimant drawing up at the premises in his car with his children in the car, but Mr Harris could not recall that in fact the meeting did not start for another 45 minutes and did not recall the claimant coming to see him about the meeting. We accept the claimant's evidence that the meeting did not start for 45 minutes and then only took a few minutes longer to conclude.

65. The disciplinary hearing record had some pre-printed questions mainly stating "do you understand why you are here?" and "are you happy to proceed without a companion or trade union representative?", and it stated that:

> "We are here to discuss unauthorised absence from work of over five days without making contact."

The dialogue went:

> AC: Can you tell me why no contact?
>
> OB: I forgot to ring when went to the doctor's.
>
> AC: Did the doctor give you a sick note? Have you got a copy of the sick note?
>
> OB: No, I sent it in.
>
> AC: Ah, we haven't received it, when did you send it? We haven't had one since 28 June.
>
> OB: I have it at home. I will send it in.
>
> AC: Are there are reasons why you forgot to contact us or send in the sick note?
>
> OB: No. I said I would ring, yes I forgot.
>
> AC: Are there are external reasons why you forgot?
>
> OB: No, there are no reasons.
>
> AC: The absence policy is quite clear in regards to keeping in touch with us – but have you no reason why you stopped and forgot to contact us? Have you anything to say before we adjourn the hearing?
>
> OB: No, nothing.
>
> AC: I don't want to make a rush decision. I need to give it some thought so I will write out to you with an outcome.

66. The claimant says that he had copies of the sick notes at the time and therefore following this meeting he sent them to the respondent. He also said that he had got them out to take in with him to the hearing but he had left them on the kitchen top. The claimant was questioned why he did not ask for an adjournment; why he did not ask if he could go home to get these, and he had no particular answer for this.

67. The respondent sent the letter out dismissing the claimant on 26 July. By this stage they had received no sick notes from the claimant, although they subsequently would receive the fourth sick note which covered 11-22 July but not the sick note for the intervening period. The claimant said he had sent both in the same envelope. He

stated further that the one in the bundle for July was produced by the respondent; the one for the missing period was a sick note for 30 June to 14 July and was dated 5 September and was provided by the claimant after the preliminary hearing in March. However, this sick note did say that the doctor had assessed his case on 30 June 2016, which suggests that the claimant did see the doctor on that day. He said it was dated 5 September because he no longer had a copy of that sick note having sent his original copy and the actual original to the respondent, and therefore he had gone to the surgery in September to obtain another copy. He could not explain why he went on 5 September and not any earlier.

68. We were extremely puzzled as to why the claimant did not take the sick notes in by hand after the hearing having been told that the respondent had already lost the ones that he had sent in earlier, or why he did not send them “recorded delivery”. We were also puzzled as to why the claimant did not ask for an adjournment at this stage so he could nip back home, as he did not live that far away, and bring the sick notes back in. We also found it strange that neither party thought to arrange a time period for the submission of these sick notes following the disciplinary hearing so that there would be a cut off point for their receipt. However, the sick notes was not the only issue; the other issue was the claimant's failure to keep in touch as required.

69. Mr Seed’s dismissal letter stated:

> “You failed to attend work or contact your line manager from 28 June 2016 in regards to your absence from work due to sciatica. We called you to discuss your absence on 28 June 2016 as your previous sick note had finished on 27 June and you had not attended work or made contact. You stated that you were going to go to the doctor and would let us know the outcome. We received no further communication from you until your attendance at the disciplinary hearing. When questioned as to why you had failed to contact the company you stated you had forgotten to call us. When asked if there were any external reasons for not contacting the company you stated there were none.
>
> I am writing to inform you that my decision is that you be summarily dismissed for failing to make contact and having an unauthorised absence of more than five days.”

70. Adam Seed provided a list of drivers dismissed in the previous two years. Two white drivers and two black drivers had been dismissed for going AWOL. Other white drivers had been disciplined for various other matters of misconduct. In addition Mr Seed confirmed that although Mr Harris was present at the meeting he took no part in the decision. Finally, in answer to a question from the panel Mr Seed stated that he would have dismissed the claimant even if he had not had a first written warning because there was a pattern of behaviour of him failing to keep in touch.

71. The claimant was then advised of his right to appeal. The claimant did not appeal, he said, because he did not see the point given the decision had been made so quickly. He also advised us in evidence that he did not think the respondent would dismiss him.

The Law

Discrimination

72. The claimant brings a claim of race discrimination in relation to his dismissal. Section 13 of the Equality Act 2010 sets out the definition of direct discrimination. This is where (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.

73. Section 136 of the Equality Act 2010 sets out the burden of proof to be applied in discrimination cases. This says that if there are facts from which a 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.

74. The shifting burden of proof rule assists Employment Tribunals in establishing whether or not discrimination has taken place. In **Martin v Devonshires Solicitors [2011]** the EAT stressed that "While the burden of proof provisions in discrimination cases are important in circumstances where there is room for doubt as to the facts necessary to establish discrimination – generally that is facts about the respondent's motivation … they have no bearing where the Tribunal is in a position to make positive findings on the evidence one way or another and still less where there is no real dispute about the respondent's motivation and what is in issue as its correct characterisation in law", and in **Laing v Manchester City Council** Justice Elias then President of the EAT said that if the Tribunal is satisfied that the reason given by the employer is a genuine one and does not disclose either conscious or unconscious racial discrimination then that is the end of the matter. It is not improper for the Tribunal to say in effect there is an open question as to whether or not the burden has shifted but we are satisfied here that even if it has the employer has given a fully adequate explanation as to why he behaved as he did and it has nothing to do with race. At the same time he also said the Tribunal cannot ignore damning evidence from the employer as to the explanation for his conduct simply because the employee has not raised a sufficiently strong case at the first stage. That would be to "let form rule over substance". So if the matter is not clear a claimant needs to establish a prima facie case of discrimination, which is shorthand for saying he or she must satisfy stage one of a two-stage shifting burden of proof then the burden shifts to the respondent to explain the conduct.

75. In **Laing** Elias suggested a claimant can establish a prima facie case by showing that he or she has been less favourably treated than an appropriate comparator. The comparator must of course be in the same or not materially different circumstances. A paradigm case is where a black employee as well qualified as a white employee is not promoted where they were the only two candidates for the job. However, the case obviously becomes complicated where there are a number of candidates and there are other unsuccessful white candidates who are equally well qualified. If there are no actual comparators of course hypothetical comparators can be used.

76. The question was asked in **Madarassy v Nomura International Plc [2007] CA,** is something more than less favourable treatment required? Lord Justice Peter Gibson stated in **Igen v Wong [2005]** that "The statutory language seems to us

plain. It is for the complainant to prove the facts from which the Tribunal could conclude in the absence of an adequate explanation that the respondent committed an unlawful act of discrimination. It does not say that the facts to be proved are those from which the Tribunal could conclude that the respondent could have committed such an act … The relevant act is that the alleged discriminator treats another person less favourably and does so on racial grounds. All those facts are facts which the complainant in our judgment needs to prove on the balance of probabilities. **Igen v Wong** also said it was not an error of law for a Tribunal to draw an inference of discrimination from unexplained unreasonable conduct at the first stage of the two-stage burden of proof test. It seems the difference between the approach in **Madarassy** of Mummery in saying that a difference in treatment and a difference in status is not enough, and that of Elias in **Laing v Manchester Council**, which followed **Igen v Wong** stating that it was sufficient to establish genuine less favourable treatment if at the first stage the employer cannot rebut by evidence and it takes into account the fact that a claimant will not have overt evidence of discrimination but could have evidence of how they had been treated differently to other employees who do not share the relevant protected characteristic.

77. Another approach is to consider whether a Tribunal should draw inferences from the primary facts which would then shift the burden, and if a non-convincing explanation is provided then discrimination would follow.

78. Regarding inferences Employment Tribunals have a wide discretion to draw inferences of discrimination where appropriate but this must be based on clear findings of fact and can also be drawn from the totality of the evidence. In **Glasgow City Council v Zafar [1998]** unreasonable conduct by itself is not sufficient. However, where it is said that the unreasonable conduct is displayed ubiquitously an employee would need to provide proof of that, i.e. A was treated badly not because of his race but because the employer treated all employees badly. There must be some evidence of this and it not just be an assertion, and likewise with unexplained unreasonable conduct. Inference can be drawn from other matters such as breaches of policy and procedures, statistical evidence, breach of the EHRC Code of Practice, failure to provide information.

Unfair Dismissal

79. Section 98 of the Employment Rights Act 1996 sets out the relevant law on unfair dismissal. It is for the employer to show the reason for dismissal, or the principal reason, and that the reason was a potentially fair reason falling within section 98(2). Conduct is a potentially fair reason for dismissal. In **Abernethy v Mott, Hay & Anderson [1974]** it was said that:

> “A reason for the dismissal of an employee is a set of facts known to the employer or it may be of beliefs held by him which caused him to dismiss the employee.”

80. Once the employer has shown a potentially fair reason for dismissal a Tribunal must decide whether the employer acted reasonably or unreasonably in dismissing the claimant for that reason. Section 98(4) states that:

"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 sufficient reason for dismissing the employee; and

(b) shall be determined in accordance with equity and the substantial merits of the case."

81. In relation to a conduct dismissal **British Home Stores Limited v Burchell [1980] EAT** sets out the test to be applied where the reason relied on is conduct. This is:

(1) did the employer Did the employer genuinely believe the employee was guilty of the alleged misconduct?

(2) were there reasonable grounds on which to base that belief?

(3) was a reasonable investigation carried out?

82. In respect of deciding whether it was reasonable to dismiss **Iceland Frozen Foods Limited v Jones [1982] EAT** states that the function of the Tribunal:

"…is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted."

83. The Tribunal must not substitute its own view for the range of reasonable responses test.

84. In respect of procedure, the procedure must also be fair and the ACAS Code of Practice in relation to dismissals is the starting point as well as the respondent's own procedure. In **Sainsbury's PLC v Hitt [2003]** the court established that:

"The band of reasonable responses test also applies equally to whether the employer's standard of investigation into the suspected misconduct was reasonable."
85. In addition, the decision as to whether the dismissal was fair or unfair must include the appeal (**Taylor v OCS Group Limited [2006]** Court of Appeal). Either the appeal can remedy earlier defects or conversely a poor appeal can render an otherwise fair dismissal unfair.

Wrongful Dismissal

Any dismissal by an employer in breach of contract will constitute wrongful dismissal at common law. A common situation is where an employee is dismissed without notice and but summary dismissal is not justified.and the employee would be entitled to his or her notice pay in damages. Summary dismissal is appropriate where an employee is guilty of a repudiatory breach of contract.

. The tribunal must be satisfied the claimant was guilty of the gross misconduct and that it was sufficiently serious to constitute a repudiation of the contract. If the employer has stated a matter is to be considered gross misconduct that will go some way in establishing such a breach..

Conclusions

Unfair Dismissal

86. In respect of unfair dismissal we find that the claimant was fairly dismissed. The respondent's policy clearly sets out the parameters for when an offence of this nature will be gross misconduct, both in the disciplinary proceedings and in the absence management proceedings. They explained cogently that it was a gross misconduct offence because proper advance notice was so important to their business.

87. The claimant criticised the respondent for not undertaking an investigation. However, this was one of the rare cases where no investigation was necessary. The claimant only disputed that he had sent the sick notes in and no other matter was in dispute. We do not see what other investigation Mr Seed could have carried out.

88. The claimant also stated that the respondent had not considered his case seriously, asking him to wait for 45 minutes and then making the decision within a few minutes. We accept it was not ideal that the claimant was left waiting around for 45 minutes. It does not reflect well on the respondent. However, one of the reasons the meeting lasted such a short period of time was the claimant had nothing to say. The claimant's taciturnity in this meeting is surprising given that the claimant is an articulate man. He did not put forward any reasons for his behaviour.

89. In respect, therefore, of whether the respondent meets the BHS v Burchell test i.e. did they have reasonable grounds for concluding that the claimant had breached their procedure, we find that it was self evident in respect of the failure to contact. In respect of the sick notes, while there was some room for doubt here the claimant could easily have provided the respondent with his sick notes by the next day but failed to do so; he failed either to bring them in person or to post them recorded delivery. Whilst the respondent could have adjourned the matter and let him go home the claimant did not ask for this. Whilst the respondent could have adjourned the hearing and given a deadline for the provision of the sick notes the fact that they did not do so is not fatal, neither was this a matter raised by the claimant and in any event the letter was sent out on 26 July and the sick notes had not been received by them until four days later.

90. In respect of the claimant being given a first written warning rather than a verbal warning, we find in view of the totality of the disciplinary procedure the fact that the claimant was in breach of two issues, absence and failure to contact the respondent, was sufficient to justify moving on to the second stage even though the claimant did not have other instances where he had texted the manager and been remonstrated with about it, other than in respect of 28 April, and whilst the application of the Bradford factor is harsh, it was applied to everybody. We also find

that in accordance with Mr Seed's evidence that he would have dismissed even without the written warning. Any argument in respect of whether that was unjustified or not is irrelevant as we accept his evidence on this. It is extremely important to the respondent that they know when drivers are coming in or not. That is more important to them than the driver being absent as if they get notice they can get an agency driver in, they can still meet their targets, they will keep their franchise. The claimant totally failed to appreciate this even after it had been brought to his attention in a significant way.

91. In respect of Mr Seed's decision to dismiss the claimant, was that within the band of reasonable responses of a reasonable respondent? The claimant stated that it was not and he believed that other employees had not been dismissed in similar circumstances. Mr Seed produced a list of employees he had dismissed, of which four were for going AWOL or being absent: two were white and two were black, and therefore it could be seen that the respondent's treatment of the claimant was consistent with other employees. We had no other information as to whether any of these individuals differed from the claimant in respect of time absent or how often they had failed to contact the respondent, and therefore we took that information on face value.

92. We find it was towards the harsh end of the band of reasonable responses to dismiss the claimant for failing to contact the respondent and not providing sick notes. However, the claimant's behaviour did support a view that the claimant would continue to fail to adhere to the respondent's procedures having failed once and still repeating this matter, and then having conspicuously failed after 24 June to contact the respondent even after they had had quite a long telephone conversation with him on 28 June urging him to comply with the procedure.

93. Accordingly we find that the claimant was fairly dismissed.

94. We would, however, add that there were failings in the respondent's procedure, as we have referred to above, in asking the claimant to wait for 45 minutes instead of immediately commencing the disciplinary hearing and in failing to fully engage with the issue regarding the sick notes setting a deadline for these to be provided. However as can be seen we have found these were not significant enough to make the dismissal procedurally unfair.

Wrongful Dismissal

95. We have accepted that the offence the claimant was charged with was a suitable offence of gross misconduct and that the claimant was guilty of failing to comply with the respondent's reporting requirements whilst off sick to a significant degree, his failure to keep in touch was serious not just a matter of a few days. Further that this was a matter of great importance to the business.. Accordingly the claimant was properly summarily dismissed for gross misconduct and his wrongful dismissal claim fails.

Race Discrimination

96. The claimant has asked us to draw inferences from the alleged behaviour of Ms Sadik and Duncan Harris. As can be seen above we find in respect of three

incidents that they did occur, although in respect of the Zimbabwe comment we find that there was nothing offensive about this comment. In respect of the other two matters, on the face of them they appear to be different treatment of the claimant compared to other white employees. On that basis we considered whether or not we could draw an inference from those two matters. We decided that we would draw an inference from those two matters.

97. The burden to shift therefore shifts to the respondent, we find that the respondent has provided an explanation free of discrimination for their actions in dismissing the claimant. The respondent was perfectly entitled to call the claimant to a disciplinary hearing in the circumstances, and in the absence of the claimant providing any information in respect of mitigation and failing to provide the sick notes even after the hearing when he had the opportunity, that it was not an unusual decision for them to decide in context of their business, to dismiss the claimant. Further the fact that white employees where dismissed for the similar offences also establishes that there was no less favourable treatment when the claimant was dismissed. Although the claimant did not raise it, it might have been argued that the dismissals were disproportionate given the limited number of black drivers employed by the respondent but this was just for AWOL, there were several other dismissals of white drivers which satisfies us in the absence of any other information that the was no disproportionate treatment

98. In addition we have accepted the respondent's evidence that Adam Seed made the decision and that Duncan Harris had no influence over the decision. Mr Seed was convincing in evidence, and of course Mr Seed himself was not involved in any of the alleged conduct the claimant relied on for race discrimination.

99. Accordingly the claimant's claim fails and is dismissed.

100. We would add that as we have found there were matters from which an inference could be drawn this was not a claim in which striking out could have properly been considered .

Employment Judge Feeney

Date 28th July 2017

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
31 July 2017

FOR THE TRIBUNAL OFFICE