



Case Number: 2301525.2016  
2301526.2016

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## EMPLOYMENT TRIBUNALS

BETWEEN

**Claimants**

1 Mr J Sharma  
2 Mr J Gurung

and

**Respondent**

Cleveland Cable Co. Ltd.

**Held at Ashford on 2 and 3 October 2017**

**Representation**

**Claimants:**

In Person, with an Interpreter

**Respondent:**

Mr A Kirk, HR Manager

**Members**

**Employment Judge** Kurrein

Ms C Edwards

Ms B Leverton

## JUDGMENT

- 1 The second Claimant's claims alleging unfair dismissal, race discrimination victimisation, public interest disclosure detriment/dismissal, dismissal for trade union activities and breach of contract are not well founded and are dismissed.
- 2 The Respondent has made unauthorised deductions from the second Claimant's pay for any working days that fell on the, 9, 10, 11 or 12 April 2016.
- 3 The hearing of the first Claimant's claim is postponed.

## REASONS

**Claims and Issues**

- 1 On 16 July 2016 the Claimants presented a claim to the Tribunal alleging unfair dismissal, race discrimination, breach of contract relating to notice pay and unauthorised deductions from wages. The first Claimant's claim has not proceeded in the circumstances set out below.
- 2 On 21 September 2016 the Respondent presented a response in which it contested the claims.
- 3 At a Preliminary Hearing before EJ Wallis on 21 October 2016 the issues in the case were defined as follows:-

Complaint under s.103A ERA 1996 (dismissal for making protected disclosures)

- (1) Did the Claimants make a protected disclosure on 25 February 2016 (reporting an oil leak on machine 10) as defined by section 43B ERA 1996. In particular, did the Claimants disclose information which in their reasonable belief tended to show that there was a danger to the health and safety of any individual (s.43B (1) (d));

- (2) Was the disclosure of that information in the Claimants' reasonable belief in the public interest;
- (2) If the Claimants were found to have made protected disclosures, were those disclosures the reason, or principal reason, for the dismissal;

Victimisation claim – section 27 Equality Act 2010

- (3) Did the Claimants carry out protected acts (details to be supplied by the Claimants in accordance with the order set out above) as defined by s.27 EqA 2010;
- (4) If so, were the Claimants dismissed because they did those protected acts;

Dismissal for trade union activities – section 152 Trade Union & Labour Relations (Consolidation) Act 1992

- (5) There being no dispute that the Claimants were members of a trade union and took part in trade union activities, was the fact that they did so the reason for dismissal;

Unfair dismissal claim – section 98 Employment Rights Act 1996

- (6) If the reason for the dismissal of the Claimants was not a protected disclosure, a protected act or trade union activities, what was the reason;
- (7) If the reason was conduct, as relied upon by the Respondent, did the Respondent have a genuine belief that the misconduct had taken place;
- (8) If so, was that belief based on reasonable grounds following a reasonable investigation;
- (9) Was a fair disciplinary procedure followed, having regard in particular to the provisions of the Acas Code;
- (10) Did the decision to dismiss the Claimants fall within the band of reasonable responses open to a reasonable employer;
- (11) If the dismissal was procedurally unfair, would a fair procedure have affected the outcome;
- (12) If the dismissal was unfair, did the Claimants cause or contribute to the dismissal by any blameworthy conduct;

Notice pay claim – Extension of Jurisdiction Order 1994

- (13) did the Claimants act in such a way as to justify summary dismissal, or are they entitled to notice pay;

Remedy

- (14) If any of the claims are successful, what is the appropriate remedy.

### **Summary of the Respective Parties' Cases**

- 4 It was the Claimants' case that the Respondent, in response to them having raised public interest disclosures and/or issues on behalf of their trade union, had forced them to sign and/or forge documents to implicate them in a scheme to falsify an accident at work.

- 5 It was the Respondent's case that both the Claimants had been involved in making a false claim that an accident had taken place, they had been caught red-handed and dismissed for gross misconduct.

**Procedural Matters**

- 6 Following the directions given by EJ Wallis on 19 January 2017 the following procedural matters are of relevance:-
- 6.1 On 2 February 2017 the Claimants provided particulars of the alleged PIDs they relied on as being the oil leaks reported on 25 February and 12 March 2016. They provided no particulars of any protected act for the purpose of their victimisation claim.
- 6.2 On 23 February each of the Claimants provided a Schedule of Loss in the identical sum of £98,147, as a "tentative figure".
- 6.3 On 21 March 2017 Mr Kirk complained that the Claimants had not exchanged documents. The Claimants acknowledged this and sent the documents on 23 March 2017.
- 6.4 On 23 March 2017 the Claimants sought an order for specific disclosure of the following:-
- 6.4.1 CCTV footage from 25 February to 16 March 2016 to prove there was an oil leak from machine 10
- 6.4.2 Check Sheets and Work Sheets from 1 February to 14 March 2016 to prove the Claimants had complained about oil leaks
- 6.4.3 Salary sheets to prove discrimination between workers
- 6.4.4 Employee contract letters to show working hours, because the Respondent had increased their hours and victimised them.
- 6.4.5 Minutes of a meeting on 31 March 2016 at which health and safety was discussed.
- 6.5 On 24 March 2017 Mr Kirk responded to object to the application, pointing out that the requests for salary information had been rejected twice already by Judge Wallis, and asserting that all other relevant information had been disclosed.
- 6.6 On 6 April 2017 the parties were informed that Judge Wallis had declined to make an Order in respect of salary information and no other Order was necessary as the Respondent had complied with its obligations.
- 6.7 On 9 April 2017 the Claimants sought a review of Judge Wallis' decision, making the same assertions as before.
- 6.8 On 3 May 2017 Judge Wallis declined to review her Order, but indicated that if there were minutes of a meeting on 31 March 2016 they might be relevant.
- 6.9 On 5 May 2017 Mr Kirk informed the Tribunal that the alleged meeting on 31 May 2016 with Mr Patching appeared to be a meeting between the

Claimants and a Union representative, and he had no knowledge or minutes relating to it.

- 6.10 On 17 May 2017 Judge Wallis sought clarification whether the Respondent was at the meeting.
- 6.11 On 19 May 2016 Mr Kirk clarified that a disciplinary hearing was intended to take place on 31 March 2016 but the Claimants, accompanied by their Union representative, had cancelled it as soon as they arrived. There were no minutes.
- 6.12 In the interim, on 18 May 2017, the Claimants made another application for disclosure, alleging they could not have a fair hearing without it.
- 6.13 On 1 June 2017 Mr Kirk responded at length to say:-
- 6.13.1 No other CCTV footage had been preserved. He pointed out that the fact of the two oil leaks was not in dispute.
- 6.13.2 A sheet showing all faults reported on all machines from 21 December 2015 to 12 May 2016 was in the bundle, together with the fault report for machine 10.
- 6.13.3 The contracts of employment were in the bundle. The letters of appointment mirrored them, but would now be included as the Claimants had not previously requested them.
- 6.13.4 No meeting took place on 31 March 2016.
- 6.13.5 The only documents the Respondent had received from the Claimants that were not in the bundle were the witness statements of the Claimants and their witnesses, which had been sent to the Respondent contrary to the express directions given by Judge Wallis.
- 6.14 By letter of 13 June 2017 the Claimants were informed that Judge Wallis had refused their application.
- 6.15 On 12 June 2017 Mr Kirk complained that the Claimants had not exchanged witness statements.
- 6.16 On 20 June 2017 the Claimants gave notice of their intention to appeal Judge Wallis' decisions on disclosure and could not complete their statements without it.
- 6.17 ON 13 July 2017 Judge Wallis urged the parties to comply with the directions to ensure the case was ready for hearing.
- 6.18 Meanwhile, on 6 July 2017, the Tribunal received purported "Detail Grounds of Appeal of 20 June 2017" from the Claimants.
- 6.19 On the 20 July 2017 Mr Kirk again complained about the failure of the Claimants to exchange statements.
- 6.20 On 9 August the Claimants reiterated their request for reasons for the refusal of an Order for disclosure. They were informed by letter of 16 August that Judge Wallis had accepted the contents of the Respondent's

letter of 1 June 2017, of which a copy was enclosed. She directed that witness statements should be exchanged within 7 days.

- 6.21 On 18 and 19 September 2017 the Claimants emailed to state that they had appealed to the EAT and requested a postponement. By a letter of 29 September 2017, received by us after the conclusion of the hearing, the Claimants were informed that HHJ Martyn Barklem was of the opinion there were no reasonable grounds for bringing the appeal..
- 6.22 On 26 September EJ Sage refused that application.
- 6.23 On 27 September 2017 the Claimants sought a review of that decision.
- 6.24 On 27 September 2017 REJ Hildebrand refused that application, because there were no grounds to reconsider it, but indicated that the Claimants could re-apply at the hearing.
- 6.25 Later on 27 September 2017 the Claimants purported to set out their grounds for the application.
- 6.26 On 29 September 2017 EJ Kurrein refused that application, but indicated that the Claimants might renew their application on the first day of the hearing.
- 7 That application was renewed on 2 October 2017, when the Claimants had the benefit of an Interpreter in Nepali. Due to administrative errors the hearing could not start until 13:00. Unfortunately the Claimants had not given any notice of the application, which was in writing, or a copy of it to anyone until we convened.
- 8 The Claimants made the following points:-
  - 8.1 The CCTV footage was necessary because it would show the oil leak, which was central to the PID claim and to health and safety and the public interest.
  - 8.2 The Check Sheets and Work Sheets were required for health and safety and the Claimants could not prove their case to the civil standard without them.
  - 8.3 The Contracts of Employment were “fake and forged” and were probative of the Respondent’s dishonesty.
  - 8.4 Unlawful deductions had been made from salary.
  - 8.5 The Minutes of the 31 March meeting were essential for a fair hearing
  - 8.6 Bundle:-
    - 8.6.1 The notes of the disciplinary hearing were not detailed
    - 8.6.2 The Respondent had not included documents from the Claimant
  - 8.7 Witness
    - 8.7.1 The Respondent had sent a key witness for the Claimants to Nepal
    - 8.7.2 The Respondent relied on 6 witness statements, not the 5 they had indicated.

- 9 We heard the submissions on behalf of the Respondent.
- 10 We reached the following conclusions:-
- 10.1 The CCTV footage no longer existed and, in any event, the existence of oil leaks on the dates in question was not disputed.
- 10.2 The Respondent's available records of all faults reported in respect of machine 10, and all other machines, was in the bundle. The documents presented by the Claimant would add nothing because the oil leaks on the relevant dates were not in dispute.
- 10.3 To the extent it was relevant it was open to the Claimant's to cross-examine on the provenance of the contracts of employment.
- 10.4 The unauthorised deductions issue would be considered on the evidence presented.
- 10.5 There were no meeting minutes for 31 March 2016 and, in any event, such did not appear relevant.
- 10.6 The Claimants could cross-examine on the accuracy or sufficiency of the note of the hearings.
- 10.7 The Claimants had not established the existence of any relevant document that was not in the bundle.
- 10.8 The Respondent had granted the witnesses' holiday request, they had not sent him to Nepal. In this context we noted that none of the Claimants' other witnesses attended the hearing.
- 10.9 The Respondents were not bound by their indication of the number of witnesses they foresaw calling.

We therefore refused the applications for specific disclosure and a postponement.

- 11 It then transpired that the Claimants had not brought any documents with them to the hearing, not even their own and their witnesses' statements. We are grateful to the Respondent for providing us with copies of those documents.
- 12 At the point at which we informed the parties of our intention to adjourn until the following day the first Claimant again sought to make an application for disclosure. We ruled that we having shortly before listened to and dealt with an extensive application for disclosure and postponement it was an abuse of the process to make a further, or seek to repeat, an application for disclosure.
- 13 We then adjourned to read all the statements, and the documents in the bundles referred to in them.
- 14 At 10:00 am on 3 October 2017 the Clerk was handed documents by the Claimants. These were:-
- 14.1 A statement by the first Claimant's son, with supporting documents, informing us that the first Claimant was depressed and had tried to commit suicide the night before.

- 14.2 A joint statement by the Claimants reiterating their application for disclosure and requesting permission to appeal.
- 15 In light of the information concerning the first Claimant we directed that his case would not proceed that day but that he should use his best endeavours to provide by 10:00 the following day a suitable medical certificate from his GP. The first Claimant then left. The medical certificate was provided the following morning and the hearing of the first Claimant's case was postponed.
- 16 The second Claimant then sought to submit that:-
- 16.1 he would not be ready to proceed with the hearing until he got the disclosure he sought
- 16.2 he was not the "main person"  
and we should postpone the hearing.
- 17 We declined that application. We took the view that whilst the two Claimants' cases were clearly convenient to be heard together there would be no injustice in not doing so. No prejudice arose from the alleged failure to disclose documents. We could plainly have regard to the first Claimant's statement and give it appropriate weight. We could assist with cross examination.
- 18 The second Claimant, who we hereafter refer to simply as "the Claimant" (referring to the first Claimant as Mr Sharma), sought to protest again:-
- 18.1 He could not cross-examine as he was not the "main person"
- 18.2 He did not wish to say anything unless the first Claimant was present;
- 18.3 He wanted a postponement.
- 19 We informed him of his right to give evidence or not, as he wished, but pointed out that his statement would carry less weight if he did not. We also informed him we could not require him to remain or to give evidence at all, but again pointed out the detriment that would flow from him not taking part in the hearing, which was likely to continue in his absence.
- 20 The Claimant then left the hearing. We adjourned to consider Rule 47 Employment Tribunals Rules of Procedure.

**47 Non-attendance**

If a party fails to attend or to be represented at the hearing, the Tribunal may dismiss the claim or proceed with the hearing in the absence of that party. Before doing so, it shall consider any information which is available to it, after any enquiries that may be practicable, about the reasons for the party's absence.

- 21 We concluded that it was not appropriate to dismiss his claims. We concluded it was contrary to the interests of justice to postpone the hearing. Our principal reasons were as follows:-
- 21.1 The case was ready to be heard, and was already taking place 18 months after the events in question.

- 21.2 The Claimant had been advised of his rights and the consequences of leaving the hearing and had chosen to do so.
- 21.3 There was no certainty that the case would be heard even if it was postponed in view of the Claimant's attitude to disclosure.
- 21.4 The Respondent and all its witnesses were present and were ready and able to proceed. A postponement would cause substantial cost and inconvenience which was unlikely to be compensated.
- 21.5 We had written statements on behalf of the Claimant, Mr Sharma and all their proposed witnesses to which we would have regard and give appropriate weight.
- 21.6 We were in a position to put the Claimant's case to the Respondent's witnesses.
- 22 We thereafter reconvened, and informed the Respondent of our decision to proceed with the hearing in respect of the Claimant.

### **The Evidence**

- 23 We read, took account of and gave appropriate weight to the statements of both the Claimants and all their witnesses, including that of the witness allegedly sent to Nepal.
- 24 We invited the Respondent to open its case by showing us the CCTV footage, using the projector they had provided, so that all the witnesses' evidence could be heard in context.
- 25 We heard the evidence of Mr Mike Norris, Operations Manager; Mrs Jan Robson, Company Secretary; Mr Dave Farnish, Health and Safety Officer; Mr Alan Botting, Electric Maintenance Engineer; Mr Brian Belcher, Warehouse Supervisor; and Mr Andrew Kirk, Human Resources Manager on behalf of the Respondent. We had regard to the documents to which we were referred and make the following findings of fact.

### **Findings of Fact**

- 26 The Claimant was born on 15 July 1962 and started his employment with the Respondent as a warehouse operative on 30 June 2008. His employment was uneventful until the event with which we are concerned.
- 27 The Respondent is a family owned company which is a leader in its field. It wholesales specialist cables for railways, underground railways, electrical supply and other industries. It employs about 90 people at its branch in Kent and about 500 nationally. Its turnover is in excess of £200 million a year.
- 28 In December 2015 Mr Sharma became a GMB shop steward. Both he and the Claimant had been members of the Union since about 2012. We accepted that the first Claimant had been involved in seeking to resolve difficulties within the workplace in his role as a shop steward. He raised issues with management and attended meetings both with management and on behalf of his colleagues.

- 29 On 25 February 2016 it was reported by the Claimants to the Respondent that there was a leak of hydraulic oil on machine 10.
- 29.1 Machine 10 is composed of two parts, both of which can be moved longitudinally or horizontally.
- 29.2 One part is known as the pay-out machine and the other is known as the recipient drum.
- 29.3 Large reels of cable, weighing up to 15 tonnes, are loaded onto the pay-out side of the machine and then unrolled to be rolled onto the receiving reel.
- 29.4 These reels are located on spindles mounted between two arms that are raised and lowered with hydraulic rams. The arms can also be moved closer together or further apart by other hydraulic rams.
- 30 At that time the precise source of the oil leak was not apparent. The Respondent took the view that the leak was immaterial because the leaking oil was confined to a channel running across the machine, referred to in evidence as a “drip tray”, and was of only small quantities. The first and second Claimants were both asked to monitor the leak and report on it if it worsened.
- 31 On Saturday 12 March 2016 both the Claimant and Mr Sharma were on shift from 6am. Mr Belcher was on duty, as was a Team Leader Mr Hamoudi. We accepted Mr Belcher’s evidence to the following effect:-
- 31.1 Shortly after 9am that day Mr Hamoudi called him on the radio to inform him that Mr Sharma had slipped on some oil by machine 10 and hurt his knee. Mr Belcher enquired after Mr Sharma’s welfare and was told that he was OK.
- 31.2 Mr Hamoudi made a handwritten statement confirming those events, which was in the bundle.
- 31.3 When Mr Belcher went to machine 10 he found that the oil on the floor had been covered with absorbent granules by a warehouse operative. He asked Mr Sharma what had happened and was told in reply that Mr Sharma had slipped and fallen on his knee but was OK.
- 31.4 Mr Sharma then accompanied Mr Belcher to his office to prepare an accident report, which both he and Mr Sharma signed.
- 32 On Monday 14 March 2016 Mr Farnish interviewed Mr Sharma, and subsequently the Claimant, to investigate the accident. Both Mr Sharma and the Claimant alleged that Mr Sharma had slipped on a patch of oil and injured his knee. We accepted Mr Farnish’s evidence that the note he typed contemporaneously with the interview was an accurate record on what had been said in the course of those meetings. Mr Sharma confirmed that he had seen the oil but walked across to get onto the machine but his leg had slipped and he had fallen to the floor hitting his knee. The Claimant confirmed that he had seen Mr Sharma slip on the oil. Mr Sharma and the Claimant both signed these interview notes as accurate.

- 33 We put the Claimant's case, to the effect that these documents had been created by duplicity and/or coercion and/or were forged, to both Mr Belcher and Mr Farnish. Their denials were clear and unequivocal.
- 34 On 14 March 2016 Mr Sharma also provided a signed written statement, albeit written by a colleague, alleging he had slipped on the oil and "smashed my left knee on the floor".
- 35 As part of his investigation into the accident Mr Farnish viewed the CCTV that covered this area of the Respondent's warehouse. We accepted that there were two such cameras trained on the relevant area but that the CCTV we watched, which was shown to the Claimants at later stages in the investigation, showed everything necessary. We observed the following:-
- 35.1 Mr Sharma and the Claimant are involved in manoeuvring the pay-out part of the machine at first. They then move to the recipient drum end of the machine.
- 35.2 They appear to observe the oil leak on the floor when they move the recipient drum part of the machine sideways. It is in the region of one metre across.
- 35.3 Neither Mr Sharma nor the Claimant take any steps to use the granular material stored nearby to try and absorb this leak.
- 35.4 Both Mr Sharma and the Claimant appear to walk on or through the oil on more than one occasion.
- 35.5 Following what appears to be a discussion between Mr Sharma and the Claimant:-
- 35.5.1 The Claimant stands three or four yards to the left of the machine with what appears to be a mobile phone raised to his eyes while Mr Sharma lowers himself to the ground so that he is lying half propped up on his right side with his feet adjacent to the patch of oil.<sup>1</sup>
- 35.5.2 Mr Sharma then gets up and is approached by the Claimant. They appear to confer over what can be seen on the phone.
- 35.5.3 The Claimant then moves to a position at right angles to the position he was in formerly, so that he is then out of sight behind the machine, and Mr Sharma again gets back down on the ground and lies half propped up on his right side with his feet adjacent to the patch of oil.<sup>2</sup>
- 35.5.4 Mr Sharma then gets up and the Claimant and Mr Sharma again appear to be looking at the phone and conferring.
- 36 When Mr Farnish viewed this CCTV he took the view that the Claimant and Mr Sharma had conspired to make a false accident claim. Each of them was called to a meeting with Mr Watson, Assistant Operations Manager, who was accompanied by Mr Farnish. Each of them were told of the Respondent's suspicions regarding their intention to make a false accident claim and that

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<sup>1</sup> The photograph at page 140 appears to be taken from this position.

<sup>2</sup> The photograph at page 138 appears to be taken from this position.

- they would be suspended. Each was asked if they wanted to see the CCTV footage of the incident and it was played back to each of them. Both of them denied that this video was of the alleged accident, despite the time being the same as that alleged for the accident by the Claimant and Mr Sharma in their interviews. Neither the Claimant nor Mr Sharma gave adequate answers to the questions put to them. They were told a copy of the CCTV would be made available to them and a disciplinary hearing would take place on 18 March 2016.
- 37 That invitation was confirmed in a formal letter dated 15 March 2016 which set out the allegations against the Claimant and Mr Sharma and told them that it was considered to be potential gross misconduct for which they might be dismissed without notice. That letter enclosed copies of the relevant statements made by the Respondent's staff and a copy of the CCTV footage. It advised the Claimant and Mr Sharma of their right to be accompanied.
- 38 Mr Sharma informed the Respondents that he was "mentally in tension" and wanted to have a meeting with his Union. He requested a postponement of the hearing. He later asserted that he could not understand English properly. The Claimant wrote in similar terms and requested a registered Nepalese interpreter.
- 39 The Claimant had the benefit of a Nepalese interpreter for the purpose of the disciplinary hearing and throughout that part of this hearing he attended. We do not question his right to have the benefit of such interpreter for legal proceedings which are likely to use more complex English than that regularly used in the workplace. However, we rejected the Claimant's and Mr Sharma's assertions that they were not reasonably proficient in English. In particular we noted:-
- 39.1 The Claimant served in the Brigade of Gurkha for fifteen years and on his discharge in mid-1994 his Commanding Officer stated that he had a good grasp of English.
- 39.2 We accepted the evidence of the Respondents' witnesses, who had worked with both Claimants for several years, that they had no difficulty in understanding the instructions given to them or any queries that were raised.
- 39.3 The Claimant's own evidence that he was able to "solve problems" in the workplace.
- 40 In the event the Claimant's disciplinary meeting took place on 8 April 2016 when he was accompanied by Mr Kemp of the GMB Union and had the benefit of an interpreter. The meeting was conducted by Mike Norris with the assistance of Mr Farnish and a minute taker was also present.
- 41 In the course of that meeting the Claimant asserted that Mr Sharma had done nothing more than put his foot in the oil to see whether it was slippery as a "slip test". He further asserted that there had not been an accident at all. He sought to assert that he had seen Mr Sharma on the floor "checking the oil".

It was asserted that the Claimant was already taking photos when Mr Sharma got in front of him on the floor.

- 42 Mr Norris concluded the meeting by informing the Claimant that he would consider his decision and inform the Claimant of it in writing.
- 43 He did so on 11 April 2016. He stated that he was “confirming” that the Claimant’s employment had been terminated on the grounds of gross misconduct as at 8 April 2016. He set out what he perceived to be fundamental conflicts between what had been alleged by the Claimant and what was revealed by the CCTV footage. He concluded by informing the Claimant of his right of appeal.
- 44 By a letter dated 13 April 2016 the Claimant wrote to Mr Norris to appeal the decision. He felt that there were things that he did not mention at the hearing that might have been beneficial to him.
- 45 The Respondent told the Claimant his appeal hearing would take place on 18 April 2016. It was conducted by Mr Kirk. The Claimant was accompanied by Mr Kemp, as before, and a minute taker was present.
- 46 It was only in the course of this hearing, for the first time, that the Claimant alleged that he had been tricked or forced into signing documents without knowing what their content was. He sought to suggest that “it just so happened” that Mr Sharma was lying down on the floor when the Claimant was taking photographs of the oil. At the conclusion of the hearing Mr Norris asked the Claimant to provide him with copies of the photographs he had taken. The Claimant provided four such photographs.
- 47 On 29 April 2016 Mr Kirk wrote to the Claimant to inform him that he had upheld the decision to dismiss the Claimant. He took the view that the Claimant’s version of events was not consistent with the CCTV footage of the incident or the Claimant’s initial statements during and after the event. He concluded by informing the Claimant that his decision was final.
- 48 We find as a fact that the explanations given by the Claimant were wholly inconsistent with the CCTV because:-
- 48.1 It is clear from the photos taken by the Claimant that Mr Sharma’s head is nowhere near a position where he might be inspecting the machine to look for the source of the leak.
- 48.2 There is no plausible explanation for the Claimant taking at least two separate photographs, from two vantage points, that required Mr Sharma to get down on the ground on two separate occasions.
- 48.3 The photos at pages 139 and 141 were more than sufficient to show the oil leak: photos from other vantage points or at other zoom lengths were wholly unnecessary.

### **The Law**

- 49 In considering this case we have had regard to the following authorities:-  
British Home Stores Ltd v. Burchell [1978] IRLR 379

Iceland Frozen Foods v. Jones [1982] IRLR 439  
Sainsbury's Supermarkets Ltd v. Hitt [2003] IRLR 23  
Taylor v OCS Group Ltd. [2006] IRLR 163  
Newbound v. Thames Water Utilities Ltd [2015] IRLR 734

## **Further Findings and Conclusions**

### Protected Disclosures

- 50 We accepted that the Claimants had disclosed to the Respondent oil leaks from machine 10 on 25 February and 12 March 2016.
- 51 We did not accept these were qualifying disclosures because we received no evidence from the Claimants that they had informed the Respondent of these leaks because they were concerned about health and safety. It was in accordance with the standard operating procedures for these machines.
- 52 In addition:-
- 52.1 In respect of the leak of 25 February 2016 it was so minor as to require no action to be taken. The Claimants could not have reasonably believed it posed a danger to health and safety.
- 52.2 In respect of the leak of 12 March 2016 the leak was more substantial, but the necessary absorbent granules, which neither the Claimant nor Mr Sharma thought to use themselves, were immediately available and would have removed any possible danger to health and safety.
- 53 We also note that the Claimant gave no evidence to support a suggestion that the disclosures were in the public interest.
- 54 In any event, for the reasons set out below, even if this was a qualifying disclosure that was protected there is no basis whatsoever to find any causal connection between the disciplinary proceedings instituted against the Claimant and his dismissal and the disclosures he made.

### Race Discrimination

- 55 The Claimant gave no evidence at all of any act alleged to be race discrimination or, indeed, a protected act. The directions given in the case in January 2017 required the Claimant to provide particulars of any alleged protected act by 3 February 2017. No such particulars were provided then or thereafter.
- 56 In the above circumstances we find there is no protected act by the Claimant on which to found a claim alleging victimisation because of race.

### Trade Union Activities

- 57 The Claimant gave no evidence of being involved in trade union activities other than in common with his member colleagues.
- 58 However, there was no evidence at all to establish any causal connection between his membership and/or activities of a trade union member and his dismissal.

Unfair Dismissal

- 59 We are unanimous in concluding that the Respondent carried out a reasonable investigation into the events that took place between 12 and 14 March 2016. They obtained statements from the Claimant and Mr Sharma. Mr Belcher and Mr Hamoudi made statements. They preserved the CCTV footage for the time in question. They informed the Claimant of what was suspected and gave him the opportunity to view and comment on the CCTV. He was provided with copies of those statements and interviews and of the CCTV.
- 60 There has been no suggestion by the Claimant that the nature and extent of the investigation was in any way to be criticised.
- 61 We were entirely satisfied by Mr Norris's evidence that he held an honest belief that the Claimant was guilty of a conspiracy to make a false accident claim against the Respondent. On the basis of the evidence available to him at the time, which we have seen today, we are entirely satisfied that there was a reasonable basis for that belief.
- 62 It is clear that Mr Norris gave careful thought to the sanction he should impose. He was on good terms with the Claimant and recognised that he had a long period of effectively unblemished service with the Respondent. Against that, however, the offence was undoubtedly one of gross misconduct which merited a serious sanction. In all the circumstances of this case we are quite unable to find that the sanction of dismissal was outside the band of reasonable responses open to an employer in a case of this nature.
- 63 There has been no criticism of the manner in which Mr Kirk conducted the appeal hearing. It is clear that he listened carefully to everything the Claimant had to say and took it into account. His rejection of the Claimant's appeal, based on the fundamental inconsistency between what was being advanced by the Claimant and the incontrovertible evidence of the CCTV footage, was entirely reasonable.
- 64 In all the circumstances of the case we are therefore satisfied that the Claimant's claim is not well founded and must be dismissed.

Breach of Contract

- 65 On the basis of the evidence before us the Respondent has satisfied us on the balance of probabilities that the Claimant was guilty of an offence of gross misconduct which was repudiatory of the contract of employment and entitled the Respondent to terminate it summarily without pay in lieu of notice. The conduct of the Claimant was flagrantly improper and could only have one intention: the making of a false claim.

Unauthorised Deductions

- 66 The Respondent's letter of dismissal dated 11 April 2016 purported to "confirm" the summary dismissal of the Claimants with effect from the date of hearing, 8 April 2016.

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- 67 It is trite law that a dismissal cannot be backdated by the employer. The dismissal could not take effect until the Claimant's receipt of that letter, at the earliest 12 April 2016.
- 68 In those circumstances the Respondent appears to have made unauthorised deductions from the Claimant's pay for 9, 10, 11 and 12 April 2016 to the extent that those were working days.
- 69 At this stage we make no award in respect of those deductions. The parties are invited to agree the appropriate sum. If they fail to do so the case will be listed for a Remedy Hearing in due course. We trust that will not be necessary.

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Employment Judge Kurrein

6 October 2017