EMPLOYMENT TRIBUNALS

Claimant: Mr Imran Pandor

Respondent: E.On UK Energy Solutions Limited

Heard at: Leicester

On: Wednesday 25 April 2018
Thursday 26 April 2018
Friday 27 April 2018
Monday 30 April 2018

Before: Employment Judge Macmillan
Members: Mr R Jones
Mr W J Dawson

Representatives
Claimant: In person
Respondent: Mrs Helen Barney (Counsel)

JUDGMENT

1. The Claimant's complaints of unfair dismissal and discrimination on the grounds of race and/or religion fail and are dismissed.

2. The Claimant is ordered to pay to the Respondent the sum of £2,000 as a contribution towards their costs.

REASONS

Background and issues

1. This is a complaint by Mr Pandor that he was unfairly dismissed from his employment with the Respondent as a Gas Meter Fitter on 23 November 2016. He also complains that the dismissal was an act of race discrimination or discrimination on the grounds of his religious belief: he is a practising Muslim. Mr Pandor, who is clearly an intelligent man, has conducted his case with considerable skill and ingenuity despite his frequent protestations that he is in unfamiliar territory and does not understand the law.

2. In support of his contention that the dismissal was also discriminatory, Mr Pandor relies on two things; the first is the more favourable treatment which he says was afforded to white non-Muslim comparators in relevantly similar circumstances. The second was the involvement of a Mr Derek McAteer in the disciplinary process, as Mr McAteer had been the subject of a successful grievance by him in respect of his (that is Mr McAteer's) religiously discriminatory remarks made in 2014.

3. The Respondent gives as the reason for the dismissal that Mr Pandor was guilty of three acts of gross misconduct. First in being responsible for a gas leak at a customer's premises; secondly in misusing something known as a hand-held unit (HHU) which informs the Respondent of his whereabouts at any given moment; and, thirdly, using his work's vehicle for private purposes. The Respondent has been well represented by Mrs Barney of Counsel and we have heard evidence from Mr Doug Mincher who carried out the investigation; Mr Philip O'Brien who dismissed Mr Pandor, Ms Helena Jacks who heard the appeal, and Mr Stephen Brady an HR Consultant who has given evidence about the comparators.

The Law

4. The right not to be unfairly dismissed derives from section 94 of the Employment Rights Act 1996. The all-important test of fairness derives from sec 98. The reason for dismissal is dealt with in subsection (1):

> In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show:
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> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
> (b) that it is either a reason falling within subsection (2) or some other substantial reason …

5. Amongst the potentially fair reasons within subsection (2), is one which relates to the conduct of the employee, and that is the allegation here. The test of reasonableness itself is in subsection (4):

> Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
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> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
> (b) shall be determined in accordance with equity and the substantial merits of the case.

6. It is important that the Tribunal reminds itself of its function in a misconduct dismissal. It is not our task, as it would be in a criminal trial, to determine whether as a matter of objective fact Mr Pandor is guilty of the disciplinary charges which are brought against him. Our task was identified by the Employment Appeal Tribunal in the well-known case of **British Home Stores v Birchell (1978) IRLR 379** to which Mr Pandor has himself referred in his closing submissions. We need to be satisfied, the burden of proof now being neutral, that: the Respondent held a genuine belief in Mr Pandor's guilt; that they held that belief on reasonable grounds; and that they reached that belief on those grounds following an enquiry which itself was reasonable in all of the circumstances.

7. But that is not the end of the matter. Having reached the conclusion, following the **Birchell** test, that the reason for dismissal is established, the Tribunal still has to be satisfied that the sanction of dismissal fell within the range of responses of the reasonable employer to the facts as thus established. As Mrs Barney reminded us in her closing submission, it is not permissible for this Tribunal to substitute its judgment for that of the employer.

8. In view of the way the evidence has unfolded, it is important to add a further important qualification to our role. Because we are determining the reasonableness of the Respondent's decision to dismiss Mr Pandor, we are not permitted to take into account information which was not before them when the decision to dismiss was taken or the appeal heard and which is being put forward by Mr Pandor for the first time during the Tribunal proceedings.

9. The discrimination claims can be dealt with very briefly at this point. The claims will succeed if the Tribunal is satisfied that Mr Pandor has been less favourably treated than white non-Muslims in relevantly similar circumstances have been or would be treated, and that the reason for that less favourable treatment was either his race or his religious belief.

The claimant's credibility

10. Before we turn to the facts, Mrs Barney invites us to make findings about Mr Pandor's credibility as a witness. She submits that he has demonstrated himself in cross examination to be inconsistent and unreliable as a witness, shifting his ground to suit the circumstances of the questioning. The Tribunal have listened very carefully to Mr Pandor give evidence over the course of a whole day. We have come to the conclusion that he is so utterly convinced in his own mind that he is entirely innocent of all of the disciplinary charges that have been brought against him, that he is prepared to say almost anything irrespective of the truth of the matter in order to justify that position. We will quote at this stage two examples, others are likely to emerge during the course of our findings of fact.

11. The first concerns the minutes of the investigatory interview with Doug Mincher, and the two-stage disciplinary proceedings before Mr O'Brien. It became clear during the course of Mrs Barney's cross examination of Mr Pandor that during those interviews he or his trade union representative had made what are now seen to be very damaging admissions. The minutes were never formally agreed – they were sent to Mr Pandor and his representative before the next stage in the process but they were not asked specifically to agree them - and Mr Pandor now seeks to make capital out of that omission by denying the accuracy of any statement in the minutes which he believes to be damaging to his position. It is true that at the appeal stage Ms Jacks was told that there was a dispute about the accuracy of the minutes, but when she asked for examples of the alleged inaccuracies, none were given. There had been ample opportunity for Mr Pandor himself, or his trade union Unite, to draw to the Respondent's attention any passages in the minutes which they claimed to be wrong, but they have never done so. Therefore, when the matter reached Ms Jacks on appeal, it did so on the basis of minutes which were

not disputed in any specific way. Mr Pandor's answer to almost every point put to him based on the minutes was simply that the minutes are not agreed and so cannot be relied on.

12. The second point is that in his own witness statement at paragraphs 9, 11 and 12 he makes claims about the outcome of the grievance which he raised against Mr McAteer which are, in two cases entirely false, and in the third case partially false. He claims that within the grievance outcome "Mr McAteer was found to have initiated unwarranted disciplinary investigations against me, one such investigation was when I was accused of claiming fraudulent expenses". That is expressly contrary to the finding of the grievance appeal, where it was held that the initiation of disciplinary proceedings was indeed justified given the evidence available to Mr McAteer. In paragraph 11 Mr Pandor says that Mr McAteer was found guilty of causing stress by giving improper medical advice for which he has no training. That was indeed the finding of the first stage of the grievance process, but it was overturned at the appeal stage because the person hearing the grievance had misunderstood the advice which Mr McAteer had given which was logistical not medical in nature. Then at paragraph 9 Mr Pandor asserts that a request from his trade union representative for Mr McAteer to be removed as his line manager was ignored. The grievance appeal outcome letter says something entirely different. When the request for his line manager to be changed was made by the trade union through the appropriate officer, it was acted upon immediately and Mr Mincher became his line manager. What Mr Pandor may be referring to is the Respondent's refusal to deal with a similar request made only a few days earlier which was not made through the correct channels.

13. It should perhaps be added at this stage, that when the subject of Mr Pandor's relationship with Mr Mincher came up during the course of the disciplinary hearing, he seemed to be entirely happy with it. However, in cross examination that was one of the examples he gave of false entries in the minutes.

Findings of Fact

14. We now turn to the facts. On 26 September 2016 Mr Pandor exchanged an old gas meter for a new one at a residential property. For some of the time another gas fitter was present. There seems to have been some difficulty with the HHU, which we will return to later in these reasons, which accounted for the presence of two fitters. The meter was in a cupboard, probably under the stairs, and when Mr Pandor had his head in the cupboard to fit the meter, it was very difficult for anyone else to see the detail of what he was doing. Mr Pandor has made much of the fact that the other meter fitter present gave a statement to the Respondent which confirmed Mr Pandor's claim that he had carried out all the relevant tests and had fully tightened the unions between the gas pipes and the meter. But in cross examination he had to accept that that was not in fact correct, although in his closing submissions he reasserted that it was. All the other fitter had been able to see were movements suggesting that the tests had been done and the unions fully tightened, but when he was interviewed by Mr O'Brien between the two stages of the disciplinary hearing, he made it clear that he had been standing three meters away and his view into the cupboard had been obscured.

15. Mr Pandor, who has six years' service with the Respondent and describes himself as an experienced gas meter technician, accepted both during the investigatory interview with Doug Mincher and at the disciplinary hearing that during the process of exchanging the meter while he was performing a test to establish that he had made a gas tight union, he went outside to return some tools to his van. In cross examination he accepted that if that is what he had done it would have been negligent and he also accepted that it was not something which he would normally do. This is important because the charge which he faced in connection with the subsequent gas leak at the premises which comes under the heading of gross misconduct in the Respondents disciplinary procedure was "deliberate or negligent failure to discharge safety responsibilities. Serious, deliberate or negligent failure to comply with safety rules or safety procedures".

16. When Mr Pandor left the premises on 26 September, he advised the householder that the work had been completed and that there was a possibility there might be a slight smell of gas for a short time. But the smell of gas was so severe and persistent that on the following Saturday, 1 October, the householder reported the matter to National Grid. Someone from National Grid attended and subsequently gave a written report to the Respondent. National Grid operatives carry a wand which detects gas, and the report stated that this was activated as soon as the National Grid employee entered the house. He found that the three unions connecting gas pipes to the meter had been left finger tight only, in other words they had not been fully tightened in accordance with the written procedure for meter installation. National Grid made a RIDDOR (Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 2013) report to the Respondent. This was received by Mr McAteer who happened to be the manager on duty. His sole involvement in this matter was to pass on that report and the complaint of a gas leak to Mr Mincher for investigation and to instruct an employee of the Respondent to attend the premises and prepare a written report. Mr Pandor accepted in evidence that Mr McAteer was under a legal duty to act as he did and that the Respondent was also under a legal duty to carry out an investigation into the leak. Mr Pandor has no evidence whatsoever to suggest that beyond that simple act of transmitting the report of the gas leak to Mr Mincher and sending an employee to the scene to investigate, Mr McAteer had any involvement in the disciplinary process at all. There is no evidence in any of the contemporary documents that he did so and we accept the evidence of the Respondent's witnesses that he did not. Any greater link between Mr McAteer, the disciplinary process and Mr Pandor's dismissal exists only in Mr Pandor's mind.

17. Three steps automatically follow the submission of a report of this nature. The first is that the Respondent sends one of their own expert engineers to the property – that was a Mr Zarik Khan. He arrived after the faults had been rectified. His report consists largely of hearsay evidence from the householder, but it does include the important statement that there was a strong smell of gas on the premises. In his letter of appeal against the dismissal, Mr Pandor clearly calls into question whether in fact there had ever been a gas leak. When this was pointed out to him during the course of his evidence, he said that he had meant to say there was no evidence of a gas leak for which he was responsible, but that it not what the letter says He also challenged Mr Khan's qualifications for making the report.

One does not need qualifications to report the existence of a strong smell of gas.

18. The next step was for Mr Pandor's HHU data and the telemetry data - that is the tracker data from his vehicle - to be analysed and compared. Mr Pandor has contended that as there is no written policy stating that this should be done, any information derived from those two sets of data is inadmissible in evidence. He accepts however that to check the data in this way is best practice. We accept the Respondent's evidence – which Mr Pandor has not in fact challenged – that this has been policy, albeit unwritten, since January 2016. We note that his trade union representatives made no objection to the use of the data during the disciplinary hearing or the appeal. Thirdly, safety audit checks are carried out to see if any substandard work giving rise to the gas leak was a one off, or whether there is a pattern of negligent behaviour. Mr Pandor complained throughout the disciplinary process that only five such audits were carried out and more should have been done. However, one of the five revealed another serious safety failing, this time in connection with the installation of an electricity meter.

19. Mr Mincher carried out a thorough investigation, which included a lengthy interview with Mr Pandor who was represented by an official from his trade union, Unite. Mr Pandor's explanation was that as he had carried out all of the stipulated safety the checks, had tightened the unions with the appropriate piece of equipment, and had been seen to do so, it must be the householder who had loosened the three unions and who was therefore responsible for the leak. That claim seems highly fanciful. The householder, although he had been in minor dispute with the Respondent over a very small amount on his bill, made no claim for compensation in respect of the leak and had absolutely no motive for putting himself and his wife in jeopardy by causing the leak. There was no evidence to suggest that the supply had been tampered with so that the householder could bypass his meter to avoid paying for gas.

20. The second gross misconduct charge concerned the misuse of Mr Pandor's works vehicle and his HHU. All gas meter technicians are remote workers in the sense that they start and finish their day at home. Mr Pandor is in contact with the Respondent via the HHU which is read by the Respondent at base by a system known as ETA. He is required to enter the start and fish time for each job into the HHU which then transmits the data automatically. This is how the Respondent knows that an employee has finished a job and is available to be sent to another job. There are also safety critical aspects to this so that the employees' whereabouts are known at any time of the working day in the event of a gas leak or explosion. When the data derived from the HHU was compared by Mr Mincher with the tracker data taken from Mr Pandor's vehicle, it became apparent that on a number of occasions during the week covered by the inittial investigation, Mr Pandor was seen to have left more than one job (according to the telemetry data) sometimes a considerable period of time before he notified the Respondent via his HHU that he had done so. When this happened the telemetry data shows that he went to addresses which had no obvious connection with the business, and for which in at least one instance he had no explanation. On one occasion he spent 40 minutes at one of those addresses at a time when (because of his failure to send the correct information by his HHU) the

respondent believed him still to be at his last job.

21. As a result of the initial investigation of the week immediately following the faulty installation of the meter, the investigation was widened into September as a whole, and similar discrepancies emerged. The issue here of course is one of trust. The Respondent has to be able to trust their employees to be honest about where they are, and to be honest about their availability for work. In effect Mr Pandor was hiding. He was hiding the fact that he had become available for work by failing to notify the Respondent that he had completed the last job assigned to him.

22. Mr Pandor asserts that on the basis of what Mr Mincher's investigation had ascertained, his act of passing a report forward for disciplinary action to be taken is evidence that he was racially motivated against him because Mr Mincher would not have taken any further action against a white non-Muslim employee who had been found to be responsible for a gas leak and had also had discrepancies in the use of his vehicle revealed by the telemetry data. One has only to look at the comparator evidence, which we will turn to in more detail in a moment, to see the absurdity of that claim.

23. Mr O'Brien conducted the disciplinary hearing in two stages. He took the precaution of adjourning the hearing to enable him to check a number of issues raised by Mr Pandor including a claim that the HHU data was unreliable. The situation with regard to the misuse of his HHU and his works vehicle was summed up very neatly by Mr O'Brien during the course of the hearing. Against a background of Mr Pandor claiming that he had simply made mistakes in entering data into the HHU their exchange is illuminating.

    O'Brien: Can you explain though why it [the HHU] appears to be consistently used OK until the point where you're visiting unknown addresses or going home?
    Pandor: Well Constance Road I visited for lunch. I realised I didn't have my phone on me. I'd gone back to the store to ask if my phone was there, and then I'd gone back home.
    O'Brien: I need an answer as to why the HHU gets used incorrectly after visiting unknown addresses or going home?
    Pandor: Which addresses?
    O'Brien: East Park Road, Constance Road, Glen Eagles. Overall you are OK using your hand held until you're going home or visiting unknown addresses.
    Pandor: I just forgot.

24. Mr Pandor's claim that the data is unreliable and that the HHU is known by the Respondent to be faulty has to be read against the light of that exchange. Mr O'Brien's analysis of the data is correct. There is no problem with it until the times when the telemetry data from his vehicle shows that Mr Pandor appears to be absent without leave.

25. He now wishes to raise two matters in support of his claim that the data is unreliable and known to be so by the Respondent. The second matter was not raised during the course of the disciplinary proceedings. He claims that the HHU can be shown to be unreliable because of the day on which the meter was fitted. Because two meter technicians arrived at the address when only one was needed this proves that the HHU is not to be

trusted. Mr O'Brien followed this up between the two parts of the hearing. The answer he got was that the only issue with the HHU is that sometimes there is a lapse in communication between the unit and the ETA. There is a delay in transmitting when the signal is temporarily lost – much like a text message on a mobile phone. But once the employee presses a button on the HHU to record the start or finish of a job the information entered is preserved and is accurately transmitted.

26. The second matter relates to the telemetry data. Mr Pandor points out that the telemetry data shows the start and finish point for all of his working days and sometimes for journeys during the middle of the day, as Goodwood Crescent. He does not however live in Goodwood Crescent but in Waterford Close. Therefore as he starts and finishes his journey at home the telemetry data must be inaccurate. When this issue was first raised Mr Pandor insisted that he did not know where Goodwood Crescent is. It is less than 200 yards from Waterford Close and the two are linked by a footpath. Mr Pandor has had the telemetry data which shows the start and finish points of his journeys as being Goodwood Crescent since the start of the investigatory process. The documents have been examined in detail more than once and throughout, according to the apparently verbatim minutes of the disciplinary meeting and the detailed notes of the investigatory meeting, he, his trade union representative, Mr Mincher, and Mr O'Brien have used the words 'home' and 'Goodwood Crescent' interchangeably, as does Mr Pandor in his letter of appeal. In our judgment he is being disingenuous now to claim that because the telemetry data shows him ending and starting his day at an address which is not his home address this is evidence that it is unreliable. It was common ground throughout the disciplinary process that Goodwood Crescent was where he started and finished his working day. Our view that this contention is disingenuous is supported by the fact that he is not able to point to any other instance where the telemetry data is incorrect.

27. The evidence facing Mr O' Brien then, in connection with the gas leak and the misuse of the vehicle, was almost incontrovertible. The only answer which Mr Pandor was able to put forward in respect of the gas leak was the highly improbable claim that it was the homeowner who had caused the gas leak. In respect of the HHU discrepancies his only answer was that he had made mistakes.

28. Another matter emerged as a result of the scrutiny of the telemetry data which appears to have become a reason for dismissal, but which was not given as a reason for calling Mr Pandor to the disciplinary hearing, namely the use of his company vehicle for private purposes. It is strictly forbidden by the Respondent's rules and is another example of gross misconduct under the disciplinary policy. This is rather less clear cut than the other two charges which Mr Pandor faced. It is probably an inference reasonably drawn from the fact that he went missing from the ETA at various periods that he was not working and was therefore, in some senses at least, using the vehicle for private purposes, but the event to which the charge is specifically connected occurred on the same day as the faulty meter installation which was also the day on which Mr Pandor lost his personal mobile phone. At the end of that day, after he had arrived at Goodwood Crescent and switched off his vehicle, he restarted it and went back to the shop where he thought he might have left the phone.

He probably didn't get out of the vehicle, walk to his home, and then turn round and walk back again, because the delay between turning off the engine and turning it back on is not long enough. But there is no doubt that he had arrived home at what was in effect, the end of his working day even though he was still within his core working hours. Having restarted the vehicle he drove some 1.3 miles on what was entirely personal business, to see if his mobile phone had been found.

29. Although Mr Pandor undoubtedly accepted during the early stages of the disciplinary hearing, that this was private business and that he shouldn't have done it and had only done it because he was 'not in his right mind' (as he put it) because he was worried about his phone, in our judgment, if this matter had stood alone it would not have warranted dismissal. It was a relatively minor matter. It was done during normal working hours, although he does appear to have previously ended his day, and speaking strictly technically, the Respondent was right that this was private use and therefore not permitted. But we have heard evidence that the Respondent turns a blind eye to minor deviations from working routes to go to shops for purely private reasons, a deviation form route of up to mile being deemed acceptable. The private use of the vehicle over a distance of 1.3 miles each way therefore adds a little or nothing to the other matters which Mr Pandor faced.

30. Apart therefore from the issue of the comparators, to which we will turn now, in the judgment of this Tribunal the Respondent unquestionably believed the allegations which they made against Mr Pandor and they did so on overwhelming grounds following the most thorough and painstaking investigation. For two acts of gross misconduct of this nature where the employee not only shows no remorse but in respect of the most serious matter, the failure to fit the replacement gas mete correctly, flatly refuses to even contemplate the possibility that they might be at fault, summary dismissal was plainly within the range of reasonable responses given the potentially very serious consequences of failing to follow the laid down meter installation procedures.

The comparators

31. Mr Pandor has named a number of comparators. All are white and all are non-Muslim. He has focussed principally on two of them, but as Mrs Barney rightly submits, making meaningful comparisons is difficult: there must be no material difference between the case of the comparator and the case of the Claimant. Mr Pandor was not only subject to two (three if one includes the private use of his vehicle) gross misconduct charges, in the face of the most overwhelming evidence he has flatly and refused to accept any kind of responsibility. All of those elements must also be present in the case of a comparator; the fact that somebody may not have been dismissed only for causing a gas leak is not enough.

    31.1 The first comparator is a Mr Anthony Hover, who was dismissed for gross misconduct for causing a gas leak through poor workmanship. Although he was already the subject of a final written warning, we accept the evidence of Mr Brady that the contemporary documents show that he would have been summarily dismissed even if he had had no previous warning.

31.2 The next comparator named is Mr Brian Stone, but he was found not to have been responsible for the leak. He is clearly therefore not a comparator.

31.3 Next is Daniel Darby. The disciplinary charge was 'serious gas audit failure'. It is not clear whether he was responsible for causing a leak but it seems that he was not. He was given a first written warning. Mitigating circumstances were lack of experience and because he had received wrong advice from a superior.

31.4 The next comparator is Mr Melvyn Reeves who was disciplined for the single misuse of a company vehicle (giving his wife a lift to work). Mr Pandor insists that he was guilty of multiple similar breaches of the vehicle use policy, but the Respondent's examination of the tracker data was unable to establish any other breach. Mr Reeves was given a final written warning. An important mitigating factor was that he had thirty unblemished years of service. Another example of the rather extreme positions Mr Pandor is prepared to adopt is his insistence that there is no material difference so far as mitigation is concerned between someone with thirty years unblemished service and his own record of six years unblemished service. That is wholly unrealistic.

31.5 The next comparator named by the Claimant is a Ms Karen Malyon. Interestingly, in the context of Mr Pandor's contention that Mr Mincher has discriminated against him, the investigation into her act of gross misconduct was carried out by Mr Mincher. She was summarily dismissed for a single gas leak caused by poor workmanship.

31.6 The next comparator is Jason Reeves. He was given a first written warning for causing a gas leak as a result of failing to secure a meter bracket. The singular difference between his case and Mr Pandor is that he showed remorse. In addition, he did not have significant gas meter experience and he had undertaken all safety checks. Mr Pandor had, on his own admission, left a safety check in progress to go to his vehicle.

31.7 Mr James Cudmore had two episodes, but he was held not to be responsible for the first gas leak – it was found to be the fault of National Grid. For the second gas escape, for which, unlike Mr Pandor, he accepted responsibility, he was given a final written warning and downgraded. The meter in his case was said to be inaccessible and difficult.

32. None of these are true comparators. They either faced single allegations or showed remorse or had other mitigation not available to Mr Pandor. Very importantly two were dismissed for a single offence whereas Mr Pandor was charged with three disciplinary offences. They offer no support to – in fact they tend to contradict – Mr Pandor's claim that he has been less favourably treated than other's in relevantly similar circumstances.

Conclusions

33. The Respondent had reasonable grounds for believing, after a thorough

Investigation, that Mr Pandor was guilty of serious negligence in the installation of a gas meter which caused a potentially dangerous gas leak. He admitted negligence in leaving a safety test while it was in progress. That admission appears in both the minutes of the disciplinary hearing, and the investigatory meeting with Doug Mincher and Mr Pandor did not claim during the appeal hearing that those particular minutes were inaccurate. He admitted in cross examination that if he had left the test, it would have been negligent. No realistic explanation for the gas leak is available other than that Mr Pandor had failed to fully tighten the unions and had not completed the safety checks, causing a potentially very dangerous gas leak in the customers' house. He has never shown any flicker of remorse, or acceptance that he was (or even could be) in any way responsible.

34. So far as the misuse of his HHU is concerned, the evidence again is overwhelming. The tracker data shows that on numerous occasions Mr Pandor did not inform the Respondent when he had finished a job, contrary to the express policy for HHU use. He was able to avoid taking further jobs for periods of up to 40 minutes and to use the vehicle for whatever purposes he chose during those times. There was no admission of responsibility, the only explanation forthcoming at the time was that he had made mistakes.

35. Both are acts of gross misconduct under the Respondent's policy, and in the judgement of this Tribunal it is plainly within the range of reasonable responses for him to be dismissed. There is not a shred of evidence to support his contention that he was dismissed because of his race or religion. Mr McAteer's involvement was coincidental and peripheral, and he did what he did because of a legal obligation, not out of malice against Mr Pandor. The comparators relied upon prove that white non-Muslims are dismissed for acts which are less serious than Mr Pandor's. Although some are not, their circumstances were materially different from Mr Pandor's in one or more respects. All of the Claimant's claims therefore fail and are dismissed.

Costs

36. The Respondent applied for costs. Mrs Barney relies on the Tribunal's language when dismissing the Claimant's claims as supporting the Respondent's contention, which she submits they have made throughout, that this claim is devoid of merit and never had any prospect of success. If, she submits, Mr Pandor had stood back and considered his position reasonably for even a moment, he would have realised that he could not succeed.

37. However, apart from asserting in the response form that the claim was devoid of merit and applying to the Tribunal for a deposit order or a strike out, the Respondent has not put Mr Pandor on warning that they would apply for costs in the event of the claim failing. The total costs incurred by the Respondent exceeds the Tribunal's threshold of £20,000, which is not surprising for a case of this magnitude, but Mrs Barney limits the application to £20,000.

38. In response, Mr Pandor still insists that his claim had a reasonable

prospect of success and has intimated that he will appeal the Tribunal's decision. He says that the Tribunal should not make an order for costs until the appeal process is concluded. He has told us that he is not currently working as he is now a full-time carer for his father who lost his wife in November of last year and has been badly affected by the bereavement. Mr Pandor is married and owns a house jointly with his wife subject to a mortgage. He originally said he had no capital 'as such', but then corrected himself and said that he had very little savings – some £3,000 to £4,000.

39. Costs do not follow the event in the Employment Tribunal. There are strict rules about the circumstances in which costs can be awarded. Rules 76 and 84 are material.

39.1 Rule 76 provides:

> (1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—
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> (a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or
>
> (b)any claim or response had no reasonable prospect of success.

39.2 Rule 84 provides:

> In deciding whether to make a costs, preparation time, or wasted costs order, and if so in what amount, the Tribunal may have regard to the paying party's (or, where a wasted costs order is made, the representative's) ability to pay.

40. This is a three-stage process. The Tribunal has first to decide whether any of the triggering factors of rule 76(1) are met. If we are of that opinion, we are then obliged to consider whether to make a costs order. We are not however obliged to make a costs order. When considering whether to do so we take all relevant matters into consideration, including, if we deem it appropriate, the Claimant's ability to pay. It seems to us to follow from the decision that we have given, and the language in which we expressed ourselves, that this claim clearly had no reasonable prospect of success. We must therefore go on to consider whether to make a costs order.

41. Mr Pandor, so far as we know, has not had the benefit of his union's advice since the appeal. He has been a litigant in person who appears to be genuinely and deeply convinced of the rightness of his case. He feels, and appears still to feel, that he has been the victim of a deep injustice. He has convinced himself that he has a case worth pursuing. That view can only have been fortified by the failure of the Respondent's application to have the claim struck out, or a deposit order made. Although it is entirely right, as Mrs Barney concedes, that to strike out a claim of this length and complexity at a preliminary hearing would have been extremely unusual, Mr Pandor almost certainly would not have known that. There is no costs warning in the response form and the Respondent has not put Mr Pandor on notice that despite the outcome of the preliminary hearing they still regarded the claim as being misconceived and warning that if he pursued it further there would be an application for costs.

42. All that having been said, in our judgment this claim was so obviously lacking in merit that Mr Pandor, if he had been acting reasonably, should

have realised that it was doomed to fail. The claim should not have been brought. It is therefore appropriate for the Tribunal to make an award of costs. But taking into account the Respondent's failure to warn Mr Pandor that a costs application would be made and his limited ability to pay, those costs are limited to £2,000. The Claimant is therefore ordered to pay to the Respondents the sum of £2,000 as a contribution towards their costs.

Employment Judge Macmillan
Date: 5th May 2018

JUDGMENT SENT TO THE PARTIES ON

19 May 2018

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FOR THE TRIBUNAL OFFICE