Case Number: 2301149/2017

EMPLOYMENT TRIBUNALS

Claimant: **Mr M Gunathilake**
Respondent: **Cross and Wells Limited**

Heard at: **Ashford** **on:** **10-12 July 2018 & 19 July 2018 (In Chambers)**

Before: **EMPLOYMENT JUDGE CORRIGAN**
Mr S Sheath
Mr D Clay

Representation
Claimant: Mr F Wildman, Solicitor
Respondent: Miss N Connor, Counsel

RESERVED JUDGMENT

1. The Claimant was not unfairly dismissed.

2. The Tribunal does not find that there has been a contravention of the Equality Act 2010 (race discrimination) by the Respondent.

3. The Claimant was not wrongfully dismissed.

4. The Respondent did not make unlawful deductions from the Claimant's wages in respect of overtime.

5. The Claimant's complaints are dismissed.

REASONS

1. By his complaint dated 12 April 2017 the Claimant brings complaints of

    1.1 unfair dismissal;

    1.2 wrongful dismissal;

    1.3 race discrimination; and

    1.4 overtime pay (unlawful deduction of wages).

2. By her Order dated 6 December 2017 Employment Judge Wallis stayed race discrimination claims in respect of incidents in 2013-2015.

Issues

3. The issues in respect of the claims for the Tribunal to determine were also set out in that Order, and after discussion with the parties at the outset of the hearing, were agreed to be:

Unfair dismissal

    3.1 What was the reason for dismissal? The Claimant accepts it was conduct.

    3.2 Did the Respondent have a genuine belief that there had been misconduct, based on reasonable grounds, following a reasonable investigation?

    3.3 Was a fair procedure followed (the Claimant suggests that there was a failure to arrange an appeal against the final written warning and so it was unfairly taken into account; and there is a dispute about the accuracy of the notes taken at the disciplinary meetings);

    3.4 Did the decision to dismiss fall within the band of responses open to a reasonable employer (the Claimant contends that the decision was too harsh as the canteen and notice board was not accessible by customers and suppliers)?

    3.5 If the dismissal was unfair, should any compensation be reduced by reference to Polkey or to any contributory conduct?

Direct race discrimination

    3.6 Did the Respondent fail to provide training for the Claimant in September/October 2016 on his return to work?

    3.7 If so, was this treatment of the Claimant less favourable treatment compared to the way Mr Hardziej, who stood in for the Claimant, was treated?

3.8 If so, was it because of the Claimant's race and the fact that he is not Polish?

3.9 Did the Respondent fail to appoint the Claimant to a CQ post in or around November 2016?

3.10 If so, was that less favourable treatment compared to a hypothetical comparator?

3.11 If so, was it because of the Claimant's race and the fact that he is not Polish?

3.12 Was any claim presented outside of the time limit?

3.13 If so, is there evidence of conduct extending over a period that would bring the claim in time; or would it be just and equitable to extend the time limit?

Wrongful dismissal

3.14 Did the Claimant act in such a way as to justify summary dismissal, or is he entitled to notice pay?

Wages

3.15 Is the Claimant owed any overtime pay, having regard to the provisions of his contract of employment and the hours worked?

Remedy

3.16 If any of the claims is successful, what is the appropriate remedy?

Hearing

4. We heard evidence from the Claimant on his own behalf. On behalf of the Respondent we heard evidence from Mr Steve Wardell (Managing Director), Ms Vickie Lowe (Payroll Assistant and HR Administrator), and Mr Raymond Hostler (Operations Manager).

5. There was an agreed bundle, to which both sides added (with the agreement of both parties) during the hearing.

6. Based on the evidence heard and the documents before us we found the following facts.

The Facts

7. The Respondent is involved in the business of packaging fruit and vegetables for supermarkets. It provides storage and packing facilities for global clients bringing in fruit and vegetables to sell to the supermarkets. As such it is heavily regulated including by Sedex, which regularly performs an Ethical Trade Audit. Sedex monitors adherence to the range of employment standards including monitoring for

discrimination. They have random confidential interviews with staff and have not raised concerns about discrimination. The Respondent allows global clients office space on the Respondent's premises and the ability to use facilities such as the canteen.

8. Steve Wardell is Managing Director but also oversees Human Resources including recruitment. He rescued the Company from bankruptcy and turned it around in four years so that by November 2012 it was awarded a Tesco Blue Ribbon, which is the highest accolade a company in that sector can achieve. Due to the influence of the supermarkets margins are very tight and any accounts are scrutinised closely by the Respondent's trading partners in the sector. The Respondent's business is labour intensive and labour is the highest cost. There can be short notice loss of significant contracts. As a result Mr Wardell tightly manages the number of permanent staff to remain around 230 to limit employment obligations and relies on agency staff for flexibility and to limit unnecessary costs. Our impression of Mr Wardell was that he is a strong hands on manager with a firm grip on a complex business, as reflected by the Sedex report.

9. Roles that do arise are filled competitively. Lower premium jobs are advertised via the company notice board, jobsinkent.com, and the Job Centre. High end jobs are advertised on yourfoodjobs.com.

10. The Respondent employs staff from a number of countries, described as follows:

    Algeria (2)

    Great Britain (29)

    India (1)

    Latvia (51)

    Lithuania (45)

    Sri Lanka (1)

    Poland (96)

    Portugal (6)

    Slovenia (3)

11. The Claimant asserts that staff at all levels were "mostly Polish". This is not correct. There are 41% Polish staff although approximately 80% of staff are from just three countries: Poland, Lithuania and Latvia. The Claimant is the one staff member from Sri Lanka.

12. The Claimant joined the Respondent as an agency worker in 2012 and became a permanent employee in 2013. He was employed as a Packhouse Operative.

13. In the past the Claimant has held positions of greater responsibility, including quality assurance within the petrochemical industry outside of the UK. He was committed to returning to a role at that level in the UK. Prior to joining the Respondent the Claimant had worked for Mansfields (another fresh produce growing, storing and packaging company in Kent) where he had received acknowledgement of suggestions for improvement, by way of "Best Suggestion for the Quarter". The Claimant is clear that he intended to try to progress in the Respondent by demonstrating that he could be "more useful than a Packhouse Operative".

14. Whilst still an agency worker the Claimant raised a number of suggestions via the suggestion box. Mr Wardell discussed them with him and a representative from HRGO in a lengthy meeting. He explained the operation of the business in the context of the specific wider industry and the recent past and transformation to make the business viable. The Claimant had no experience of this and his suggestions were not therefore relevant.

15. He believed that Polish managers at higher levels were discriminating in favour of other Polish people and rejecting better qualified people from other nationalities. On 3 June 2015 he raised concerns about recruitment (page 181) to Raymond Hostler and Steve Wardell (both of whom are British). He claims that Aneta Brobowicz is Polish and is in charge of applications. The letter claimed "Anita" tried to fill all the vacancies with her Polish friends and relatives using HRGO (a recruitment agency). He does not have any knowledge of non Polish applicants apart from himself and the fact that he has applied for other positions and been unsuccessful. This was the only evidence cited in his letter.

16. The Respondent interpreted this as the Claimant's attempt to get a Quality Control job rather than a complaint of race discrimination. Raymond Hostler advised the Claimant to keep trying as he was aware that the Claimant did have Quality Control experience in another sector, although Steve Wardell explained that the Claimant was not yet sufficiently qualified for a Quality Control position in the fruit sector as he would expect some years of experience working in that specific sector. Quality control in the petrochemical industry is very different to the fruit sector with its specific risks.

17. Raymond Hostler and Steve Wardell gave evidence (which we accept) that Aneta was not recruiting her relatives and friends and that they informed the agency what they were looking for and the agency would decide who to send. They were concerned that the Claimant had an issue with Polish people, especially as they did not just recruit Polish people (as he asserts), as borne out by their figures.

18. The Claimant did then provide his CV but was told the Respondent were not recruiting Quality Control positions at the time. He sent the letter entitled appeal dated 28 July 2015 (p182) to Steven Wardell repeating his equal opportunity concerns. Steve

Wardell gave evidence (which we accept) that the Respondent had made the decision to use agency workers at the time as at the end of 2014 the Respondent had lost a significant customer and had had to make redundancies. In 2015 it was still unclear whether there would be replacement permanent work. He did not personally reply though he says he would have delegated this at the time.

19. Although the Claimant was unsuccessful at obtaining a Quality Control position he was given the opportunity to be promoted to a Box Making Operative. However by the time he left this had not been formally recognised in a contractual change with the increase in salary. The reason for this was that there had been some concerns about whether it was the right position for the Claimant.

20. As of March 2016 the Claimant was being monitored to see if he was doing everything required to merit the premium rate associated with the role. This had not yet been signed off when concerns were raised by the General Manager to the Operations Manager (Raymond Hostler) on 7 April 2016 (page 220). The General Manager said that he had lost patience with the Claimant, when he visited the box making area the machine was regularly stopped and the Claimant was talking and messing around. He said the Claimant was not the right person to work on his own unmanaged and that he needed to be driven. He said the area was a mess with very little stock made up. Mr Hostler was asked to "get a grip of him; replace him do whatever you need to do, but make it work for us; the time for messing around in there has passed".

21. Mr Hostler responded by having a performance review with the Claimant on 14 April 2016 in which the Claimant scored 2.5 on performance. The Respondent expects a 3 at least. He was to work on required improvements and it was agreed he could have some training on the hand reach truck and fork lift though neither were strictly necessary for his role. He was told he needed to maintain stock levels and keep the area clearer.

22. A further email on 5 May 2016 (page 222) from the General Manager to Raymond Hostler about rearrangement of packaging stores indicates that whilst he saw the Claimant's colleague as having the potential to be a "very good resource" he considered the Claimant would "only try and reinvent the wheel".

23. These emails indicate that there were concerns about the Claimant's performance as a Box Machine Operative and he was not someone seen as having potential for further promotion at that time.

24. Some time between 25 May 2016 and 14 June 2016 the Claimant submitted a proposal about upgrading the packaging house. He did indeed attempt to "reinvent the wheel". It went so far as to propose a new building with detailed designs and plans. He had obtained a quote from a third party building company for £42,000 (pages 201-216). The General Manager spoke to the Claimant about this on 14 June 2016, as recorded in his email dated 15 June 2016 (page 235). The General Manager said that going

forward it was not something the Company wanted him to do and he should stop doing this and concentrate on his role in the business - currently box making. He was asked about the contact with the building company and whether they had been brought to site to measure up. He said not and that at no point had he given the Respondent's details. The General Manager had his doubts about this as normally companies would view a site before working on plans or quoting. No action was taken against the Claimant but he was reminded that he should not discuss the Respondent's business with a third party unless instructed to do so, which at his current level would be unlikely. The General Manager said the Claimant had been left in no doubt he should not repeat this.

25. Then the next day 15 June 2016 the Claimant was given a final written warning by Mr Hostler after a disciplinary meeting for a serious health and safety breach in operating the box making machine without guards being present on or about 10 June 2016 (pages 228-241). In fact the machine was not being operated, but the Claimant had removed guards that should not be removed by unauthorised personnel. The machine in question does not belong to the Respondent but to the supplier of the machine. The relevant agreement provides that Smurfit Kappa are responsible for all maintenance and repair and the expectation was that they would respond promptly to any call out and the engineer was local. If there was any delay the Respondent has a back up of using a third party to make up boxes. There was no expectation that the Claimant as the Box Making Operative would do anything other than use it to make boxes.

26. There was no dispute by the Claimant that he had removed the guards though he claimed Maintenance had told him to and given him a tool to adjust the sensor. Mr Hostler accepts he may not have investigated this but because in the context of the machine it was obvious that the Claimant had no authority to remove the guards and Maintenance would not have told him to as even maintenance are not meant to remove the guards as it is not the Respondent's machine.

27. Although he considered dismissal was a possibility for this type of offence, Mr Hostler decided to give the Claimant a final written warning for two years instead. The letter confirming the written warning (page 241) warned the Claimant that during the two year period he was required to show continued and sustained improvements in line with general duties. Should there be further breaches in performance of company rules further disciplinary action could be taken.

28. The Claimant appealed to Mr Wardell and a date for the appeal was set as 30 June 2016. He was required to come to the Main Office reception 5 minutes before the meeting. He did so, but to inform Mr Wardell that he could not attend at that time. There was a dispute between the parties as to whether he was trying to rearrange the matter or cancel his appeal, but what is accepted by both is that no further action was taken by either side to progress the matter.

29. The Claimant then commenced a period of sick leave on 18 July 2016. This became an extended absence for 11 weeks. The Claimant provided fortnightly fit notes which each said that he had knee joint pain and was awaiting investigation and treatment

until 9 September when he was under investigation and treatment. He finally returned on 4 October 2018.

30. During that period of absence, on 22 August 2016 (p250), Ms Lowe organised training for a number of staff including Mr Krysztof Hardziej, a Polish Packhouse Operative. Mr Hardziej's sessions were on 19-21 September 2016 (Reach Truck Certificate); 4-6 October 2016 (Fork Lift Truck Certificate) and 7 October 2016 (Pallet Reach Stacker Certificate) (p254). Mr Hardziej covered holidays and sickness and needed the training provided to be able to fulfil cover roles.

31. Not everyone listed in the email about training dated 22 August 2016 were Polish. In particular we accept that those listed with initials A.O., A.B. and A. M. were not Polish.

32. We accept that training needs to be arranged months in advance and depends on the availability of the external trainer and that the Respondent seeks to train more than one employee at one time. The Claimant accepted he could not have done the training on the same days as Mr Hardziej as it was his first week back after his extended absence.

33. The Claimant's training record is at page 189. He did receive some training both before and after his absence. He did not receive all the training he had been told he would have in the April performance review (paragraph 21) because he was absent when it was arranged in August and then his dismissal intervened. The Claimant had already had the minimum training for his role. In evidence the Claimant said for the first time that he was scheduled to do training in November but it was postponed. There was no evidence to support this. Ms Lowe said that training was not usually arranged for the last two months of the year as it is a busy period and the staff are needed doing their normal duties. In any event if training was provided then postponed this would undermine the Claimant's case as this would suggest the Claimant was to be provided training if his dismissal had not intervened.

34. The Claimant applied for a QC role in November 2016. In the end the Respondent decided not to appoint to the role at that time. In any event Mr Wardell's view was the Claimant did not have the minimum credentials the Respondent would want which was 4-5 years exposure working at a relevant food site. Although the Claimant had knowledge of the petrochemical industry these were not transferable skills and he had no previous experience of Quality Management in the food industry. He did not have a deep enough understanding at that time of food hygiene and contamination. In any event, the Respondent's position is that at that time the Claimant was on a final written warning, had just returned from a lengthy absence and there had been concerns about his performance in his existing role. The Respondent did not rule out that he might one day be ready for such a role but he was not at that time.

35. On 4 December 2016 the Claimant distributed the documents at pages 266 and 267-273 widely in the Respondent's canteen and posted them on noticeboards including the smoking shelter. The Claimant was invited to an investigatory meeting on 9 December 2016 with Mr Hostler. The Claimant admitted putting the notice up and was

suspended. The Claimant did not attend a further rescheduled investigatory meeting but was then invited to a disciplinary hearing on 15 December 2016. The invitation letter stated it was considering (p284):

"Gross Misconduct -Bringing the company into Disrepute namely the placing of Literature /Flyers on the company walls/canteen tables and the notice boards…[sic]".

36. The Respondent considered the conduct potentially fell within the list of acts of gross misconduct on page 109s in particular "an act or omission that seriously and adversely affects the relationship of trust and confidence between a Customer and the Company or brings the Company into disrepute".

37. Each party has presented a set of minutes for the dismissal meeting. The Respondent's were prepared by Ms Lowe who took a detailed contemporaneous note in the meeting. The Claimant's are much briefer and clearly do not reflect the entire meeting. They were made after the event and are less a record of the meeting than the Claimant's perception. We find Ms Lowe's note more likely to be an accurate reflection of the meeting.

38. At the disciplinary meeting the Claimant fully accepted that he was the source of the documents and that he had put them on the notice board and in the smoking area. He further accepted that he had entered the site on a Sunday when he did not normally work to distribute them in the canteen.

39. The documents are an open letter (p266) to colleagues to join with him to ask for a Christmas bonus and he had drafted a letter for staff to complete and submit to request a bonus. The Claimant was encouraging staff to ask for 0.05% of profits, which on his figures would amount to about £2,250 per staff member.

40. However the letter to colleagues stated in addition:

"the small wage we are given for this is not enough even to fulfil our basic needs such as foods, lodging, vehicle maintenance…,bill payments…can you imagine how much profit the company gain daily basis through our labour.? [sic]….Is there any salary differences between you as an experienced long-term worker and any un experienced temporary employee hired from agencies?
…but the company pays to the agency £14 to £16 per hour an employee rate…".

41. He said that daily, monthly, yearly estimations were attached for colleagues to review and understand about company expenses and income. He then presented detailed but fabricated and inaccurate accounts suggesting that the company made £4.43 million profit and that £3.5 million of that went to shareholders.

42. In fact the agency workers receive the same as permanent staff and the agency received under £10 per hour. The Company's statement of income submitted to Companies House shows a profit for the 2016 financial year of £695,103.

43. In the disciplinary meeting the Claimant said he wanted to "wake up" management. He said senior managers are Polish and don't care. He said he would do it again. His Union Representative said it was "very naive" and that he should go to managers first before putting anything on a notice board. He is recorded as laughing at one stage.

44. Mr Hostler dismissed the Claimant. The reason given at the meeting was that the Respondent had the quote from the building company (paragraph 24 above), then the Health and Safety issue (paragraph 25) and then this incident which brought the company into disrepute. Earlier in the meeting this was explained as being because trade partners could also have seen the literature as they have offices on site and free access throughout. Also mentioned in the meeting was that after the Claimant sent measurements to the building company the Respondent had had other companies calling in to quote on the building work that had been suggested by the Claimant.

45. Mr Hostler's thinking about bringing the company into disrepute was expanded upon in evidence. He said that if the trade partners saw a suggestion that company profits were 4.5 million it had the potential for serious repercussions. He also said that informing the workforce of about 250 people that the agency were paid £14 per hour and the company had 4.5 million profits had the risk of causing a "massive" problem to staff morale. He said that although he did have the history with the Claimant in mind and that the Claimant was on a final written warning, in fact he would have dismissed him for this incident alone.

46. The Claimant appealed which was dealt with by Mr Wardell and heard on 6 January 2017. He was still unapologetic in his appeal (p308) but by the hearing the Claimant did apologise and say he was trying to get a bonus for everyone, it was wrong and he was struggling financially. He accepted inventing the material. Again the issue about the quote for building work was raised and there were two issues going outside his remit. His union representative is recorded as saying to the Claimant that he had not given Mr Wardell any reason to change his mind.

47. Mr Wardell decided to uphold the decision. Again he took account of the history of the building quote and health and safety warning. He expanded on his reasoning in evidence. He said he would have upheld dismissal for the final incident alone. He explained that in the Respondent's sector the supermarkets want to take any significant profit and if they had posted profits of the scale alleged by the Claimant the supermarkets would want price reductions. As a result accounting information is treated as very sensitive. It's not even circulated to Senior Managers. Only he himself as Managing Director is privy to it. Any gains in efficiencies are lost in the next year. He also would not want staff to see it as they would be outraged at a suggestion that agency staff are paid double.

48. The Claimant worked an 8 week rota which averaged 38.5 hours a week but involved 4 days on and 4 days off. His shifts were 12 hours minus 1 hour unpaid break. This meant that he worked 4 days (44 hours) in 4 weeks and 3 days (33 hours) in the other

4 weeks. He was paid on the basis of 38.5 hours. Over the 8 weeks he therefore received pay for the hours he worked. If he worked over and above his normal hours those he did receive overtime in accordance with his contract. His contract states: "Your normal working hours are 4 days on 4 days off 0800-2000….[and]…38.50 per week for which you will be paid the normal hourly rate…Additional overtime worked after 40 hours per week will be paid at time and a quarter of your basic rate" (p117).

49. There were others on different shift patterns and the rationale for paying overtime above 40 hours was to ensure no particular shift pattern was more beneficial than another.

50. The Claimant's claim for overtime is based on an argument that he should receive 4 hours at the overtime rate for each of the 4 weeks that he worked 44 hours not withstanding that he averaged 38.5 hours over the 8 weeks. We do not interpret his contract that way. The contract is clearly specifying that he will be paid the normal rate for his normal hours over the 8 week period. It is only "additional overtime" that is to be paid at the additional rate (which he received).

Relevant law

51. The law in relation to unfair dismissal is contained in section 98 of the Employment Rights Act 1996. Section 98 provides:

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show-

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it-

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3). . .

(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)-

(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.

52. In considering reasonableness in cases of dismissal for suspected misconduct the relevant test is that set out in *British Home Stores Ltd v Burchell* 1978 IRLR 379, namely whether the employer had a genuine belief in the employee's guilt, held on reasonable grounds after carrying out as much investigation into the matter as was reasonable in all the circumstances of the case.

53. In applying section 98 (4) the Tribunal are not to substitute their own view for that of the employer. The question is whether the employer's decision to dismiss fell within the range of reasonable responses open to the employer, or whether it was a decision that no reasonable employer could have made in the circumstances.

54. The Respondent's Representative referred to *Davies v Sandwell Metropolitan Borough Council* [2013] EWCA Civ 135 and the principles therein in relation to treatment of previous warnings. That case confirms that the question is whether the dismissal was reasonable in all the circumstances including, where relevant, whether the final warning is a circumstance which a reasonable employer could reasonably take into account. In assessing that reasonableness it is relevant to take into account whether the warning was made in good faith, whether there were prima facie grounds for following the final warning procedure and whether it was manifestly inappropriate to issue the warning. Further, it may be reasonable for an employer to take account of the fact that an appeal was withdrawn or abandoned.

Race Discrimination

55. Section 13 Equality Act 2010 states: **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.** Race is a protected characteristic. Section 23 provides that there must be no material difference in the circumstances of any comparator.

56. Section 136 provides that if there are facts from which the tribunal could decide, in the absence of any explanation, that a person A unlawfully discriminated against B, then the court must hold that contravention occurred unless A shows that A did not unlawfully discriminate against B. Section 136 does not put an initial burden on the

employee but requires the tribunal to consider all the evidence, from all sources, at the end of the hearing (*Efobi v Royal Mail Group Ltd* UKEAT/0203/16).

Conclusions

Unfair dismissal

What was the reason for dismissal?

57. Although the Claimant was recorded at the Preliminary Hearing as accepting the reason was conduct, the Claimant's Representative sought to argue in submission that the "dismissal incident" did not involve misconduct. He asserts that all the Claimant was doing was trying to join with other workers to improve his situation as he is entitled to do.

58. The misconduct alleged however is not the attempt to organise and ask for a bonus. In fact the Respondent's witnesses said the Claimant could have brought that request to them and they would have considered it. The alleged misconduct is the publishing in accessible places material that grossly misrepresented the Respondent's profits and how much agencies/agency staff are paid, with the potential to stir up ill feeling amongst staff and expose the Respondent to scrutiny by trading partners who have access to the same premises.

59. The Claimant had already accepted that the dismissal was for the potentially fair reason of misconduct and we agree.

Did the Respondent have a genuine belief that there had been misconduct, based on reasonable grounds, following a reasonable investigation?

60. We accept the Respondents' witnesses had a genuine belief this was misconduct as it misrepresented company financial information and was posted in places where it could be seen by trading partners and in a manner that could stir ill feeling among staff.

61. The matter was reasonably investigated. The Claimant did not dispute that he had posted the material and the documents were plain to see, but the Claimant did have an opportunity to explain his position.

62. The real issue is whether there were reasonable grounds to consider there had been misconduct. We find that there were reasonable grounds to find the Claimant had misrepresented profits. The material did seek to persuade those who read it that the Respondent's profits were £4.5 million which is grossly inaccurate given the Respondent's tax return for 2016.

63. The Claimant did not however suggest agency workers were paid £14-£16 per hour and there were no reasonable grounds for thinking this. His claims related only to

the agency, though again they were not accurate and overestimated what the Respondent pays the agency.

64. We do however accept there were reasonable grounds for concluding that the inaccuracies that he did post had the potential to stir up disaffection amongst staff.

Was a fair procedure followed (the Claimant suggests that there was a failure to arrange an appeal against the final written warning and so it was unfairly taken into account; and there is a dispute about the accuracy of the notes taken at the disciplinary meetings)?

65. We have found that the Respondent's notes were accurate and the procedure for the dismissal fair. The Claimant was invited to a disciplinary meeting and an appeal meeting at which he was represented by his Union Representative and had an opportunity to put his case.

66. We address our findings in relation to the final written warning below, as part of the decision in respect of reasonableness of the dismissal.

Did the decision to dismiss fall within the band of responses open to a reasonable employer (the Claimant contends that the decision was too harsh as the canteen and notice board was not accessible by customers and suppliers)?

67. Firstly, addressing the issue raised within the issues by the Claimant, we have found as a fact that the canteen and notice board are accessible to trading partners (customers), some of whom are based on the Respondent's premises and have access to those areas.

68. The Respondent has particularly tight practices in relation to the company's financial information because of the nature of the sector in which it operates. Only the Managing Director is privy to the kind of detailed financial information which the Claimant claimed to present. The Claimant in his contract was on notice of the confidentiality of the Respondent's affairs and his obligations in this respect. In all these circumstances we cannot find it beyond the range of reasonable responses open to an employer for the Respondent to dismiss for fabricating and presenting such information as true where trading partners (customers) and other staff could see it, and with the potential to stir up disaffection in staff.

69. In any event, we agree that it was reasonable for the Respondent to take account of the final written warning. We accept that the Claimant ultimately did not pursue his appeal. Whatever the circumstances of the aborted appeal hearing, the Claimant did not chase up action on his appeal. We do not consider the warning was in bad faith or without prima facie grounds or manifestly inappropriate. The Claimant removed safety guards without authority on a machine that did not even belong to the Respondent. He carried out work he was neither trained or authorised to do and the Respondent's response was reasonable.

70. Given that the Claimant was on a final written warning it was reasonable to dismiss for this further incidence of misconduct.

71. The Respondent did in fact also take into account the request for an external building quotation and the suggestion for a new building, whereas there had been no disciplinary action in respect of this. Nevertheless we consider it was reasonable in the circumstances to take account of all the background in deciding how to deal with the misconduct. The Claimant did have a history of going outside his remit in a manner that exposed the Respondent to risk. All three incidents have that in common. That was relevant to the decision as to how to deal with the Claimant.

If the dismissal was unfair, should any compensation be reduced by reference to Polkey or to any contributory conduct?

72. Having found the dismissal fair there was no need to address this.

Direct race discrimination

Did the Respondent fail to provide training for the Claimant in September/October 2016 on his return to work? If so, was this treatment of the Claimant less favourable treatment compared to the way Mr Hardziej, who stood in for the Claimant, was treated? If so, was it because of the Claimant's race and the fact that he is not Polish?

73. It is correct the Respondent did not provide the Claimant with the training it provided to Mr Hardziej in September/October 2016 (Reach truck, Fork Lift, Pallet Reach Stacker Certificates). They could not provide training to the Claimant then. The Claimant was off sick in August when the training was arranged and only returned after an 11 week absence on 4th October 2016. The training dates were 4th-7th October 2016, the week the Claimant returned. He accepts he could not expect to attend training immediately on his return to work. The Respondent might have arranged training for the Claimant if he had not been absent as training was identified in his April review on Hand Reach Truck and Fork Lift, even though these were not essential for his job as Box Making Operative. The Claimant did receive other training and had had the essential training for his own role. We therefore do not accept the Claimant was treated less favourably.

74. In any event Mr Hardziej is not an appropriate comparator as there are material differences between the two. Mr Hardziej stood in for the Claimant during his absence as he was cover staff and covered holidays and other absences of staff generally. His duties were not limited to Box Making and he required the training he received in September/October 2016 to carry out the basic duties of his cover role effectively. The Claimant's role was Box Making Operative and he had had the required training for his own role. The Respondent had agreed to additional training but had not yet provided it due to the Claimant's absence.

75. There is no evidence the difference in the way the two were treated had anything to do with the Claimant's race and the fact that he was not Polish. Training had been highlighted in the Claimant's review but then he had been on an extended absence when the training was arranged, the Respondent does not usually arrange training for November and December as they are busy periods. By December the Claimant was dismissed in any event. Moreover the Claimant had had the requisite training for his role and the additional training was not essential for his role.

Did the Respondent fail to appoint the Claimant to a CQ post in or around November 2016? If so, was that less favourable treatment compared to a hypothetical comparator? If so, was it because of the Claimant's race and the fact that he is not Polish?

76. Firstly, although a post was advertised in the event the appointment did not go ahead and nobody was appointed to a Quality Control post around November 2016. So it is correct the Claimant was not appointed, but nor was anyone else. It was not less favourable treatment than a hypothetical comparator. Nor was it because the Claimant was not Polish but because there was no post in the end.

77. That said the Respondent also did not think the Claimant was ready and did not think he had the requisite skills and experience. The hypothetical comparator in the same circumstances as the Claimant also would not have been given the role (which in any even did not exist).

78. The failure to appoint the Claimant had nothing to do with the Claimant's race. The Respondent was open to the Claimant being ready at some point. However at that time he did not have the 4-5 years' in depth experience in the food industry, including in depth knowledge of quality control in the food industry. At the time he was also struggling in his own role, had been on extended sickness absence and was on a final written warning.

Was any claim presented outside of the time limit? If so, is there evidence of conduct extending over a period that would bring the claim in time; or would it be just and equitable to extend the time limit?

79. Having found against the Claimant in respect of the substantive race discrimination claims there was no need to consider the time limit points.

<u>Wrongful dismissal</u>

Did the Claimant act in such a way as to justify summary dismissal, or is he entitled to notice pay?

80. The question here is whether the incident in relation to Christmas bonus in isolation was so serious as to amount to gross misconduct justifying withholding notice. We find that it was.

81. As before we take account that the contract is clear that the Respondent's business affairs are to be kept confidential and the Managing Director does not even share sensitive financial matters with other Senior managers. The Respondent also asserted that it brought the company into disrepute which was gross misconduct in itself.

82. We agree the conduct had the potential to bring the Respondent into disrepute but for different reasoning to the Respondent. We consider that the documentation was sufficiently "strange" that it was not likely to be seen as very credible or reliable if it came to the attention of the trading partners, and that they would likely look to the official Companies House returns rather than rely on documentation that was clearly from disaffected staff. We therefore do not agree that the Respondent was exposed to issues in respect of profits being misrepresented to trading partners.

83. However we do accept the notice and the fabricated accounts had the potential to cause disaffection amongst staff. We consider that in itself, along with the fact that the notices posted in view of trading partners suggested that staff were disaffected, has potential to undermine the Respondent's credibility with trading partners. The Respondent relies on having a reputation as suitable to be part of the supermarket supply chain. We heard their reputation as a good employer is essential in that environment/sector that is so closely regulated by Sedex. We also heard the strict requirements to protect the integrity of the produce given its destination to be sold at supermarkets and consider that material of the nature the Claimant posted has the potential to cause concern about the risks disaffected staff might pose to the produce.

84. We therefore consider there was a serious reputational risk with trading partners and within the sector because of the potential effect of it being believed there were disaffected staff. For these reasons we consider the conduct sufficiently serious to be gross misconduct.

Wages

Is the Claimant owed any overtime pay, having regard to the provisions of his contract of employment and the hours worked?

85. It follows from our factual findings at paragraphs 48 to 50 that the Claimant was not owed outstanding overtime. He worked 44 hours in 4 weeks and 33 hours in the next 4 weeks. This gave an average of 38.5 hours over 8 weeks for which he was paid. These were his normal hours. Overtime rates were paid for any additional hours above normal hours and above 40 hours. The Claimant was paid for such overtime. He claimed he should have received the overtime rate for the weeks his normal hours were 44 hours. These were not additional over time hours and therefore did not attract the overtime rate. He is not owed any overtime on this basis.

Next steps

86. The Claimant's claims have not been successful. It follows that the stayed claims are are out of time (substantially). Nevertheless the order staying the claim made clear the parties' views would be sought as to how to proceed. The parties are therefore to provide their views on how to proceed in respect of the stayed claims to the Tribunal and to each other by **9 November 2018.**

87. The Claimant was ordered to pay a deposit in respect of both the unfair dismissal and the race discrimination claims. All have been unsuccessful. It appears to us that we have made our decision for substantially the same reasons as the deposits were ordered however this is a provisional view. The parties are ordered to make any representations in respect of the deposits and whether they should be paid to the Respondent or returned to the Claimant on or before **9 November 2018.** Again the parties should write to the Tribunal and copy in each other.

Employment Judge Corrigan
19 October 2018