



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr R Semba

v

Ocado Central Services Limited

Heard at: Watford Employment Tribunal

On: 15-17 April 2019

Before: Employment Judge C Palmer
S Hamill
R Leslie

Appearances

For the Claimant: In person

For the Respondent: Mr N Pourghazi, counsel

JUDGMENT

1. The claimant's claim for race discrimination fails and is dismissed.
2. The claimant's claim for unfair dismissal succeeds.
3. The total amount payable by the respondent to the claimant is £1,751.80, comprising:
 - 3.1 £992.60 for the basic award which is £4963 reduced by an 80% contribution.
 - 3.2 £759.20 for the compensatory award which is £3796 reduced by an 80% contribution.

REASONS

Claims

1. By a claim form presented on the 23 March 2018, following a period of early conciliation from 26 January to 26 February 2018, the claimant brought complaints of unfair dismissal and direct race discrimination.

Issues

2. These are set out in the Case Management Decision.

The issues for unfair dismissal are:

3. What was the principal reason for dismissal and was it a potentially fair reason in accordance with Sections 98(1) and (2) of the Employment Rights Act 1996 (ERA). The respondent asserts that it was a reason relating to the claimant's conduct.
4. If the dismissal was for a potentially fair reason, was the dismissal fair or unfair in accordance with ERA section 98(4) and, in particular, did the respondent in all respects act within the so-called 'band of reasonable responses'?

Remedy for unfair dismissal

5. Was there a chance that the claimant would have been dismissed in any event at some point and, if so, what adjustment, if any, should be made to the compensatory award?
6. Can the respondent show that the claimant has failed to take reasonable steps to mitigate his losses?
7. Would it be just and equitable to reduce the amount of the claimant's basic award because of any blameworthy or culpable conduct before the dismissal, and to what extent? ERA section 122(2).
8. Did the claimant, by blameworthy or culpable actions, cause or contribute to his dismissal to any extent; and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award pursuant to ERA Section 123(6).

Equality Act 2010 section 13: direct discrimination because of race

9. It is not in dispute that the respondent dismissed the claimant. The claimant identifies his race as Polish and alleges that he was dismissed because he is Polish.
10. Was the dismissal less favourable treatment, i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others (comparators) in not materially different circumstances?
11. The claimant relied on three comparators, Mr Mohammed Muzammal, Mr Ben Perkins and a Brazilian driver whose name the claimant did not know. The claimant further relies on a hypothetical comparator.
12. If there was less favourable treatment was this because of the claimant's race.
13. It was agreed that we would deal with liability first, then remedy.

Evidence

14. We heard evidence from the claimant and, for the respondent, from James Smith, Operations Manager, based in Dordon (who had heard the claimant's appeal) and Melanie Bailey (who oversees the HR team and attended the appeal with Mr Smith).
15. We viewed the footage of the accident provided by the respondent from the SmartDrive camera and some footage provided by the claimant showing the road and signage on the other side of the bridge.
16. There was a witness statement from Mr Pepper, who chaired the disciplinary hearing. The respondent did not call him as he resigned with immediate effect on 3 April 2018, following a disciplinary investigation. His resignation letter criticised the company and the respondent considered that it was not reasonable or practical to call him. The respondent invited the tribunal to place significant weight on Mr Pepper's written statement even though it was hearsay.
17. As the claimant was unable to cross-examine Mr Pepper about his belief that Mr Pepper wanted to get rid of him (related to his flexible working application and an email dated 7 October 2018) we do not accept that significant weight should be given to his statement. Without his evidence being tested we cannot determine whether, and, if so, to what extent he may have been influenced by events prior to the accident which caused the respondent to dismiss the claimant. In any event, it is sufficient for us to rely on the contemporaneous disciplinary notes of the hearing Mr Pepper chaired. Further, Mr Smith reviewed all the documents during the appeal process, starting afresh, so we have his evidence to the tribunal as well as the contemporaneous notes of the appeal.
18. There was an agreed bundle of documents and we read those to which we were referred. We refer to relevant page numbers.
19. Having heard the evidence and on the balance of probabilities, we find the following facts.

Facts

20. The claimant started working for the respondent on 24 October 2005. He was dismissed summarily on 2 November 2017. He was employed as a Customer Service Team Member (CSTM), and his job involved driving Ocado vans to deliver goods. He had in fact been a driver for 28 years. The claimant had a clean licence and a clean disciplinary record with the respondent. He had not had any previous accidents in which he had been at fault.

21. The claimant worked at Ocado's Hatfield Customer Fulfilment Centre until August 2017. He applied to transfer to Milton Keynes and this was granted. He started there on 14 August 2017 (47).
22. The claimant's flexible working arrangements did not automatically transfer from Hatfield to Milton Keynes, so he had to apply again. Initially the claimant was told by the Milton Keynes spoke (site) that the same flexible working hours would not be available at Milton Keynes and he could only apply again in 6 months' time as this was company policy following a transfer.
23. He completed a Flexible Working Application Form on 6 September (69-70), which was mislaid so the working pattern had not been finalised when the claimant started working at the Milton Keynes spoke in August 2017. The claimant then contacted Senior Management at Hatfield because he did not consider that the Milton Keynes management would help him. It was eventually resolved, with a compromise, on 16 October 2017 (82).
24. The claimant said that Mr Pepper wanted to get rid of him because he went behind his back and contacted his previous manager for assistance with his flexible working application. This view was reinforced, in the claimant's view, by a comment made by Alex Marriott (Planner, Service Delivery) that the 'new transfer' (the claimant) 'likes to get back late on PM shifts' which the claimant thought suggested he was being watched (57).
25. The claimant was also concerned about another email from Chrystie McKenzie (who was a driver but training to be a Team Manager) dated 7 October 2017, sent to Mr Pepper and Mr Perkins (81) stating:

“Once again Radoslaw [the claimant] has parked in the front car park and I found him using the kitchen this morning. I'm weary of his all-round attitude and sense of entitlement. Please be on the look-out for anymore undesirable behaviour and Update HR App as needed.”
26. As Ms Bailey said, this does not sound good but she justified it saying that it indicated that the situation needed to be monitored.
27. The claimant said all staff were parking outside and kitchen facilities should have been used by all staff including him saying that: 'unless they thought I was the "wrong" type of staff, this can be seen as discrimination. It's almost as if Milton Keynes Management were looking for any reason to complain about me.' We accept the respondent's evidence that there was a different kitchen and parking area for the drivers so it was not less favourable treatment of the claimant because he is Polish.
28. We accept Mr Smith's evidence that he was not aware of the claimant's issues relating to his flexible working, the comment made by Mr Marriott and the argument about the kitchen and car park. Mr Smith came from a different area and we find that these disputes did not influence his decision to dismiss the claimant. As Mr Pepper was not called to give evidence, we cannot say whether Mr Pepper was influenced by these issues when he

dealt with the claimant's disciplinary, but he would have been aware of them. The claimant believed that they led to Mr Pepper's decision to dismiss him. The claimant relied on these issues significantly more than his claim that his race was the reason for his dismissal.

Accident 23 October 2017

29. At about 7pm on 23 October, on a country road, there was an accident on a narrow humpback bridge, between an Ocado van driven by the claimant and a car driven by a young local woman (as described by the claimant).
30. There was no dispute that the sign leading up to the bridge on the left-hand side showed only that there was a hump backed bridge ahead and the sign showing the road narrowing, which should have been on the top half of the same pole, was missing. The claimant said he did not see the hump backed bridge sign and that he was dazzled by the headlights of the oncoming car. There was a collision between the Ocado van and the car, which led to some quite serious damage to the side of the Ocado van (90).
31. The Ocado van was fitted with a SmartDrive camera, which takes footage of the road in front of the vehicle as viewed from the driver's seat, as well as footage of the driver himself. Mr Pepper was asked to review the footage by Ben Perkins and they agreed that the matter should be investigated.
32. The claimant reported the accident to Sopp + Sopp, who manage the respondent's insurance. A log of the accident was made by the claimant (97-98).
33. There was accident report (84-95), which was signed by the claimant on 23 October. It stated that:
 - 33.1 the Ocado van's speed at the time of approach to the bridge was 40 mph.
 - 33.2 The speed at the time of impact was 15 mph;
 - 33.3 The vehicle was not in a drivable state after the accident.
 - 33.4 The description of the incident by the claimant. The description provided by the claimant was that unknown to him that the bridge narrowed and as he went over it the third-party car passed and there was not enough room to both pass. On the third-party side of the road there was warning signs for the bridge narrowing; on his side there wasn't (89).
 - 33.5 The road conditions were wet.
 - 33.6 It was a one-way street, at night with no traffic.

34. There was no dispute that the claimant was within the speed limit or that there were two lanes, though it was not a wide road. The claimant later said the road was not wet but his evidence was not consistent and it was reasonable for the respondent to believe this to be the case as the initial report referred to the road being wet.
35. The respondent reasonably assessed the damage to the vehicle as serious, though the claimant alleged it was minor. There was severe damage to the driver's side (and other damage (p90) and the respondent's estimated costs were £2,325. The claimant got an estimate for £260.61 (195) but this appears to be incomplete. Having seen the photographs of the damage and the breakdown provided (90) which covered the wing, cab door, front wheel arch, offside headlamp, the respondent's estimate was reasonable.
36. As would be expected, Ocado takes driving standards very seriously and expects the highest standards of driving. It treats its CSTMs as professional drivers. They are expected to drive carefully and within the speed limit, taking into account the conditions of the road. There is regular driver training. The vans and drivers are partly the marketing for Ocado's business being the face of Ocado to its customers and the public.
37. The respondent's handbook sets out examples of gross misconduct which includes 'Driving that falls far below Ocado driving standards' (61). The respondent relied on this.

Investigation

38. Mr Perkins held an investigation meeting with the claimant on 26 October (107-112). The claimant said it was wet and dark but not raining and he saw the car coming but not the narrow bridge, or the sign which showed the hump backed bridge. The claimant braked hard and moved to the left when he realised he could not get past the car. The claimant said that a less experienced driver would have smashed into the car, but he avoided a more serious collision. The respondent reasonably decided that there was sufficient evidence to proceed to a disciplinary hearing.

Disciplinary meeting

39. On 30 October Mr Pepper wrote to the claimant inviting him to a disciplinary meeting on 2 November. He explained the allegations which were: damage to an Ocado vehicle and a third-party vehicle, dangerous driving and driving without due care and a breach of Ocado Driving Standards. Mr Pepper noted that this may constitute an act of gross misconduct and could result in summary dismissal (p118). He included an extract from Ocado's staff handbook (58-62) and the investigation meeting notes from the meeting with Ben Perkins. The claimant remained on suspension. He was told of his right to be accompanied.
40. The meeting was held on 2 November, chaired by Mr Pepper with Rebecca Foster taking notes. The claimant was accompanied by his union

representative, Dean Wass. The footage of the accident was shown to the claimant at the beginning of the hearing.

41. The claimant watched the footage and was then asked questions. He said he was about an hour late because of an earlier accident, that he was not speeding, it was a straight, normal road, it was dark and the sign of the road narrowing was missing so he did not know there was a narrow bridge. When he realised there was a narrow bridge it was too late to brake as he was already on it. He then braked, went to the left but still hit the car.
42. There was a dispute about whether the claimant was driving just inside the white line delineating the middle of the road or over the white line. The claimant said he was on the inside of the white line. The respondent believed from looking at the footage, reasonably so, that he was just over the white line. It was not suggested there was any other traffic except the oncoming car whose lights could be seen in the distance, which the claimant said blinded him. This, the claimant said, was driven by a young local woman on her own but when her father arrived at the scene to collect her he said there were two in the car, the claimant suggesting that she should not have been driving on her own. There was no other evidence of this.
43. During the interview the claimant was sometimes reluctant to answer questions insisting that he had done nothing wrong, focussing on the missing sign and not being aware of the narrow bridge. Mr Pepper repeatedly said that the claimant was not accepting fault and tried to get him to acknowledge fault. The claimant said that if he admitted blame it would be taken against him. The claimant did say during the meeting that 'we are human, we make mistakes, the only people not having accidents are those not driving'. He said, "It's not my fault but I would do it differently" and referred to his exemplary record. He said he had learned his lesson to which Mr Pepper said, "I don't know how you understand and learn if you've done nothing wrong", to which the claimant responded "Like I say, I would do something differently" and agreed that he should have slowed down (130).
44. At the end of the meeting Mr Pepper issued the claimant with a final written warning for damage to an Ocado vehicle and a third party one. In relation to the dangerous driving Mr Pepper said the claimant failed at any point to take responsibility for his actions and commented that at no point had the claimant said, "I shouldn't have done that or should do something differently". Although we accept that the claimant did not accept fault, he did say, on two occasions (p129, 130), he would do something differently and he should have slowed down. He also said he had learned his lesson.
45. When the claimant repeated that he was an experienced driver with no previous accidents, Mr Pepper said that he would expect the claimant to hold a higher standard as an experienced driver with 12 years' service and should have noticed there was a hazard. He also said that there was no potential for retraining if he had not acknowledged and accepted there had been an error on his part, so with all that in mind, Mr Pepper said he was driving without due care and attention and he was dismissed.

46. The claimant did not help himself by interrupting Mr Pepper, failing to answer some of the questions and saying he should not be blamed. He refused to admit fault. He did, however, say he had learned from the accident and would do things differently. This was not enough for Mr Pepper to find that he would not repeat his mistake. The claimant was not given any credit for his 12 years of unblemished service and his clean driving record
47. As to whether Mr Pepper was influenced by events prior to the accident, and dismissed the claimant because of these, we make no findings as he was not present for his evidence to be tested.

Dismissal letters

48. On 7 November 2017 Mr Pepper wrote to the claimant saying that his employment was terminated for gross misconduct which was driving without due care and dangerous driving (137).
49. A second letter (138) confirmed that the claimant was given a final written warning for the damage to an Ocado vehicle and third-party vehicle. The letter set out what improvement was required and the consequences of a failure to improve.

Appeal

50. The claimant appealed. The grounds were that there was a missing or not visible traffic road sign, his speed limit was adequate for the driving conditions, the decision was too harsh, he had 12 years' service with Ocado and a good track record and the damage to the vehicle was minimal (p150). He said that during the meeting with Mr Pepper he felt he was being pressured into admitting the accident was his fault and given the points above he did not agree that he should be blamed for the collision.

Appeal meeting

51. The appeal took place on 29 November 2019 and was chaired by James Smith, Operations Manager. Mel Bailey, HR Business Partner, took notes. Andy Hearn accompanied the claimant. The claimant said that Mr Smith knew Mr Pepper suggesting that Mr Smith would therefore support Mr Pepper's findings. They were colleagues who worked together but there was no evidence of a mafia, as the claimant alleged.
52. Mr Smith said he did not know the claimant was Polish and we have no reason to doubt this.
53. At the beginning of the appeal hearing the claimant was shown the Smartdrive footage.

54. The claimant said that he was not speeding but he missed the sign about the humped back bridge and the sign showing the road was narrowing was missing. The claimant later reported this to the council. The claimant said he was sure if there had been the other sign he would have seen it. Mr Smith assumed that if the claimant had not seen one sign he would not have seen the other one.
55. Mr Smith said that 47 mph was too fast in the circumstances and that the other car was on the bridge first, looking at the footage, so had priority. The claimant did not accept this, saying he was a good and safe driver, had no points on his licence in 26 years and it was not clear that the other car was on the bridge first. We find that it was reasonable for Mr Smith to believe that the car was on the bridge first from the footage.
56. The claimant maintained that the accident was not his fault and he would admit it if it was the case. He also said he would have acted differently if he had been aware of the circumstances. At the end of the interview the claimant said the worst case was 50/50 as both cars didn't react in time. He also said it was his first time on this road whereas the other driver was local and knew the road (178).
57. The claimant agreed that the risk to the company was not just damage of the van but also the negativity spreading into the local region that Ocado drivers drive fast and crash into people (179).
58. The claimant found out later, through the other driver, that the third party's insurer had assessed the fault as being 50/50. The claimant argued that he should have been suspended until the insurance company had assessed fault. This was not the respondent's policy and we accept it was reasonable to proceed with the disciplinary process without waiting.
59. In making his decision to uphold Mr Pepper's decision to dismiss the claimant for gross misconduct, Mr Smith took into account the following:
 - 59.1 That if the claimant failed to see the sign of the bridge he would not have seen the sign of the road narrowing if it had been on the post.
 - 59.2 The speed at which the claimant was too fast given the circumstances, i.e. the narrow, wet, dark road, the oncoming car with bright lights.
 - 59.3 An assumption that the claimant was thinking of his next stop as he was an hour late.
 - 59.4 The claimant's lack of understanding that the incident could have been his fault (para 26).
 - 59.5 The involvement of a third party.

- 59.6 The significant damage to the van which had cost several thousand pounds to repair. The estimate we were shown was for £2,325.
- 59.7 The claimant would not benefit by further training because he did not acknowledge that his driving was in any way deficient.
- 59.8 The fact that the claimant had 12 years' experience of driving for Ocado, 28 years in total which would put a higher level of responsibility on a driver. However, Mr Smith also said that the fact that the claimant had 12 years' experience was not relevant as the situation needs to be judged on what happened in that particular scenario rather than looking at a person's experience and length of service.
- 59.9 Other employees had been dismissed in similar circumstances so that the claimant had not been treated differently.
- 59.10 The reputational damage to Ocado, as their van acted as a billboard for Ocado.
60. Mr Smith also said that if he had not dismissed the claimant this would be allowing him to return to the road and continue driving dangerously. We do not accept that this was a reasonable assumption to have been made in view of the claimant's unblemished driving record and the fact that the claimant said he would do things differently and should have slowed down.
61. Mr Smith relied on the same matters as Mr Pepper and came to the same conclusions.
62. We accept that the reason for the claimant's dismissal was misconduct, namely his driving and the fact that he refused to take the blame for the accident.
63. We do not accept that a reasonable employer would have labelled the claimant's conduct as gross misconduct. The respondent could not reasonably call the claimant's conduct a deliberate or wilful contradiction of the contract terms nor gross negligence. Just because the conduct is called 'gross misconduct' does not make it so.
64. We accept that it was reasonable for the respondent to make findings and take into account that the claimant's speed may have been too fast (in view of the road conditions), his failure to see the sign that was there, the involvement of the third party and the likelihood that she was on the bridge first, the significant damage to the van and that it was not drivable, that other employees had been dismissed in similar circumstances (but for length of service). We accept that Ocado's reputation is very important and that the Ocado vans do perform a marketing function for the company. There was no known damage to public opinion in this case though this cannot be guaranteed and it was reasonable to consider it as a risk.

65. While there was no evidence that the claimant would have not seen the sign of the narrowing road even if it had existed and that he was driving too fast because he was late we do not go so far to say that no reasonable employer would have made these assumptions, though they were not supported by the evidence.

Race discrimination and comparisons with other drivers

66. The claimant did not allege race discrimination during the investigation, disciplinary or appeal process, nor did he refer to it in his witness statement, relying more on the fact that Mr Pepper wanted to 'get rid' of him because he went behind his back and contacted a previous manager for assistance about his flexible working request, the email of 7 October 2017 and that he was being watched.
67. When asked whether he thought he was treated less favourably because he is Polish, he said he was 'not sure.'
68. The claimant alleged he was treated less favourably than Mohammad Muzammal who had one accident in 2017. This was where a third party drove their car into his van, so it was clearly not the fault of Mr Muzammal and he is not an appropriate comparator
69. The other named comparator was Ben Perkins but two of his accidents in 2006 and 2007 were caused by third parties. In 2005 he bumped into another vehicle at low speed as he left a petrol station forecourt but it was established that the damage was minimal and Mr Perkins immediately accepted fault. This is not an appropriate comparator, the circumstances being different, as the damage was minimal, and the incident took place 14 years ago.
70. The claimant referred to a Brazilian driver but he could not provide the name and the respondent, despite trying, was understandably not able to identify him.
71. Other drivers, who were British, were dismissed for accidents, though none had 12 years' unblemished service. These included John Ikioumoton (white Irish) and Reece Johnson (white British) who drove into a vehicle causing damage. Jamie Lambert (white British) hit a cyclist at low speed with his van, causing little damage to the van and no injury to the cyclist.
72. There was no evidence that the claimant was treated differently to other employees on grounds of his race. On the contrary, if anything, they show that white British employees were dismissed after accidents if they were at fault. The circumstances of comparators provided by the claimant were not similar.
73. Further, we accept that Mr Smith did not know the claimant was Polish

The law

74. What constitutes gross misconduct is a mixed question of fact and law, which involves either deliberate wrongdoing or gross negligence. The question is whether it was reasonable for the employer to regard that conduct as gross misconduct on the facts of the case. The fact that the employee was in breach of the employer's policy did not necessarily amount to gross misconduct simply because the disciplinary procedure described it as so.
75. Section 98 ERA provides:
76. The test for whether an employer has acted reasonably in a conduct dismissal is set out in *British Homes Stores v Burchell* [1980] ICR 303, EAT. The test of reasonableness is:
- 76.1 Did the respondent have a genuine belief that the claimant had committed misconduct?
- 76.2 Did the Respondent carry out as much investigation into the matter as was reasonable in the circumstances?
- 76.3 From that investigation, were there reasonable grounds for the respondent to conclude that the claimant had committed misconduct.
77. The question then is whether the decision to dismiss fell within the range of reasonable responses which an employer might have adopted. A dismissal will fall outside the range of reasonable responses only if no reasonable employer would dismiss in the circumstances. A tribunal should not substitute its own factual findings about events giving rise to the dismissal nor substitute its own view of the appropriate sanction.
78. The tribunal's task is to assess the reasonableness of the decision to dismiss against the objective standards of the hypothetical reasonable employer, measured by reference to the band of reasonable responses.

Polkey deduction

79. If there was a chance that the claimant would have been dismissed in any event at some point the compensatory award may be reduced.

Contributory fault

80. S123(6) Employment Rights Act provides that where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.
81. S122 (2) ERA provides that where the tribunal considers that any conduct of the complainant before the dismissal was such that it would be just and

equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce that amount accordingly.

Equality Act

82. Section 13 Equality Act provides that 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.
83. The claimant must show that he was treated less favourably than a real or hypothetical comparator whose circumstances were not materially different to his (s23 Equality Act). The relevant circumstances are those factors which the alleged discriminator has taken into account in deciding to treat the claimant as he did, with the exception of the protected characteristic (see Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285).
84. A difference in treatment and a difference in race is not sufficient see *Royal Mail Group Ltd v Efoji* [2019] EWCA Civ 18. The focus is on the employer's reason for their behaviour. Why did they do it?
85. Section 136 EqA provides:
- 85.1 If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
- 88.2 (3) But subsection (2) does not apply if A shows that A did not contravene the provision.
86. The burden of proof provisions have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other (Hewage v Grampian Health Board [2012] ICR 1054).
87. Where a claimant fails to establish a prima facie case, the necessary inference is that there is in all probability an innocent non-discriminatory explanation for what occurred. The claim is then little more than assertion and the employer should not then be required to provide any further explanation (*Efoji*).

Submissions

88. The respondent provided written submissions. In brief, the respondent submitted there was no evidence of race discrimination and that there was clear evidence of a non-discriminatory reason why the claimant was dismissed, the reason being his driving that led to the accident. The claimant had not identified any valid actual comparators. So, there was no prima facie case of race discrimination. In relation to the dismissal, the respondent submitted that there was a fair procedure, there was no

inconsistent treatment of the claimant compared to others and the dismissal was within the range of reasonable responses.

89. The claimant made no further submissions.

Conclusions

Discrimination

90. We find there was no evidence of direct race discrimination against the claimant on the grounds that he is Polish. He was not treated less favourably, when he was dismissed, than the comparators he identified. The circumstances of the comparators' accidents were different, so they were not appropriate comparators.

91. There was also evidence to show that British employees were also dismissed in circumstances where the actual accident was not dissimilar to the claimant's, except for length of service.

92. The reason why the claimant was dismissed was his conduct relating to the accident on 23 October. The decision to dismiss him was not influenced by his race. Indeed, we accept that Mr Smith did not know he was Polish.

93. The claimant himself said that he was not sure he was treated less favourably because he is Polish. He relied more heavily on his concerns about his flexible working application, being watched for returning late and the email of 7 October 2017 as a reason for his dismissal.

94. The claimant has failed to discharge the burden placed upon him to show a prima facie case of race discrimination as there is no evidence that he was treated less favourably than the named comparators nor of a hypothetical comparator. The claim for race discrimination is dismissed.

Unfair dismissal

95. The claimant was dismissed because of his misconduct, which is a potentially fair reason for dismissal. The respondent genuinely believed that the claimant had committed misconduct.

96. We accept that the respondent carried out a reasonable investigation and process before making a decision to dismiss. The procedure was in accordance with the ACAS guidance and the respondent's procedure.

99. There was a reasonable investigation, which entitled the respondent to proceed to a disciplinary hearing.

100. The claimant was offered the right to be accompanied.

101. The disciplinary hearing was chaired by Mr Pepper. The claimant appealed and the appeal was held by Mr Smith, who was an Operations Manager.

Although Mr Smith knew Mr Pepper well, as colleagues, we do not accept the claimant's allegation that there was some sort of 'mafia', so that it was inevitable that Mr Smith would follow Mr Pepper's decision. In fact, Mr Smith did adopt the same findings and come to the same conclusion as Mr Pepper.

102. We also accept that it was reasonable for the respondent to find that the claimant was at least 50% to blame for the accident, partly because they believed, on reasonable grounds, that the third party was on the bridge before the claimant and that he did not see the hazard sign so did not slow down. The claimant did accept, towards the end of the disciplinary process, that it was '50-50' between him and the third party.
103. We do not accept it was reasonable for the respondent to label the conduct as gross misconduct. The conduct was not deliberate or grossly negligent and there were mitigating circumstances such as the missing sign. It was misconduct because of the claimant's failure to slow down before the bridge when he saw the oncoming lights, having 15 seconds to slow down and the collision with the oncoming car.
104. We find that the dismissal was unfair in that no reasonable employer would have dismissed the claimant in the circumstances. The relevant circumstances are: first the claimant's long service with no previous accidents which we find should have been taken into account in his favour, when deciding the penalty and second, that he did, albeit reluctantly, agree that it was 50/50% his fault, and that he would do things differently.
105. Mr Smith's evidence on the claimant's length of service was not entirely consistent as he also said that the situation needed to be judged on what happened in that particular scenario rather than looking at a person's experience and length of service.
106. We find that no reasonable employer would not give an employee credit for 12 years' unblemished service in circumstances where there were some mitigating circumstances, such as the lack of signage about the narrow road on the claimant's side of the bridge.
107. During the disciplinary hearing and the appeal there was great emphasis placed on the fact that the claimant would not take any responsibility for the accident, continually denying he was at fault. From the evidence we find that the respondent would not have dismissed the claim if they had accepted the claimant had taken responsibility, but would instead have been given a final written warning with a condition that he had to have further training.
108. We find that the claimant did, eventually, admit some fault and said he had learned his lesson. If the claimant had been given a written warning, instead of being dismissed, we find that he would have continued working for the respondent as he had for the previous twelve years.
109. Mr Smith said that he looked for mitigating circumstances in a case like this. The main point for him was the claimant's lack of any understanding that the

incident could have been his fault. This made him believe that retraining him would be ineffective so that they would be allowing him back on to the road knowing that he could cause another accident. Mr Smith said that the claimant's inability to understand that he had caused the accident was a key factor in his decision-making. However, he did acknowledge Mr Semba's statement that he was aware that his driving had contributed to the incident, despite his unwillingness to admit fault.

110. Mr Smith assumed that because the claimant would not admit any wrongdoing (or at most 50%) he would continue to drive in that manner and continue to risk the safety of customers and members of the public. We find that no reasonable employer would reach this conclusion in view of the claimant's evidence that he would do things differently and in view of his good driving record. The claimant did, albeit reluctantly, admit fault in the appeal meeting and said that he would do things differently. He said that "I learned my lesson, I took everything on board what you say", "Like I say, I would do something differently" and "I should have slowed down".
111. Finally, in deciding to dismiss the claimant Mr Smith took account of the fact that it was a serious incident, the damage to the van and the impact on the third party as well as the more general damage to the Ocado brand. However, for damage to the van, the claimant was given a final written warning. The impact on the third party was unknown and the third-party insurers said it was 50-50 fault.

Conclusion

112. We find that the claimant was unfairly dismissed. We also find that there was no race discrimination in relation to the dismissal.

Remedy Hearing

113. The claimant found contractor work nine weeks after his dismissal. It was agreed that his net loss for the nine weeks was £3,088 for loss of earnings and £358 for his pension loss. It was also agreed that the basic award was £4,963. The respondent did not argue that the claimant had failed to mitigate his loss.
114. We award £350 for loss of statutory rights.
115. The claimant found contractor (self-employed) work after nine weeks, but provided no evidence about what he was paid nor his expenses. He said he earned a net profit of about £11,000 and had a significant pension loss. This was the only evidence he provided.
116. At the Case Management Hearing on 10 July 2019 Employment Judge McNeill QC made an order that his schedule of loss set out how much money he had earned since his dismissal, how it was earned and if the claimant's claim included a claim for loss of pension, he must state precisely how much was being claimed and how that claim had been calculated. On

the first day of the Hearing (15 April) the claimant was told to produce all documents supporting his claim for compensation but he had not done this.

117. Without any supporting documentary evidence of the claimant's earnings and related expenses, we do not feel able to make any order beyond the nine weeks when the claimant was not employed. We cannot simply accept the claimant's word about how much he had earned without any calculations or documents supporting his claim.

Contributory fault

118. The respondent argued that this should be 100% on the basis that the claimant was driving dangerously and because of the manner of his responses during the disciplinary proceedings. They took into account the fact that the road was dark and wet, the claimant was driving across white line at 47 mph. He passed a road hazard sign without seeing it. He did not brake until he was on the bridge. There was another car on the bridge so it had priority. He was blinded by lights on earlier bridge some way in the distance giving him time to slow down. He would not have seen another hazard sign if it had been there.
119. The respondent said the claimant blamed everything and everyone but himself, including the other driver who he said was local and a young woman. He asserted that she had a provisional driving licence when there was no evidence of this. He said the damage to the van was minimal. He pretended one sign was invisible when it was visible. He said he was not to blame. Although the claimant said if he had known of the hazard he would drive slower but that is not admitting fault. He believed he was not driving dangerously. When asked if he admitted fault in the appeal hearing he said No.
120. We find that the claimant's contributory fault was 80%. This is partly based on the claimant's driving and his conduct during the disciplinary meetings when he often failed to listen to the chair, interrupted, blamed others and insisted, certainly at the beginning, that he was not at fault in any way and was a very experienced driver. He refused to admit fault because he believed that would lead to his dismissal. However, towards the end of the appeal the claimant did acknowledge that he was at least partly at fault – 50-50, that he had learned his lesson and he would agree to training by an instructor. If he had been more co-operative we find that he may well not have been dismissed.

Polkey deduction

121. The respondent argued there should be a 100% reduction on the basis that there was no evidence that the claimant would have been given a final written warning but for the factors which the Tribunal found made the dismissal unfair. Two of the comparators admitted fault and were remorseful and they were still dismissed. The 12 years' service without accidents would

not have led Mr Smith to reach different outcome. Given the seriousness of accident the claimant would have been dismissed in any event.

122. From the evidence, we are not persuaded that the claimant would have been dismissed summarily or otherwise, but for the factors we found made the dismissal unfair. Unless there was policy of always dismissing in road traffic incidents, which was not the case, we find that no reasonable employer would dismiss for a first incident in these circumstances. We make no deduction for Polkey.
123. Having heard the evidence, we find that the claimant would not have been dismissed if the respondent had accepted that he had admitted some responsibility and that he would in future do things differently. We also find that if the claimant had been given credit for his 12 years of unblemished service as a driver, it is likely he would not have been dismissed.

Conclusion

124. The claimant has not provided any credible evidence that his dismissal was caused by his race, being Polish and his claim for race discrimination is dismissed.
125. The claim for unfair dismissal succeeds but compensation is reduced by contributory fault of 80%
126. The total amount payable to the claimant is:
- 126.1 £992.60 for the basic award after a reduction of 80% contribution;
- 126.2 £759.20 for the compensatory award (including £350 loss of statutory rights) after a reduction of 80% for contributory fault.
127. The total award payable by the respondent to the claimant is £1,751.80.

Employment Judge Palmer

Date: 22 May 2019

Sent to the parties on:

.....
For the Tribunal Office