EMPLOYMENT TRIBUNALS

Claimant: **Mr Bartosz Russ**

Respondent: **Custom Insulation Services Limited**

Heard at: **Nottingham**

On: **Monday 28, Tuesday 29 and Wednesday 30 October 2019**

Before: **Employment Judge Butler**

Members: **Ms C Hatcliff**
Mr S Hemmings

Representatives

Claimant: **In Person**
Respondent: **Mr J Gidney of Counsel**

JUDGMENT

The unanimous judgment of the Employment Tribunal is that the claims of victimisation and unfair dismissal are not well founded and are dismissed.

REASONS

The Claim

1. The Respondent is a company based in Burton-upon-Trent that provides insulation services to business. It employed the Claimant as a General Operative from February 2014 until his dismissal on 11 January 2018. He presented his claim form on 6 December 2017 after a period of early conciliation from 18 April 2017 to 24 May 2017.

2. As it was not clear precisely what claims the Claimant was bringing in his claim form, at a preliminary telephone hearing on 11 June 2018, Employment Judge Camp ordered the Claimant to give further details of his claims to be discussed at an in-person Preliminary Hearing on 3 August 2018. The Claimant confirmed that his complaints were of direct race discrimination relying on him being of Polish national origin and not of British national origin. He also wished to pursue alternative claims of racial harassment.

3. In summary the Claimant complained of a number of incidents of direct

discrimination and/or harassment which are:-

3.1 In 2017 to April/May 2017 piece work was taken off him by his then team leader, Bob Smith, and given to a colleague.

3.2 A manager called Paul Baker twice told him in April 2018 that the Respondent wanted to get rid of him.

3.3 On 16 May 2017 Paul Baker walked around the Respondent's factory trying to persuade people to complain about the Claimant.

3.4 On 8 and 9 June 2017 Paul Baker refused to disconnect radiators close to where the Claimant was working resulting in him having to work in an unsafe, hot environment.

3.5 The Claimant's grievance raised in May 2017 resulted in him being lied to about a recording of one of the witness interviews being lost, the length of time the investigation took, failure to interview relevant witnesses, the outcome of the grievance that it was not upheld and failure to uphold the grievance on appeal.

4. At this Preliminary Hearing the Claimant applied to amend his claims to include unfair dismissal and victimisation. The detriment claimed by the Claimant was his dismissal and the protected act relied upon was the submission of his claim to the Tribunal.

5. There was then a further Preliminary Hearing in person before Employment Judge Hutchinson on 7 January 2019. This hearing was listed to consider the Claimant's application to amend his claim form and whether any of his claims should be struck out or he should be ordered to pay a deposit as a condition of continuing to pursue them.

6. Employment Judge Hutchinson allowed the application to amend the claim to include unfair dismissal and victimisation but, in relation to the five alleged incidents of race discrimination, considered they had little prospect of success and ordered the Claimant to pay a deposit of £200 in respect of each individual allegation. Further, he considered the claims of unfair dismissal and victimisation to have little prospect of success and ordered a deposit to be paid by the Claimant in the sum of £200 for each claim. There was thus a total deposit ordered of £1,400 and Employment Judge Hutchinson advised the Claimant that his claims appeared to be weak and there might be costs implications if he pursued them.

7. The Claimant decided to pay the deposits in respect of the unfair dismissal and victimisation claims but did not pursue the race discrimination/harassment claims. Thus, when the claims came before the Tribunal for this substantive hearing the only claims to be considered were those of unfair dismissal and victimisation.

8. The Respondent defended the claims arguing that the Claimant's dismissal for gross misconduct had been fair and there had been no victimisation.

The Issues

9. The issues to be decided by the Tribunal are:-

9.1 What was the reason for the Claimant's dismissal?

9.2 Was it a potentially fair reason for the purposes of Section 98(2) Employment Rights Act 1996 (ERA)?

9.3 Whether the Respondent acted reasonably or unreasonably in treating the reason for the dismissal as a sufficient reason for dismissing the Claimant?

9.4 Whether for the purposes of Section 27 Equality Act 2010 (EQA) the Claimant had done a protected act which the Respondent believed he had done and in so doing whether the Respondent subjected the Claimant to a detriment?

The Law

10. Section 98(1) ERA provides:

"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 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;

(4) Where the employee has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is unfair or unfair (having regard to the reasons 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."

11. In **British Home Stores Limited v Burchell** [1980] ICR 303, EAT the Court set out a test to the effect that the employer must show:

(i) It believed the employee was guilty of misconduct;

(ii) It had in mind reasonable grounds upon which to sustain that belief;

(iii) At the stage at which that belief was formed on those grounds, it had carried out as much investigation into the matter as was reasonable in the circumstances.

12. That test has been amended in further decisions of the Court of Appeal to include that the decision to dismiss must have fallen within the range of responses of a reasonable employer.

13. Section 27 EQA provides:

(1) A person (A) victimises another person (B) if A subjects B to a detriment because:-

(a) B does a protected act, or;

(b) A believes that B has done, or may do a protected act.

(2) Each of the following is a protected act:

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made in bad faith.

(4) This section applies only where the person subjected to a detriment is an individual.

(5) The reference to contravening this Act include a reference to

committing a breach of an equality clause or rule.

The Evidence

14. We heard evidence from the Claimant and for the Respondent from Mr Richard Holden, team leader (stores and transport department), Mrs Karen Kirby, the Respondent's external HR Consultant and Mr Mitchell Tiisler, Technical Manager. There was an agreed bundle of documents running to 389 pages and references to page numbers in this judgment are to page numbers in the bundle. The witnesses produced witness statements, although they do not appear to have been exchanged until the morning of the first day of the hearing, and they gave oral evidence including cross examination.

The Factual Background

15. Although the issues in this case are relatively narrow, the Claimant wished to refer to incidents which led him to raise two historical grievances and, eventually, his complaint to the Tribunal.

16. English is the Claimant's second language. Accordingly, he struggled to explain himself and understand the legal principles involved in his claims. For this reason, an interpreter, Mrs M Johnson, was appointed and attended throughout the hearing. The Tribunal is grateful for her assistance in this matter.

17. At the commencement of the hearing, the Employment Judge spent around twenty minutes explaining the procedure to be adopted during the hearing and the legal principles involved in determining the Claimant's claims. The Claimant was asked if he understood what the Employment Judge had said and he confirmed he had.

18. The Claimant's view was that the treatment he received from the Respondent and its employees showed a course of conduct towards him that illustrated the Respondent was "out to get him".

19. Briefly, the Claimant said that one of the Respondent's employees, the team leader, Bruce Gordon, said to the Claimant on 6 January 2016 "I have nothing against a foreigner, but fuck off out of my sight". In the light of this comment, the Claimant submitted a grievance on 12 January 2016 and then alleged that Paul Baker asked him whether he really wanted to proceed with his complaint as nothing would ever be the same again between the Claimant and his colleagues. On 20 May 2016 the Respondent informed the Claimant that his grievance had been upheld.

20. In March 2017 the Claimant alleges that he was given less profitable piece work by Bob Smith and the more profitable work was given to his colleague, Kevin Damant, who was paid more than the Claimant. Again, in March 2017 the Claimant alleges that Paul Baker told him that if he did not like being taken off well paid jobs by Bob Smith he knew where the door was and they would give the job to someone else.

21. On 18 April 2017 the Claimant notified ACAS of a dispute with the Respondent. On 27 April 2017 the Claimant alleges that Paul Baker met with the Claimant and told him the Respondent wanted to get rid of him.

22. On 4 May 2017 having been contacted by ACAS, Mr Rick Plews met the Claimant to ask for details of his complaints in order that he could understand and investigate them. On 16 May 2017 the Claimant alleges that Paul Baker walked around the warehouse asking employees to put in a complaint about the Claimant. On 18 May 2017 the Claimant attended a meeting with Mr Plews at which he was informed that seven bullying and harassment complaints had been made against him by other employees.

23. On 24 May 2017 the Claimant was issued with an ACAS early conciliation certificate. On 30 May 2017 he issued five grievances against individual employees claiming, inter alia, harassment, victimisation, race discrimination and sexual harassment. On 6 June 2017 there was a meeting between the Claimant, Mr Plews and Mr Tiisler setting out how Mr Tiisler would investigate the grievances and an investigatory meeting with Mr Tiisler and the Claimant was held on 15 June 2017. Mr Tiisler then investigated the Claimant's grievances which were all based on race discrimination, and he interviewed all of the relevant individuals. His investigation report was completed on 18 September 2017 and Mrs Kirby was engaged to review the investigation and was advised by her of the outcome in person on 18 October 2017. Upon learning that his grievance had not been upheld, the Claimant walked out of the meeting without waiting to hear all of Mrs Kirby's conclusions. The Claimant appealed that outcome on 25 October 2017 to Mr Plews. His appeal was dismissed on 17 November 2017.

24. Throughout all of the various meetings involving the Claimant he had either covertly or openly recorded those meetings.

25. The Claimant submitted his claim form alleging direct race discrimination including harassment and a claim for unpaid wages. The unpaid wages claim seems to relate to the Claimant's allegation that he was paid less than Mr Damant although the analysis of their wages at page 139 shows that allegation to be unfounded.

26. On 4 January 2018 the Claimant was asked by Rachel Szita to work in the spray booth. He refused but Ms Szita noticed he was recording their conversation. She left the Claimant and went to tell Mr Baker what had happened. Mr Baker instructed her to ask the Claimant again as he was needed in the spray booth to do work he was qualified to do in order to satisfy customer orders. The Claimant again refused and was asked to go to Mr Baker's office. Once there, Mr Baker again asked him if he would work in the spray booth but the Claimant maintained his refusal. Mr Baker suspended the Claimant.

27. Statements were taken from Ms Szita and Mr Baker and the Claimant was invited to a disciplinary hearing on 8 January 2018 which was conducted by Mr Tiisler with Mrs Kirby supporting him. Throughout the disciplinary hearing, the Claimant confirmed he had refused work in the spray booth, offered no apology for his conduct and showed no remorse. His argument seems to have been that another colleague told him the day before he was asked to work in the spray booth that he would not have to do that work on the following day and it deprived him of the opportunity of undertaking more lucrative work.

Mr Tiisler made the decision to summarily dismiss the Claimant for gross misconduct for refusing to follow a reasonable management instruction. In reaching that decision, he did bear in mind that the Claimant offered no excuse or apology for his refusal. The Claimant's dismissal was confirmed in writing (page 347) and he was advised of his right of appeal which he elected not to pursue.

28. On 22 January 2018, the Tribunal sent the Claimant's claim form to the Respondent (page 32). It was received by the Respondent on 31 January 2018 (page 32).

29. It was the Claimant's evidence that he did not refer to his claim form throughout the disciplinary process and had assumed that the Respondent had received it prior to the disciplinary hearing and took it into account in reaching the decision to dismiss him.

The Facts

30. Many of the facts in relation to this matter, and particularly how the Claimant's grievances were dealt with and the disciplinary procedure which was followed, are not in dispute. Indeed, in the light of the comprehensive documentation in the bundle, any attempt to discredit those facts would be futile. What is in dispute, however, from the Claimant's perspective is that the Respondent's motivation behind everything it did was to force him out of his job because of his ethnic origin. This conspiracy theory permeated the whole of the Claimant's case.

31. Throughout the hearing, the Claimant consistently confirmed he had refused to work in the spray booth on 4 January 2018. He was, however, a General Operative which meant he could be instructed to work in any of the Respondent's production processes for which he had been trained. This included spraying which did not attract a higher rate of pay for the Claimant since it was not piece work. At page 96, the Claimant's contract of employment states:

> "2.2 Your duties are set out in the attached job description. In addition to the duties which this job normally entails, you may from time to time be required to undertake additional or alternative tasks or other duties as we may from time to time reasonably require, including but not limited to the commencement of piece rate work and/or the discontinuance of piece rate work as the company may determine from time to time in its sole and absolute discretion.
>
> 2.3 You are required at all times to comply with the company's rules, policies and procedures in force from time to time."

32. The Claimant also alleged that he was paid less than Mr Damant which seems to have been part of his justification for refusing to work in the spray booth which was work he says Mr Damant could do thereby allowing the Claimant to undertake more lucrative piece work. He said Mr Damant was paid more than him. The comparison at page 139 shows this not to be the case.

We spent some time discussing this comparison in the hearing but the Claimant was seemingly unable to comprehend the concept of the financial year as opposed to the calendar year. Further, he claimed to be better qualified than Mr Damant which, again, proved not to be the case. During an adjournment in the disciplinary hearing, Mr Tiisler investigated these matters and found that the Claimant's allegations were unsubstantiated.

33. Throughout the hearing, we made allowances for the fact that the Claimant's English language skills were limited in comparison to the other witnesses. In this regard, and whilst explaining procedure to the Claimant, the Employment Judge spent some time explaining how cross examinations should be conducted. Despite this explanation, the Claimant continued to use cross examination as a way of giving his evidence and had to be reminded by the Employment Judge on several occasions that cross examination was an opportunity to ask questions and not give evidence.

34. When the Claimant said he had concluded his cross examination of Mr Tiisler he had not asked any questions at all relating to his dismissal. All he concentrated on was his allegations of race discrimination. He was asked by the Employment Judge if he wanted to ask any questions about his dismissal and he thanked the Employment Judge for reminding him and then only asked one question.

35. The Claimant seemed to give no credit to the fact that the Respondent had investigated his first grievance against Mr Gordon and, indeed upheld it as a result of which Mr Gordon was disciplined (pages 140 to 141a-g).

36. The Claimant's grievances against five of his colleagues on 30 May 2017 (pages 174-178) were investigated thoroughly by Mr Tiisler. He met with the Claimant to explain his terms of reference and the procedure to be adopted. The Claimant raised no objection. A recording of Mr Tiisler's interview with Mr Holden malfunctioned so there was no recording available and Mr Tiisler's notes had to be relied upon. The Claimant sees this as deliberate action by the Respondent in attempting to frustrate his grievances. The investigation carried out by Mr Tiisler was very comprehensive (pages 194-200). The Claimant had covertly recorded some meetings and openly recorded others. The Respondent raised no objection to this but we formed the view that the Claimant did this in an attempt to support his allegations. In our view, the recordings added nothing to his case and only evidenced the thorough and reasonable approach to investigating the grievances taken by Mr Tiisler. Further, Mrs Kirby, who runs her own HR company, was engaged by the Respondent and scrutinised Mr Tiisler's investigation as the Respondent is a relatively small company with no in-house HR capacity.

37. The Respondent is a relatively small company manufacturing insulation products for its customers. This involves a number of processes including the storage of raw materials, cutting them, pressing and spraying them before they are distributed to customers. The General Operatives engaged by the Respondent are trained to undertake work in many of the Respondent's departments. There is a management structure involving team leaders and supervisors who were responsible for allocating work. The Claimant, unjustifiably in our view, in January 2018 considered that he was the one who would decide which work he undertook regardless of any other reasonable instructions he was given.

38. For the above reasons, we did not find the Claimant's evidence to be credible as it could not be substantiated by his evidence, the evidence of the Respondent's witnesses or the documents in the bundle. The most notable example, which is relevant to the Claimant's victimisation claim, is his evidence that he simply assumed, without mentioning it himself, that the Respondent had received his claim form before his disciplinary hearing. To base a claim on an assumption like this and to continue with it when documents showing his assumption to be completely unfounded had been produced to him, shows the kind of weakness in the claim which permeates the whole of the Claimant's case.

39. In relation to the Respondent's witnesses, their evidence was given in an open and straightforward way and fully supported by documents in the bundle.

Submissions

40. The Employment Judge explained at the commencement of the hearing to the Claimant the concept and meaning of submissions. His submissions were brief. He compared Mr Gordon's sanction of a written warning in 2016 for telling him to "fuck off out of my sight" with his own refusal to follow a management instruction for which he was dismissed. He said he was mentally exhausted and could not say more but if the Tribunal believed all of the facts in his witness statement are lies he apologised for that.

41. For the Respondent, Mr Gidney referred to the final paragraph of the Claimant's own witness statement which confirmed his refusal to follow management instructions. He said it was clear that the Respondent takes race discrimination complaints seriously and properly investigates them. This was illustrated by ACAS contacting the Respondent in April 2017 with the Claimant's race complaint as a result of which the Respondent immediately investigated the complaint and assured the Claimant he was not going to be dismissed. In relation to the unfair dismissal he submitted that the requirements of **Burchell** had been met. In respect of the reason for the dismissal, it was conduct. Further, it could not have been the fact that the Claimant had brought a claim because, at the time of the disciplinary hearing and dismissal, it had not received a claim.

42. In relation to the £400 deposit paid by the Claimant, Mr Gidney indicated that, in the light of the comments of the Employment Judges at the Preliminary Hearings, the Claimant had continued with his claims at significant cost to the Respondent after having been advised they had little prospect of success. Accordingly, in the event the Claimant succeeded the Respondent now made an application for costs limited to the £400 deposit paid. The Employment Judge explained what this meant to the Claimant and asked for his response or any comments to the application. He had none.

Procedural Note

43. The Claimant was the last witness to give evidence. On the second day of the hearing, the Tribunal adjourned from 1:00 pm to 2:00 pm. At 2:00 pm as we were about to return to the Tribunal room, Mrs Hatcliffe received a call to indicate that her husband was ill and awaiting the arrival of paramedics and was being admitted to hospital. There were as it transpired, only ten minutes of further cross examination of the Claimant by Mr Gidney.

The Employment Judge explained what had happened to the parties and asked whether they were happy to continue without Mrs Hatcliffe and they both confirmed in the circumstances they had no objection. The submissions were also very brief and the Employment Judge was able to give Mrs Hatcliffe an opportunity to review his notes before judgment was given. The judgment is a unanimous one and, in the circumstances, both lay members approved it before it was sent to the parties.

Conclusions

44. We firstly consider the claim of victimisation. The Claimant contends that he suffered the detriment of dismissal after doing the protected act of submitting a claim against the Respondent to the Tribunal. We are entirely satisfied that ,at the time of the disciplinary hearing, the claim form submitted to the Tribunal by the Claimant on 6 December 2017 (page 3) was not sent to the Respondent by the Tribunal until 22 January 2018 (page 32). We accept that the Claimant contacted ACAS in April 2017 and ACAS contacted the Respondent. The Claimant then took no further action, even after the issue of his Early Conciliation Certificate on 24 May 2017 (page 2) until he submitted his claim. There was no evidence before us that between May 2017 and the end of January 2018 anyone at the Respondent was aware that the Claimant intended to or had issued a claim. Given that the misconduct alleged took place on 4 January 2018 and the disciplinary hearing at which he was dismissed took place on 11 January 2018, the Respondent clearly did not know about the claim at the time of dismissal. Accordingly, the Claimant cannot sustain his claim of victimisation by suffering the detriment of dismissal as a result of doing a protected act.

45. On the evidence, in relation to the Claimant's dismissal, we find the only reason for that dismissal was misconduct. Since the Claimant at the time, throughout the disciplinary process and throughout this hearing, has consistently confirmed he refused to follow a reasonable management instruction, it is completely obvious to us that the Respondent held a genuine belief on reasonable grounds that the Claimant had committed that act of misconduct. The Respondent's disciplinary procedure states (page 109) "any breach of the company's regulations or any misconduct by an employee in the course of employment shall be regarded by the company as a disciplinary matter". Further, (page 110) a relevant officer may "order the employee to be suspended without pay for such period as he shall think fit". There is no evidence before us that the Claimant was suspended without pay. The disciplinary procedure also states (page 110) that the relevant officer may "dismiss the employee summarily if he considers the circumstances justify this course of action".

46. The **Burchell** test also provides that the genuine belief in the misconduct alleged must be sustained after a reasonable investigation. Two of the Respondent's employees, Ms Szita and Mr Baker, asked the Claimant to work in the spray booth on 4 January 2018. In the management hierarchy at the Respondent, both of these people had the authority to instruct the Claimant as to where he should work. The only further investigation that could be carried out was to listen to what the Claimant had to say in the disciplinary hearing. Not only did Mr Tiisler do this but he adjourned to make further enquiries as to the salary comparison between the Claimant and Mr Damant and to look at their "passports" which showed the level of training they had achieved for each of the Respondent's relevant production processes.

In both cases, Mr Tiisler found that the Claimant's reasons for refusing to work in the spray booth were completely unfounded. Mr Tiisler also noted that the Claimant made no attempt to apologise for his refusal to work in the spray booth. Mr Tiisler's evidence was that had the Claimant done so and perhaps said he had done it in the heat of the moment for whatever reason, a final written warning might have been appropriate. In the event, however, at no time throughout the disciplinary process did the Claimant attempt to apologise for his refusal or to justify it on grounds he could establish. It is a prominent factor in this case that the Claimant made assumptions as to his treatment compared to that given to Mr Damant without any basis, foundation or information for doing so.

47. It follows that we find the belief in the Claimant's misconduct was sustained by the Respondent after a reasonable investigation which included giving the Claimant an opportunity to justify his actions.

48. This leaves us to decide whether the decision to dismiss fell within the range of responses of a reasonable employer. We find that it did. Mr Tiisler explained comprehensively why he chose to summarily dismiss the Claimant rather than give him a final written warning. There was no argument of inconsistency. He told us that never before had the Respondent been met with a point blank refusal by an employee to undertake work he or she had been requested to do. He was in unknown territory. He explained under what circumstances he would have given a lesser sanction. Those circumstances did not exist in the Claimant's case. He also explained that this was important to the Respondent since the flexibility of the workforce and the General Operatives in particular was important to the production process.

49. Accordingly, we find that the principles of **Burchell** as added to by later decisions being fully satisfied.

Costs

50. We have already noted that Mr Gidney indicated that he was applying for costs limited to £400 in the event that the Claimant was unsuccessful.

51. Rule 76 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 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:
>
> > (b) any claim or response had no reasonable prospect of success."

52. The Claimant was advised in two Preliminary Hearings by two Employment Judges that his claims were weak. In making a deposit order against him, Employment Judge Hutchinson carefully explained to him that he was doing so because his claims of unfair dismissal and victimisation had little prospect of success. He further advised the Claimant that, if he pursued his claims in the light of the deposit order, there was the possibility that the Respondent would apply for a costs order against him.

53. It was apparent to the Tribunal that the Claimant's claims had, indeed, little prospect of success. The fact that there was no protected act giving rise to the detriment of dismissal was blatantly obvious. The Claimant had confirmed quite specifically that the protected act relied upon was the submission of his claim form to the Tribunal. It has been clearly established by the documents before us that the Respondent was completely unaware of the claim at the time of the Claimant's dismissal. Thus the claim of victimisation had to fail.

54. In relation to the unfair dismissal claim, the Claimant consistently confirmed his absolute refusal, on grounds we have found to be completely unfounded, to follow a reasonable instruction of management. It was his job in accordance with his contract of employment to undertake various tasks in a number of the Respondent's department. This is clearly a case of a conduct dismissal and the Respondent's reasons for applying the sanction of summary dismissal have been clearly explained and justified.

55. In the circumstances, we award costs as claimed by the Respondent to be paid by the Claimant in the sum of £400.00 and the deposit paid by the Claimant shall be applied in satisfaction of that costs award.

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Employment Judge Butler

Date 11 November 2019

JUDGMENT SENT TO THE PARTIES ON

FOR THE TRIBUNAL OFFICE