



EMPLOYMENT TRIBUNALS

Claimant: E

Respondent: Jamm Print & Production Limited

Heard at: London South Employment Tribunal

On: 1-4 July 2019 and 11 October 2019.

Before: Employment Judge Martin
Ms Bharadia and Ms Murray

Representation
Claimant:
Respondent:

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The Claimant was unfairly dismissed
2. The Claimant's claim of direct race discrimination is dismissed
3. The Claimant's claim of harassment is dismissed

REASONS

1. The Claimant brought a claim of unfair dismissal, race discrimination and harassment on 15 June. The Respondent defended all allegations. The Tribunal heard from the Claimant, his brother Almein, and Mohamed Souare. For the Respondent the Tribunal heard from Ms Elisabeth Shakleton (Director and majority shareholder), Z (Account Handler), Ms Jennifer Harlin (Warehouse Manager and mother of Z), Mr Michael Prime (Director of Mailing Service and dismissal manager), Mr Alberto Ciniccola (Print Production

Director and dismissal manager), Mr Darren Rusher (Machine Room Manager and appeal manager), Mr Matthew Alexander (Head of IT and Data Processing and appeal manager) and Ms Yolande Thomas (Warehouse Assistant). The Tribunal had an agreed bundle of documents additional phone records, witness statements from all witnesses, a cast list and chronology prepared by the Claimant and the Claimant's skeleton argument.

The agreed issues

2. The Claimant argues that the instances of discrimination and harassment amounted to a continuing course of conduct. The Claimant confirms that the relevant aspect of the definition of race is his colour.

Direct discrimination – section 13 EqA 2010

3. Did the following detriments occur?
 - (a) Throughout his employment, was the Claimant overly monitored, criticised, treated harshly for lateness and provided with less opportunities?
 - (b) From 2013 and on a regular basis thereafter, did Jenny Harlin refer to the Claimant as “black boy”?
 - (c) From around November 2013 and thereafter, did Jenny Harlin tell people at R to stop supporting or talking about the Claimant's relationship with Z as she did not approve of the relationship?
 - (d) From around November 2013 and thereafter, did Darren Rusher make comments that he was not happy about the Claimant's relationship with Z, in particular that she was in a relationship with a “black boy”?
 - (e) From around November 2013 and thereafter, did Jenny Harlin, Mike Prime and Darren Rusher stare at the Claimant when he was with Z in order to make him feel uncomfortable?
 - (f) When Mike Prime was going on annual leave, did Mr Prime make a point of informing Jenny Harlin that she had to keep her eye on the Claimant and give him extra work so that he did not have the time to spend with Z?
 - (g) From November 2013 and thereafter, did Jenny Harlin change the Claimant's break times to ensure that he would not spend time with Z?
 - (h) In April or May 2014, did Jenny Harlin say in front of Darren Rusher and the Claimant that if the relationship between the Claimant and Z ended the Claimant would lose his job?
 - (i) From around June 2015 and at regular intervals thereafter, did Jenny Harlin refer to the Claimant as “BC” which stands for “black cunt”?

- (j) Did Jenny Harlin accuse the Claimant of stealing and going through her belongings in front of the open plan office?
 - (k) Throughout the disciplinary proceedings, did Mike Prime, Alberto Cinicola, Darren Rusher and Matthew Alexander believe Z's version of events over the Claimant's? If so, was that a detriment?
 - (l) On 27 February 2018, the Claimant was dismissed.
4. If so, did those detriments amount to less favourable treatment than someone without his race? For each of the detriments the Claimant relies on the following comparators:
- (a) In respect of detriment (k), the Claimant relies on his white colleague, Matt, who was not shouted at or disciplined.
 - (b) In respect of the other detriments, the Claimant relies on the hypothetical comparator of a white colleague in an equivalent position.
5. If so, in relation to each allegation above, was that less favourable treatment because of race?

Harassment – section 26 EqA 2010

6. Did the following things occur?
- a. Throughout his employment, was the Claimant overly monitored, criticised, treated harshly for lateness and provided with less opportunities?
 - b. From 2013 and on a regular basis thereafter, did Jenny Harlin refer to the Claimant as “black boy”?
 - c. From around November 2013 and thereafter, did Jenny Harlin tell people at R to stop supporting or talking about the Claimant's relationship with Z as she did not approve of the relationship?
 - d. From around November 2013 and thereafter, did Mike Prime make comments that he was not happy about the Claimant's relationship with Z, in particular that she was in a relationship with a “black boy”?
 - e. From around November 2013 and thereafter, did Darren Rusher make comments that he was not happy about the Claimant's relationship with Z, in particular that she was in a relationship with a “black boy”?
 - f. From around November 2013 and thereafter, did Jenny Harlin, Mike Prime and Darren Rusher stare at the Claimant when he was with Z in order to make him feel uncomfortable?

- g. When Mike Prime was going on annual leave, did Mr Prime make a point of informing Jenny Harlin that she had to keep her eye on the Claimant and give him extra work so that he did not have the time to spend with Z?
 - h. From November 2013 and thereafter, did Jenny Harlin change the Claimant's break times to ensure that he would not spend time with Z?
 - i. In April or May 2014, did Jenny Harlin say in front of Darren Rusher and the Claimant that if the relationship between the Claimant and Z ended the Claimant would lose his job?
 - j. From around June 2015 and at regular intervals thereafter, did Jenny Harlin refer to the Claimant as "BC" which stands for "black cunt"?
 - k. Did Jenny Harlin accuse the Claimant of stealing and going through her belongings in front of the open plan office?
 - l. Throughout the disciplinary proceedings, did Mike Prime and Alberto Cinicola, Darren Rusher and Matthew Alexander believe Z' version of events over the Claimant's?
 - m. On 27 February 2018, the Claimant was dismissed.
7. If so, did they amount to unwanted conduct?
8. If so, were they related to the Claimant's race?
9. If so, did they the purpose or effect of (i) violating the Claimant's dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?
10. If the effect of the conduct is relied upon, the following must be taken into account:
- a. The Claimant's perception;
 - b. The other circumstances of the case; and
 - c. Whether it is reasonable for the conduct to have that effect.

Unfair dismissal – section 98 ERA 1996

11. The Claimant was dismissed on 27 February 2018.
12. Was the Claimant dismissed for a potentially fair reason? The Respondent relies on misconduct.
13. If so, was the dismissal fair and reasonable within the meaning of section 98(4) of the ERA 1996? Following *British Home Stores Ltd v Burchell* (1980) ICR 303, the Respondent must show that it had a genuine belief in the misconduct, reasonable grounds for that belief, and formed such belief after reasonable

investigation into the matter. The tribunal must decide whether dismissal was within the range of reasonable responses.

The Tribunals finding of fact

14. The Tribunal has come to the following findings of fact on the balance of probabilities having heard the evidence and read the documents referred to. These findings are confined to those facts that are relevant to the issues and necessary to explain the decision reached. All evidence was heard and considered even if not recorded here. The Tribunal has not slavishly followed the list of issues but has considered all matters as set out above.
15. The Respondent is a small printing company working with not for profit organisation and fund-raising organisations. There are four directors: Ms Shackleton; Mr Prime; Mr Cinicola and Mr Ellis. The business has a warehouse and an office. There are about 22 permanent staff split roughly equally between the office and the warehouse a team of about 10-15 casual staff at any one time. The organisation has a mix of ethnicities. Ms Shackleton told the Tribunal that at the time the Claimant was working for the Respondent there were five who moved from casual workers to being given permanent contracts who were from BAME backgrounds.
16. The Respondent has an employee handbook within which is a disciplinary and grievance policy.
17. Ms Jenny Harlin is a senior manager. She has worked for the Respondent for 19 years. Her daughter joined the company as a school leaver with few qualifications and has worked her way up over the years to the position of Account Handler. She has worked for the Respondent since 2003. Sarah Miller is a casual worker and is Z' cousin. Ms Harlin's stepson also works for the Respondent.
18. The Claimant is Nigerian and was introduced to the Respondent when he came to the UK in 2011 by his brother who at that time worked for them as a casual worker. The Claimant started as a casual worker on 13 May 2011 while he was completing his studies at university. He was well thought of and the Respondent encouraged him in his progression within the company becoming a permanent member of staff. The Claimant first assisted Ms Harlin and then Mr Cinicola who was a director. At this time, Mr Cinicola was just below director level and Mr Cinicola told the Tribunal that in time, the Claimant may have taken over his role.
19. The Claimant was well liked by staff at the Respondent. Mr Cinicola considered him to be a friend of his and they socialised out of work. Ms Harlin told the Tribunal that she also liked the Claimant and 'mothered' him as he was in the UK away from his family. Mr Prime similarly expressed that he liked the Claimant. The Claimant was considered to be a good worker who was punctual and reliable. Ms Harlin encouraged him to progress within the Respondent asking for him to be given a guaranteed 120 hours per month contract which he was then given, and he assisted her with her work, and she was pleased with the work that he did for her.

20. Traditionally the Respondent took its permanent members of staff away once a year for an AGM. However, in 2009 the economic climate and the loss of a major customer meant that these trips were cancelled. The next trip was in 2016 when a country house was rented in Norfolk. The Claimant complains that he was not invited and only went because someone else dropped out and says that he was not invited because he is black. Ms Shackleton refuted this by saying all permanent staff including the Claimant were invited and that this group had several staff attending from all backgrounds as shown in the photographs in the bundle. The Tribunal was taken to photographs of this trip and find that the Claimant was invited as were all permanent members of staff of all ethnicities.
21. The Claimant and Z started a relationship in or about 2013 to 2014. There was a dispute in the evidence. At that time Z was living with her partner, R, who was the father of her child. The Claimant says the relationship ended in August 2017 whereas Z says it ended much earlier. In her evidence she said it ended in December 2015 but that the last intimate encounter with the Claimant was in February 2016 when she resumed her relationship with her previous partner with whom she now has another child.
22. There is a conflict of evidence about whether the Claimant's relationship with Z was common knowledge in the company. The Claimant says it was and that he was often with the Claimant during the working day. The Respondent witnesses gave the following evidence about their knowledge.
23. Ms Harlin knew about the Claimant's relationship with Z in late 2014 when her daughter told her. Her evidence was that she was annoyed about this as Z had been with R for many years and they had a child, but knew that Z was not happy at that time. Her evidence was that no one else at work knew about the Claimant's relationship with Z until 2017. She denied saying that if this relationship ended then the Claimant would lose his job and denied not being happy about their relationship because the Claimant was a "black boy" and said she did not disapprove of their relationship. She was aware in February 2016 that the Claimant's relationship with Z had ended but was told by Z that they were working hard on maintaining a friendship.
24. In 2017 Ms Harlin noticed Z was unhappy, tearful with her health suffering. Z was reluctant to tell her the reason for this, but eventually told her that she was frightened to come to work in case she ended up alone with the Claimant. Z told Ms Harlin that the Claimant followed her in his car and Ms Harlin said that Z was fearful of him. Ms Harlin's evidence was that matters were deteriorating so she telephoned Mr Prime on 15 September 2017 asking to meet him off the premises and asking him to bring Z with him. Z told Mr Prime what had been happening and then spoke to Ms Shackleton and told her what had happened.
25. The Tribunal has no reason to doubt Ms Shackleton's evidence when she says this was the first she knew of a relationship between Z and the Claimant and knew of the reason for the change in Z's demeanour. Ms Shackleton, Mr Prime, Mr Cinicola and Ms Harlin all gave evidence that the Claimant who had been extrovert and bubbly had changed to someone who was introverted, crying, taking time off work which she had not previously done and not performing her work to her previous standards.

26. Ms Shackleton asked the Claimant to join them and it is Z's evidence (corroborated by Mr Prime and Ms Shackleton) that the Claimant (although saying Z had spat at him) admitted sweeping a row of mugs off the kitchen surface towards her. He denied Z was frightened and Z said she had been. Z said that the Claimant had pushed her up against a wall outside the factory on two occasions. The Claimant denied that this happened. The Claimant apologised and it was agreed that Z and the Claimant would only communicate on work issues and that they would treat each other with respect and consideration. The Claimant agreed to behave responsibly.
27. About this time Z had cameras fitted to her house and car as she said that the Claimant was following her and came to her home and that she was fearful of him.
28. There was an incident a few weeks later. Evidence was heard from Z, Ms Harlin, Mr Cinicola and the Claimant about it. The evidence from the Respondent's witnesses was consistent. The incident involved the Claimant asking Z for an address to which she said he could find this on the job bag on the company systems. The Claimant left the office and then returned saying "I will remember this". The Respondent's witnesses describe him saying this in a threatening manner. Mr Cinicola said that he jumped up from his seat as he was so concerned. Their evidence is that Z was visibly shaking, and Ms Harlin said she arranged for Z to have counselling after this. The Claimant said he was just saying that he would remember that he could find things on the system and did not need to ask Z. On balance the Tribunal find that this incident happened in the way the Respondent witnesses described it. Mr Cinicola's evidence appeared to be very genuine.
29. Ms Shackleton told the Tribunal that she then observed the Claimant following Z out of the room, approaching her desk, particularly when people were not about and that Z appeared to be getting more upset. She advised the Claimant to put in a formal grievance. The Claimant put in a formal grievance on 19 February 2018.
30. On receipt of the grievance Ms Shackleton met with her and formed the opinion that Z was genuinely fearful of the Claimant to the extent that she did not consider herself safe at work. She observed Z shaking and knew she was scared to leave her desk. Z said her absences from work were because of this situation.
31. On 20 February 2018 Ms Shackleton met with the Claimant and outlined the allegations made against him. She said that his responses were that this was a private matter between him and Z and nothing to do with the Respondent and that he did not engage to discuss what could be done co-operatively to change the situation. She said his attitude was hostile. Ms Shackleton told the Claimant that he could resign or go through a disciplinary process. He refused to resign so a disciplinary process was initiated.
32. The directors agreed that Mr Prime and Mr Cinicola should conduct the disciplinary hearing. Ms Shackleton removed herself from the hearings as she had formed a clear view and believed Z. She did not think she could be

impartial. Matthew Alexander and Darren Rusher (who were not directors) were to hear any appeal.

33. Ms Shackleton said that the Claimant never mentioned any race discrimination in any conversation she had with him at this time or at any time during his employment.
34. A letter was written to the Claimant on 19 February 2018 inviting him to a disciplinary hearing on 23 February 2019. This letter did not enclose the grievance made by Z, did not enclose any other documentation that the Respondent was going to rely on and did not enclose the disciplinary policy. The allegations against the Claimant were not set out, the letter simply said **“At this meeting the question of disciplinary action against you, in accordance with the Company Disciplinary Procedure, will be considered with regard to inappropriate behaviour, including threatened and/or actual violence, harassment and bullying of a colleague”**. The Claimant was told that dismissal was a possible outcome and was given the right to be accompanied.
35. On 23 February 2019 Ms Miller, Z’s cousin, gave a statement to say that in early 2017 she was told by Z that she was scared to leave the building because the Claimant was outside. Ms Shackleton pulled together the statements and documents for the disciplinary hearing but did not take the statements herself. This included a statement the Claimant had got from the former owner of a café next door to the Respondent’s premises. This statement said that she saw the Claimant behave aggressively towards the Claimant pushing her against a wall and that the owner had to come out and intervene. There was also a statement from Alan Jackson saying he observed the Claimant going to Z and whispering something and that Z looked scared. Mr Jackson first told Ms Shackleton of this and she asked him to make a statement which he did.
36. The disciplinary hearing went ahead on 23 February 2018. Mr Prime conducted the hearing and Mr Ciniccola took the notes. The Claimant was given the statements from the café owner, Mr Jackson and Ms Miller at the hearing but was not given the actual grievance made or a copy of her complaint from 26 September 2017. The outcome was given in a letter dated 27 February 2018 summarily dismissing the Claimant for gross misconduct.
37. This letter sets out the allegations very briefly. The letter shows that Mr Prime considered that Z was to be believed but no rationale for this is given. He records that the Claimant said that in his opinion anything that happens outside the company’s premises is not an issue of the Company and that Z was not threatened or scared by him. The letter concludes: **“I have decided that your conduct constitutes gross misconduct and that your explanation about these events was not acceptable because [Rachel] is clearly distressed, and feels unsafe at work as a result of your behaviour”**.
38. In his evidence to the Tribunal Mr Prime said that he and Mr Ciniccola spent a lot of time seeing whether it would be possible to separate the Claimant and Z from each other when at work. They valued the Claimant’s work and wanted to see if his continued employment was possible. They concluded that it was not especially as the Claimant had given no indication of any contrition or acceptance that his behaviour was inappropriate.

39. Mr Prime also said that he rejected the suggestion from the Claimant that him spitting at the Claimant was affectionate and playful. He relied on what the Claimant had said in September and considered the Claimant had admitted spitting and breaking the mugs. Mr Prime did not go behind the statements he had been given saying that they were signed so he had no need to despite the Claimant saying that they were not true. There was no mention of discrimination in this hearing.
40. Mr Prime was clear in his evidence that he did not know of the relationship until September 2017.
41. The Claimant appealed and the appeal was heard by Mr Rusher and Mr Alexander. The Claimant's letter of appeal is undated. This is a detailed two-page letter which sets out clearly the grounds of appeal. In summary the grounds of appeal are:
- a. The decision was pre-determined
 - b. His immigration status was used to try to terminate his employment
 - c. Allegations were made once he told the Respondent he had his certificate of application which would allow him to return to work and he was asked to resign
 - d. The matters raised were over 12 months old and it was inappropriate to raise them now
 - e. He denied spitting at Z
 - f. He said he accidentally knocked the mugs over
 - g. He did not pin Z to a wall
 - h. He did not pin Z to a wall of a nearby café
 - i. He did not whisper to Z and had not spoken to her at all
 - j. That Ms Miller is Z's cousin and the incident was not as described
 - k. The allegations were distorted
 - l. His dismissal was orchestrated to make things easier for Z
 - m. That as Ms Harlin is senior, he will not get an objective hearing
42. The letter of appeal was sent to Ms Shackleton who then had a meeting with Z to get her comments on the appeal letter. A further statement from Z was made and given to the appeal panel but not to the Claimant.
43. At the appeal the Claimant also said that Mr Prime was biased and that there was a failure to investigate. In his oral evidence the Claimant maintained that the transcript of the recorded appeal hearing did not cover everything and that he had said he was discriminated against on the basis of his race. This did not appear in the transcript (although the word 'discriminated' did). The Claimant was adamant he had detailed the discrimination. As there was a dispute about this the Tribunal asked to hear the recordings and both parties thought this was a good idea. The recordings were not actually listened to in the Tribunal as the Claimant accepted on having listened to them again, that the transcript was correct, and he had not said what he meant by the word 'discriminated'.
44. The appeal meeting was very long lasting about 2.25 hours. The outcome letter was very short comprising just over one page. The appeal letter dealt with the

spitting allegation, the mugs, pinning to the wall and again at the café, whispering and the statement of Ms Miller regarding the Claimant's phone call to her. Other matters were not dealt with at all. Even where a matter is dealt with the rationale is lacking. For example "**Pinning [Z] to the wall. Rachel confirms this happened**"; **Phone call. We have no reason to doubt the truth of this statement**". The appeal panel did not investigate the statements even though the Claimant said they were not correct. They believed Ms Miller just because they had a signed statement. Not because they had checked matters with her and then came to their view. Throughout Mr Rushers evidence he said that there was no need to go behind the written statements as they were signed.

45. When asked why matters were not put in the appeal outcome letter so that the Claimant could know why the decision was reached, the Tribunal was told that it had been discussed in the appeal hearing. For example, when asked why they did not make any reference to the decision to dismiss being pre-determined in the outcome letter the answer was that it was discussed and not pre-determined.
46. Neither Mr Alexander or Mr Rusher had any training in how to handle an appeal, and despite the Tribunal being told they had read the disciplinary policy the Tribunal has doubts that this was actually done.
47. The Claimant alleges he was called 'black boy' and 'black cunt or BC' during his employment. He has not produced witnesses to corroborate this and all the Respondent witnesses deny ever hearing this said. The Respondent called two employees who are casual workers and who work in the warehouse. Both are black. They said that they did not hear these words or any racially discriminatory language and said that if they had, then they would have raised it with management. They both described being treated very well by the Respondent and had respect for Ms Harlin.
48. The Tribunal finds that the Claimant was genuinely liked and until these matters arose was respected. Mr Cinicolla considered the Claimant a good friend. Ms Harlin 'mothered' the Claimant as he was away from his family. Ms Shackleton had praise for his work. He was considered reliable, punctual and trustworthy.
49. The Claimant says he was treated less favourably as set out in the issues. The Tribunal does not find that there was any less favourable treatment. The evidence does not support this aspect of the Claimant's claims.
50. The Claimant says he was accused of stealing by Ms Harlin. Ms Harlin explained that the Claimant had taken her spare locker key without her permission and had gone into her locker to get a key for a storeroom so he could open the storeroom. He says he was treated less favourably on the grounds of his race than Matt (who is white) who was with him. The explanation given by Ms Harlin is that Matt did not know where her spare key was, only the Claimant and Matt had not opened her locker. This is a non-discriminatory explanation which the Tribunal accepts.
51. The Tribunal finds that the Claimant was unfairly dismissed. The disciplinary procedure was woefully lacking. Although the Tribunal understands why Ms Shackleton recused herself from the actual hearings, this gave a clear

indication to everyone that she thought the Claimant guilty of the allegations. The Tribunal has considered the deficiencies in the process and set this against the size and administrative resources of the Respondent. The Tribunal may have given the Respondent a bit more leeway were it not for the disciplinary proceedings taken against the Claimant's brother. The documents were in the bundle and show an exemplary procedure adopted then. The letter inviting to the disciplinary hearing set out the allegations in detail so they could be properly understood. This did not happen for the Claimant. The hearing covered each point raised and the decision was made on what was before them at the hearing. This was not the case here as reference was made to previous informal discussions without the context of them being properly discussed or explained in the documentation. The outcome letter clearly set out why the decision was to dismiss with full reasons. For the Claimant, he was not given any rationale for the decision.

52. The appeal process could have remedied the defects in the disciplinary procedure applied to the Claimant but did not do so. Although there was a very long appeal hearing, the appeal process did not deal adequately with the Claimant's grounds of appeal. It is not sufficient to say that matters were omitted from the outcome letter because they did not happen (for example the allegation that the decision was pre-determined). The outcome letter does not deal with all grounds of appeal raised in the letter and at the hearing.
53. The Tribunal is also troubled that Mr Alexander and Mr Rusher sit below Mr Prime and Mr Ciniccelo in the organisation structure of the Respondent, yet were expected to overturn their decision if needs be. The Tribunal heard what Mr Rusher said about his role in compliance and how this would mean that he would be able to overturn his director's decision however the Tribunal is not convinced.
54. A major failing in the whole process are the investigations done both before the disciplinary hearing, during the disciplinary hearing and in the appeal process. The investigations fall short of being within the reasonable band of responses even taking into account the size and administrative resources of the Respondent. The statements were taken at face value with no critical reading or any attempt to check facts even where the Claimant raised issues with them. All those involved took the statements provided on the Respondent's behalf at face value. They considered that as they were signed there was no need to explore the issues further. This rationale did not however apply to the witness statement produced by the Claimant. This statement was signed but not accepted. The explanation that it was hearsay only is rejected. This statement clearly has first-hand information. It is short so is set out in full: **"I confirm that I am aware of an incident that occurred some years ago where a row of mugs fell onto the kitchen floor. I was approached by [Z] to inform me of this. At the time she confirmed that the mugs had been knocked accidentally by [the Claimant]. She was not in any way upset by this incident"**. The statement is signed and dated. This statement should have been explored further as it clearly goes to one of the issues raised against the Claimant which he disputes.
55. The Tribunal is satisfied that the reason for dismissal is conduct and not connected to the Claimant's race. The Tribunal does not find on the evidence

before it any animosity towards the Claimant because of his race, either in the performance of his work or in his relationship with the Claimant.

56. One issue is whether the Claimant was overly monitored, criticised, treated harshly for lateness and provided with less opportunities because of his race. The Claimant has provided no information about this. He does not for example describe when he was late, how late he was, how often he was late and how this treatment differed from others who were also late. The Respondent's witnesses were not cross examined on this and said that they had no issues with his performance or punctuality prior to the events set out above. Therefore, the Tribunal find that this detriment did not occur.
57. The Claimant's claim of unfair dismissal is successful. The Claimant's claims of direct race discrimination and harassment are dismissed.
58. Having come to the conclusion that the dismissal was unfair, the Tribunal considered whether there should be a deduction on the basis that had a fair procedure been carried out the result would have been the same (a Polkey decision) and whether the Claimant contributed to his own dismissal.
59. A proper investigation would have been done by someone independent which in the context of this organisation would have been someone external as all the directors were involved to one degree or another. That person would have taken statements from all the directors and other employees. The Tribunal, whilst finding that there were defects in the procedures applied consider that the evidence given by Ms Shackleton, Mr Prime and Mr Cinicola in particular was very genuine and reflected their views of what was happening. The Tribunal does not mean to say that Ms Harlin's evidence was not genuine however as Z's mother she would understandably prefer Z's evidence.
60. The Tribunal was struck by Mr Prime's evidence that what troubled him most was that the Claimant could not accept there was anything wrong and implied that he would continue treating the Claimant in the same way had he been allowed to remain in employment. The Respondent was faced with a long-standing member of staff whose demeanour had changed dramatically, whose work had fallen below usual standards and who was suffering and afraid of the Claimant whether or not she had good reason to be. The Respondent owed a duty of care towards the Claimant to provide a safe place of work. The Tribunal find that it would be unlikely that a proper procedure would have given a different result. The Tribunal accept the evidence about how Z presented at work. This was not disputed by the Claimant.
61. There is of course a chance that the decision would have been different and the Tribunal award a reduction of 80% to the compensatory award to reflect this.
62. In the alternative, the Tribunal finds that the Claimant contributed to his own dismissal by his behaviour towards the Claimant and his attitude at the disciplinary hearing and the appeal hearing. The Tribunal finds that the compensatory award should be reduced by 80% due to the Claimant's

contributory conduct. For the avoidance of doubt there will be an 80% reduction in the compensatory award.

63. **The relevant law** applied in coming to these conclusions is:

Unfair dismissal

64. It is for the Respondent to establish a potentially fair reason for dismissal. Here, the reason advanced is conduct. The question is, has the Respondent shown a genuine belief in a set of facts amounting to misconduct by the employee?

65. Did the Employer act reasonably in treating that reason as a sufficient reason for dismissal (Employment Rights Act 1996 section 98(4)(a))? That question is to be, determined in accordance with equity and the substantial merits of the case (section 98(4)(b)). It is not for the Tribunal to substitute its view of the matter for that of the disciplining officer or appeal panels. Thus, the focus is on the dismissing officer's reasons and, applying the British Home Stores Ltd v Burchell [1980] ICR 303 test (here, the burden of proof being neutral), whether he had reasonable grounds for his belief following a reasonable investigation.

66. Procedural fairness is a relevant consideration, applying the range of reasonable responses test (see Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23).

67. Did the sanction of dismissal fall within the range of reasonable responses open to the employer? Dismissal will fall within the range rendering the dismissal fair if one body of reasonable employers would dismiss on the facts properly found, even if another group would impose a sanction short of dismissal.

Direct race discrimination

68. Section 13(1) Equality Act 2010 provides as follows:

13 Direct discrimination

(1) 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.

Burden of proof

69. The burden of proof provision is set out in s136 Equality Act 2010. In considering the claim of direct discrimination, the first task of the Tribunal is to decide whether on the primary facts as proved by the Claimant, and any appropriate inferences which can be drawn, there is sufficient evidence from which the Tribunal could (but not necessarily would) reasonably conclude that there had been unlawful discrimination. If the Claimant can prove such facts, then the burden of proof passes to the Respondent to show that what occurred to the Claimant was not to any extent because of the relevant protected characteristic as set out in the Equality Act 2010.

70. In each case, the matter is to be determined on a balance of probabilities. The fact that a claimant has a protected characteristic and that there has been a

difference in treatment by comparison with another person who does not have that characteristic will not necessarily be sufficient to establish unlawful discrimination. In all cases, the task of the Tribunal is to ascertain the reasons for the treatment in question and whether it was because of the protected characteristic. The provisions of section 136 of course apply to any proceedings under the Act, and not only to claims of direct discrimination.

Harassment

71. Section 26 of the EqA provides:

(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B. . .

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

72.(5) The relevant protected characteristics are - . . . race”

73.A Tribunal should consider all the acts together in determining whether or not they might properly be regarded as harassment (Driskel –v- Peninsular Business Services Ltd [2000] IRLR 151, EAT and Reed and Bull Information Systems Ltd –v- Stedman [1999] IRLR 299, EAT).

74.The motive or intention on behalf of the alleged harasser is irrelevant (see Driskel above).

75.The Court of Appeal confirmed in Land Registry –v- Grant (Equality and Human Rights Commission intervening) [2011] ICR 1390 “when assessing the effect of a remark, the context in which it is given is always highly material”.

76.In Richmond Pharmacology –v- Dhaliwal [2009] ICR 724 the EAT held that the Claimant must have felt or perceived his or her dignity to have been violated. The fact that a Claimant is slightly upset or mildly offended is not enough.

Employment Judge Martin

Dated: 17 December 2019