EMPLOYMENT TRIBUNALS

Claimant Mr E D Iyiewuare **v** **Respondent** Second State Pizza Company Limited

Heard at: **Bristol (by video)** **On: 30 November and 1 to 3 December 2020**

Before: **Employment Judge C H O'Rourke**

Appearances
For the Claimant: **in person**
For the Respondent: **Mrs Winstone - counsel**

JUDGMENT

1. The Claimant's claims of unfair dismissal and race discrimination fail and are dismissed.

2. The Claimant is ordered to pay the Respondent's costs, in the sum of £1000.

(The Claimant having, at the Hearing, requested written reasons, in accordance with Rule 62(3) of the Employment Tribunal's Rules of Procedure 2013, the following reasons are provided:)

REASONS

Background and Issues

1. By a claim form dated 6 August 2019, the Claimant brought claims of unfair dismissal, race discrimination and protected disclosure. He withdrew the latter claim subsequently, on being ordered to pay a deposit in respect of it. He had been employed for approximately five years, latterly as a store manager by the Respondent, who trade under the name Domino's. He was subject to disciplinary proceedings in March and April 2019 and subsequently dismissed, without notice, for gross misconduct, with effect 5 April 2019. The essence of the charge against

him was that, on 8 March 2019, he had falsified his time records, to show that he was at work, when he wasn't.

2. The Parties had agreed that the claims could be heard by a judge sitting alone.

3. The issues in this claim were set out in a case management order of Employment Judge Bax of 7 October 2019 [42] and are as follows.

4. <u>Unfair Dismissal</u>

 4.1. What was the reason for dismissal? The Respondent states that it was conduct, a potentially fair reason for dismissal, whereas as the Claimant states that it an act of racial discrimination.

 4.2. Had the Respondent a genuine belief in the Claimant's 'guilt', based on reasonable grounds, following as much investigation as was reasonable in the circumstances? The Claimant sets out the following matters:

  4.2.1. He was dismissed because of his race;
  4.2.2. The disciplining officer (Mr Al-Rabee) held a grudge against him.
  4.2.3. His line manager, Mr Caines, had stated that he wished to 'get rid' of him.
  4.2.4. He was held to a different standard to other managers and employees, in respect of others who had made mistakes in clocking in and out from work, bringing a child to work, wearing his own clothes over his uniform and breach of data protection;
  4.2.5. The allegation about not wearing uniform was false;
  4.2.6. The events of 8 March 2019 were not the real reason for his dismissal.

 4.3. Did the Respondent adopt a fair procedure? The Claimant challenged the fairness of the procedure on the following grounds:

  4.3.1. He was not provided with access to CCTV footage, but only selected stills from that footage;
  4.3.2. Mr Al-Rabee had a grudge against him;
  4.3.3. The statements the Claimant provided in support of his case were dismissed and those persons who he had mentioned as having done comparable acts to him were not questioned;
  4.3.4. He was not provided with the minutes of the disciplinary hearing; and
  4.3.5. His appeal was not heard and he was not provided with an outcome within a reasonable period of time.

 4.4. The Claimant contends that dismissal was outside the range of reasonable responses.

 4.5. In the event of a finding of unfair dismissal, the Respondent contends that the Claimant's actions contributed to his dismissal, which the Claimant does not accept.

4.6. The Respondent would also seek to rely on the *Polkey* principle, in the event of a finding of procedural unfairness, to show that the Claimant would have been fairly dismissed, in any event, as he already had a live final written warning on his record.

5. Harassment on Grounds of Race.

5.1. Did the Respondent engage in unwanted conduct as follows:

5.1.1. On about 26 October 2018, Mr Caines, when talking to the Claimant, said '*Who is that black girl I saw smoking outside? She doesn't look serious, just get rid of her.'* The Claimant alleged that Mr Caines was upset with him when he didn't do as asked.

5.1.2. In February 2019, during a store managers' meeting, Mr Caines challenged the Fishponds' store manager, Mr Jasp, for employing non-English staff and suggested he got rid of them, by reducing their working hours, without reason.

5.1.3. On 26 March 2019, during another store managers' meeting, Mr Caines made a discriminatory statement about managers recruiting non-English staff.

5.2. Was the conduct related to the Claimant's protected characteristic (the Claimant is of black African race)? The Claimant states that it was, by association.

5.3 Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant? If not, did it have that effect? The Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

6. Direct Discrimination.

6.1. Did the Respondent subject the Claimant to the following treatment, falling within s.39 of the Equality Act 2010, namely:

6.1.1. The alleged acts of harassment set out above; and

6.1.2. Dismissing him?

6.2. Did the Respondent treat the Claimant as alleged less favourably than it treated or would have treated the comparators? The Claimant relies, in this respect, on Mr Moeed, Mr Jasp and/or a hypothetical comparator.

6.3. If so, can the Claimant prove primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of his race?

6.4. If so, what is the Respondent's explanation? Can it provide a non-discriminatory reason for any proven treatment?

7. Preliminary Matters. There was some discussion at the outset of the Hearing as to whether or not all relevant documents had been included in the Bundle and I agreed to extend the bundle page limit to permit those additional documents to be added. In addition, the Claimant disputed the inclusion of additional statements from some witnesses, but I permitted them, on the basis of relevance. He was also permitted, in examination in chief, to add to his statement to deal with matters raised in supplemental statements of the Respondent.

The Law

8. I reminded myself of s.98 of the Employment Rights Act and that when hearing a case of unfair dismissal, a Tribunal's powers are limited, specifically that I am not permitted to substitute my judgment for that of the employer. Rather, it is for me to say whether both the decision to dismiss (**Iceland Frozen Foods –v- Jones [1983] ICR 17 EAT)** and the way in which the investigation was conducted (**J Sainsbury Plc –v- Hitt [2003] ICR111 CA)** fell within the range of responses of the reasonable employer, in the circumstances in which the Respondent found itself. If the dismissal or the conduct of the investigation falls within the range, it is fair, if outside, then it is unfair. In a misconduct case such as this, I am guided by the case of **British Home Stores –v- Burchell [1980] ICR303 EAT** which sets out the well-known three-fold test, where the Tribunal must be satisfied that the employer held a genuine belief in the employee's guilt; that it had carried out a reasonable enquiry and that in consequence of that enquiry, it had reasonable grounds for holding that belief. The burden of proving fairness in this respect is neutral.

The Facts

9. I heard evidence from the Claimant and on his behalf, from a Mr Ahmad and a Mr Mioc, both former colleagues. Mr Ahmad was the subject of a witness order and had not provided a witness statement. On behalf of the Respondent, I heard evidence from Mr Caines, the Claimant's then line-manager, Mr Hollis, an operations director, who had provided evidence for the disciplinary hearing, Mr Al-Rabee, an area manager who had conducted the disciplinary hearing, Mr Cunningham, an HR representative, who had assisted with the appeal, a Ms Sferle, a former colleague of the Claimant and a Mr Da Silva, a former area manager, who heard the Claimant's appeal and grievance.

10. The Respondent is a large employer, with the appropriate managerial and administrative resources.

11. Chronology. I set out the following chronology, upon which I comment as I consider appropriate:

    11.1. July 2014 – the Claimant commenced employment with the Respondent, at the Kingswood, Bristol store, of which Mr Caines was the manager at the time.

11.2. March to July 2015 – the Claimant left the Respondent's employment for those months, but returned for a second period of employment, to the same store and again with Mr Caines as his manager. When re-applying, he gave Mr Caines as his sole referee.

11.3. July 2015 onwards – the Claimant progressed through the Respondent's management-in-training programme (February 2016), to assistant manager (November 2016).

11.4. April 2017 – on the departure of Mr Caines to be the area manager, the Claimant was promoted to store manager. Mr Caines said that all of these steps, the two recruitment processes and the promotions, had been with his active support and encouragement, as he viewed the Claimant as *'one of a few employees who I identified as being potential management candidates'* and '*the strongest candidate'* for the store manager role (WS3). To the Claimant's discredit, he found himself unable to give due recognition to the support that Mr Caines had obviously given him, instead contending that all of these steps had been entirely due to his own efforts. I can only assume he chose to do so, as he considered that had be given Mr Caines due credit, it would have undermined his claim that Mr Caines subsequently racially discriminated against him. When challenged in cross-examination that if it was true that Mr Caines didn't want him, he could have blocked the Claimant's progress, but didn't do that, the Claimant responded by saying '*why would he* (Mr Caines) *do that?'*, answering his own question by then saying that '*he* (Mr Caines) *put me in a position, I believe, where he felt I owed him, so not succumbing to him caused all this.'* When challenged by the Tribunal as to how this therefore indicated any racist motivation by Mr Caine, the Claimant was unable to explain.

11.5. 13 December 2017 – the Claimant was issued with a 'letter of concern/notice of improvement' in respect of his performance [90]. This was not an official disciplinary sanction and no mention was made of the matter subsequently.

11.6. 26 July 2018 – the Claimant was disciplined by Mr Caine for sharing his store manager log-in details with other members of staff, who had logged into the Respondent's computer system in his absence. This was considered to be a serious security issue, as managers have access to parts of the system, not open to others, such as business sensitive data, sales and pricing information and employee and payroll data. The Claimant's explanation that in his absence from the store, duty managers and managers in training needed to be able to log in was not accepted, as a system existed for those managers to be given their own log-in details, permitting them more restricted access, sufficient to carry out their roles, but that the Claimant had not arranged this, or requested assistance, if he was unable to set it up. He was given a final written warning [108]. He did not appeal against that decision.

11.7. Friday 8 March 2019 – An incident occurred at the store which lead to the Claimant being disciplined and subsequently dismissed. I will deal with the events of that day in more detail below.

11.8. 1 April 2019 – a disciplinary hearing was held with the Claimant, chaired by Mr Al Rabee [notes 145]. The Claimant was accompanied by Mr Mioc. At the conclusion of the meeting, the Claimant, when asked if he had any other comments, said that Mr Caine wanted to get rid of him and had harassed and bullied him.

11.9. 5 April 2019 – the Claimant was summarily dismissed for gross misconduct. He was advised that if he had concerns about Mr Caine (which the disciplining officer did not consider relevant to the disciplinary process), then he should raise a grievance to that effect [154].

11.10. 9 April 2019 – the Claimant appealed against the decision [164].

11.11. 12 April 2019 – the Claimant brought a grievance against Mr Caines accusing him, amongst other things, of being a racist and a thief [169].

11.12. 10 May 2019 – Mr Da Silva conducted the appeal and grievance hearing, rejecting both.

11.13. 17 and 20 May 2019 – Mr Da Silva signed off two letters to the Claimant, addressed to his home address, setting out his decisions in respect of both matters [185 and 193]. The Claimant claimed not to have received either of these letters at the time, only seeing them subsequently, in late August, in response to a subject access request he had made.

12. <u>The Claimant's Case and the Respondent's response in cross-examination</u>. In summary, the Claimant's case was as follows:

12.1. Although he did not appeal against the first disciplinary finding, in 2018, he disagreed that he should have been found to have committed misconduct, considering that he had been '*threatened and pushed'* by Mr Caine, to accept a decision that he '*considered to be very unfair'* (WS22). He accepted in cross examination, however that he had admitted, at the disciplinary hearing that he had shared his log-in details with other employees, stating that he'd done so because he was unable to set up the lower-level access for his sub-managers [108]. He did not accept that if Mr Caines had wanted to 'get rid' of him, this was an opportunity for him to do so, as, he said, Mr Caines had himself shared his log-in, when he was the store manager. Mr Caines, in evidence, denied that he had ever shared his log-in and in respect of his decision to restrict the sanction to a final written warning that he had decided to give the Claimant '*the benefit of the doubt, accept his explanation … and wanted to give him an opportunity to prove himself*' (WS12, 13).

12.2. The Claimant, in common with other store managers, was contracted to work a minimum 45-hour week [72]. Managers had discretion as to which hours they worked. In the week of 4 March 2019, it was undisputed evidence that

by the point of Friday 8 March, the Claimant had worked only just under 24 hours so far, in that week [time sheet 159]. Therefore, to comply with his contractual obligations, he needed to work another approximate 21 hours, by the end of the week (to include Sunday). It was again undisputed evidence that managers who were unable to work 45 hours did not face disciplinary sanctions, as such, depending on the explanation provided, but might have pay deducted. The time sheet records that on Friday 8 March, the Claimant worked 14.35 hours, on Saturday, 7.08 hours and on Sunday 0.74, giving him a total of 45.63 for that week.

12.3. The following is undisputed evidence. On 8 March, the Claimant attended at the store, at 8.58 a.m. He had his child with him, at the time just over a year old, as, he said in evidence, his wife was working that day. He subsequently left the store, at 9.36 (as shown on CCTV), but did not log out of the computer system, which therefore continued to show him as at work, accruing hours. He returned to the store at about 6 pm, to find that Mr Caines was at the store, as were other more senior managers, who coincidentally were visiting stores in Bristol, on that day.

12.4. This lead to him being questioned as to why he was shown as logged into the system, when he was not in the store. His explanation was considered unsatisfactory, with the Respondent clearly of the view that he was falsifying his attendance record, to accrue hours he had not worked, thus leading to the disciplinary process.

12.5. The Claimant said in evidence that he had come into the store '*for an emergency meeting to discuss with a driver who had requested a transfer to another Domino's store. I had arranged to meet with him that morning with the intention to convince him to work for us for the weekend … and also to agree when he would be returning company items such as uniforms, before returning to another store.'* (WS29). He went on to say that '*this meeting should have been conducted by the shift manager, Alina Sferle, but she informed me that morning that she would feel uncomfortable having this discussion with the driver, hence my visiting the store that morning.'* The driver did not attend for the interview and therefore the Claimant left.

12.6. On the day in question, when asked to explain by one of the visiting managers, Mr Hollis, he (Mr Hollis) recorded that the Claimant told him that he'd had to leave the store, at about 3.30 pm, because there'd been an emergency with a second child and he had to collect him from school and take him to the doctors. Mr Hollis said that he then informed the Claimant that in fact Mr Caines had been at the store since 2 pm and the Claimant had not been present at that time. He said that in response, the Claimant then said that he liked his shift manager, Ms Sferle, to work alone, as part of her development and he had left her in the morning (WS6). The Claimant said that when he'd arrived at the store, he'd been flustered and out of breath, because he'd run there, having been informed by Ms Sferle of the managers' presence. He said that Mr Hollis insisted on speaking to him near a hot and noisy pizza oven, thus putting him under undue pressure and that Mr Caine had been aggressive to him and that therefore, in the circumstances, he may

not have explained himself properly, or Mr Hollis may have misunderstood what he was saying. Both Mr Hollis and Mr Caine denied this and stated that they considered the Claimant's account to be contradictory and suspicious. Mr Hollis provided a statement for the disciplinary process, at the time, reflecting his evidence given at this hearing [158].

12.7. At the subsequent disciplinary hearing, the Claimant gave the explanation that he has also provided in his witness statement, the need to assist Ms Sferle with the interview and to train her in that process [147]. He was challenged as to why, if he was conducting training and an interview, he was not (as appeared on CCTV) wearing his uniform and he said that he was, but that it was under his jacket, as the store was cold. He accepted, however, in evidence at this hearing that he was clearly not wearing uniform trousers, as he was wearing jeans, which are not part of the uniform, nor his hat.

12.8. For the disciplinary hearing, he provided statements from two colleagues, Ms Sferle and Mr Barrett [151-153]. There is an earlier draft of Ms Sferle's statement [210] and both this and Mr Barrett's statements record that the witnesses considered it '*a genuine honour to write this letter'* and set out that the accusations against him were due to a misunderstanding. Ms Sferle said in the second draft of her statement that she had asked the Claimant to assist her with the interview, due to her English not being good enough and that he always wore his uniform, but under his clothes, for warmth. She considered that the Claimant's failure to log out was simply a mistake and that when she realised this, at about noon, she called him to tell him and he said he would resolve it when he came into work, once he'd sorted out his childcare issues. Mr Barrett said that the Claimant had not left his child unattended in the store's kitchen (one of the allegations made against him at the disciplinary hearing) and that he had seen the Claimant's uniform collar underneath his jumper. Subsequently, as part of the appeal process, Mr Barratt was interviewed by Mr Cunningham and said that he did provide a statement, but that it only consisted of four lines, as opposed to the twelve or so lines in the statement provided by the Claimant [183]. Ms Sferle gave evidence to this hearing and said that the Claimant sent her the first draft statement, which she hadn't wished to sign. She asked for some changes, after which she did sign, as she felt under pressure from the Claimant, as her manager and that he might make her life difficult at work, perhaps by cutting her hours (although she accepts that he didn't say anything of this nature and had never threatened her before). She now says that some of the content of the statement is untrue and that she had not realised it was to be used in a disciplinary process, having been told by the Claimant that it was to be for '*a little help for an issue he had'*. She confirmed, in evidence today, that there was no interview arranged for the morning of the 8th. She had processed the driver's paperwork the day before, to transfer him to another store [111]. In any event, her English was good enough to conduct an interview and nor would she would have arranged an interview for such time, as she would have been too busy, setting up the store. She didn't know why the Claimant attended at the store, as she had not asked him to. She couldn't recall if he was in uniform, or not, but did agree that the store could be cold, first thing. Nor did the Claimant ask her to look after his child. She had not noticed that the Claimant

was still signed in, but had phoned him at some point that day, to tell him of the managers' visit to the store and that he needed to come in. She subsequently told a regional manager that she was uneasy that she had provided the statement and that it had been a mistake to do so. She categorically denied that the Respondent had told her what to say in evidence today and said that after the Claimant had been dismissed, she had felt bad about signing the statement. It was also Mr Ahmad's evidence that the Claimant had similarly sent him a draft statement to sign, which he refused to do '*as it contained untruths'* and when asked for an example, he said '*that Mr Caines said not to hire non-English people'.*

12.9. A subsidiary issue at the disciplinary hearing was the matter of whether or not the Claimant had allowed his child to wander unsupervised around the store's kitchen, potentially putting him at risk of injury and thereby risking the Respondent's liability for such injury. The Claimant said that he'd had no choice but to bring his child with him and that in any event, Ms Sferle had offered to look after him (which she now denies). He did not dispute that the CCTV showed the child, a toddler, moving around the kitchen, unsupervised. He also said that it was quite common for managers to bring their children with them to meetings, if they had no choice and that accordingly children would find themselves passing through the kitchen and that this had never been an issue before. There was some agreement from both Mr Ahmad and the Respondent witnesses that on occasion, children were brought in, but meetings would be held in the 'carry out' area of the store (i.e. the public area) entering from the street, or, if the store was entered from the rear, children would be under the supervision of their parent, while passing through the kitchen. The Claimant's witness, Mr Mioc, said that it was quite common to bring children to meetings and that sometimes children would enter through the kitchen. He also supported the Claimant's assertions that Mr Caine used the term 'get rid' in respect of staff (Mr Caine denied this, stating that if he did use the phrase, it would only be in relation to out of date foodstuffs or stock). I did not, however, consider Mr Mioc to be a reliable witness, as he was obliged to admit in cross-examination that he had resigned from the Respondent, in advance of a disciplinary hearing that was due to dismiss him, for theft of takings in the region of £3600. He also admitted that he'd been questioned by the police, admitted the offence and accepted a fine. Despite his protestations therefore to be '*an honest man'*, he is clearly anything but and has a clear motivation to give evidence against the Respondent.

12.10. In respect of the Claimant's allegations of race discrimination, he repeated the allegations he had made in his claim and at the case management hearing. He denied that he had 'gone on the attack' against Mr Caine, as he couldn't explain away his misconduct, so instead attempted to 'muddy the waters', by alleging that Mr Caine was both a racist and a thief. He refused, somewhat contradictorily, to accept that such statements were an attack on Mr Caine's character. When it was suggested to him that Mr Caine can have had no real influence on the decision to dismiss him, as more senior managers were involved, both in giving evidence and in conducting the disciplinary and appeal, he nonetheless said that Mr Caine '*was involved'*, but without providing any evidence to that effect. When challenged that if it was

true that Mr Caine did not wish to hire non-English staff, why had he twice recruited and promoted the Claimant, he failed to answer properly and said that was '*your* view'. It was suggested that if Mr Caine had said anything about English, it was the need to have staff who spoke reasonable English, which the Claimant had twisted. When it was put to him that Mr Ahmed's evidence didn't support his version of events, he said that he was '*sad to see that Mr Ahmed recounted it in that way'*. Turning to the Claimant's cross-examination of Mr Caine, who was the focus of his claims of race discrimination, the vast bulk of the questioning actually focused on seeking to challenge Mr Caine's conclusions in the first disciplinary hearing; whether or not Mr Caine had unjustly cancelled some leave of the Claimant's in August 2018 and the events of 8 March 2019, none of which were either alleged racially-motivated acts of less favourable treatment or harassment. The alleged racist comments by Mr Caine were only briefly touched upon and when denied by Mr Caine, the Claimant simply moved on to another issue. When he abruptly announced that he had concluded his questioning of Mr Caine, he had to be reminded by the Tribunal that Mr Caine was the focus of his race discrimination claims, but that he had not really dealt with that issue. While he then carried on with some further questioning, it bore little or no relation to those claims. I note, also that his closing submissions made only passing reference to these matters.

13. <u>Conclusions in respect of the claim of race discrimination</u>. The Claimant has failed to satisfy even the initial burden of proof in respect of these claims and I find therefore that they should be dismissed and I do so for the following reasons:

    13.1. The Claimant could provide no corroborating evidence whatsoever to support the allegations, even if the unreliable evidence of Mr Mioc and the contemporaneous clearly heavily-influenced statements of Ms Sferle and Mr Barratt are taken into account. Indeed, it is curious that if he really felt that Mr Caine had been racist towards him for some time before his dismissal that he did not introduce that theme into his drafts of his witnesses' statements, instead only directly raising these matters in his grievance, after having been dismissed. This indicates to me that these allegations are not genuine, but 'thrown into the mix' by the Claimant, in an effort to intimidate the Respondent and to distract from his own wrong-doing, clearly a vexatious act on his part.

    13.2. All the evidence, in fact, indicates exactly the opposite. While the Claimant was unable to admit that Mr Caine had greatly assisted his progress in the Company, it was clearly the case that that is exactly what happened. Mr Caine had twice recruited the Claimant, promoted him, put him forward for management training and when he himself was promoted, suggested the Claimant replace him. It beggars belief that any of this could have happened if Mr Caine was racist towards the Claimant. Further, when the Claimant was subject to the first disciplinary process, it could have been open to Mr Caine to dismiss him at that point, but he instead gave the Claimant '*the benefit of the doubt'*. These are not the acts of a person who discriminates on grounds of race. It is also evident, just from the witnesses' backgrounds, with several from Eastern European, or Middle Eastern backgrounds that the Respondent

has a multi-ethnic workforce, to include at managerial level, rather than the 'English' one that the Claimant asserts that Mr Caine wanted.

13.3. I had no reason to doubt Mr Caine's evidence on these matters, whereas I had every reason to doubt the Claimant's. He clearly told untruths to the managers who spoke to him on the 8th March. He gave first one false account of a school emergency for his child at 3.30 pm, obliging him to leave the store at that point, only to have to swiftly alter that account when it was apparent that Mr Hollis knew that he could not have been in the store any later than 2 pm. He was not in uniform, or at least full uniform, as he claimed, changing his evidence on this point, at this hearing. He pressurised Ms Sferle into giving a false statement, supporting his account, when it is clear from her heartfelt and entirely plausible evidence at this hearing that he was not telling the truth about the interview, or her requesting his attendance that morning. He then made false allegations against Mr Caine, the manager who had assisted his progress throughout, purely in an effort to distract from his own wrongdoing. Finally, sadly, under oath, he sustained these untruths through to this hearing.

14. Unfair Dismissal. I come to the following conclusions in respect of this claim:

14.1. Having found that the Claimant was not racially discriminated against, the reason for his dismissal was clearly misconduct, a potentially fair reason.

14.2. Did the Respondent hold a genuine belief in the Claimant's misconduct, on reasonable grounds and following as much investigation as was reasonable in the circumstances? Dealing with the Claimant's challenges on this point, in turn, I find as follows:

14.2.1. As I have found, he was not dismissed because of his race.

14.2.2. There was absolutely no worthwhile evidence that Mr Al-Rabee had any grudge against him. There was some vague reference to the Claimant having queried a write-off by Mr Al-Rabee of some pizzas given to a hospice or hospital, but no evidence whatsoever that Mr Al-Rabee was even aware of this matter a year or so later, when he conducted the disciplinary, let alone that it influenced him in any way against the Claimant. Nor did the Claimant challenge the appointment of Mr Al-Rabee at the time. Indeed, the Claimant did not challenge Mr Al-Rabbi on this point, in cross-examination, indicating to me the lack of merit of this assertion.

14.2.3. There was no worthwhile evidence that Mr Caine had said that he wanted to 'get rid' of the Claimant and indeed, as set out in my findings above, in respect of the discrimination claims, the opposite seems to have been the case. In any event, Mr Caine had no influence on the disciplinary process, it being conducted by a more senior manager and reliant on evidence from Mr Hollis, another more senior manager.

14.2.4. The Claimant consistently attempted, even as late as his closing submissions, to assert that he had been dismissed for 'making a mistake' in not logging out from the time recording system, when others, who had also made similar mistakes, had not been disciplined. While I

consider that he willfully chose to put this spin on events, it was patently clear that he was not dismissed for that reason, but for his attempts to deceive his managers as to the reasons for his failure to log out. As a store manager, he was in a position of considerable trust, operating generally relatively independently and using his own discretion as to how to manage the store. The Respondent clearly felt that based on his behaviour of 8 March, sustained through to the disciplinary and appeal process, they could no longer trust him. The supervision of his child and whether or not he was wearing a uniform were entirely subsidiary matters to that main point and would have been unlikely, on their own, to have resulted in his dismissal. He was, therefore, not 'held to a different standard' than others who had made mistakes, but dismissed for deliberately seeking to mislead his employer. The only matter upon which Mr Al-Rabee was successfully challenged was as to whether or not it was the Claimant who had approached the managers in the store on the 8th March, or the managers who had approached him. Mr Al-Rabee accepted that it was incorrect of him to record in the dismissal letter that it was the latter, when in fact the Claimant had made the approach, but didn't consider (and nor do I) that it would have made any material difference to his overall decision, bearing in mind the contradictory and clearly false account given by the Claimant.

14.3. Clearly, when a manager seeks to willfully mislead his employer, in an attempt to justify the falsification of work hours, it will be entirely within the range of reasonable responses for a reasonable employer to dismiss, in those circumstances. In fact, Mr Al-Rabee was unaware that the Claimant had an active final written warning on his record and that therefore formed no part of his decision, he considering that the Claimant's misconduct on this occasion, alone, was sufficient.

14.4. Did the Respondent adopt a fair procedure? I consider the Claimant's challenges on this point, as follows:

14.4.1. Whether or not the Claimant was given access to CCTV footage was irrelevant. There was no dispute about the timings that he had been in the store, that no interview took place, nor that his child was moving around the store and the CCTV stills clearly showed that he was wearing jeans, as he admitted in evidence at this hearing. The Claimant was unable (and in fact didn't attempt) to explain why CCTV footage would have assisted his case.

14.4.2. It was entirely reasonable to treat the statements he provided with caution, for the reasons I have set out above. There was no need to interview other members of staff as to whether or not they had forgotten on occasion to log out of the system – such events were accepted by the Respondent as having occasionally happened, but this was not what the Claimant was being accused of and nor was the matter of whether others brought their children to meetings relevant. The Respondent accepted that this did

sometimes occur, but that children were expected to be kept under supervision, which had not been the case on 8 March.

14.4.3. The Claimant was in fact provided with the disciplinary hearing minutes, as he himself states in his witness statement (paragraph 63).

14.4.4. Finally, as he accepts in evidence, his appeal was heard. He contends however that the appeal outcome was not provided to him, until he later obtained a copy through a freedom of information request. However, I have no reason to doubt that the decision letters were sent to him. The letters are correctly addressed; there was no reason for the Respondent to withhold the letters and the Claimant did not simply ask the Respondent after a week or so, where the letters were. I note also my views as to the Claimant's credibility generally.

14.5. I find therefore that the Respondent's procedure was fair.

15. Conclusion. For these reasons, therefore the Claimant's claims of unfair dismissal and race discrimination fail and are dismissed.

COSTS APPLICATION

16. Application. Following a short adjournment to take instructions, Mrs Winstone made a costs application on behalf of the Respondent. The amount sought was of a 'nominal sum', of £1000, rather than the full extent of the Respondent's costs, which ran to approximately £20,000.

17. The application was made subject to Rule 76(1)(a) and (b), firstly, on the basis that the Claimant had acted unreasonably and vexatiously in pursuing the race discrimination claim and secondly that it had no reasonable prospects of success. He had previously brought a protected disclosure claim, which he promptly withdrew when ordered to pay a deposit, indicating a tendency on his part to pursue claims with little merit. He had been warned by Employment Judge Bax, at the case management hearing that his discrimination claim '*was not strong'* and '*just above the little prospects of success threshold'* and it was suggested he take legal advice.

18. Pursuing the race discrimination claim was an act of character assassination by the Claimant, against Mr Caines and his attempt to influence witnesses at the time was clearly unreasonable behaviour. His failure, in this hearing, to address this claim indicates that he clearly didn't himself believe it.

19. The claim was unreasonably brought and conducted. He told untruths in this Hearing, which, classically, is behaviour that could have justified an order for the full costs incurred.

20. In respect of his means, the Claimant is working at two jobs, one in Amazon and the other in another pizza store, Papa Johns, with Mr Mioc, whose denial of this was questionable, stating instead that the Claimant had been '*ill*'.

21. Claimant's Response. The Claimant said that he did attempt to seek legal advice, but the CAB was unable to assist, due to COVID restrictions and he could not afford to go to a solicitor.

22. In respect of his ability to pay, he said that he was doing the best for his family, to include his two children and had started in third-level education, incurring a large student loan. He worked only for Amazon, in Swindon and therefore could not commute to another job in Bristol. The only reason he was in Papa Johns was because he was using it a case study for a dissertation he was writing for university.

23. He said that his earnings from Amazon were £26k per annum and that his wife's (as a litigator with HMRC) were £30k.

24. He was invited to state why a costs order should not be made and said that what he had alleged in his claim was true.

25. Decision. I grant the application for costs, in the sum of £1000, for the following reasons:

    25.1. While costs are the exception, rather than the rule in Employment Tribunal proceedings, this case is one of those exceptions.

    25.2. As I have found, the claim of race discrimination was entirely without merit and brought and conducted purely for vexatious/unreasonable purposes. The Claimant made little or no effort to substantiate his allegations, or even to actively question witnesses (in particular Mr Caines) about them. He made only passing reference to them in closing submissions, again indicating the lack of merit even he attached to them.

    25.3. He also clearly maintained the same untruths he had told his employer, through to this hearing.

    25.4. This is not, I consider, a question of whether or not the Claimant could obtain legal advice in respect of this claim, but rather his decision to bring a claim that he knew to be untrue.

    25.5. Such conduct falls squarely within Rule 76, justifying a costs order in this case.

    25.6. The Respondent has, very reasonably, limited their application to £1000, a fraction of their likely costs, when it is obvious that they will have expended a great deal more than that (with or without exclusion of VAT liability). Indeed, Mrs Winstone's fees alone, for this four-day hearing, will well exceed that amount.

25.7. I heard evidence from the Claimant as to his ability to pay any such order, based on his and his wife's earnings (between them £56k) and I therefore consider, regardless of any other outgoings (to include his student loan, which in any event will not be fully repayable for some considerable time) that it will be perfectly feasible for him, in due course, to pay such an amount.

26. Conclusion. The Claimant is ordered to pay the Respondent's costs, in the sum of £1000.

Employment Judge O'Rourke
Dated: 3 December 2020