



EMPLOYMENT TRIBUNALS

Claimant: Mr Z Iqbal

Respondent: Jacarem Ltd

Heard at: Aylesbury Crown Court

On: 5, 6, 7 and 8 October 2020

Before: Judge Bartlett, Mr Scott and Mrs Sood

Representation

Claimant: in person

Respondent: Ms Hall, of Peninsula

JUDGMENT

1. The claimant was not unfairly dismissed. The respondent dismissed the claimant for the reason of conduct and this is a potentially fair reason for dismissal. The respondent has discharged the burden of proof to establish that in the circumstances the dismissal was fair. In particular the respondent satisfies the steps set out in **British Homes Stores Limited v Burchell [1978] IRLR 379**.
2. The claimant's claim that he suffered direct race discrimination because his dismissal was tainted by race discrimination fails.
3. The claimant's claim that he suffered direct race discrimination in that he was paid less than other cable assemblers and the reason for that was related to race succeeds.

REASONS

4. Introduction

- 4.1. The claimant was employed by the respondent from 28 July 2014 until 16 August 2018. The claimant was employed as a cable assembler. His employment was terminated on notice, on 16 August 2018. The letter giving

notice was dated 19 July 2018 and followed a disciplinary hearing which took place on 18 July 2018.

5. The hearing

- 5.1. At the start of the oral hearing the claimant confirmed that he had not prepared a written witness statement. He stated that he did not have any witnesses. I said to him that he was a witness but he said that he had not prepared anything. I asked if he wanted time to prepare a witness statement and he indicated that he did not. In those circumstances I suggested that, as the record of the case management summary which was held on 14 October 2019 set out a detailed account of what the claimant told Judge Hyams about his claim, it would be taken as his witness statement. The claimant stated that he was happy with this. I asked if he wished to add anything to it and he stated that he did not.
- 5.2. A point was also raised that the claimant had not included any of his documents in the bundle. There had been some correspondence with the tribunal about this issue. The claimant had stated that he had no documents to disclose and therefore it was the opinion of Judge Hyams (in case management) and Judge Bartlett (at the start of this hearing) that the bundle was complete. The claimant did not indicate that he wished to add any further documents to the bundle. On the 2nd day of the hearing the claimant said that he had not read the bundle, though he had confirmed at the start of the hearing that he had the bundle and he had it with him during the hearing. In addition, he had other relevant documents such as the case management summary on an iPad which was available to him at the hearing. The claimant did not refer to the documents during the hearing. At one point in the hearing the claimant said that he had not had the opportunity to prepare. I reminded the claimant that the case management hearing took place on 14 October 2019 which was approximately 51 weeks before the final hearing. Even if the claimant had a multitude of difficulties with preparing his case, I considered that 51 weeks was sufficient time for him to adequately prepare and that he could not be said to be disadvantaged.
- 5.3. During the course of the 1st day of the hearing Judge Bartlett said to Ms Hall that the respondent may wish to consider disclosing pay information about the assembly workers as the pay information in the bundle was limited. A question was asked about the format of the information and Judge Bartlett stated that this could be in contract form, a table or some other means of setting out the pay. On the second day the respondent handed in a contract of employment which included salary information and a pay slip in respect of one white employee and an Asian former employee.
- 5.4. At the start of the hearing the order of the witnesses was discussed and again I offered the claimant time to prepare written cross-examination as he stated that he had not prepared written questions. The claimant declined this offer and stated that it was all in his head. During the course of the case, it became clear that the claimant had a clear and detailed understanding of the case in his mind. At various points he was offered time to prepare which he declined, except in relation to preparing submissions. The hearing finished at 15:35 on the 2nd day and the parties

indicated that they wished to give submissions on the morning of the 3rd day so that they had extra time to prepare. This was agreed.

6. The issues

6.1. At the start of the hearing the parties were reminded that the issues were set out in the case management summary dated 14 October 2019. These were largely read out at the start of the hearing. At several times during the hearing, I reminded the parties that the List of Issues contained the issues that needed to be considered and these were the issues on which the tribunal would make a decision.

6.2. The issues are as follows (extracted from the case management and therefore including its paragraph numbering):

Unfair dismissal

23 As a result of the above description of the facts, I deduced that the issues in the claim of unfair dismissal would be as follows.

23.1 What was the reason for the claimant's dismissal?

23.2 Did the person who decided that the claimant should be dismissed for misconduct genuinely believe that the claimant had committed the misconduct for which he was dismissed?

23.3 Did that person have reasonable grounds for that belief?

23.4 Was the investigation which led to the decision to dismiss the claimant fair, i.e. was it (see *J Sainsbury plc v Hitt* [2003] ICR 111) one which it was within the range of reasonable responses of a reasonable employer to carry out, or was it outside that range?

23.5 If the respondent is able to satisfy the tribunal that the reason for the claimant's dismissal was his conduct, was the decision that the claimant should be dismissed for that conduct one which it was within the range of reasonable responses of a reasonable employer to make?

23.6 If the claimant's dismissal was unfair, would it be just and equitable to reduce the amount of the basic award because of any blameworthy or culpable conduct before the dismissal, pursuant to section 122(2) of the

Employment Rights Act 1996 ("ERA 1996"); and if so to what extent?

Race discrimination

- 24 The liability issues in the claim of discrimination because of race (i.e. direct discrimination within the meaning of section 13 of the Equality Act 2010 ("EqA 2010")) are as follows.
- 24.1 Was the claimant paid less than the other cable assemblers (as claimed by the claimant: see paragraph 17 above)?
- 24.2 If so, what was the reason for that difference in pay? Was it to any extent because of the claimant's race?
- 24.3 Was the claimant's dismissal tainted to any extent by his race? In determining that question, the following issues will fall to be determined.
- 24.4 Has the claimant proved facts from which the tribunal could, in the absence of an explanation from the respondent, decide that his dismissal was to any extent because of his race?
- 24.5 If so, then has the respondent proved on the balance of probabilities that it did not dismiss the claimant to any extent because of his race?
- 25 The claimant relies on a hypothetical comparator and on the comparison with the circumstances of Mr Shepard when the claimant was disciplined for the manner in which he spoke to Mr Shepard, but Mr Shepard was not disciplined for the manner in which he spoke to the claimant (as described in paragraph 10 above).
- 26 In addition, it is the claimant's case that the manner in which he was treated by the respondent (including by dismissing him) was so unreasonable that the inference that his dismissal was because of his race can be drawn.
- 27 As noted in paragraph 22 above, if the claim of race discrimination succeeds, then the claimant will be seeking only compensation for injury to his feelings and possibly damages for personal injury.

7. The evidence

- 7.1. The claimant appeared as a witness and was asked a number of questions by Ms Hall. The full record of the questions and answers is set out in the record of proceedings and I will not repeat them all here. In summary the claimant's evidence was:
- 7.1.1. the claimant was bullied by Darren Shepherd who was a test manager at the respondent. The allegations of bullying were that Mr Shepherd unfairly criticised the appellant's work;
- 7.1.2. an incident occurred on 26 July 2017 when Mr Shepherd told the claimant that some of his crimps were not of the required standard and showed him a particular way to take them off. The claimant decided to adopt his own method of taking them off. After he had been doing this for a few minutes Mr Shepherd came and found the claimant and told him that he should have finished it by then. The claimant and Mr Shepherd shouted at each other and the claimant but not Mr Shepherd was disciplined for what happened. The claimant received a final written warning lasting for 12 months;

- 7.1.3. on 19 October 2017 the claimant went to see Mr Reeve to raise issues about Mr Shepherd. During the meeting the claimant said why not just make me redundant and Mr Reeve said that the claimant could go in 5 minutes if he wanted to. Mr Reeve asked Pauline Williams to meet with the claimant and sort out the process. Pauline Williams provided the wording and the claimant wrote and signed this letter of resignation. He left the premises shortly afterwards. Ms Pauline Williams telephoned the claimant later and stated that he should take 5 days to consider if he wanted to resign and use this as a cooling off period. The claimant went to see his doctor at this time and was signed off as too unwell to work because of stress. The claimant decided to stay in his employment and returned to work after a 2 week absence;
- 7.1.4. after the claimant's return to work the respondent started a disciplinary procedure. One of the allegations was that on the day of his resignation the claimant had walked out without permission;
- 7.1.5. the outcome of those disciplinary proceedings was that his existing 12 month final written warning was extended for another 5 months;
- 7.1.6. it took the respondent 5 weeks to decide on his disciplinary sanction and this caused the claimant a lot of stress;
- 7.1.7. on 13 July 2018 Ms Pauline Williams called the claimant into an office and started to discuss the fact that he had booked 2 half days holiday. At the start of the meeting the claimant and Ms Williams were happy talking about the weather and he complemented her clothing. Ms Williams said to him that he should book full days holiday rather than half days holiday (he had previously had 12 1/2 days holiday) as this might be better for his health. When he declined to change his 2 half days to 1 full days holiday Ms Williams said that the half days were disrupting his work. The claimant said that "if I were dying, none of you would care about me." The claimant raised the 2 previous disciplinary proceedings and that they were still stressing him out. The meeting became heated and Ms Williams said that she would terminate the meeting. The claimant then stated that he was terminating the meeting;
- 7.1.8. the claimant denied that he shouted at any of the meetings. He stated that he had a loud voice but he did not shout;
- 7.1.9. the claimant was subject to another disciplinary process, which included an allegation relating to 13 July 2018. The outcome of this was that the claimant was dismissed for misconduct with notice on 18 July 2018;
- 7.1.10. during his employment, the claimant felt that he was not offered promotions and that he was treated unfairly in that he was criticised more than others for no good reason, criticised for talking and that he was generally underappreciated.

7.2. The respondent called the following individuals as witnesses:

- 7.2.1. Mrs Reeve;
- 7.2.2. Mr Reeve;
- 7.2.3. Mr Darren Shepherd;
- 7.2.4. Mr Gareth Hamilton;
- 7.2.5. Mrs Hamilton;
- 7.2.6. Ms Pauline Williams.

7.3. They all adopted their witness statement and the claimant asked all of the

individuals questions. The full detail of the questions and answers is set out in the record of proceedings. All of the witnesses except Ms Williams, appeared in person at the hearing. Ms Williams appeared via a CVP link because she had suffered a recent bereavement and did not feel up to attending the tribunal. The tribunal notes that Ms Williams did not appear distressed or unable to give adequate evidence.

7.4. The allegations made against the claimant in the first disciplinary procedure are set out in the letter dated 28 July 2017 which invited the claimant to a disciplinary meeting:

- **It is alleged that you have acted in a rude, objectionable manner and used insulting, abusive language towards a fellow member of staff. Further particulars are that on 26/07/17 you became engaged in a verbal altercation with Darren Shepperd in which you shouted at him that he was mental.**
- **Alleged failure to follow a reasonable management instruction. Further particulars are that it is alleged that you do not like to take instructions or orders given to you by the Test Manager (Darren Shepperd) and therefore find your own way of doing things. One example of this occurred on 26/07/17 when you chose to use a vice and hammer to rectify the work, instead of the recommended way, shown to you by Darren.**

7.5. The allegations against the claimant in the second disciplinary procedure were set out in a letter dated 8 November 2017 which invited the claimant to a disciplinary meeting:

1. **Alleged failure to follow management instructions on 19/10/2017 from Darren Sheppard our Test Manager**
2. **Alleged undermining of your Team Leader Gareth Hamilton our Assembly Room Team Leader on 19/10/2017**
3. **Alleged leaving the premises without permission on 19/10/2017**

8. *The allegations against the claimant in the third and final disciplinary procedure were set out in a letter dated 16 July 2018 which invited the claimant to a disciplinary meeting:*

- **It is alleged that over the last few months you have failed to follow reasonable management instructions by Gareth Hamilton particularly regarding reduction in talking.**
- **Alleged unreasonable behaviour. Further particulars are that your conduct toward a fellow member of staff was aggressive and unprofessional raising your voice, making your colleague feel uncomfortable and intimidated on Friday 13th July 2018.**

9. The Law

9.1. S98 of the Employment Rights Act 1996 sets out the legal test which must be applied to determine whether or not a dismissal is fair:

“General.

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

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

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

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

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

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

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

(3) In subsection (2)(a)—

(a) “capability”, in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b) “qualifications”, in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(4) the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.”

9.2. The list of issues above encompasses the guidance set out in **British Homes Stores Limited v Burchell [1978] IRLR 379** which applies to misconduct dismissal and includes a three limbed test:

9.2.1. Did the employer believe the employee to be guilty of misconduct at

the time of dismissal?

9.2.2. Did the employer have in mind reasonable grounds on which to sustain that belief?

9.2.3. When the employer formed that belief had it carried out a reasonable investigation in the circumstances?

9.3. S13 of the Equality 2010 sets out the test for 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.

(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim...

(5) If the protected characteristic is race, less favourable treatment includes segregating B from others...”

10. Burden of Proof

10.1. s136 of the Equality Act 2010 sets out the burden of proof which applies to discrimination cases:

“(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.”

10.2. In **Igen Ltd v Wong** the Court of Appeal approved the guidance given in **Barton v Investec Securities Ltd [2003] IRLR 332** concerning the burden of proof in discrimination cases which is that:

“(1) Pursuant to s 63A of the SDA 1975, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s 41 or s 42 of the SDA 1975 is to be treated as having been committed against the claimant. These are referred to below as “such facts”.

(2) If the claimant does not prove such facts he or she will fail....

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.

(10) *It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.*

(11) *To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since “no discrimination whatsoever” is compatible with the Burden of Proof Directive.”*

11. Findings of facts

11.1. The claimant accepted numerous times during the hearing that Mr Darren Shephard acted in the same way towards everyone.

11.2. The claimant made a general point that he had a loud voice but that this was not shouting it was just the way he was. The Tribunal recognizes that shouting means different things to different people. The Tribunal finds that the claimant did not yell at the top of his voice but a loud angry voice is, quite reasonably, interpreted by many as shouting and the Tribunal finds that this is what the claimant did when he was accused of shouting.

11.3. 1st Disciplinary 28 July 2017

11.3.1. *26 July 2017 incident with Darren Shephard*

11.3.1.1. The claimant's evidence is that Darren was rude to him and insulted him. The claimant did not identify insulting words except to the effect that Darren would do the work quicker than the claimant. The claimant identified being insulted by Darren's conduct which was to check what the claimant was doing 5 minutes after he started the rework and tell him to do it the way he said.

11.3.1.2. The Tribunal finds that Darren Shepherd did check on the claimant's work shortly after the claimant started the rework. The tribunal considers that it was in the region of 10 to 30 minutes after the claimant started the rework. The Tribunal also finds that Darren said words which implied that he would do the work a lot quicker than the claimant and the claimant took this as an insult;

11.3.1.3. the tribunal finds that Darren Shepherd did not shout at the claimant. Instead the claimant shouted at him: it was not a conversation rather Darren was shouted at by the claimant. Darren's evidence set out this version of events and is supported by statements made by other employees when they were interviewed as part of the investigation into this event. We note that the claimant takes issue with Adam's investigation statement on the basis that he could not have known what was said. In particular, the claimant disputes that he used the word “mental” to describe Darren Shepherd. Even accepting the claimant's criticisms of Adam's evidence, the respondent still had several statements from other employees which supported the contention that the claimant had insulted Darren Shepherd, spoken to him in

a loud and angry manner and that Darren Shepherd had not acted in a similar way to the claimant though they did not mention the use of the word “mental”. It is noted that the disciplinary outcome does not make a finding that the word mental was used;

11.3.1.4. The tribunal finds that the statements from a number of employees during the investigation establish that the claimant behaved in a manner towards Darren that could be reasonably interpreted as shouting and that he was insulting towards him.

11.3.2. Not following a reasonable management instruction

11.3.2.1. At one point during the hearing the claimant disputed that Darren Shepherd’s instructions were instructions rather than an advisory way work could be carried out. This is contrary to what the claimant said at the preliminary hearing and to what he said at other times in the hearing.

11.3.2.2. Alternatively, the claimant stated that what Darren said was not a reasonable instruction because it was not the best way of doing things.

11.3.2.3. The tribunal notes that the claimant is very experienced at his work, he has held supervisory positions previously;

11.3.2.4. The tribunal finds that Darren Shepherd gave a reasonable instruction and that as test manager he was in a position of authority to give this instruction. Darren Shepherd’s role was to ensure work was produced to the correct standard and he required that all employees adopted uniform methods of work. This did not suit the claimant but that does not make it unreasonable. The tribunal finds that Darren Shepherd gave a clear and unambiguous instruction to the claimant about how to carry out the work, all the evidence before the investigation including from the claimant and other employees was that Darren required everyone to work in the way he said. The tribunal finds it wholly unbelievable that Darren Shepherd would have made a suggestion only about how the claimant should carry out work;

11.3.2.5. it is not disputed that the claimant did not carry out the instruction and the tribunal finds that the claimant did not carry it out.

11.4. 2nd disciplinary procedure 13 November 2017

11.4.1. Not following an instruction from Darren Shephard on 19 October 2017

11.4.1.1. This issue arose from a disagreement about the crimping length of a piece of work and the use of the crimping machine. There is some evidence of an investigation into this issue including

a meeting with Darren Shepherd about use of the machine. The claimant did not dispute that he did not follow Darren's instruction. It was his view that this instruction was not reasonable. Again we find that Darren's role included giving instructions about how work was carried out and as such his instruction was reasonable and from management.

11.4.2. Undermining Gareth Hamilton, the claimant's team leader, on 19 October 2017

11.4.2.1. It is unclear what this allegation was except that the claimant raised concerns about what had happened with Darren with Terry Reeve and not his line manager, Gareth Hamilton. The tribunal does not accept that this action by the claimant could reasonably be construed as misconduct by a reasonable employer.

11.4.2.2. Further, there is no evidence that this was taken as an issue by the Respondent at the time. For example, if it was so serious as to be an allegation of misconduct Mr Reeve could have instructed the claimant to raise the matter directly with Gareth and not himself. There is no evidence to show that this or anything like it happened. In addition, Gareth Hamilton did not make a complaint or raise an issue about this with management.

11.4.3. Leaving the premises on 19 October 2017

11.4.3.1. There was no dispute that the claimant left the respondent's premises. The claimant said that Terry Reeve said that he could leave in 5 mins which Mr Reeve denied. However Mr Reeve's statement said that they would not have asked the claimant to work his paid notice which indicates that the claimant was not required to carry out more work at the respondent. The Tribunal finds that, in light of Mr Reeve's evidence that he has given people jobs on the spot, his statement that the claimant would not be required to work his paid notice when combined with the claimant's own evidence and the circumstances of the meeting, Mr Reeve did say that the claimant could leave in 5 minutes.

11.4.3.2. Ms Williams notes do not state that the claimant behaved abusively in the meeting and the notes do not state that the claimant walked out in the middle of it. Further, her notes do not state that the Claimant was told to stay.

11.4.3.3. All parties agreed that the claimant had written a notice of resignation at the meeting with Pauline Williams. There was no reason for the claimant to stay at this point. The respondent's position was that Pauline had asked the claimant to stay, have a cup of tea and calm down. The tribunal does not accept that in the circumstances any party could have an expectation that the claimant was obliged to stay on the premises. The Tribunal finds that no reasonable employer could reasonably believe that the claimant leaving in these circumstances could be misconduct.

11.4.4. Overall, we consider that no reasonable employer could conclude that the latter 2 allegations (undermining Gareth and leaving the premises) amounted to misconduct. However we find that a reasonable employer acting reasonably could have imposed the disciplinary sanction which the respondent did in relation to the claimant not following the crimping method on which he had been instructed.

11.5. Disciplinary procedure 18 July 2018

11.5.1. *Failure to follow instructions from team leader Gareth Hamilton in particular regarding talking.*

11.5.1.1. A meeting note from Gareth Hamilton dated 8 December 2017 sets out that he spoke to the claimant and another employee about talking and turning around. The other employee apologized but the claimant did not agree or disagree to stop chatting and said that he knew and was planning on leaving anyway.

11.5.1.2. A meeting note dated 4 July 2018 sets out that Gareth had requested a meeting with Ms Hamilton to discuss 2 issues concerning the claimant. One issue was talking too much and the other was an altercation between the claimant and Darren in which the claimant was loud and verbally angry to Darren. Darren was calm and did not raise his voice.

11.5.1.3. The tribunal finds that Gareth Hamilton had spoken to the claimant on numerous occasions about talking with another employee. The claimant denied that he spoke to this employee because he stated that he had nothing in common with him. The tribunal preferred the evidence of Gareth Hamilton which corresponded with evidence about the claimant's seating position, the claimant's desire to sit on the bench where there are other employees working rather than the position he was in with his back to other employees and other records of the claimant talking including in his appraisal.

11.5.1.4. The tribunal does not accept even in light of all the background circumstances and the live warning on the claimant's file, that a reasonable employer acting reasonably could conclude that this was sufficiently serious misconduct to justify the imposition of a disciplinary sanction.

11.5.2. *Unreasonable behavior towards Pauline Williams on 13 July 2018*

11.5.2.1. Ms Williams notes of the meeting of 13 July are dated 16 July 2018 (the following Monday) and are called "Witness Statement". The Tribunal finds that a reasonable employer would conclude that these notes were made after the meeting with the claimant and may not have been fulsome or accurate. Particularly as Ms

Williams has made notes for many other meetings in handwriting but these are typed post dated notes.

11.5.2.2. Ms Williams notes state “his manner was aggressive both in tone and body language...he was cross & angry & confrontational” and “Zaffar continued in this vein shouting loudly at me”.

11.5.2.3. The claimant disputes that he shouted at Ms Williams but he accepts that he was emotional and that his voice is loud. The Tribunal finds that the meeting became heated and that the claimant became loud and angry and acted in a way which could be construed as shouting. The Tribunal finds that a reasonable employer acting reasonably could have concluded that this was misconduct.

12. Decision

12.1. This is a case involving an alleged dismissal for misconduct, Therefore, we shall address each stage of the BHS v Burchell test in turn.

12.2. *Had the employer carried out a reasonable investigation?*

12.2.1. The Tribunal finds that the respondent did carry out a reasonable investigation in relation to all the disciplinaries including but not limited to the final one which resulted in dismissal. This is for the following reasons:

12.2.1.1. In relation to the first disciplinary, the tribunal finds that the respondent carried out an investigation stage which included Ms Hamilton meeting with employees who were in the vicinity of the incident with the appellant and Darren Sheppard. The disciplinary meeting and decision was taken by Mrs Reeve, who conducted some additional investigatory meetings, The claimant was invited to a meeting, notified of the allegations against him and given the opportunity to state his case;

12.2.1.2. in relation to the 2nd disciplinary:

12.2.1.2.1. the respondent again interviewed relevant employees. In this case an interview was conducted with Darren Sheppard which investigated the use of the crimping machine, the claimant’s method of using this machine and its results and the method propounded by Darren Sheppard. The tribunal finds that this was a reasonable fact-finding investigation. The allegations were put to the claimant and he was given an opportunity to state his case.

12.2.1.2.2. In relation to the allegation that the claimant undermined Gareth Hamilton, we find that it was not fully investigated because there is no record of Gareth Hamilton’s views being sought about whether he was undermined and there is no record of Mr Reeve’s account of what happened in the meeting with him and the claimant.

12.2.1.2.3. In relation to the final allegation, which was the appellant leaving the premises, we find the investigation was reasonable in that it sought the claimant's views and it considered Ms Pauline Williams notes.

12.2.1.3. in relation to the 3rd disciplinary:

12.2.1.3.1. the tribunal concludes that investigation into the first allegation, failing to follow instructions from Gareth was not reasonable because there is no evidence that Gareth views on it and how he was undermined were sought: there is merely a note of Gareth seeking advice from Ms Hamilton about how to deal with the claimant.

12.2.1.3.2. in relation to the 2nd allegation, which was unreasonable behaviour towards Pauline Williams, the tribunal finds that the investigation was reasonable because the appellant was given the opportunity to state his position and Ms Pauline Williams was interviewed and her notes taken into account.

12.3. Did the employer believe the employee to be guilty of misconduct at the time of dismissal?

12.3.1. The claimant's case is that the dismissal was tainted by discrimination, if this were the case the respondent could not believe that the claimant was guilty of misconduct. In particular, he refers to differential treatment between himself and Darren Shephard in relation to the events in July 2017, general allegations of his complaints not being dealt with and that he was viewed as inferior.

12.3.2. The tribunal finds that the respondent did believe the employee to be guilty of misconduct at the time of dismissal. All parties agreed that during the 18 months preceding the claimant's dismissal there had been a number of difficulties with the claimant at work, some of which arose from his relationship with Darren Shephard, the claimant's unhappiness with his seating position and his desire to be seated on the main bench with 3 other employees and several incidents of the claimant speaking loudly and aggressively. Many of these incidences have been recorded in the disciplinary letters. As the tribunal has indicated above, it considers that some of the allegations made against the claimant are minor. However, it has also found that in each disciplinary process there was at least one serious allegation on which a reasonable employer acting reasonably could have come to the same decision as the respondent. Therefore the tribunal finds that the respondent believed the employee to be guilty of misconduct at the time of dismissal which, as a result of his live final warning, resulted in dismissal.

12.4. Did the employer have in mind reasonable grounds on which to sustain that belief?

- 12.4.1. The tribunal finds that the respondent did have reasonable grounds on which to sustain its belief for the following reasons:
- 12.4.1.1. Ms Pauline Williams had set out in writing that the claimant had been loud, angry and shouted at her in a meeting;
- 12.4.1.2. At the meeting with the claimant to hear his side of the story he apologised for his behavior, he did not directly dispute what Ms Pauline Williams said, he stated that his emotions came out of him and that he would try to control himself better in future;
- 12.4.1.3. the tribunal finds that the evidence from Ms Pauline Williams and the claimant about what happened at the meeting were reasonably consistent and indicated that the claimant had become emotional and angry. When this was combined with the previous conduct of the claimant which included angry and insulting behaviour towards Darren Shephard, the tribunal finds that a reasonable employer acting reasonably could accept Ms Pauline Williams account about the claimant's actions and conclude that his actions were misconduct.
- 12.4.1.4. The tribunal finds that when this is combined with his live warning these are reasonable grounds to sustain the belief.

13. We now address each issue specifically:

Unfair Dismissal

- 13.1. What was the reason for the claimant's dismissal?
- 13.1.1. We find that the reason for dismissal was misconduct.
- 13.2. Did the person who decided that the claimant should be dismissed for misconduct genuinely believe that the claimant had committed the misconduct for which he was dismissed?
- 13.2.1. We find that this test is satisfied as set out above.
- 13.3. Did that person have reasonable grounds for that belief?
- 13.3.1. We find that this test is satisfied as set out above.
- 13.4. Was the investigation which led to the decision to dismiss the claimant fair, i.e. was it one which was within the range of reasonable responses of a reasonable employer to carry out, or was it outside that range?
- 13.4.1. We find that this test is satisfied as set out above.
- 13.5. If the respondent is able to satisfy the tribunal that the reason for the claimant's dismissal was his conduct, was the decision that the claimant should be dismissed that conduct one which it was within the range of reasonable responses of a reasonable employer to make?

13.5.1. This legal test gives the respondent a margin in which it can make decisions. The test is not whether another employer would have acted differently and it is not whether the tribunal would have made a different decision. The tribunal must not substitute its judgement for that of the employer. The test is whether or not the respondent's actions fall within the band of reasonable responses of a reasonable employer acting reasonably. This test applies to both the decision to dismiss and the procedure by which the decision was reached.

13.5.2. The tribunal considers that the respondent could have taken a more critical view of Ms Pauline Williams evidence about the meeting of 13 July 2018. However in all the circumstances which include the claimant's live final warning, which was given to him because of previous conduct which involved loud, angry voices, the decision to dismiss was within the range of reasonable responses of a reasonable employer.

13.6. The Tribunal finds that the claimant was not unfairly dismissed.

Race Discrimination

13.7. Was the claimant paid less than the other cable assemblers (as claimed by the claimant)? If so, what was the reason for that difference in pay, was it to any extent because of the claimant's race?

13.7.1. The Respondent accepted that Debbie Smith was paid more (£4k) than the claimant but argued that she was not a comparator because she did more intricate work and worked faster. This was set out in Ms Hamilton's witness statement and a similar statement was in Gareth's witness statement which stated that he assumed that this was the reason for the pay differential.

13.7.2. The respondent provided pay information about another employee (DP) whose salary was £15,500 in 2016 and an employee who left several years ago who was Asian. The latter earned £17,400 in 2016. No pay information was provided about other assembly operators.

13.7.3. In summary the Tribunal has been provided with incomplete information about assembly operators' pay by the respondent. The information indicates that one white employee was paid more than the claimant and one white employee was paid less. We find that the appellant has discharged the prima facie burden of proof as he was paid less than white employees. We also note the partial nature of the disclosure from the respondent of information (about race and pay) which is entirely within its control and to which the claimant does not have access. The claimant has disclosed all he can on this issue.

13.7.4. The Tribunal has drawn an adverse inference from the respondent's failure to disclose pay information about the other assembly operators.

13.7.5. We find that the respondent has failed to discharge the burden of proof which lies on it. The respondent denies that Debbie Smith is a comparator but has provided very little evidence to support its defense to a claim of race discrimination – the only reason for the difference is the brief and vague witness statement of Ms Hamilton. As set out above Gareth's statement makes clear he is not sure of the reasons for the pay differential. The Tribunal would expect more evidence from the respondent. It was specifically raised on the first day of the hearing that the Respondent may wish to consider providing further documentary evidence about pay of its employees and though it disclosed some information this was incomplete and unhelpful.

13.8. *Was the claimant's dismissal tainted to any extent by his race?*

13.8.1. In considering this question. The tribunal must consider whether or not the claimant has proved facts from which the tribunal could, in the absence of an explanation from the respondent, decide that his dismissal was to any extent because of his race. If so, then has the respondent proved, on the balance of probabilities, that it did not dismiss the claimant to any extent because of his race?

13.8.2. The claimant relies on a hypothetical comparator and the situation when the claimant was disciplined for the manner in which he spoke to Mr Shepherd but Mr Shepherd was not disciplined. The tribunal finds that Mr Shepherd is not a comparator. At most, Mr Shepherd was involved in one of the 9 events which form the allegations of misconduct in the 3 disciplinary processes which ultimately led to the claimant's dismissal. Mr Shepherd was not involved in any of the allegations which were set out in the 3rd and final disciplinary which ultimately resulted in the claimant's dismissal.

13.8.3. If a hypothetical comparator is used the tribunal does not find that the claimant has proved facts from which we can conclude that his dismissal was to any extent because of his race. We recognise that the claimant has raised a number of concerns about how fairly he was treated during his employment however we do not accept that these can discharge the prima facie burden of proof which lies on the claimant. Overall, the tribunal finds that at least one of the allegations in each disciplinary justified the sanction imposed and it does not accept that even those allegations which were more minor have any element of race discrimination.

13.8.4. Further, the tribunal does not accept that the manner in which he was treated by the respondent was so unreasonable that an inference can be drawn that his dismissal was because of his race. This is because the tribunal finds that at least one of the allegations in each disciplinary that were made against the appellant were serious misconduct and that they justified the sanction imposed. As set out above the tribunal finds that in relation to the incident of July 2017 the claimant spoke loudly and angrily to Mr Shepherd. But Mr Darren Shepherd did not talk in this manner to the claimant. It is the difference in their actions that cause the differential treatment and there is no

connection to race whatsoever.

13.9. The tribunal finds that the claimant was discriminated against because of his race in relation to pay only within the meaning of section 13 of the Equality Act 2010.

13.10. Note: These written reasons were prepared on 20 January 2021 because the request for written reasons was only received by Judge Bartlett on 14 January 2021 even though I recognise that the requests for written reasons were submitted some months before that date.

Employment Judge Bartlett

Date 20 January 2021

JUDGMENT SENT TO THE PARTIES ON

.....27/1/21.....

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FOR THE TRIBUNAL OFFICE

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