



Claimant: Mr J Singh

Respondent: Manpower UK Ltd

Heard at: Leeds

On: 20-21 January 2021

Before: Employment Judge Parkin
Ms NH Downey
Mr J Howarth

Representation

Claimant: In person (at Leeds ET)

Respondent: Mr A Sutherland, Solicitor

RESERVED JUDGMENT

The unanimous Judgment of the Tribunal is that:

- 1) The claimant's claims of race discrimination and racial harassment are dismissed;
and
- 2) The claimant was not unfairly dismissed for making a protected disclosure and his unfair dismissal claim is dismissed.

REASONS

1 The claim and response

1.1 In his claim form presented on 24 January 2020 the claimant ticked the boxes for unfair dismissal and race discrimination, setting out at box 8.1: "Racist prejudice and discriminated against me only and for whistle blowing and at 8.2:

" I worked for the respondent at Premier Farnell ... Leeds. On 5 November 2019 I went to work and ... Magic called me over and said have you been drinking I said no

he said go home Paki and don't come back I said why. I also told him A. stealing from the company electric goods I have voice recording and taking drugs and drink at work and other whites and Polish and Romanians not working taking smoke breaks when they want drugs drink at work you don't say nothing to them why single me out because I'm the only Indian Asian he said get out I also saw powder in this Magic nose he had no right to accuse me of anything without any proof or dismiss me.”

1.2 He claimed compensation for being called a Paki and being racially prejudiced and discriminated against and for whistleblowing. In further particulars provided on 3 June 2020, the claimant clarified that his case was that he was not dismissed on 5 November 2019 just told to “Go home, Paki” but that he was actually dismissed on 11 November 2019 when he told Magic (Lizon) over the phone that he had told Mark Cahill, the respondent's Managing Director that “whites and Polish (are) taking drugs and doing what they wanted at work stealing and drinking and Magic says nothing to them”. He maintained that when he disclosed this to Mr Lizon and told him he had emailed his Head Office and Premier Farnell's boss, Mr Lizon dismissed him (on 11 November).

1.3 By its response presented on 24 February 2020, the respondent denied the claimant's claims, contending that he had not set out sufficient detail of any discrimination claims and denied that he had been unfairly dismissed for making a protected disclosure. It provided a much fuller amended response on 17 August 2020 after two case management hearings. The respondent denied the claimant had sufficient service for a claim of ordinary unfair dismissal and denied that he had made a protected qualifying disclosure, disputing that the claimant had any reasonable belief in his disclosures being in the public interest or that they tended to show the relevant offence or matters disclosed. It denied that its personnel (Mr Lizon and Ms Pitchford) had any knowledge of disclosures at the time the claimant's assignment was terminated on 11 November 2019 or that this amounted to dismissal, contending this termination happened before the claimant made his disclosure.

2 The Complaints and the Issues

At the second case management hearing on 27 July 2020, Employment Judge Little identified the complaints with the resulting issues as follows. (In Judge Little's Case Management Summary, these are numbered from 4.1.1 to 4.3.5. The first names of colleagues C and A have been abbreviated to their initial):

2.1 Direct race discrimination

2.1.1 On dates yet to be clarified, colleagues including C and A (further information to be provided about the identity of those colleagues) making the comment to the effect of “what is this Paki doing in our country”;

2.1.2 Mr Lizon having overheard those comments, taking no action;

2.1.3 Mr Lizon allegedly referring to the claimant as a Paki in a conversation on 5 November 2019;

2.1.4 Mr Lizon ignoring the claimant but shaking the hands of other colleagues who were Polish or white British and laughing and joking with them;

2.1.5 The claimant's alleged dismissal.

Save for the alleged comments, which if true would be overtly racist, the claimant will need to put evidence before the Tribunal to establish a provisional case that if he was ignored and if he was dismissed that was because of his race (which he describes as Indian Asian). If he can do that it will be for the respondent to prove that that was not the reason.

2.2 Harassment related to race

The unwanted conduct is the allegedly overt racist comments mentioned above together with allegedly being ignored. The issue for the Tribunal is whether this obviously unwanted conduct occurred and if it did whether it had the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him.

2.3 Unfair dismissal by reason of making a protected disclosure

This is a type of unfair dismissal complaint where it is not necessary for the employee to have two years' minimum qualifying service. The relevant issues will be:

2.3.1 Did the claimant make a qualifying protected disclosure in his email of 11 November 2019 to Mr Mark Cahill, Managing Director of the respondent, the email being sent at 16.36;

2.3.2 Did the claimant subsequently on 11 November 2019 inform Mr Lizon that he had made such a disclosure?;

2.3.3 Did Mr Lizon dismiss the claimant on 11 November 2019 (as opposed to informing him that his assignment with Premier Farnell had ended)?;

2.3.4 Alternatively did the claimant end his own employment on or about 17 November 2019 by requesting his P45? (The claimant denies that he resigned and obviously in those circumstances he is not claiming that he was constructively dismissed - that is that the respondent's actions had entitled him to resign but treat himself as dismissed).

2.3.5 If the claimant was dismissed was the reason or if more than one the principal reason for the dismissal that the claimant had made a qualifying protected disclosure?

3 Case management and evidence at the hearing

3.1 The hearing was listed for two days as a virtual hearing by CVP (as signified by Code V above), and proceeded as a "hybrid" hearing with the claimant participating and giving his

evidence within a hearing room at Leeds ET. Some time was lost during the hearing because of Internet difficulties sustained by one of the members. Whilst it had been intended to deliver judgment on liability if possible to the parties on the second day, the claimant needed to attend hospital for medical tests and the Tribunal therefore reserved its judgment, going on to deliberate and determine the claims on liability that day.

3.2 There was a bundle of documents (135 pages). Although ordered to agree the contents, it transpired that the bundle had substantially been prepared by the respondent without the claimant's agreement and he disputed the inclusion of some documents. Accordingly, before hearing oral evidence, the Tribunal considered matters relating to the bundle and disclosure of evidence, having regard to its overriding objective at rule 2 of the Employment Tribunals Rules of Procedure 2013 which governed the whole hearing, namely:

“The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable-

- (a) ensuring that the parties are on an equal footing;
- (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;
- (c) avoiding unnecessary formality and seeking flexibility in the proceedings;
- (d) avoiding delay, so far as compatible with proper consideration of the issues; and
- (e) saving expense.

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.”

3.3 The claimant objected to the late introduction by the respondent of an earlier Tribunal decision which the respondent contended showed great similarity of issues and timing of whistleblowing disclosure in circumstances where the credibility of the claimant was very much in issue in the proceedings. Although the claimant accepted the earlier decision related to a case of his, he contended it had nothing to do with this claim and had been brought up by the respondent at the last minute, the day before the hearing. Although the respondent contended there was no prejudice to the claimant in introducing the new document, the Tribunal considered that reliance by the respondent on this previous decision late in circumstances where the claimant was acting for himself did disadvantage him, although it acknowledged the respondent would be entitled to cross-examine the claimant on the decision in testing his credibility. However, the Tribunal stressed that it was primarily concerned with the evidence within these proceedings and it did not admit or read the earlier decision.

3.4 The claimant objected to the inclusion of a sick certificate in the bundle relating to August-October 2020 which he had himself provided to the Tribunal. Since it was a document within the proceedings, the Tribunal did not order its removal but ruled it was for the respondent to establish the relevance of that document to the proceedings, in circumstances where the events the Tribunal was mainly concerned were in November 2019.

3.5 Finally, the parties also referred to a voice recording the claimant had made which he wanted to rely upon, contending that this confirmed an admission of theft to him by another employee at his workplace or an oral disclosure by him to Mr Lizon about colleagues' misconduct. This voice recording had never been disclosed to the respondent but the Tribunal was referred to correspondence between the parties as far back as late October/early November 2020 where the respondent made clear that the claimant was under an obligation to disclose it as a relevant document, although contending that he must also provide a transcript and that it would object to its admissibility in any event. The Tribunal found it wholly unsatisfactory that the claimant sought to introduce the recording at the start of the hearing having not disclosed the recording which he wished to rely upon earlier; irrespective of its admissibility, this would not have been fair to the respondent. The Tribunal refused to allow the claimant to produce it and rely upon it.

3.6 The order of evidence and closing submissions on liability was agreed, with the claimant giving evidence followed by the respondent's witnesses and the parties' closing submissions made in the reverse order with the claimant addressing the Tribunal last.

4 Witnesses and credibility

4.1 The claimant gave evidence and the respondent called its Account Manager for Premier Farnell (PF), Maciej (Magic) Lizon and Angela Pitchford, its Contract Consultant on the PF account. Since the parties presented significantly different accounts of events on 5 and 11 November 2019, credibility of the witnesses was most important to the Tribunal's decision-making.

4.2 Regrettably and even taking into account that the claimant was a litigant in person with no support evident during the proceedings especially at the two hearings he attended and that he may have been hospitalised in both November 2019 and August 2020 (the latter time in a coma and having suffered a stroke) with ongoing heart issues, it did not find him a reliable witness. Whilst full internal consistency and conformity with contemporaneous documentation and the evidence of others is rarely found in a witness, the Tribunal found major discrepancies in the claimant's case which it could not overlook, especially in relation to events on the key dates of 5 November and 11 November 2019. The claimant gave a number of different versions of the words used towards him by Mr Lizon on 5 November. Thus, in the ET1 claim form: "Go home Paki and don't come back"; in the email to Mr Cahill on 11 November: "Don't come back Paki at all"; in his witness statement: "Piss off, Paki and don't come back" and in oral evidence: "Get out, Paki" or "Get lost, Paki" and then on three further occasions the claimant said the expression that Mr Lizon used was: "Paki, Don't come back". Whilst of course the grossly offensive word Paki is common to all and the theme is the same, the Tribunal would have expected the whole phrase to have been remembered by the

claimant and not just the word and the theme. Moreover, in cross-examination the claimant maintained that this was a one-off use of the word by Mr Lizon whereas the email to Mr Cahill referred to a second use on 11 November in the phrase: "So what Paki?". This was said to be Mr Lizon's response to the claimant drawing attention to differential treatment between him and white and Polish workers and informing that he had been poorly, in hospital and on tablets all week (and that he had lost his phone). Within the course of his evidence, the claimant moved from saying early in cross-examination that there was just him and Mr Lizon present when the racial slur containing "Paki" was said, to later stating expressly that there was a witness to the conversation working nearby and that all the packers too could hear what was being said, indicating that six or seven others could hear it. He refused to name them, maintaining that some still worked for the respondent and were fearful for their jobs. The Tribunal concluded these and other inconsistencies on important aspects of the claimant's evidence significantly undermined his reliability.

4.3 The Tribunal also considered carefully the evidence and actions of the respondent and in particular its witnesses Mr Lizon and Ms Pitchford. It was noteworthy that save for correspondence with Premier Farnell on 6 and 7 November 2019 in relation to the claimant's assignment, there was no formal documentation about or to him before the telephone call and email on 11 November 2019. Ultimately, however, the Tribunal was satisfied that Mr Lizon on took a lenient course with the claimant on 5 November 2019, allowing him to go home and rest and return the next day despite him appearing drunk. This was consistent with the text messages to him which were initially sympathetic on 6 November but developed into threatening the claimant he would be reported to the police in respect of the colleague's missing jacket. Whether the two witnesses did or did not discuss events prior to providing their accounts to Laura Beeston, Ms Pitchford on 12 November and Mr Lizon on 13 November gave separate individual accounts which were not simply identical recounting of an agreed narrative.

5 The Facts

From the oral and documentary evidence the Tribunal made the following findings of primary fact and drew the following inferences on the balance of probabilities.

5.1 As part of its recruitment and supply of staff business, the respondent employed the claimant and other "field staff" to work for clients on assignment on clients' premises. The clients had the power to request the removal of the respondent's employees from their site. such that the respondent paid their employees when they were at working on those assignments but not when they were not on assignment.

5.2 Premier Farnell (PF), the respondent's client, is an electronics components manufacturer and distributor based in Leeds and in late 2019 the respondent was supplying and managing approximately 100 staff working in its warehouse alongside or in proximity to PF employees.

5.3 Mr Lizon dealt with all aspects of recruitment, performance, sickness absence and staffing, managing the respondent's team at the Leeds site with Ms Pitchford as his assistant

on these matters including staff holidays and payroll issues. Mr Lizon was the first point of contact between the respondent and PF and they used a small office on the PF site.

5.4 The claimant is of Indian Asian national and ethnic origin. From 23 September 2019, he was employed by the respondent on the PF assignment at PF's site as a picker/packer working at a designated bay within the site dealing with particular products.

5.5 On 4 November 2019, the claimant failed to attend work and did not respond to Mr Lizon's text messages.

5.6 On 5 November 2019, the Claimant texted Mr Lizon saying: "I'll be in today Jasbir Singh house was burgled and lost my work stuff what shall I do". (85)

5.7 He attended work that day at 2pm and went to the office for a return to work interview with Mr Lizon. Angela Pitchford was present as well. The claimant confirmed that he had been burgled the day before and Mr Lizon initially allowed him to go back to his work bay, completing a return to work form about the clients absence and circling on that form that the claimant felt capable of undertaking his normal duties (86-87). Mr Lizon did not smell alcohol on the claimant's breath, but said he had a blocked nose due to a cold at the time.

5.8 However, PF's supervisor Mr Chris Farrar raised a concern with Ms Pitchford and Mr Lizon that the claimant was drunk and unsteady on his feet and should not be working on site. Ms Pitchford saw that the claimant was staggering and wobbling from one side of the walkway to the other. Mr Lizon then followed the claimant to his work bay and asked if he had been drinking; the claimant denied that he had but Mr Lizon suggested the claimant should leave and go home to rest and come back to work the next day, which the claimant agreed to do. Mr Lizon did not tell the claimant to "Piss off", "Get out", "Get Lost" or "Don't come back" or similar words and did not use the racist term "Paki" to the claimant at this time. There is no substantial evidence that anyone overheard the conversation between them. Moreover, the Tribunal did not find that the claimant responded to Mr Lizon's question whether he had been drinking, having denied it, with his own question to Mr Lizon whether he (Lizon) he had been taking drugs (or cocaine) and was not satisfied the claimant saw white powder on Mr Lizon's nose at that time.

5.9 Mr Lizon watched the claimant walking down the warehouse to leave and saw him struggling to walk in a straight line. The claimant was met as he walked off to the PF security office by the PF supervisor, Chris Farrar, who effectively escorted him off or saw him off the premises. When he left, the claimant took another colleague's jacket by mistake, leaving his own jacket instead.

5.10 Later that afternoon Mr Lizon texted the claimant on his mobile phone: "Hi hope you are better. Did you take your own jacket or somebody elses?" (85). He continued to try to make contact with the claimant who did not attend for work on 6 November 2019, but replied: "Sorry, I can't talk right now" (85). on 6 November Mr Lizon texted: "Jasbir Please call me ASAP. I need to know what is happening and if you're returning to work!" and then later: "Hi Jasbir, You have taken somebody's jacket with you on leaving site last night. Since you failed to return it this will be treated as theft and will become a police matter." (85)

5.11 Following that message, Mr Lizon spoke with the claimant's mother on the claimant's phone and was assured that the jacket would be returned. That prompted his text: "Hello it is Premier Farnell ... I will let security know that you will bring the jacket and Jazbir's jacket will be waiting at security. Thank you for your help. Magic from Manpower." (85)

5.12 Whereas the claimant gave oral evidence that had tried to contact the respondent's Head Office HR team on 6, 7 and 8 November to complain about Mr Lizon and had made some contact, the Tribunal did not find this established. It noted that there was no mention of such contact or attempted contact in the claimant's witness statement and nor was there any such indication in his email to Mark Cahill on 11 November 2019 and did not find it consistent with his evidence that he was in hospital for much of the period between 5 and 11 November with heart problems.

5.13 After speaking with the claimant's mother on 6 November, Mr Lizon agreed with PF that the claimant would not return to work on site, emailing PF Personnel at 17.15: "Jasbir Kalay will not be returning due to personal problems. Can you please process as a leaver?" (88). This was formally confirmed within PF on 7 November 2019: "(The claimant) has been treated as a leaver with immediate effect and should have site access removed." (126)

5.14 From 6 November until 11 November 2019, there was no further contact by the claimant with local management at Leeds or from them to him.

5.15 At 15.12 on 11 November 2019, the claimant rang Angela Pitchford at work with words to the effect: "I'm ringing to say I'm feeling better and I can come back to work tomorrow". However, Ms Pitchford told him that she was sorry but he could not return to work at PF because of the incident the other day when he was asked to leave. The claimant told her he didn't steal anyone's coat and it was one rule for one here and he could prove colleagues were stealing products from the shop floor yet the respondent had allowed them back. When Ms Pitchford told him it was not the coat issue, the claimant became abusive and said she was a racist. She immediately put her manager Mr Lizon on to the phone to speak with the claimant.

5.16 Although the claimant strongly contended that his telephone call with Angela Pitchford and Magic Lizon was after he had first emailed Mark Cahill and amplified his oral evidence to say that he had emailed Mark Cahill twice on 11 November 2019, he did not produce any further email or other evidence to establish this. The Tribunal concluded that the email from the claimant to Mr Cahill followed this telephone conversation on the same afternoon and that he did not tell Mr Lizon he had emailed the Managing Director.

5.17 During the conversation, the claimant became angry and aggressive when Mr Lizon told him he was not returning to work at the PF site. The claimant said that other colleagues were stealing from PF and taking drugs on site but he was not allowed to work there. Although Mr Lizon did tell the claimant words to the effect: "You're not coming back", this was in reference to the PF site and he did not use the word "Paki".

5.18 Later that afternoon at 16.36, the claimant emailed the respondent's Chief Executive Mark Cahill. His email, headed: "Subject: Canal Rd Premier Farnell Leeds magic for

manpower chief executive called me Paki last week and said dont come back letter before action”, stated:

“Magic who works for manpower Leeds farnell canal Rd LS12 accused me of drinking last week and said don't come back Paki at all and I told him today he can't be prejudiced discriminate and be racist against me only and allow white people employed by manpower and Polish continued to work when they all take drugs in warehouse and drink I have proof (A) who works there white man has been stealing 2000 pounds of electric goods I told Magic and Angie this today they said so what what kind of company are you have I await your urgent reply before I issue tribunal proceedings against manpower and (PF) for discrimination and being racist and prejudiced against me only and manpower for whistle blowing and accusing me of drinking in warehouse without any proof your Jasbir Singh why not white and Polish people only me when their targets were less than 25 per and they drink and take drugs there why only me when I told him I was poorly and in hospital all week and on tablets and lost phone he said So what Paki I await your final reply by end of this week before issue an tribunal claim against farnell and manpower group no more notice will be given. (89, fuller version at 94-95)

There is no suggestion in that email that it is a second or follow up email to Mr Cahill and its own content shows that it was made subsequently to the telephone conversation with Ms Pitchford and Mr Lizon: “...I told Magic and Angie this today...”.

The claimant also copied his email to others at the respondent and to PF's Chief Executive Mr Ryan and others at PF that same afternoon.

5.19 The respondent acted upon the claimant's email, with its Customer Services Officer, Felice Oxborrow sending a holding reply at 16.59 that day. Laura Beeston, a Regional Manager, was soon after assigned to deal with the email which was taken as a grievance complaint.

5.20 On 12 November 2019 at 10:25 Angela Pitchford gave her detailed version:

“Yesterday 11th November 2019 at 15.12 from a landline number called my work mobile, I answered as I usually would “good afternoon Manpower Angie speaking” and the caller said “hi Angie this is Jasbir Kalay” I said hi Jasbir what can I do for you. Jasbir replied “I'm ringing to say I'm feeling better and I can come back to work tomorrow” I said I'm very sorry Jasbir but unfortunately we cannot allow you back to work at PF due to the incident the other day when you were asked to leave. Jasbir responded by saying he didn't steal anyone's coat and it's one rule for one here because he can prove XY&Z are stealing products from the shop floor and we allow them back. I said Jasbir it's nothing to do with the coat issue, he then said I was a racist. At this point I said bear with me jazz be I will pass you onto my manager Magic. I handed the phone to Magic and he continued the conversation.

This all originated from an occasion on Tuesday 5th November when Jasbir came to work and into the Manpower office which is on site at PF, he needed to come into our

office to complete a return to work form as he had been off work the previous day, his reason was his house had been burgled. Magic had gone to collect Jasbir from the Bay he was working in and when Magic arrived back in our office before Jasbir came in Magic just said watch this guy do you think he seems a bit odd today. Magic completed the return to work document with him, I thought he seemed quite down and sheepish but put that down to him just having his house burgled.

Whilst Magic was finishing up the return to work form with Jasbir, a supervisor of PF, I (Chris Farrar) knocked on our office door and gestured me to come out to him, I went out and closed the door behind me, Chris said to me “that lad you have in there is under the influence” (this literally seconds) Before anything else could be said the door opened and Jasbir left our office and continued to walk down the warehouse, Chris said “look at him he’s all over the place! He’s been like it down in his bay, he needs getting off site”. I can confirm jasbir was staggering and wobbling from one side of the walkway to the other.

Magic and I both agreed we would remove him from site

Magic left the office to collect Jasbir from the bottom of the warehouse to escort him from site, that is when Jasbir mistook his coat for someone else's and took the wrong jacket, this was returned by Jasbir’s parent on Thursday 7th November...

You will need to hear from Magic what happened from him collecting Jasbir and escorting him from PF premises...” (96-97)

5.21 On 13 November 2019 at 12.10, Mr Lizon gave his version:

Jasbir failed to attend work on Monday 04/11. He did not follow the correct absence procedure. We tried contact him few times on that day but with no luck. He did send a text message on Tuesday 05/11 at 07.45: “I’ll be in today Jasbir Singh house was burgled and lost my work stuff what shall I do”. I then called Jasbir and advised that we can support him with new equipment. Upon his return to site that day at 14.00 we held return to work interview. He claimed that his absence was due to house burglary. I notice that Jasbir looked tired and not like himself. His speech was slower and slurry and he seemed as under the influence of alcohol. When asked if he was drinking he said No. He returned to work in his station. Almost immediately we were approached by one of the supervisors Chris Farrar who raised a concern that Jasbir might be drunk. I went to speak to Jasbir and advised that since he seemed tired and distressed he could take a rest and go home for the shift and return tomorrow when better. He said it will be good and appreciated. He walked down the warehouse towards the exit struggling to keep a straight line. Chris Farrar met him halfway walked with him to the exit door. Later Chris told me that Jasbir admitted having few too many to drink. Jasbir had taken someone else's jacket when leaving and left his on site. We discovered this with support of security around 14.30. I tried calling Jasbir but he did not answer. Gentleman who’s jacket was taken needed to go home in cold and rain without it. He also mentioned that some money and earphones were in the pockets. I tried contact Jasbir numerous times by calling and texting that night as well as next day but with no

luck apart from 2 text messages “Sorry, I can't talk right now” At 10.17 and 12.31. He did not return to work on Wednesday 06/11. I kept calling his number a few times to get an update on this situation and finally his phone was answered by his mother on 06/11 at 16.12. She told me that Jasbir has a massive drinking problem and only just returned home and they did not see him since Friday. He lives with his parents. She did say that the jacket he brought was not his. It was soaking wet. I asked for it to be returned. I believe Jasbir's father brought it on site the next day on Thursday and collected Jasbir's jacket from security. The returned jacket was empty with no money or earphones. Jasbir did not contact us until he called us on Monday. It called Angela Pitchford's phone and said we were racist and allow other people who steal and take drugs to work but he was sat. When he started being more abusive Angela passed the phone onto me nice but with Jasbir. He told me that we are racist and allow other people who steal and take drugs and underperform to work but he cannot work. He was abusive and used inappropriate language including “Fuck off dickhead” I tried to call him down and explain that we want to support him but all he was saying is that he will take it higher and contact chief executive of PF and Manpower. He then put the phone down on me” (98).

5.22 The claimant did not wish to attend a grievance meeting, maintaining that everything he needed to say had been set out in his email.

5.23 On 17 November 2019, the claimant emailed asking for his P45. (101). The P45 was finally issued by respondent to him in February 2020. The respondent also issued contradictory PAYE statements of earnings giving his date of leaving as alternatively 15 November 2019 (the date of the final payment of wages) or 16 February 2020.

5.24 On 21 November 2019 a statement was taken from Chris Farrar, the PF supervisor. Whilst this did not expressly state the date 5 November 2019, the circumstances outlined plainly related to the same incident. Mr Farrar referred to following a worker walk from Y Bay being very unsteady going to the Manpower office at 2-2.15pm. He said he saw the worker come out plainly looking drunk and smelling of alcohol and he asked Manpower to remove him from site. He decided to escort the worker from site and asked him: “Did you overdo it last night?” to which the reply was “Yes”.(103)

5.25 The respondent's investigation included extra questions for the claimant, some of which he dealt with on 15 November and 19 November 2019 confirming that only Magic had called him “Paki” on 5 November near Bay Y (101-102,117). Both Ms Pitchford and Mr Lizon also answered extra questions put by Laura Beeston. Mr Lizon in particular denied using the word on 5 November 2019 to the claimant or ever witnessing or being advised of any racial or discriminatory comments at PF (11-112).

5.26 On 3 January 2020, Laura Beeston gave her grievance outcome, finding no evidence to support the allegation of discrimination by Mr Lizon, but that the (PF) client had requested his assignment be ended because they could not sustain his unreliability, saying that both the client and the respondent were going to communicate the Misuse of Drugs and Alcohol and Code of Conduct, including acceptable behaviour within the workplace, to their employees.

Overall, she rejected the points within his grievance (120-123), affording a right of appeal which was not taken up.

5.27 The claimant did not work on any further assignments and was not paid by the respondent after 5 November 2019.

5.28 The Tribunal did not find that Mr Lizon regularly shook hands with the claimant's colleagues, such as white and Polish workers, but not with the claimant. It found that he did not overhear but ignore a comment by colleagues: "What is that Paki doing in our country" at a time when he was laughing and joking with those colleagues. It preferred Mr Lizon's version that, as the respondent's manager on site he simply did not shake hands with anyone in the workplace but and that he treated colleagues alike.

6 The parties' submissions

6.1 In closing submissions, the respondent warned the Tribunal of the danger in discrimination claims of the claimant's allegations becoming a "moveable feast" and pointed to the issues identified at the case management hearing on 27 July 2020. Case law showed there must be more than a mere difference in treatment and race before the burden of proof transferred to the respondent. Credibility was particularly important in discrimination and whistleblowing cases but this claimant was not credible for a number of reasons: he was evasive and dismissive during cross-examination, often answering questions with "why should I answer?"; he made assertions without evidence, such as that he wrote more than one email to Mark Cahill, and he denied the undeniable, for instance that his 11 November email post-dated the time of his telephone call to Angela Pitchford. He would not name or bring the 6 or 7 witnesses he claimed overheard the racial epithet on 5 November or disclose the voice recording he claimed he had. He could not remember the words spoken on 5 November which you would expect to be seared in his memory, other than "Paki", and he could not even remember that he was absent on 4 November. In contrast the respondent's witnesses both gave evidence in a measured manner and were perfectly credible. Angela Pitchford's written version was given shortly after on 12 November, Mr Lizon gave his version on 13 November; there was no reason to think they were not given independently and both were made when their memories were fresh. The Tribunal should prefer their version especially when those went unchallenged by the claimant in cross-examination.

6.2 On the discrimination claims, there was no real evidence of when colleagues were supposed to have made the racist comments or Mr Lizon overheard them and it was no more than an assertion by the claimant that Mr Lizon used the racist slur, which Mr Lizon denied; this did not come close to transferring the burden of proof. There were other reasons to prefer the respondent's version; the lack of witnesses, delay from 5 to 11 November in the claimant reporting the comment when it was wholly inconceivable that the recipient of such a racial slur would wait six days, the claimant's general lack of credibility. Mr Lizon's evidence was clear: he had no animus against the claimant but had accepted his explanation of a burglary and allowed him to go home on 5 November to rest and return next day, as was consistent with his text on 6 November. This would not hold true if he had said: "Go home, Paki". Most importantly in oral evidence the claimant said the use of the word was one-off but his email to

Mr Cahill alleged Magic Lizon used the word a second time on 11 November; the claimant's version was muddled and his account varied each time. Another inconsistency was his attitude towards the respondent's attempts to investigate: he withheld the voice recording and said he did not wish to meet with the respondent. He said he only glanced at the grievance outcome letter, a facetious attitude inconsistent with an employee who had been racially abused and wanted redress. Overall, there was insufficient evidence for the Tribunal to find the epithet was used and shift the burden of proof onto the respondent. On issue 2.1.4 the balance of evidence from Mr Lizon and Ms Pitchford was that Lizon had not shaken other colleagues' hands and ignored the claimant. As to 2.1.5, the respondent denied any dismissal but contended that, if the claimant proved a dismissal, there was nothing to suggest it was discriminatory; he resigned when he sought his P45 by email on 17 November 2019.

6.3 On the whistleblowing claim, the respondent contended it had a knockout point since the claimant's email to Mr Cahill on 11 November 2019 was at 16.36 but it was clear from Ms Pitchford's evidence that his phone call to her was earlier at 15.12; any retaliatory act cannot have happened in response to that email. The much more likely sequence was that the claimant was told both by Ms Pitchford and Mr Lizon that he could not come back to PF and then sent his angry email to Mr Cahill. There was no evidence of Mr Lizon dismissing the claimant on 11 November 2019; in his claim form he put 5 November 2019, which morphed into 11 November over the course of the proceedings. The respondent's case is that it puts people on assignments which can be terminated by the client and it then seeks to find a new assignment; termination of the assignment does not amount to a dismissal. The reason for the end of the assignment was his behaviour on 5 November; Chris Farrar's independent evidence was critical, the claimant was drunk. Whether a dismissal or only termination of the assignment, the reason was wholly unconnected with a protected disclosure or the claimant's race. Finally, the respondent contended the claimant had no reasonable belief in the disclosures being in the public interest; they were simply complaints within the respondent internally which did not become protected disclosures.

6.4 The claimant contended that Chris Farrar was not in court to give sworn evidence and his statement should not count since the Tribunal could not know whether it was true, but in any event his evidence was not credible since he stated the claimant walked out not that he escorted him out. Mr Lizon had said he didn't smell drink on him and clearly stated that he was not drunk, which contradicted Chris Farrar. He wasn't breath-tested; the respondent only got rid of him because it wanted to and, had he been drunk, he would not have been told to go back to work on his station. Not only had Chris Farrar not spoken to him from day 1, he had looked at the claimant funnily and only spoke to A or other white people not to the Indians or Asians there. The claimant reiterated that there was different treatment of him from others and that he had the recording where A referred to stealing from the respondent. Having phoned the PF Head Office on 6 to 8 November 2019, they finally they gave him Laura Beeston's Head Office email address, which he contended confirmed he spoke to the respondent's HR at Head Office before 11 November, showing Mr Lizon knew what had happened.

6.5 He had never resigned his employment and the respondent had never found him more work; he only asked for his P45 because he needed it and the respondent never contacted

him or never bothered with him. He had responded to the HR inquiries afterwards although he didn't provide the voice recording because he felt they were being a bit funny with him and not taking his complaint seriously; it was all one-sided in his mind but he intended to give his voice recording to the police. He maintained he had previously reported to the police that Mr Lizon had called him a Paki; they had spoken with Mr Lizon and told him it was his word against Mr Lizon's. The reason for Mr Lizon's text on the 6 November: "I need to know what is happening and if you're returning to work" was that Lizon panicked, having already told the claimant: "Paki don't come back"; it was a strange thing for him to do but Mr Lizon got scared. Angela Pitchford was not telling the truth, she and Mr Lizon had made a story up. In evidence she first said that she hadn't discussed it with him and then that she couldn't remember. Mr Lizon had even told the Tribunal that he didn't know about the complaint in the email until the proceedings this year, that was a lie as he knew in 2019. The claimant explained lapses in his memory because in August 2020 he had been in a coma having suffered a stroke and his memory was confused, but he had told the truth to the Tribunal.

6.6 Not only was there no proof that he was drunk on 5 November 2019, for instance no CCTV evidence confirming he was wobbling, there had been no report or follow-up after 5 November until he complained because they were scared and knew he had complained; he was sure Head Office would have got in touch with Mr Lizon after he (the claimant) had phoned on 6 November. Although he originally stated 5 November 2019 as the date of dismissal, that was amended during one of the case management hearings. He was paid his final wage on 18 November 2019 so obviously Mr Lizon sacked him on 11 November 2019; his P45 said he was employed to February 2020, which did not make sense but if that was the case he was owed pay and holiday pay.

7 The Law

7.1 The statutory protections against unlawful discrimination and harassment all set out in the Equality Act 2010 in particular at Sections 4, 9, 13, 26, 39, 109 and 136.

Section 9 states:

(1) Race includes—

(a) colour;

(b) nationality;

(c) ethnic or national origins.

(2) In relation to the protected characteristic of race—

(a) a reference to a person who has a particular protected characteristic is a reference to a person of a particular racial group;

(b) a reference to persons who share a protected characteristic is a reference to persons of the same racial group.

(3)A racial group is a group of persons defined by reference to race; and a reference to a person's racial group is a reference to a racial group into which the person falls...”

Section 13 states:

(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...

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

Section 23 states:

(1)On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case...

Section 26 states:

(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.

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

Section 39 states:

(2)An employer (A) must not discriminate against an employee of A's (B)—

(a)as to B's terms of employment;

(b)in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c)by dismissing B;

(d)by subjecting B to any other detriment.

Section 40 states:

...1)An employer (A) must not, in relation to employment by A, harass a person (B)—

(a)who is an employee of A's...;

Section 109 states:

(1)Anything done by a person (A) in the course of A's employment must be treated as also done by the employer...

(4)In proceedings against A's employer (B) in respect of anything alleged to have been done by A in the course of A's employment it is a defence for B to show that B took all reasonable steps to prevent A—

(a)from doing that thing, or

(b)from doing anything of that description...

Section 136 states:

(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...

(6)A reference to the court includes a reference to—

(a)an employment tribunal..."

7.2 The protections for those making protected disclosures (“whistleblowers”) and against unfair dismissal are at Parts IVA, V and X of the Employment Rights Act 1996

Section 43B, as amended, states:

(1)In this Part a “qualifying disclosure” means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—

(a)that a criminal offence has been committed, is being committed or is likely to be committed,

(b)that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

(c)that a miscarriage of justice has occurred, is occurring or is likely to occur,

(d)that the health or safety of any individual has been, is being or is likely to be endangered,

(e)that the environment has been, is being or is likely to be damaged, or

(f)that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

(2)For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere, and whether the law applying to it is that of the United Kingdom or of any other country or territory.

(3)A disclosure of information is not a qualifying disclosure if the person making the disclosure commits an offence by making it.

(4)A disclosure of information in respect of which a claim to legal professional privilege (or, in Scotland, to confidentiality as between client and professional legal adviser) could be maintained in legal proceedings is not a qualifying disclosure if it is made by a person to whom the information had been disclosed in the course of obtaining legal advice.

(5)In this Part “ the relevant failure ”, in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1).

Section 43C states:

(1)A qualifying disclosure is made in accordance with this section if the worker makes the disclosure ...—

(a)to his employer, or

(b)where the worker reasonably believes that the relevant failure relates solely or mainly to—

(i)the conduct of a person other than his employer, or

(ii)any other matter for which a person other than his employer has legal responsibility, to that other person...

Section 95 states:

For the purposes of this Part an employee is dismissed by his employer if (and... only if)—

(a)the contract under which he is employed is terminated by the employer (whether with or without notice),...

(c)the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct...

Section 103A states:

An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

7.3 Burden of proof

In direct discrimination cases under section 13 of the 2010 Act it is for the claimant to show a prima facie/provisional case of acts of less favourable treatment than other comparator employees in circumstances from which the Employment Tribunal could infer unlawful discrimination. If he does so, the burden switches to the respondent to prove that its treatment of him was in no sense whatsoever because of his race. Where the basic facts are not in dispute, a Tribunal may simply consider whether the employer is able to prove, on the balance of probabilities, that they did not commit the unlawful act of discrimination. In harassment claims under section 26 in which allegations often overlap with direct discrimination claims (as here), if the claimant proves overtly racist acts committed against him by or on behalf of the respondent, it follows that they will be unwanted and it is also very likely to follow that they had the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him. Claims of unfair dismissal by reason of making a protected disclosure are an exception to the normal two-year continuous employment requirement for bringing ordinary claims of unfair dismissal; that rule does not apply to specific types of claims of having been unfairly dismissed for an inadmissible reason. However, in respect of this claim, there is a series of burdens of proof upon the claimant; he must prove that (1) he made a protected qualifying disclosure, (2) that he was dismissed by the respondent and (3) that his dismissal was for the reason or principal reason that he had made the protected disclosure. As to (1), the Tribunal needs to be satisfied by the claimant that he made a disclosure of information by the claimant falling within one of the protected categories, and made it to one of the identified recipients such as the claimant's employer, in circumstances whereby the claimant genuinely believed the disclosure was in the public interest and it was reasonable for him to have done so.

8 Conclusions

8.1 The Tribunal's factual findings mean that its conclusions can be set out succinctly.

8.2 Race discrimination

Issues 2.1.1 and 2.1.2: Did colleagues including C and A make the comments to the effect of “What is this Paki doing in our country” and did Mr Lizon, having overheard those comments, take no action?

The Tribunal found as a fact that this was not said in Mr Lizon's presence and thus not ignored by him as in his role as a manager by taking no action.

Issue 2.1.3: Did Mr Lizon refer to the claimant as a Paki in the conversation on 5 November 2019?

The Tribunal's firm finding of fact is that the claimant did not refer to the claimant in this way on 5 November 2019, whether at the respondent's office or shortly afterwards at the claimant's workstation, Bay Y. Nor did he do so during the telephone conversation on 11 November 2019.

Issue 2.1.4: Did Mr Lizon ignore the claimant and shake the hands of Polish or white British colleagues and laugh and joke with them?

Mr Lizon did not ignore the claimant while deliberately shaking hands with white British and Polish colleagues. The claimant has not proved that this less favourable treatment took place.

Issue 2.1.5: The claimant's alleged dismissal – has he proved a dismissal?.

The claimant has not shown a provisional case that he was subjected to less favourable treatment including dismissal which was because of his race. The Tribunal concluded that he was not dismissed in November 2019; the respondent merely terminated his assignment to work as its employee at the PF premises. Accordingly, the claims of unlawful acts of direct race discrimination are all dismissed.

8.3 Harassment

Issue 2.2: Harassment related to race - the alleged overt racist comments together with allegedly being ignored by Mr Lizon as he greeted white and Polish colleagues.

Although use of the word “Paki” towards the claimant or about him in his hearing would undoubtedly have amounted to harassment related to the protected characteristic of race, the claimant did not establish that this offensive racist term was used towards him by Mr Lizon or used about him by colleagues in Mr Lizon's presence (but ignored by the manager who took no action), nor that he was ignored by the manager when he was greeting white British or Polish colleagues. The claims of racial harassment are dismissed.

8.4 Unfair dismissal by reason of making a protected disclosure

2.3.1 and 2.3.2: Did the claimant make a qualifying protected disclosure in his email of 11 November 2019 to Mr Cahill, sent at 16.36 and did he subsequently on 11 November 2019 inform Mr Lizon that he had made such a disclosure?

The Tribunal was not addressed at great length by the parties as to whether the claimant made a qualifying protected disclosure, although the respondent in its response and submissions challenged that the disclosure to Mr Cahill was made by the claimant genuinely believing at the time that his disclosure was in the public interest and that such a belief was reasonable. Working through the stages of determining whether the claimant made a disclosure which gained protection under Section 43A as a qualifying disclosure under Section 43B made to the employer within Section 43C, the Tribunal was satisfied that the claimant disclosed to Mr Cahill in his email the possible commission of criminal offences, ie theft, racial harassment and perhaps possession of drugs, breach of a legal obligation that the employer should not discriminate because of the protected characteristic of race, and possible endangerment to health (workers under the influence of drugs within the workplace). This could fall within different limbs of Section 43B(1) and was made to his employer within section 43C. The Tribunal considered that this could have been more than a purely internal matter of complaint by the claimant; the matters raised concerning the criminal offences alleged and racist treatment within the employment sphere would satisfy the public interest test. However, consistent with its findings of fact, the Tribunal unanimously concluded that the claimant's disclosure to Mr Cahill was not made in his reasonable belief that the information he was disclosing was in the public interest because it tended to show the commission of criminal offences, breach of legal obligation or endangerment of health. Far from any racist comment being made by Mr Lizon in response to learning from the claimant that a report had already been made to Mr Cahill, the actual sequence was that the claimant only sent his email alleging this after learning that he would not be returning to work at the PF site; the disclosures were in retaliation by him to being told he could not return to work there as he hoped to do. The Tribunal gained no sense from the claimant that he was shocked by the behaviour of workers working for a major staffing and recruitment company such as the respondent Manpower Group and needed to expose this in the public interest but only that he was governed by self-interest because he was aggrieved at being prevented from working at PF whilst others were not. It did not find that he made a protected disclosure within Section 43A when carefully applying Section 43B.

As a matter of timing, the claimant did not inform Mr Lizon that he had already made a disclosure to the respondent's Managing Director Mark Cahill during the telephone call on 11 November 2019 (although he did state that he was going to notify the respondent's MD and PF's Chief Executive). The disclosure was only made after the telephone conversation with Mr Lizon.

2.3.3 and 2.3.4 Did Mr Lizon dismiss the claimant on 11 November 2019 (as opposed to informing him that his assignment with Premier Farnell had ended)? and alternatively did the claimant end his own employment on or about 17 November 2019 by requesting his P45?

The claimant did not prove on the balance of probabilities that he was dismissed by the respondent on 11 November 2019 (the date of dismissal he asserted, as clarified by him at a case management hearing). The Tribunal's conclusion was that Mr Lizon did no more than make clear that the assignment to work for the respondent at PF's premises had been terminated, such that the claimant could no longer return there. His employment continued and the claimant might have been given a further assignment, although in the event this did not happen. For the avoidance of doubt, nor was there any termination of employment on 5 November 2019, when Mr Lizon sent the claimant home but expected him to return for work the following day. Finally, the Tribunal did not find that the claimant seeking his P45 conclusively terminated his employment upon his resignation on 17 November 2019. Although evidence that he no longer considered the contract of employment to be subsisting or no longer wish to work for the respondent, the position relating to his contract of employment remained unsatisfactory; he never worked again for the respondent on another assignment but the respondent only provided his P45 evidencing the termination of his employment together with final payslips in February 2020.

2.3.5 If the claimant was dismissed, was the reason or if more than one the principal reason for the dismissal that the claimant had made a qualifying protected disclosure?

Since the claimant was not dismissed on 11 November 2019, the Tribunal did not need to determine this final issue. However, had it concluded that the claimant was dismissed on 11 November and also that the disclosure made by the claimant to Mr Mark Cahill was a protected disclosure, it would not have found that the principal reason for his dismissal was the making of that disclosure since the disclosure was only made by the claimant later on the same afternoon. In terms of timing, his making of the disclosure could have not provided Mr Lizon with the reason for dismissing him. Although the burden of proof lay with the claimant establish his dismissal and that he had made a protected disclosure and that the reason or principal reason for the dismissal was the inadmissible reason that he had made that protected disclosure, the Tribunal was satisfied that the real reason for the termination of the assignment by Mr Lizon on behalf of the respondent and in accordance with the wishes of the client PF was the claimant's unreliability and conduct on 5 November 2019.

For the reasons set out above, the claimant's claim under Section 103A ERA 1996 that he was unfairly dismissed for the inadmissible reason that he had made a protected disclosure is dismissed.

Employment Judge Parkin

Date: 3 February 2021

**RESERVED JUDGMENT & REASONS
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