EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4100592/2020

Held in Edinburgh on 13, 14 and 15 April 2021

10 **Employment Judge Jones**
Tribunal Member Ms Z van Zwanenberg
Tribunal Member Mr D Frew

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Mr P Rzepka	**Claimant** **In Person**

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Amazon UK Services Limited	**Respondent** **Represented by:** **Mr Holloway,** **of counsel instructed** **by Pinsent Masons**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

30 It is the unanimous judgment of the Tribunal that:

- The claimant was wrongfully dismissed and the respondent is ordered to pay to the claimant the sum of £730.70 net in respect of unpaid notice pay

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- The claimant was not subjected to discrimination on the grounds of his race

- The claimant was unfairly dismissed and the respondent is ordered to pay to the claimant the sum of £9858.78 in compensation

Reasons

Introduction

5 1. The claimant brought claims of race discrimination, unfair dismissal, wrongful dismissal and a claim in respect of unpaid holiday pay. At the commencement of the hearing the claimant confirmed that he did not wish to proceed with the claim in respect of holiday pay. He also made clear that he was not seeking to bring a claim under the statutory provisions in relation to time off for
10 dependents.

2. At the commencement of the hearing, the claimant initially suggested that he wished the Tribunal to make witness orders in respect of witnesses who were still employed by the respondent. However, after reflection, the claimant
15 indicated that he no longer sought any witness orders.

3. The claimant was assisted ably throughout the proceedings by an interpreter. The respondent called four witnesses and the claimant gave evidence in person. Evidence in chief was given by way of written witness statements in
20 addition to supplementary questions. All witnesses were cross examined and were asked questions by the Tribunal.

4. A joint bundle of documents was provided for the Tribunal and a list of issues was also agreed although this was adjusted at the commencement of the
25 hearing. During the course of the hearing, in order to assist the Tribunal in its understanding of the evidence, the respondent provided the Tribunal with a map of the area in which the claimant worked. The claimant agreed that this map was accurate.

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Findings in fact

5. Having listened to the evidence, considered the documents produced to the Tribunal and the submissions made by the parties, the Tribunal found the following facts to have been established.

5 6. The claimant commenced work with the respondent on 15th June 2016 through an agency and became a permanent employee on 20 November 2016 in its warehouse in Dunfermline until his dismissal on 3 January 2020.

7. The claimant is a native Polish speaker although his spoken English is
10 reasonable.

8. The claimant's average weekly pay was £365.35 net and £460.40 gross. The respondent contributed £14.04 per week to the claimant's pension and the claimant was entitled to shares.

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9. The claimant's position was that of Tier One associate. He worked mainly in the pack area of the respondent's warehouse. An associate is the entry level role with the respondent.

20 10. A Team Lead is responsible for staffing shifts and ensuring that each process has enough workers. A Team Lead reports to an Area Manager.

11. The respondent operates a disciplinary policy, a copy of which had been provided to the claimant.

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12. The claimant received a first written warning in December 2017, which in terms of the respondent's policy was to be disregarded after a period of nine months (page 101).

30 13. The claimant was working in the pack area on 23rd November 2019. Ms Florek was a Team Lead on that shift and Mr Gkatsos was working as a Temporary Team Lead. Both Ms Florek and Mr Gkatsos reported to Mr Walker who is an Area Manager responsible for the pack area.

35 14. The claimant stood back from the line he was working on to take a few minutes rest as he had been very busy.

15. The claimant regularly met his targets and had never been disciplined in relation to his productivity.

16. The claimant was approached by Ms Florek who raised her voice to the claimant telling him to go to another line to work. The claimant indicated he did not wish to do so as he was having a break. Ms Florek was frustrated by the claimant not working and raised her voice to him in Polish.

17. Ms Florek did not call the claimant ‘ a lazy Polish shit’.

18. Ms Florek was frustrated at the claimant’s response to her and immediately went to speak to Mr Walker. Mr Walker indicated he would speak to the claimant.

19. The claimant was annoyed at Ms Florek’s intervention as he had been very busy. Shortly after he also spoke to Mr Walker and expressed his annoyance at being spoken to in the manner Ms Florek spoke to him.

20. The claimant did not threaten to slap Ms Florek or break her legs.

21. Mr Walker told the claimant to go back to work.

22. The claimant then went to the toilet before going back to work.

23. Shortly thereafter, Mr Walker asked Mr Gkatsos, who had been standing nearby, on the respondent’s internal messaging program, whether he had heard anything the claimant had said. Mr Gkatsos indicated he had heard ‘some of it’. Mr Walker told Mr Gkatsos that he may need a statement from him.

24. A few minutes later, Mr Walker spoke to Mr Gkatsos. Mr Walker did not ask Mr Gkatsos what he had heard the claimant say. Instead, Mr Walker asked Mr Gkatsos if he had heard the claimant say ‘If she speaks to me like that I am going to slap her and break her legs’.

25. Mr Gkatsos then wrote a statement at Mr Walker's request, indicating that he had heard the claimant say that if Ms Florek spoke to him like that again 'he was going to slap her'.

26. At the same time, Mr Walker wrote a witness statement indicating that the claimant had said he would slap Ms Florek and 'break her fucking legs' if she shouted at him again.

27. Shortly after, Mr Walker went to see HR and told them what the claimant was alleged to have said.

28. An Area Manager, Mr Newton then asked to meet the claimant with a member of the respondent's HR team. The claimant was told that he was suspended. He was not advised of what he was alleged to have said. He was asked if he thought what he had said was threatening language, to which he replied 'no'.

29. Mr Newton interviewed Mr Walker and Ms Florek in the early hours of the following day.

30. On 25th November, the claimant sent a grievance by email alleging that his treatment by Ms Florek amounted to bullying. In that grievance the claimant indicated that when speaking to Mr Walker he lost his patience and said "nobody will be shouting at me next time she come and slap me on the face to go to work."

31. A grievance hearing took place on 27th November. In that hearing the claimant repeated that he had said to Mr Walker 'next time she will slap my face".

32. The outcome of the grievance was that a mediation was proposed between the claimant, Mr Walker and Ms Florek. The claimant indicated that he was happy to participate in such a mediation. No mediation was ever arranged between the parties by the respondent. The outcome of the grievance was confirmed to the claimant by letter dated 20 December and indicated that the mediation would take place following the claimant's return to work.

33. By letter dated 28 November, the claimant was advised that there was a disciplinary investigation being carried out by Mr Spence, an Area Manager and that the claimant should attend an investigatory meeting on 30 November. The letter indicated "it is alleged that you used comments of a threatening nature whilst speaking about a fellow colleague to an Area Manager." No further information or documentation was provided to the claimant.

34. The claimant was interviewed by Mr Spence on 30 November. At the end of the meeting, Mr Spence indicated 'I will review all the evidence provided and I need to speak to others'.

35. The claimant sent an email to the HR rep to whom he had been advised to direct any queries on 2nd December. He said 'I was have some time to reed statements in quiet, and I got some answers may be helpful'. He went on to say 'I'm don't have to much trust for Kenny walker.' The claimant narrated a situation where the claimant had raised a health and safety issue about another associate with HR. He had understood that the issue would be confidential. However, Mr Walker had informed the other associate who had raised the matter, which caused issues between the claimant and other associate. The claimant went on to say 'I'm wrote about it cause (kW) it's not always good, and he covers he's friends for benefits. Than if he don't get benefit from me, and worse, he got poor connection answers, than better to remove me from site. Than everything will be better. Looks like (kW) aware of me because safety and complaining."

36. The claimant went on to ask the respondent to interview another member of staff about his demeanour in his interaction with Ms Florek. The claimant concluded 'It's strongly looks like (kW) wants to remove me from amazon, cause its aware of my safety Behaviour and because I'm complaining often and don't like be treated, and than I'm able to refuse to do something in the name of safety or overwhelming.'

37. The respondent did not carry out any investigations into the allegations made by the claimant or contact the witness he named. The respondent did not respond to the claimant's email.

38. Mr Newton (who had not been appointed as the Investigating Manager, despite carrying out most of the interviews) then carried out further meetings with Mr Walker, Ms Florek and Mr Gkatsos on 7th December. Mr Newton did not ask Mr Walker about any of the issues raised by the claimant in his email of 2nd December.

39. In the interview with Mr Walker, reference was made to CCTV footage. The respondent did not provide this footage to the claimant and it did not form part of the investigation report which was subsequently produced.

40. During the interview with Mr Walker, Mr Newton asked “Is this the time he made the following comment “ Michaela shouted at me. If she fucking shouts at me again I am going to slap her face and break her fucking legs”. “Mr Walker responded “ Yes that was exactly when it was”.

41. In the interview with Mr Gkatsos, Mr Newton asked Mr Gkatsos “Can you clarify if the following comment was made to Kenny W by Pawel “Michaela shouted at me, if she fucking shouts at me again I am going to slap her face and break her fucking legs?” Mr Gkatsos replied “I heard half of it as I was going there to check my computer so I only heard the first part as he had his back towards me’. Mr Newton then asked ‘Did he say the second part quieter’ to which Mr Gkatsos replied “No, I don’t think he knew if I was there as he had his back on me”.

42. Mr Spence, who had not spoken to anyone other than the claimant in relation to the matter, then produced an Investigation Report on 11 December. At the beginning of the report, he stated ‘there are currently no disciplinary warnings on file’. In the report, Mr Spence makes reference to the claimant’s email of 2nd December and goes on to state “Despite the email above being received, I fully believe that the alleged comment was made to Kenny Walker (Area Manager), this was partially confirmed by Elenos Gkatsos however both comments were of a concerning nature. It is clear with respect to the allegations that are not only in breach of Amazon’s conduct policies, but have

been and could be harmful to employees in future." He did not elaborate on in what way the comments had been harmful to anyone.

43. By letter dated 11 December, the claimant was then required to attend a disciplinary hearing on 18 December. The hearing was rescheduled to take place on 20 December. The hearing was chaired by Mr Scott, who is a reverse Logistics Operations manager. Also present was Ms Cura, a Senior HR Business Partner and a note taker, Haymen Ng.

44. The notes of the hearing, which were not verbatim noted 'sigh' on a number of occasions when the claimant was said to have sighed.

45. During the meeting, the claimant was asked 'Did you say you would slap her? One of the things in the statement then?' to which the claimant responded 'Maybe it is possible, But *sigh* I am usually more patient than that'. Mr Scott then said 'You had to go to the toilet to calm down, if you are nervous you may say things that you don't mean' to which the claimant said 'I said, Michaela will slap me next time if I don't do something *sigh*."

46. Prior to the meeting commencing, Mr Scott had formed the view that the claimant's email of 2nd December was simply an attempt by the claimant to deflect from the allegations which had been made against him.

47. Mr Scott did not approach the disciplinary hearing with an open mind.

48. Mr Scott was also provided with the details of the first written warning which had been issued in respect of the claimant and which had expired. Mr Scott took this warning and the subject matter of the warning into account when considering the allegations against the claimant and the disciplinary sanction.

49. The claimant was not advised that Mr Scott had been provided with details of the prior warning in advance of the disciplinary hearing.

50. The previous disciplinary warning was not for making threats against a colleague, but was 'unprofessional behaviour towards customers, colleagues and suppliers'. The warning related to allegations that the claimant had flashed

a scanner towards an Area Manager and made a comment to another Area Manager.

51. Mr Scott carried out further investigations without advising the claimant. In particular Mr Scott accessed records regarding the claimant's productivity for the last six months.

52. Mr Scott wrote to the claimant by letter dated 3 January 2020 advising the claimant that he was to be summarily dismissed. In that letter, Mr Scott made reference on two occasions to the expired warning which had been issued to the claimant. Mr Scott concluded "I took into account the serious nature of the allegations and I also considered your previous Disciplinary record. I note that in December 2017 you were issued with a Written Warning in relation to unprofessional behaviour towards two members of the Operations management team. Whilst these warnings are spent for the purpose of the Disciplinary Policy, there does appear to be a pattern in your behaviour which is unacceptable." Although Mr Scott refers to 'warnings', the claimant was only ever issued with one warning.

53. The claimant was advised in this letter that he could appeal against the decision, although the letter did not indicate who would deal with that appeal.

54. The claimant did not appeal against the decision to dismiss him as he did not believe that there would be any point in appealing. The claimant mistakenly believed that the appeal would be dealt with by Mr Scott.

55. The claimant obtained alternative employment on a part time basis on 28 March 2020. The claimant's pay with his new employer is £152.34 less per month than he received in his employment with the respondent, although the claimant also works less hours.

56. The claimant's wife's working hours changed at some point in 2020 which meant that for childcare purposes the claimant could only work a limited number of hours.

Observations on the evidence

57. The Tribunal found the evidence of Ms Florek and Mr Gkastos to be generally credible and reliable. In particular, the Tribunal found Mr Gkastos to be a straightforward witness. However, the Tribunal noted that Mr Walker suggested to him what the claimant had said rather than asking Mr Gkastos what he had heard, which in the Tribunal's view impacted on the reliability of his evidence. The Tribunal was of the view that this pattern was repeated throughout the process, where Mr Walker and Mr Newton sought to confirm what had been said, rather than ask open questions about what had been said or heard.

58. Ms Florek struck the Tribunal as a straightforward witness. However, the suggestion by the respondent that she was a quiet happy person did not seem to the Tribunal to be accurate. The Tribunal was of the view that Ms Florek came across as a determined individual who was very focussed on her duties as a supervisor and had no difficulty in exercising her authority over those she supervised. While the Tribunal did not conclude that she had called the claimant a 'lazy Polish shit', the Tribunal was of the view that she had raised her voice towards the claimant and spoke to him in an authoritative manner. The Tribunal concluded that she did criticise the claimant.

59. The Tribunal was conscious that while the claimant's spoken English seemed to be reasonable, the respondent did not at any stage seek to determine whether he required any assistance during the investigatory or disciplinary proceedings. While the Tribunal accepted that while the claimant had worked for the respondent, he spoke English at work, the Tribunal was mindful that disciplinary proceedings are inherently stressful and that this together with the written nature of the documentation, could impact on the claimant's ability to participate fully in the proceedings. This was particularly so, when the claimant informed the respondent on a number of occasions that he was tired and stressed, due to looking after two small children and the proceedings hanging over him.

60. The Tribunal was also surprised that as the allegation against the claimant was that he had said something in what was a noisy environment, no attempt had been made at the time by Mr Walker to clarify that he had heard correctly or what the claimant had meant by what he had said. Instead the claimant was simply told to go back to work. The Tribunal was of the view that if Mr Walker had believed that the claimant had made threatening comments against another employee, he would have been very unlikely to have sent him back to work where he could have come into contact with that employee. The Tribunal did not find Mr Walker to be an impressive witness. The Tribunal found him evasive in cross examination.

61. The Tribunal also found Mr Scott to be evasive on occasion. He appeared to answer questions which had not been asked rather than focus on the question asked. Mr Scott indicated he had been allocated to deal with the matter as he was one of the more experienced managers. The Tribunal was therefore very surprised to hear Mr Scott's evidence that he carried out his own investigations without discussing this with the claimant, that he had already formed a negative view of the claimant prior to the disciplinary hearing taking place and that he did not question why there were two individuals who seemed to be the 'Investigating Manager'. The Tribunal did not accept Mr Scott evidence that he did not take the previous warning given to the claimant into account during the proceedings. Mr Scott's evidence appeared to be that he considered the matter but did not take it into account, which, particularly in light of the terms of the letter of dismissal, seemed an entirely inconsistent position to adopt.

62. The Tribunal found the claimant to be generally credible and reliable. The claimant was evasive on occasion, although it did also appear that sometimes he misunderstood what he was being asked.

Issues to determine

63. The Tribunal was required to determine the following issues:

- In dismissing the claimant without notice or pay in lieu of notice, did the respondent wrongfully dismiss the claimant;

- Was the claimant subjected to discrimination on the grounds of his race. This claim was based on an allegation that the claimant's supervisor had called the claimant 'a lazy Polish shit' in Polish.

- Was the claimant unfairly dismissed and if so what compensation should be awarded to him.

Relevant law

Wrongful dismissal

64. The question for the Tribunal to address in this regard is whether the employee was guilty of conduct so serious as to amount to a repudiatory breach of the contract of employment entitling the employer to summarily terminate the contract?

Race discrimination

65. Section 9 of the Equality Act 2010 provides that race is a protected characteristic.

Race

(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.

5 (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.

(4) The fact that a racial group comprises two or more distinct racial groups does not prevent it from constituting a particular racial 10 group.

66. Section 13 defines Direct discrimination

(1) A person (A) discriminates against another (B) if, because of a protected 15 characteristic, A treats B less favourably than A treats or would treat others.

Unfair dismissal

67. In order to determine whether a dismissal is fair or unfair, it is first necessary 20 to determine whether the reason for the dismissal is one of the potentially fair reasons set out in the Employment Rights Act 1996 ('ERA'). Section 98(2) ERA sets out the potentially fair reasons for dismissal. These include conduct (section 98(2(b)) and some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held 25 (section 98(1)(b)).

68. Where an employer has established a potentially fair reason for dismissal, that is not an end to the matter. Where a Tribunal is satisfied that an employee was dismissed for a potentially fair reason, a Tribunal must then apply its mind to 30 the provisions of section 98(4) ERA which states:

Where 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) –

5 (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 dismiss the employee, and

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

69. This requires the Tribunal to consider whether in all of the circumstances, including the procedure which was followed, the dismissal of an employee was fair. Fairness is to be considered within the band of reasonable responses of
15 an employer and a Tribunal must be careful not to come to its own view as to the fairness but analyse the employer's conduct within the band of what a reasonable employer would do.

Submissions

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70. Mr Holloway, for the respondent made oral submissions and referred to the ACAS code of practice, ***Airbus UK Ltd v Webb*** [2008] EWCA Civ 49, ***ILEA v Gravett*** 1988 IRLR 497, ***Gray Dunn & Co Limited v Edwards*** [1980] IRLR 23. He made reference to ***Polkey v AE Dayton Services Ltd*** [1988] A.C. 344
25 in the context of remedy.

71. Mr Holloway initially addressed the findings in fact he said the Tribunal should make. In relation to the claim of race discrimination, he said that Ms Flores was an excellent and clear witness whose evidence had never wavered. He said
30 that it was inherently unlikely that Ms Flores would make the comment alleged given she had a good relationship on the whole with the claimant, had a Polish husband and step son and visited Poland regularly. He said that the claimant's evidence that he had not make the allegation against her until he raised his tribunal claim because he had not wanted her to lose her job should not be

accepted. He also said that it was concerning that, on the basis of that evidence, the claimant had not been prepared to tell the truth during the investigation. He said that the Tribunal should find that the comment Ms Flores was alleged to have made by the claimant had not been made.

72. In relation to the allegation against the claimant, it was submitted that a finding in fact that the claimant had made the alleged threatening comment in relation to Ms Flores should be made on the basis that on the balance of probability, the claimant had made the statement. It was said that Mr Walker and Mr Gkatsos had been measured and sensible in their evidence. While there had been some inconsistencies in their evidence this was exactly the sort of thing which happens to memory and points strongly to the likelihood of their evidence being truthful. It was suggested that the allegation against Mr Walker that he made up the allegation against the claimant would be an incredibly rare and extreme act for him to have committed. It was also noted that the claimant had not put this to Mr Walker directly.

73. It was submitted that the high water mark of the claimant’s position was that minor health and safety issues had been raised by him often not directly with Mr Walker. It was suggested that it would be an outlandish finding to conclude that Mr Walker had been untruthful.

74. Mr Holloway indicated that that the claimant’s account had changed markedly which made it more plausible that he had made the alleged comment. At the very least, the claimant had been frustrated with Ms Flores and then in the claimant’s own words ‘pissed off’ when he saw himself as being fobbed off by Mr Walker. Unlike the respondent’s witnesses, the claimant would have every incentive to be untruthful about whether he had made the alleged comment.

75. It was submitted that given the evidence of Mr Walker and Mr Gkatsos, the decision was straightforward enough. However, it was also said that Mr Gkatsos was an excellent witness, that he had worked at the same level as the claimant, and he had no axe to grind. It was submitted that as Mr Gkatsos had only ever heard one part of the alleged comment, this demonstrated that he was telling the truth. Finally, as the claimant had accepted in the disciplinary

hearing that he might have made the comment, the only conclusion the Tribunal could reach was that the claimant had made the comment and that the respondent as a matter of contract, was entitled to dismiss him.

5 76. Turning to the claim of unfair dismissal, it was submitted that the claimant was dismissed for a potentially fair reason, being conduct and that the respondent had reasonable grounds upon which to believe that misconduct had occurred. There was crystal clear evidence from two witnesses, both with more senior roles to that of the claimant and the respondent was entitled to rely on that
10 evidence. It was submitted that Mr Walker's evidence alone was a sufficient basis on which to amount to reasonable grounds. It was submitted that an employer is entitled to believe managers are being truthful about such things absent clear evidence to the contrary. However, there was also further evidence from Mr Gkatsos and the claimant had not given any reason for him
15 making this up.

77. Turning to the issue of the reasonableness of the respondent's investigation, this has to be considered in context. Reference was made to Lord Justice Woods comments in *Gravett* regarding the scope required of an investigation
20 and Lord McDonald's comments in *Gray Dunn* at paragraph 25. On this basis it was said that the investigation was well within the range of reasonable investigations.

78. It was said that the email of 2nd December sent by the claimant was only sent
25 after the claimant had received Mr Walker's statement and the allegations in this email were not raised at the interview with the claimant. It was also said that in any event the allegations made by the claimant in this regard were no where near sufficient to explain why Mr Walker had been untruthful or explain how Mr Gkatsos could have made the allegations up.

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79. It was submitted that it was too high a bar for the Tribunal to find that no reasonable employer could not continue without further investigation. While it was accepted that further investigations could have been carried out, this was not the test and it was necessary to look at the context of the investigation in
35 light of the evidence.

80. In terms of the procedure followed, it was submitted that this was also within the range of reasonable conduct of an employer. While the respondent's position was that the first written warning had not been taken into account by Mr Scott, if the Tribunal did not accept that, then reference was made to the *Airbus* case to demonstrate that expired warnings can be taken into account. It was said that the central point was that a very serious offence had been found to have committed by the claimant and that it would have been surprising if this had not resulted in dismissal in any event. It was said that the warning insofar as it was taken into account at all, had just been background and was therefore permissible.

81. Mr Holloway also submitted that as his investigations into the claimant's performance had not been relevant to his findings, there had been no need to share these with the claimant.

82. Turning to Mr Scott's evidence in relation to his view of the email the claimant had sent raising issues about Mr Walker, Mr Holloway said that this matter had been cleared up in re-examination and that Mr Scott did not finally determine the email before he spoke to the claimant and was entitled to take a preliminary view on it. It was said that there was nothing in this which would render the procedure unfair.

83. In terms of the investigation which was carried out, it was said that while it was better for one person to carry out an investigation, there was no requirement that this be the case and that there had been two people involved in the investigation because of shift patterns. It was said that Mr Spence was entitled to conclude the investigation and that this matter was not raised by the claimant during the procedure.

84. Mr Holloway then addressed the issue of whether Mr Spence reaching a concluded view on the matter was appropriate. He said that Mr Scott came to his own decision on regarding what had happened and the sanction and that therefore there was nothing unfair in the terms of Mr Spence's report.

85. Looking at the investigation as a whole, it was said that witness statements had been taken promptly, there was a prompt suspension of the claimant, a more detailed account was taken from Mr Walker, the claimant had attended an investigation meeting promptly and given a full opportunity to tell his side of the story and was given all relevant information. He was then invited to a disciplinary hearing, warned that dismissal was a potential outcome and given a chance to explain his side. He was then given a right of appeal against the decision to dismiss him. Therefore all core elements of a fair procedure were within the range of reasonableness in the context of the evidence of the case.

86. Finally in this regard, Mr Holloway reminded the Tribunal not to set the bar too high and risk substituting its own view on the fairness of the claimant's dismissal. In relation to the question of sanction, it was submitted that it was obvious that the sanction was reasonable. In all these circumstances it was said that the Tribunal should find that the claimant's dismissal was fair.

87. In the event that the Tribunal did not accept his primary submission, Mr Holloway referred to *Polkey* and submitted that whatever happened in terms of procedure the outcome was always going to be the same. He said that despite the claimant's exhaustive cross examination of Mr Walker and Mr Gkatsos, their evidence did not change. On that basis there should be a 100% reduction in any compensation the Tribunal found should be awarded.

88. Further, it was submitted that the claimant had contributed 100% to his dismissal, on the basis that the Tribunal should find as a matter of fact that the claimant had made the threat.

89. In addition, it was said that any compensation should be reduced by 25% on the basis of the claimant's failure to appeal against his dismissal. It was said that the claimant's assumption that the appeal would be by the same people was not borne out by the policy he was provided with which he decided not to read. In addition, the claimant did not ask any questions about the appeal.

90. If any compensation was to be awarded, it was accepted that the claimant's wages had been £460 a week gross and £365 net; that he would have suffered

a loss of statutory rights which would amount to £500 and that his share entitlement was £2,333.46. However, Mr Holloway reminded the Tribunal that neither of these were payable if the Tribunal accepted that there should be a Polkey reduction.

91. Finally, the respondent made submissions on the issue of mitigation. The claimant was criticised for only making one job application to a warehouse, and for not applying for any jobs in a supermarket. It was said that if the claimant had taken these steps he would have found more suitable work earlier. Further, after 23rd March, when he did obtain alternative work, he failed to continue to actively look for work which he ought to have done as he was working less and earning less. Finally, as his wife's hours changed, it was likely that he would have had to stop working with the respondent in any event.

92. The claimant made brief oral submissions. He explained that he didn't appeal as he thought it would be dealt with by the same people and that the outcome would have been the same. He accepted that his lack of knowledge didn't mean he wasn't responsible for this decision.

93. He also pointed out that he was overwhelmed with what had happened when he lost his employment. He had to rearrange his financial affairs and the last thing on his mind was reading policies. He said that this was understandable as he was looking after two small children while trying to find employment.

94. He said that preparing for this case was a great challenge for him because of his lack of advanced English and knowledge of procedure which meant his first claim form was rejected. He said he wanted to prove to himself and others that they could take on businesses such as the respondent. He also said that the largest hurdle was the lack of willingness of witnesses who were worried about losing their jobs.

95. He said that the investigation was carried out in a way that focussed only on his wrongdoing and not his defence. There was no follow up on issues raised in his email. He said that he was proud to get to this point with his English and little understanding of the law. He said that his wife tried to be supportive but

that because of the financial problems caused by his dismissal, his marriage almost collapsed and his family was suffering. He said that meetings were prejudiced and carried out in an unfair way and that during the procedure, the expired warning had been used. He said that Mr Scott was so focussed on finding evidence towards his guilt that he didn't look for any evidence against it which could have influenced the decision.

96. He said that nothing said during the period of six weeks during which the investigation was carried out made him think that the respondent would look into his grievance. He accepted that sometimes his explanations were unclear but that this was because he often couldn't come up with the correct word. In addition he was stressed by the suspension. He said that none of his lines of defence were followed up and that Mr Walker had decided to change what had been said to make a complaint to HR about him.

97. The claimant criticised the evidence of Mr Walker and Mr Gkastos and that Mr Walker had prompted Mr Gkastos' evidence.

98. He said he didn't want to cause Ms Florek more issues as he was aware of her family and financial situation. However, she had shouted at him and shown a lack of respect and used vulgar words.

99. He said that finding alternative employment had been very difficult because of his wife's shifts and because he had to tell prospective employers the truth about the circumstances of his dismissal. He said it was not surprising that he didn't have time to look for alternative work now as he was working and also looking after his children.

100. The claimant said that the only thing he was guilty of was refusing to co-operate with Ms Florek's instructions, which would have been detrimental to his health. He said that such treatment was a regular occurrence.

101. The claimant said that Mr Scott had formed an opinion of him at the very beginning of the hearing and difficulties with language resulted in him being treated as being evasive. His guilt had been presumed because of what had been said by managers. He said that Mr Scott had based his decision on the

expired warning and that there had been no follow up on issues he raised. He said he hadn't been aggressive in the incident which led to his dismissal.

Discussion and decision

Race Discrimination

102. The Tribunal was of the view that there was not sufficient evidence to find that the claimant had been discriminated against because of his race. While the Tribunal was of the view that Ms Florek had been likely to have said something at least critical of if not derogatory towards the claimant, it was not satisfied that she referred to him as a 'lazy Polish shit'. The Tribunal particularly took into account the delay in the claimant making this allegation. It was not until he lodged his claim that he made the allegation that this comment had been made. The Tribunal was not convinced that the claimant had not made the allegation until lodging his claim out of altruism towards Ms Florek.

103. While the Tribunal did not accept the description of Ms Florek by the other respondent's witnesses as quiet and always happy, it was of the view that the claimant had simply not done enough for the Tribunal to conclude that a racist comment had been made by her.

104. Therefore the claimant's claim of race discrimination fails.

Unfair dismissal

105. The Tribunal was satisfied that the respondent had established a potentially fair reason for dismissal, being the conduct of the claimant. The Tribunal then turned to consider the well-established 'Burchell test'. The Tribunal also reminded itself that it must not substitute its own view in relation to the decision to dismiss the claimant. It was necessary to consider whether the procedure which was followed was fair and was within the margin afforded to employers, such that it need be within a band of reasonableness of a reasonable employer.

106. The Tribunal formed the view that the investigation which was carried out was not within that band of reasonableness. The tone of the investigation was set when Mr Walker, rather than asking Mr Gkatsos what he had heard the claimant say, suggested to him what he had said. Thereafter, it seemed to the Tribunal that the process adopted by the respondent, rather than being impartial and seeking to establish the facts of the case, was directed towards establishing that the claimant had said what Mr Walker alleged he had said. The investigation was not impartial. In particular,

- the interview with Mr Gkatsos on 7th December asked him 'to clarify if the following comment was made….' (p136). When Mr Gkatsos did not provide the clarification sought, he was then asked 'Did he say the second part quieter'. It seemed to the Tribunal that this interview was not an attempt to establish facts but to seek to persuade Mr Gkatsos to agree that the claimant had made the comment alleged by Mr Walker. It was not a fact finding interview.

- Mr Spence produced an investigation report without conducting any investigation other than speaking to the claimant. There was no explanation in the report as to why he was producing a report when someone else had carried out most of the interviews. While it was suggested that this was because he was on a different shift from the witnesses, there was no evidence as to why he was appointed as an investigatory manager in the first place if he could not carry out the investigation. While this of itself did not demonstrate that the investigation was not impartial, the Tribunal was very surprised that an organisation with the resources of the respondent did not think it appropriate for someone appointed to carry out an investigation to actually be required to carry it out.

- What was of more concern to the Tribunal was that Mr Spence concluded that the alleged comments had been made and that these 'were of a concerning nature. It is clear with respect to the allegations that are not only in breach of Amazon's conduct policies, but have been and could be

harmful to employees in the future." This conclusion went well beyond the allegation Mr Spence was investigating. It made findings in respect of which there was no evidence. There was nothing in the report to say that any harm had been occasioned to any member of staff, never mind that harm could be occasioned to unnamed employees in the future. The Tribunal was of the view that these conclusions were illustrative of the approach of the investigation as a whole, which did not set out to establish facts, but to establish the claimant's guilt. While setting out conclusions in this way might not of itself render a procedure unfair, within the wider context the Tribunal found that the investigation was not within the band of reasonable responses.

- Furthermore, Mr Spence did not carry out any investigations into the allegations the claimant made about Mr Walker which were included within his email of 2nd December. Mr Spence did not explain in his report why he had failed to investigate. He simply indicated that despite the email being received, he concluded that the claimant had made the comments alleged. The Tribunal found that the failure to carry out any investigation into the allegations raised by the claimant of itself rendered the investigation outwith the band of reasonable responses and therefore the dismissal unfair.

107. If the Tribunal was wrong about the investigation rendering the dismissal of the claimant unfair, the Tribunal also concluded that Mr Scott was not impartial at the disciplinary hearing. He did not approach the disciplinary hearing with an open mind. In particular,

- He concluded prior to the hearing commencing that the claimant had raised the issues set out in his email of 2nd December to distract from the allegations against him.

- Mr Scott had also been provided in advance of the hearing with the details of an expired warning given to the claimant. The Tribunal was astonished that despite the investigation report setting out that the claimant did not

have any disciplinary warnings on file, that the HR department of the respondent provided Mr Scott with details of the expired warning in advance of the hearing. Further, the claimant was not advised in advance that Mr Scott had been provided with these details.

- While Mr Holloway sought to persuade the Tribunal that the warning was not taken into account and was only background, the Tribunal could not accept this, particularly given the evidence of Mr Scott and the letter of dismissal itself. The Tribunal found that Mr Scott had formed a negative opinion of the claimant even before the hearing commenced. Mr Scott then concluded that the warning taken together with the allegations against the claimant 'followed a pattern of behaviour'. The claimant had not been alleged to have made threatening comments to anyone in the past, he had been accused of unprofessional conduct. Mr Scott also referred in the letter of dismissal to his view that the claimant 'had an issue with authority, failing to carry out work-related requests.' He went on to state that while it had no bearing on his decision 'you have previously been involved in another situation which showed a clear lack of respect for management and were given a warning for this.' The Tribunal was of the view that if this previous warning had in fact had no bearing on the decision, Mr Scott would not have made a number of references to it.

108. While the Tribunal accepted that there are likely to be occasions on which an expired warning can be taken into account in a disciplinary process, this was not one such occasion. In any event, the respondent sought to argue that the warning had not been taken into account, but that if it had it was permissible for it to do so. There was no explanation from Mr Scott as to why it would have been permissible or how it influenced his thinking. The Tribunal did not accept Mr Scott's evidence on this matter. He was evasive in relation to it and his oral evidence was not consistent with the terms of the letter of dismissal.

109. Therefore, the Tribunal found that the disciplinary hearing was not conducted in an impartial manner, which rendered the dismissal unfair. Further, Mr Scott took into account an expired warning for conduct, while related in that it was

directed towards a supervisor, was not the same conduct the claimant was accused of in the disciplinary hearing. The Tribunal found that Mr Scott took this warning into account, not only in his conclusion that the claimant had committed the conduct of which he was accused, but also in the sanction he applied. This also rendered the dismissal unfair.

Remedy

110. The Tribunal then turned to consider the question of remedy. The claimant is entitled to receive a basic award of £1575.

111. The respondent accepted that the claimant had losses in relation to his shares of £2,333.45 and that an appropriate award for loss of statutory rights was £500.

112. The respondent had submitted that the claimant had failed to mitigate his losses by taking a lower paid job with lower hours in order to suit his family arrangements. The respondent had also submitted that there were many jobs the claimant could have applied for. The claimant lives in Leven in Fife. It was suggested that the claimant could have travelled to Dundee, Cowdenbeath or even Edinburgh to obtain alternative work. The Tribunal did not accept this. The travel time and cost involved would have been significant in comparison to his relatively short journey to Dunfermline where there was parking available. The Tribunal did not accept that the claimant had failed to mitigate his loss by accepting a job as a driver. However, the Tribunal did form the view that the claimant's losses should be limited to a period of 6 months to take into account the possibility that he would have had to leave the respondent's employment due to his childcare commitments as a result of his wife's changing shifts.

113. The claimant had 13 weeks out of work. The Tribunal was also mindful that this was at the beginning of the pandemic and concluded that it would have been difficult for the claimant to find alternative work at a similar income particularly when he had been dismissed for gross misconduct and was required to be

honest about this when asked. The claimant's losses during this period were £4,748,90. The respondent also contributed to a pension on behalf of the claimant and his losses in this regard amounted to £14.04 per week which over 13 weeks amounted to £182.52. Although the claimant had referred to other benefits in his schedule of loss, there was no evidence before the Tribunal which would allow the Tribunal to quantify any such losses.

114. After the claimant obtained alternative employment in March 2020, he had an ongoing weekly loss of £144.73, and the Tribunal determined that he should be compensated for losses for a 13 week period, which amounted to £1,881.49.

Therefore in summary, the claimant was entitled to

Basic award	£1575
Loss of statutory rights	£500
Loss of shares	£2333.45
Loss of income during unemployment	£4,748.90
Ongoing losses	£1881.49
Pension loss	£182.52

115. The Tribunal considered whether to make a deduction from this compensation on the basis of *Polkey*. The respondent had submitted that the claimant would have been dismissed had a fair procedure been followed. The Tribunal could not accept this. As the Tribunal found that the investigation had not been impartial, and that the disciplinary decision maker had not been impartial, and that he had taken into account an expired disciplinary warning, the Tribunal was of the view that no deduction on the basis of *Polkey* should be made.

116. The respondent also submitted that any compensation should be reduced by 100% to take into account the claimant's conduct . Section 123(6) of ERA provides that "Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."

117. It is also possible for the Tribunal to make a deduction from any basic award. In *Nelson v BBC (No.2) 1980 ICR 110, CA*, the Court of Appeal said that three factors must be satisfied if the tribunal is to find contributory conduct:

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- the conduct must be culpable or blameworthy

- the conduct must have actually caused or contributed to the dismissal, and

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- it must be just and equitable to reduce the award by the proportion specified.

118. The Tribunal found that while the claimant had not made the alleged comments about his supervisor, he had made some comments and had been derogatory in relation to her and her management. The Tribunal therefore concluded that his conduct was blameworthy. While the Tribunal did not accept that his conduct caused the dismissal (in that he did not commit the conduct alleged), it did form the view that his angry approach to Mr Walker, was the initial cause of the proceedings which then resulted in his dismissal. The Tribunal therefore decided that it was just and equitable to reduce the compensatory award by 20%. The Tribunal did not conclude that it would be just and equitable to reduce the basic award. Further the Tribunal concluded that the deduction should not apply to the shares to which the claimant was entitled.

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119. The Tribunal then considered whether the compensation should be reduced because of the claimant's failure to appeal the decision to dismiss him. The Tribunal accepted that the claimant was in error believing that the same people would consider the appeal and that the respondent's policy indicated that it would be heard 'where possible' by a person more senior that then person who dealt with the original hearing. However, the Tribunal was not satisfied that there was any possibility of the decision being overturned on appeal. The procedure to date had been so one sided and so lacking in any impartiality, that the Tribunal would have been very surprised if an appeal would have

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resulted in a different outcome. Therefore no deduction would be made for the claimant's failure to appeal.

The compensation awarded to the claimant was therefore:

Basic award	£1575
Loss of statutory rights	£500
Loss of shares	£2333.45
Total	**£4,408.45**
Loss of income during unemployment	£4,748.90
Ongoing losses	£1881.49
Pension loss	£182.52
Total	£6812.91
reduced by 20%(£1362.58)	**£5450.33**
Total compensation	**£9,858.78**

Wrongful dismissal

120. The Tribunal concluded that the conduct of the claimant was not a fundamental breach of contract which entitled the respondent to dismiss the claimant without notice. While the Tribunal was of the view that the claimant was likely to have made comments about Ms Florek which were negative, having found that he did not threaten physical violence towards her, the Tribunal concluded that the claimant had been wrongfully dismissed and was therefore entitled to receive his notice pay of £730.70 net.

Employment Judge: Amanda Jones
Date of Judgment: 30 April 2021
Entered in register: 01 May 2021
and copied to parties