EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100076/2020 & 4104668/2020 (V)

Hearing held by CVP on 15,16,17,18,19 March 2021

Employment Judge Cowen
Tribunal Member J McCullagh
Tribunal Member J McCaig

Mr D Hawksworth	**Claimant**
	In person
Greencore Food To Go Limited	**Respondent** **Represented by:** **Ms Stobart - Counsel** **Instructed by:** **Ms S Holwill - Solicitor**

This has been a remote video hearing which was attended by the parties. A face to face hearing was not held because it was not practicable as a result of the Covid 19 pandemic and all the issues could bedetermined in a remote hearing.

RESERVED JUDGMENT

1. The claimant's claim for unfair dismissal and some of the claims for discrimination by harassment succeed. All other claims are dismissed.

2. The claimant shall be paid compensation of Thirteen Thousand, Three Hundred and Six Pounds (£13,306) in total.

REASONS

Introduction

1. The claimant brought claims by way of an ET1 dated 9 January 2020 for discrimination on grounds of race and disability (harassment). By way of a second ET1 dated 29 August 2020 he brought claims of unfair dismissal, victimisation and whistleblowing. The claims were consolidated on 15 October 2020 by order of EJ Kemp. It would not appear that there has been any other formal case management.

2. Prior to the final hearing the claimant withdrew the allegation relating to disability.

3. A joint bundle was provided to the Tribunal. The claimant gave evidence, as did Patrick Murray, Colin Lowe, Jamie Pentland and Mark Campbell for the respondent.

4. On the first day of the hearing the Tribunal took time to identify a detailed list of issues, which was then provided to the parties by the Tribunal, in order to assist the parties with their presentation of the claim and the Tribunal with their deliberation. The parties agreed that this list represented the totality of the claims to be considered by the Tribunal.

The Issues

5. The parties and Tribunal discussed the issues of the claim on the first day and a list was drawn up for use in the hearing;

    1. Under s.26 Equality Act 2010:
        a. Was the claimant harassed by the respondent in that the respondent engaged in unwanted conduct which related to his race (nationality: English); and
            i. the conduct violated the claimant's dignity, or
            ii. created an intimidating, hostile, degrading, humiliating or offensive environment for the claimant

1.1 The specific allegations of harassment which the Tribunal will consider are;

a. Patrick Murray did on numerous occasions refer to the claimant as an 'English prick' or 'English bastard',

b. Patrick Murray spread vicious lies that the claimant was facing charges of a sexual nature

c. That between 14 June and 13 July 2018, Patrick Murray told the claimant that he would soon be on a bus back to England, like the English football team from the World Cup, and/or that once Scotland gained independence the claimant would need to go home.

d. On 11 October 2019 as a result of the claimant having reported the respondent to DVSA over an issue with a van's windscreen, Patrick Murray referred to the claimant as an 'English prick'

e. On 11 October 2019 Jay Ogunyemi sent an email at 10:57 saying "If he goes to prison we can terminate contract with immediate effect".

f. On 25 November 2019 Patrick Murray threatened to sue the claimant if he were to use recordings which the claimant had made of Patrick Murray.

g. On 2 December 2019 the claimant was told that Patrick Murray had written "one of four court cases David has on the go is for sexual assault which if he gets put on the sex offenders list is it legal to employ him as he could be in contact with women/girls"

2. Under s.98 Employment Rights Act

Was the claimant unfairly dismissed by the respondent;

i. What was the potentially fair reason for dismissal (respondent says conduct)

ii. Did the respondent have a genuine belief in the claimant's misconduct,

iii. Did the respondent have reasonable grounds for the belief

iv. Was the decision to dismiss within the band of reasonable responses of an employer in the circumstances

v. Was a fair procedure applied to the process.

3. Under s.27 Equality Act 2010

i. Did the claimant carry out a protected act under s.27(2) (bringing an ET claim)

ii. Was he treated less favourably (dismissed) because he had carried out that protected act

4. Under s.43B Employment Rights Act

i. Did the claimant make a qualifying protected disclosure on 11 October 2019 or 26 June 2020 to DVSA in reporting an issue with a van windscreen.

5. Under s.103A Employment Rights Act

i. Was the reason or principal reason for the claimant's dismissal, the fact that he had made a protected disclosure.

6. If the claimant was unfairly dismissed, would be have been dismissed in any event after a fair procedure (Polkey reduction)

7. If the claimant was unfairly dismissed, did he contribute to his dismissal by way of his actions (contributory fault)

8. If any of the claims are found proved – what remedy is appropriate.

The Facts

6. The claimant started working for the respondent as a driver in their retail delivery service on 23 April 2018. His working hours were 11am to when the work was complete. The claimant liked the job as he was often able to finish work in four hours when he was paid to work for eight hours. The claimant was an experienced HGV driver, although this job required van driving across Scotland. He considered himself to be overqualified for the job.

7. The claimant was very conscientious of his position as an HGV Class 1 driver, who also held ADR and CPC driving qualifications. He believed that

if he was found to have committed a road traffic offence, he would be referred to the Traffic Commissioner, who had the power to remove his specialist licence. The claimant therefore took his responsibility very seriously.

8. The claimant is English and this was clear to his colleagues by way of his accent, but also because he told them that he had moved to Scotland.

9. Within a few weeks of starting work (in May 2018) it became clear to him that the respondent's depot manager Mr Patrick Murray did not value him. On one occasion whilst using the forklift truck to load the vans, Mr Murray referred to the claimant as an "English prick". The claimant responded with "I beg your pardon", indicating that he was offended and registering his objection. Mr Murray told the Tribunal that 'prick' was his 'go to' swear word, but denied that he used the description of the claimant being English. It was clear to the Tribunal that Mr Murray did use this phrase towards to the claimant. The Tribunal were satisfied that Mr Murray used this language, which was supported by the evidence of Colin Lowe, a Regional Director who was also English, who said that Mr Murray had also said this to him in the past, albeit in a friendly context on that occasion.

10. During the World Cup in June 2018, Mr Murray also remarked to the claimant that he would "soon be on the bus back to England like the football team". The claimant was also offended by this statement.

11. On a further occasion Mr Murray also remarked to the claimant that once Scotland gained independence the claimant would have to "go home"; meaning return to England.

12. On 31 October 2018 the claimant was invited to a disciplinary hearing to discuss a report from a member of the public about his driving inappropriately. A video had been placed on YouTube on the internet, by a member of the public, showing the claimant's driving. The respondent took this seriously, as it formed negative publicity for the company.

13. The claimant was invited to an investigatory interview on 1 November 2018, with Mr Kenny Douglas. The notes of this meeting do not record any conversation. The claimant felt this was inappropriate procedure as the

decision to take the matter to a disciplinary had already been taken. He indicated this to Mr Murray in his reply on 3 November 2018. On 2 November 2018 the claimant set out his version of events in an email to Mr Murray.

14. On 5 November 2018 the claimant went to ask Dundee police to watch the video and indicate if he had done anything wrong. An email dated 23 November 2018 indicates that PS Gordon Miller considered the manoeuvre by the claimant acceptable. This did not arrive until after the disciplinary meeting.

15. The disciplinary meeting was held initially on 15 November 2018, but adjourned to 20 November due to technical problems finding the video of the events. The result of the disciplinary hearing was a first written warning for 12 months as Mr Murray was adamant that the claimant was in the wrong.

16. The claimant appealed against the written warning. The appeal was considered by Kevin Bell the area manager on 27 December 2018. The claimant provided him with the email from the police. Mr Bell was not prepared to rely on this email to reconsider the written warning. He upheld the written warning.

17. On 1 October 2019 the claimant wrote to the customer service department at DVSA asking them “To whom it may concern. Can you drive a vehicle when there is a crack in the windscreen? If yes, is it a certain length allowed? Or does it depend on where the crack is situated? Or will I get points on my license(sic) of I drive(sic) with a cracked windscreen?”

18. The claimant received a reply on 10 October 2019 from a customer service representative at DVSA which said “Thank you for your email dated 1 October. I can confirm that damage to windscreens is part of the MOT test and depending on the size and location of the damage could result in a vehicle failing it’s(sic) MOT test. Driving with a cracked windscreen may also be considered a motoring offence as it could constitute use of a motor vehicle in a dangerous condition. We recommend you contact a windscreen repair specialist for further advice”.

19. On 10 October 2019 the claimant sent these emails to Mr Murray indicating “Please keep for your records. I had to check and this is the real reason why I didn’t take XJF to the wash last week. I was advised this on a previous CPC course regarding windscreen cracks and I am very wary of driving van’s (sic) with any cracks”.

20. Mr Murray replied to this email saying “Why did you not report it to anyone then”.

21. The claimant had noticed that another driver had in fact reported the windscreen problem on the vehicle defect sheet.

22. On 11 October 2019 Mr Murray approached the claimant in the yard, as he arrived for work. Mr Murray was annoyed that the claimant had gone to DVSA. He remonstrated with him about this and called the claimant an “English Bastard”.

23. Later the same day the claimant emailed Mr Murray to say that he may be late attending work on Monday 14 October as he had a doctor’s appointment in the morning. The claimant had had surgery on his shoulder in Summer 2019 and was not able to use his right arm to lift. He was therefore attending the doctor to obtain advice about reasonable adjustments he required. Both his late arrival and his inability to lift were inconveniences to Mr Murray. Mr Murray replied, copying in the HR adviser and the supervisor Kevin Bell, asking him to make the appointment early or on his day off.

24. In response to this email, the HR adviser, Jay Ogunyemi replied to Mr Murray saying “His OH report states he should be able to return to his full duties subject to his doctor signing him fit to work, did we ever received this fit note? If he goes to prison we can terminate contract with immediate effect”.

25. This email was shown to the claimant at a later date and formed part of his grievance.

26. A second driving issue arose on 29 October 2019 where the claimant was accused of unsafe driving. He was invited to an investigation meeting on

6 November 2019 to discuss five complaints about his driving, said to have accumulated in the last year. This was not as many as some other drivers over a shorter period of time. No notes of the meeting were provided to the Tribunal.

27. On 7 November 2019 the claimant received a whatsapp message from a colleague indicating that the claimant was going to receive a final warning for his driving. The claimant replied that he had not yet been told that the matter was going to a disciplinary hearing. Once again, the claimant believed that a decision had been taken before due process had been followed.

28. The claimant was invited to a disciplinary meeting on 15 November 2019. The meeting was conducted by Mr Murray once again. The claimant made a covert recording of the meeting and in particular the discussion between Mr Ogunyemi and Mr Murray. The outcome of the meeting was that Mr Murray gave the claimant a final written warning for 12 months.

29. After the disciplinary meeting, the claimant confronted Mr Ogunyemi, told him of the recording and suggested that the outcome had been predetermined. Mr Ogunyemi told Mr Murray that they had been recorded, which angered Mr Murray who threatened to sue the claimant.

30. The claimant had previously asked not to be made to work with Craig Steen on the basis that the claimant believed Mr Steen had made threats of violence to him on a previous occasion. On 23 November 2019 Mr Murray ordered the claimant and Mr Steen to go together in the van for the day. Despite his protests, the claimant did as he was told. During the deliveries Mr Steen referred to the claimant as a ‘paedo’ and complained to Mr Murray about the claimant’s driving.

31. On 25 November 2019 the claimant was signed off sick, due to stress. On 26 November the claimant raised a grievance about bullying by Mr Murray. In his grievance he stated that he had reported bullying to Mr Ogunyemi on 21 October 2019 but nothing had been done. He also stated that he believed his recent disciplinary was pre-determined, that Mr Murray had changed his work arrangement to cause him distress (by making him work

with Mr Steen) and refused to cancel holiday. The claimant also highlighted that others were not disciplined for breaking rules about the use of the van.

32. On 3 December 2019 the claimant met with Colin Lowe for over two hours and discussed all aspects of his grievance. The claimant was asked by Mr Lowe to send him copies of the emails as proof of his allegations. The claimant also sent Mr Lowe the recording he had taken of Mr Murray. Mr Lowe had carried out an investigation of the grievance by speaking to other within the depot prior to speaking to the claimant. Mr Lowe's intent was to try to draw a line under matters and find a way to return the claimant to work.

33. Mr Lowe produced a grievance report which said that the claimant was right about the crack on the van windscreen and that it needed to be replaced. Mr Murray arranged a repair immediately upon being told by Mr Lowe to do so.

34. Mr Lowe also highlighted that Mr Murray had failed to treat another driver with sufficient severity where had had been seen with his partner and dog in the van. This highlighted the different standard that Mr Murray was applying to the claimant's behaviour than other drivers. Similarly Mr Lowe found that another driver who had been verbally abusive to the claimant had not been disciplined.

35. Mr Lowe concluded in a letter dated 31 January 2020, that there was sufficient evidence to support the claimant's claim that he was being intimidated by both Mr Murray and his colleagues. Specifically Mr Lowe found that Mr Murray had called the claimant names, including 'English prick'. The claimant's grievance was therefore upheld in a number of aspects.

36. The claimant then attempted to appeal against the points in the grievance which were not upheld. This appeal was heard and was dismissed on 2 March 2020.

37. It was shortly after this on 23 April 2020 that the claimant was invited to an investigatory interview. The claimant enquired what the complaint was

on this occasion. This led to a number of emails in correspondence.

38. The date of the initial meeting was altered and on 24 April 2020 the claimant was invited by Mr Ogunyemi to an investigatory meeting via Skype. The claimant again agreed to be interviewed, but highlighted in his response that he was not aware of the reason for the meeting and he felt that he was being treated unfairly by the respondent. Mr Ogunyemi responded that the respondent had no obligation to disclose the subject of the investigation, which upset the claimant further.

39. As the claimant remained off sick with stress, he was referred to Occupational Health, who concluded in May 2020 that he was fit to attend a meeting and that the claimant reported that his stress was due to management issues.

40. There was further discussion with Sarah McHugh over whether the claimant was fit to attend the meeting and who was to conduct the meeting. The claimant showed a lack of trust in the process of the respondent.

41. On 19 June 2020 the claimant was again invited to an investigatory meeting via Skype Call (due to the pandemic) on 24 June 2020. The letter does not specify what the investigation is about. When the claimant asked (in an email) he was told that there was no complaint, but that they wished to speak to him.

42. The claimant attended by telephone the meeting on 24 June 2020, which was chaired by Jamie Pentland. During the call the claimant was asked what he had been doing whilst off sick and on specific days. The claimant believed that Mr Murray had reported the claimant for working elsewhere. He told Mr Pentland that Mr Murray had been racist towards him and so he was working for another company called PS Ridgeway. The claimant asserted that he had been advised that it was acceptable for him to have a second job whilst he was off sick from his position with the respondent. The claimant asserted that Mr Murray had spread lies about the claimant being a sex offender. He also suggested that other employees who have second jobs are not investigated or disciplined.

43. The notes of the meeting show that Ms McHugh brought the meeting to a close without inquiring about any further details of the claimant's assertions. No further investigation was carried out by Mr Pentland in relation to this matter.

44. The claimant took advice from the Citizens Advice Bureau and HMRC about the issue of taking another job whilst off sick. He believed that was told that it may not be inappropriate depending on the medical diagnosis (i.e. he may be too sick to work in one job, but well enough to do another).

45. The claimant also produced a letter from PS Ridgeway saying that the claimant had been employed as an LGV driver and that he would leave PS Ridgeway to return to his other post at some point in the future. The claimant asserted that he was fit to work, but could not work with Mr Murray due to the fact that his actions caused the claimant stress and anxiety.

46. The claimant was informed by letter dated 3 July 2020 that a disciplinary hearing was convened for 8 July 2020. He was told that the allegations against him were that he had been working for another company in breach of contract, that he was not focusing on his recovery and that he had breached his duty of fidelity by not telling the respondent that he was working elsewhere, which meant that he was being paid twice.

47. The claimant replied to this letter also on 3 July, outlining the points he wanted to raise at the hearing, including repeating his allegations that Mr Murray was racist towards him and that DVSA and others were aware that 'others' were breaking the law. The respondent took no action in respect of these allegations.

48. On 4 July the claimant sent a further email with his detailed response to the allegations. He indicated that he would not be attending the disciplinary meeting as he objected to Kevin Bell being the disciplinary officer and asked for the outcome to be notified to him.

49. On 13 July the respondent wrote to the claimant re-arranging the date of the disciplinary hearing and indicating that the disciplinary officer would be Mark Campbell. The claimant replied to this letter highlighting that

Mr Lowe had agreed with him that he was being badly treated by Mr Murray and that he believed this was a further instance. He declined to attend the meeting. The meeting went ahead on 11 August 2020 in the claimant's absence. A dismissal letter was issued on 26 August 2020 on behalf of Mr Campbell.

The Law

Unfair dismissal

50. In any case where an employer dismisses an employee, it is for the employer to establish the reason for dismissal and that it is a potentially fair reason within the categories set out in section 98 of the Employment Rights Act1996. Misconduct is a potentially fair reason for dismissal.

51. If the Tribunal is satisfied that misconduct is the reason for dismissal, itis for the Tribunal to decide whether it was in fact fair to dismiss for that reasonby applying the test of fairness contained in section 98(4) of the Act which provides as follows:

> *"Where the employer has fulfilled the requirements of subsection (1), thedetermination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –*
>
> *(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
>
> *(b) shall be determined in accordance with equity and the substantial merits of the case."*

52. There is no burden of proof on either party in respect of this.

53. The test of fairness does not permit the Tribunal to decide what it might have done had it been making the decision to dismiss (*London Ambulance Service NHS Trust v Small [2009] IRLR 563*). What the Tribunal must do is consider the reasonableness of the respondent's decisionand decision-making process.

54. In a conduct dismissal a Tribunal must consider the questions set out in *British Homes Stores v Burchell [1978] IRLR 379* as approved by the Court of Appeal in *Weddell & Co Ltd v Tepper [1980] ICR 286*. These have been set out in the list of issues for this case and so are not repeated here.

55. The Tribunal will also consider the adequacy of the procedure or investigation and apply the band of reasonable responses test (see *Sainsbury's Supermarkets Limited v Hitt [2003]ICR 111*); The Tribunal will take into account the ACAS Guidelines on Discipline and Grievances at Work and will consider the reasonableness of the employer's decision-making process when measured against a range of approaches that could be open to different employers looking at the same facts as they were reasonably believed to be at the time (see *Devis v Atkins [1977] ICR 662*).

56. The "band of reasonable responses" test is well-established in the law of unfair dismissal. The test requires a Tribunal to decide whether in dismissing the employer has acted reasonably or unreasonably "in accordance with equity and the substantial merits of the case" (see *Bowater v NW London Hospitals NHS Trust [2011] IRLR 331* and *Newbound v Thames Water Utilities Limited [2015] EWCA Civ 677*).

57. It is relevant in assessing whether a disciplinary investigation was reasonable in its scope (or even necessary at all) to consider whether the employee has admitted the relevant misconduct (*RSPB v Croucher [1984] ICR 604*). The Tribunal will also consider whether the employee had an opportunity to put his or her case or to challenge evidence.

58. Defects in any initial investigation or procedure may be remedied by an effective appeal (see *Taylor v OCS Group Limited [2006] ORLR 613*).

59. Where the Tribunal finds that the investigation or procedure leading to dismissal were unfair, it must consider and assess the chances of a fair process changing the outcome; this is referred to as the *Polkey* chance.

60. If a finding of unfair dismissal is made the Tribunal must also consider whether the employee contributed to the dismissal by way of their actions. If so, the Tribunal must consider a percentage reduction to reflect the culpability.

Harassment

61. S.26 Equality Act 2010 says;

> "*(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 or humiliating or offensive environment for B"*

62. The Tribunal must consider whether the conduct complained of was 'unwanted' by the employee and requires the application of a subjective test. This is part of the consideration of the defence of 'banter' in such situations.

63. The Tribunal must go on to consider whether, objectively the view of the employee that any unwanted conduct falls within (b) and must conclude whether it is reasonable in all the circumstances for the employee to be offended in the manner set out.

Victimisation

64. S.27 Equality Act 2010 says;

> *"(1) A person (A) victimises another person (B) if A subjects B to a detriment because—*
>
> *(a) B does a protected act, or*
>
> *(b) A believes that B has done, or may do, a protected act.*
>
> *(2) Each of the following is a protected act—*
>
> *(a) bringing proceedings under this Act;……."*

65. The Tribunal must establish that the person who carried out the act of victimisation was aware or reasonably ought to have been aware that the claimant had brought proceedings under the Equality Act 2010.

66. The Tribunal may also be required to consider a two stage test in determining liability as set out in s. 136 Equality Act 2010. The first stage

is to consider whether the claimant has proved facts from which discrimination could be found; If so, then the Tribunal must consider whether the respondent has shown a non-discriminatory reason for the acts. This is commonly referred to as a shift in the burden of proof; Igen v Wong [2005] ICR 931, CA.

Protected Disclosure

67. *"S.43B Employment Rights Act 1996 - Disclosures qualifying for protection;*

(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,……"

68. The claimant must show the Tribunal that he passed information, rather than making a complaint or enquiry. In addition he must show that any information which he passed showed one of the statutory breaches had occurred. He must also prove to the Tribunal that in doing so, he was acting in the public interest.

Automatically Unfair Dismissal

69. S.103A Employment Rights Act 1996

"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."

70. The Tribunal must consider whether the reason or principal reason for the dismissal was the fact that a protected disclosure had been made. This includes a consideration of whether the dismissing officer, or the person

with the controlling mind of dismissal was aware of the protected disclosure having been made.

Decision

Allegation 1.1a)

71. The Tribunal considered that Mr Murray did call the claimant an 'English prick' or 'English bastard' when he was annoyed with him in relation to work matters in the depot a few weeks after the claimant started the job in May 2018. It was agreed by Mr Lowe and Mr Robertson that this was language which Mr Murray was known to use and had used on other occasions.

72. The fact that Mr Murray chose to add the adjective 'English', is a mark of the fact that Mr Murray was identifying the claimant as someone of a different nationality and an identifying characteristic. The comment was therefore made on the grounds of the claimant's nationality. Although this had been used light heartedly on a previous occasion with Mr Lowe, the claimant perceived the comment to be intimidating, demeaning and hurtful. The Tribunal considered that the claimant's perception of the comment was reasonable in the circumstances and that the comment was contrary to s. 26 Equality Act 2010 and was harassment.

73. The tape recording of Mr Murray in a meeting with Mr Ogunyemi includes Mr Murray referring to the claimant as an 'Arrogant Bastard'. After hearing that tape, Mr Lowe's evidence was that Mr Murray may have said 'English Bastard'. The Tribunal concluded that on a balance of probabilities, Mr Murray also used the phrase 'English bastard' toward the claimant.

Allegation 1.1b)

74. Mr Murray is accused of spreading vicious lies that the claimant was facing charges of a sexual nature. The claimant initially denied that he was facing any court charges at all. In cross examination and faced with a newspaper article about his case, he admitted that there was a charge in relation to stalking, but it was dropped. The claimant had informed Mr Murray about the case in order to ask for time off to attend court. The

claimant had also told Mr Murray that he may face imprisonment. The court case was the talk of the canteen, with speculation by a number of the staff as to whether the claimant would be imprisoned. Mr Murray believed that what he said was factually true, based on what had been told to him by the claimant. He was not knowingly lying to the other staff.

75. The Tribunal considered that the evidence showed that Mr Murray did discuss the situation with Mr Ogunyemi and others and by doing so was breaching the confidentiality of the claimant. However, the Tribunal did not consider that these comments were made because the claimant is English, but because Mr Murray had a personal dislike of the claimant, whom he saw as difficult and that he believed that there were charges of a sexual nature against the claimant, for which he could face imprisonment. This was based on conversations between the claimant and Mr Murray.

Allegation 1.1c)

76. The claimant first made this claim as part of his ET1, as part of a number of examples of harassing comments made by Mr Murray. The Tribunal is content that Mr Murray did say that the claimant would soon be on a bus home to England, like the English football team. Mr Murray did not deny saying it, but the only explanation he could give, was that it was said as banter. Mr Lowe said that Mr Murray's behaviour was unacceptable and the Tribunal agree with this view. Furthermore, the Tribunal consider that the comment was made due to the claimant's nationality and was offensive and demeaning to the claimant and violated his dignity.

Allegation 1.1d)

77. This second instance of Mr Murray referring to the claimant as an 'English prick' is also accepted by the Tribunal. This occurred in circumstances where Mr Murray believed that the claimant had reported the respondent to DVSA over a van with a cracked windscreen. Mr Murray was annoyed with the claimant and used what he admitted was his 'go to' swear word, as he had done previously. On balance of probabilities, Mr Murray made this comment due to his anger with the claimant and did so in order to

intimidate the claimant. Mr Murray referenced the claimant's nationality as the reason why he believed him to be arrogant. Whilst the disagreement itself was not related to the claimant's nationality, the response of Mr Murray was to include reference to it as a derogatory term. This caused upset to the claimant.

Allegation 1.1 e)

78. The email response of Mr Ogunyemi on 11 October 2019 stating that the claimant's contract can be terminated if he goes to prison is not an act of harassment on grounds of race. There is no evidence to support the claim that this comment was intimidating or demeaning. The email was a response to a question asked by Mr Murray and was answered in Mr Ogunyemi's role as an HR adviser. The comment has no connection to the claimant's nationality and there is no evidence from which it can be inferred that it was made due to his nationality.

Allegation 1.1 f)

79. There is documentary evidence that Mr Murray made this threat to the claimant, as a copy of it is contained in the bundle. The respondent accepts that the threat was made on 25 November 2019.Mr Murray was angry with the claimant that he had covertly recorded a meeting and the discussion during a break. The reason Mr Murray made the comment was to intimidate the claimant. The Tribunal took into account the fact that Mr Murray chose to send this as a message and not merely as a verbal comment. The Tribunal also found that Mr Murray acted in this way because the claimant was English and because Mr Murray has a dislike of the claimant on that basis.

80. On 2 December 2019 the claimant became aware that Mr Murray had written a question to ask whether the claimant could continue to be employed if convicted of sex offences. This was written because Mr Murray had a genuine belief that the claimant was being tried for sex offences. The Tribunal did not accept that the question was written, or shown to the claimant because he is English and therefore the claim for harassment fails in respect of this allegation.

Allegation 3 – Victimisation

81. The respondent admitted that the claimant's act of issuing an Employment Tribunal claim qualifies under s. 27(2) Equality Act 2010 as a protected act and the Tribunal was satisfied that this was an appropriate concession.

82. The Tribunal considered whether Mark Campbell was aware of the claim and have it in mind as the cause or a cause of his dismissal. Mr Campbell's evidence was that he was not aware of the claim. The claimant told him that he was taking legal action, there was no evidence that Mr Campbell was aware that a claim under the Equality Act 2010, had in fact been issued. The Tribunal also considered whether it could be inferred from the actions of Mr Campbell that the reason for the dismissal, or an influence on his decision was the protected act. The Tribunal did not consider that this could be inferred from the evidence of Mr Campbell or Mr Pentland. The Tribunal concluded that Mr Campbell believed that the claimant had breached his contract in carrying out work for another company whilst on sick leave and therefore dismissed him due to a fundamental breach of contract.

Protected disclosure

83. The claimant asserted that he made a protected disclosure under s.43B ERA on 11 October 2019 when he showed Mr Murray the communication he had with DVSA. The Tribunal saw the email which the claimant sent to DVSA on 1 October 2019 and the reply which he received. The Tribunal considered whether under s.43B the disclosure was a qualifying one. It concluded that the email sent to DVSA was in the form of a question, sent to the customer service department. It was not sent as a report about the respondent's practice. The email does not contain the identity of the respondent, nor the van. The email does not contain information about an offence which has been, or is likely to be committed, or an unlawful act. The claimant does not express any concern in the email, but asks for confirmation of the legal position of a generic vehicle with a cracked windscreen. The content of the email does not therefore fall within the test set out in s.43B ERA.

84. The Tribunal therefore concluded that there was no qualifying protected disclosure made by the claimant to DVSA, nor when he showed this to Mr Murray and therefore any detriment suffered by the claimant, nor his dismissal cannot have been as a result of making a protected disclosure.

Unfair Dismissal

85. The respondent asserted that the reason for the claimant's dismissal was conduct. This is a potentially fair reason under s.98 ERA. Mr Campbell believed that the claimant had been working for another company whilst claiming sick pay from the respondent.

86. The Tribunal noted that there was no investigation by Mr Campbell of the reason why the claimant was absent from work. Mr Campbell took the investigation of Mr Pentland at face value, with no further enquiry. The claimant indicated to him that the reason was due to the behaviour of Mr Murray and that he could not therefore return to work. This was not investigated by Mr Campbell, nor by Mr Pentland. Mr Campbell could not take account of the circumstances surrounding the claimant's absence, without such an investigation.

87. The claimant admitted to Mr Pentland, who carried out a short investigatory meeting, that he had been working for another company whilst claiming sick pay from the respondent. It was therefore relevant for Mr Pentland to establish the claimant's reason for doing this. Instead, Mr Pentland referred to the claimant's complaints as his "rambling about Pat Murray". The Tribunal concluded that Mr Pentland did not approach his investigation with an open mind and ignored the claimant's explanation of why he had been working whilst on sick leave.

88. Mr Pentland failed to interview anyone else in relation to this allegation. Once he had an admission from the claimant that he had worked for another company during his sick leave, he stopped investigating. This meant he had not looked at the reasons why, nor spoken to any of the claimant's colleagues.

89. Had Mr Pentland spoken to Gary Robertson, he would have been able to corroborate the claimant's assertion that he had taken a job elsewhere

due to the assertion by the claimant, of bullying by Mr Murray.

90. At the disciplinary hearing before Mr Campbell, he failed to take into account the claimant's investigatory meeting with Mr Pentland and thus failed to take up the point about why it was that the claimant had found other work whilst off sick. Had Mr Campbell taken notice of the investigation notes, he would have found the claimant's reasons for his action. Furthermore, the claimant had also submitted a written submission for the purposes of the disciplinary hearing. This too highlighted the problem between himself and Mr Murray, which was also ignored by Mr Campbell.

91. The Tribunal noted that Mr Campbell admitted that he ignored the fact that the claimant told him that he was being bullied and did not investigate these claims. He also asserted that Mr Ogunyemi had not provided him with details about the claimant's complaint that he was being bullied by Mr Murray. The Tribunal considered this a failure to take into account all the relevant evidence and to ensure that a fair hearing was given to the claimant.

92. A further reason why Mr Campbell failed to take account of the claimant's reasons for working elsewhere was due to the input of Sarah McHugh in the process. Ms McHugh co-ordinated the investigation and disciplinary hearing. She attended the investigatory interview as the HR support. However, it is clear from the notes of the meeting that it was Ms McHugh who took control of the conversation and closed the meeting without letting the claimant air his reasons for taking another job whilst off sick. Mr Pentland was led by Ms McHugh during this meeting and did not inquire further, when she was satisfied to end the investigation. The Tribunal considered that if Ms McHugh had let the claimant give his reasons, then Mr Pentland would have had further issues to investigate.

93. The Tribunal therefore concluded that the investigation carried out by Mr Pentland was not reasonable in all the circumstances and did not provide Mr Campbell with a fair picture of what had occurred in relation to the claimant working elsewhere.

94. With respect to the procedure which was followed; the Tribunal considered that upon receipt of the claimant's email of 3 July which raised issues of discrimination and assertions of public interest disclosure, a reasonable employer would have paused the disciplinary procedure and investigated the issues raised. Similarly, as the claimant asserted that the reason for his absence was related to the treatment by Mr Murray, a further occupational health referral would have been a reasonable response, before continuing with the disciplinary process. The respondent did not do any of these, nor did it respond to the claimant's further email on 4 July.

95. The Tribunal acknowledged that letters of invite were sent to the claimant and that notes of the meetings held were provided to him, albeit not necessarily in a timeous manner. Whilst the respondent's process was followed, the difficulty in this case arose, because the investigatory and disciplinary officers failed to listen to the claimant, when he was given an opportunity to explain his actions.

96. The Tribunal considered whether Mr Campbell's decision to dismiss fell within a band of reasonable responses. The Tribunal noted that Mr Campbell failed to consider if the claimant could be moved to work at a different depot. The respondent had premises elsewhere in the Central belt of Scotland. The Tribunal also noted that as this was a disciplinary dismissal, it was for the respondent to consider all the options and there was no obligation on the claimant to suggest an alternative to dismissal, as was asserted by the respondent in evidence. The Tribunal also considered that a further OH report prior to the disciplinary hearing may have assisted in identifying a suitable alternative to dismissal as a solution in this case.

97. Mr Campbell concluded that as the claimant had admitted working elsewhere and as he had been claiming sick pay from the respondent, he was in breach of paragraph 12 of his contract which outlined the obligation to devote the whole of his time, attention and skill, during normal working hours to the company and not to participate in any other kind of business, which competes with the company.

98. Mr Campbell wholeheartedly failed to take into account the claimant's

reasons for so doing. His decision was therefore not based upon a reasonable investigation and was not a decision which fell within a band of reasonable responses.

99. The Tribunal considered whether the claimant's failure to appeal meant that the respondent had not had the opportunity to correct any errors which had been made. The claimant asserted that by the time the process reached the appeal stage he was not in good mental health. The Tribunal accepted that the claimant's view at the time was that an appeal was futile, was reasonable.

Polkey

100. The Tribunal went on to consider whether, if a reasonable investigation had been conducted, whether the outcome of the disciplinary procedure would have been the same in any event. The Tribunal noted that Mr Campbell had ignored the decision of Mr Lowe, despite the fact that the claimant had told him about it.

101. Furthermore, the Tribunal concluded that if a full investigation had occurred, including consideration of the reasons why the claimant said he could not return to work, and/or the claimant had been sent to OH for a further report, and/or Mr Campbell had considered whether the claimant could transfer to another location, and/or had taken into account the fact that the claimant was asking to return to work; then a dismissal would not have occurred. A reasonable employer, given the allegations made by the claimant about Mr Murray, would not have dismissed, but would have addressed the issues between them in another way.

102. The Tribunal concluded that no Polkey reduction is appropriate in these circumstances.

Contributory Fault

103. The claimant admitted working for another business whilst claiming sick pay from the respondent and without asking for sanction to do so. This would amount to a contributory fault factor, which prompted the disciplinary process.

104. However, the claimant took advice from a number of sources who indicated that it may be appropriate to do this where he has more than one job and is fit to do the other job whilst sick from the respondent. This advice has been misinterpreted by the claimant as sanctioning his work for another company doing a driving job when the reason he was not at work was said to be stress and anxiety. However, the claimant had a genuine belief that what he did was not in breach of his contract.

105. The Tribunal also considered that others who worked for the respondent had second jobs and were allowed to leave work in order to go to those jobs on time. As well as the fact that having a mental health illness does not necessarily exclude the physical ability to work.

106. The Tribunal considered that the contribution by the claimant, balanced with the mitigation of his situation, meant that on balance, there was no contribution to his dismissal in this case.

Remedy

107. The Tribunal considered an award for injury to feelings as a result of the harassment suffered by the claimant due to the comments of Mr Murray.

108. The Tribunal recognised that the claimant was off work sick between November 2019 and August 2020; a period of nine months. During that time, the claimant was taking medication.

109. The Tribunal considered the personal impact this situation had brought upon the claimant, his financial difficulties, the impact on his mental health, the length of time over which the incidents had happened and the fact that there were a number of incidents and not a single occasion. The Tribunal were satisfied that the acts of harassment amounted to a course of conduct by Mr Murray who did not like the claimant and chose to harass him on the grounds of his nationality.

110. The Tribunal considered an award of £12,000 was appropriate to reflect that this matter should sit towards the lower end of the middle band of the Vento guidelines as revised.

111. The Tribunal considered that a basic award of £302 x 3 = £906 taking into

account the claimant's age, rate of pay and length of service, is appropriate. No compensatory award is due to the claimant in this case as he did not suffer a loss, having secured a better paid job prior to the termination of this position.

112. An award of £400 for loss of statutory rights will be made.

113. No loss of pension has occurred as a result of his unfair dismissal.

114. The Tribunal considered a total award of £13,306 to be a just and equitable remedy.

Employment Judge Sally Cowen
Date of Judgment 20 May 2021
Date sent to parties