EMPLOYMENT TRIBUNALS

Claimant **Respondent**

v

Mr Olayinka Oketikun **Staffline Recruitment Ltd**

Heard at: **London South Employment Tribunal**

On: **19-21 April 2021**
17 May 2021 (In Chambers)

Before: **EJ Webster**
Ms J Bird
Mr C Mardner

Appearances
For the Claimant: **Mr Charles (Lay representative)**

For the Respondent: **Mr Gray (Counsel)**

RESERVED JUDGMENT

1. The Claimant's claim for unfair dismissal is not upheld and is dismissed.
2. The Claimant's claim for race discrimination is not upheld and is dismissed.

The Hearing

3. The preparation of the hearing was marred by poor disclosure on the part of the respondent. On the first day of the hearing the respondent applied to have

an additional 30 pages added to the bundle. We accepted those documents and although reasons were given at the hearing these will not be repeated here. Then, on the final day of the hearing following questions from the tribunal, the respondent disclosed further documents and made an application for the inclusion of the documents to the bundle. That application was refused save for one document. Reasons were given at the time which again are not repeated here. We asked for an explanation for the late disclosure by the respondent, particularly in circumstances where the claimant was not legally represented but were given no satisfactory explanation. This is disappointing given that the respondent has been legally represented throughout and all of the documents would have been easily obtainable and were largely relevant.

4. The Claimant was ably represented by his friend Mr Charles a lay representative. The Tribunal provided assistance where necessary to assist Mr Charles in order to ensure a fair hearing.

5. The Issues to be determined were agreed with the parties at the outset and are set out below. They are largely in line with the issues agreed at a case management hearing though the claimant clarified and withdrew some elements of his race discrimination claim at the outset of this hearing. Those aspects of the claims withdrawn were dismissed upon withdrawal. The Issues outlined below reflect the final List of Issues as agreed at the outset of the hearing.

6. The tribunal received written witness statements and heard evidence from the following witnesses:
Mr Olayinka Oketikun – claimant
Ms Amy Wheatley – dismissing officer for the respondent
Ms Karen Tibbs – line manager and investigating officer for the respondent
Mr Michael Berkshire – appeals officer for the respondent.

7. The bundle we were provided with numbered 421 pages and we agreed to the additional pages 422 – 453 being added at the outset of the hearing. We considered the pages that we were referred to either in the witness statements or during cross examination.

8. We heard oral submissions from both parties.

<u>The Issues</u>

9. <u>EQA, section 13: Direct Discrimination because of Race</u>

9.1 Has the respondent subjected the claimant to the following treatment:

(i) Violation of the claimant's dignity and heritage with an extensive oppressive formalisation of a Staffline-conceived pseudonym 'Teejay'. It extended to emails, formal documentation, the

disciplinary action and/ignoring requests of the use of his correct name which denies him control of his professional, Cert RP, qualification and alternative employment. The respondent registered the qualification using the imposed pseudonym. Psychologically; it all belies 'banter' or 'term of endearment' to the point of immorality, emasculation and injury to the claimant's feelings.

(ii) 2019 demotion, without for-cause, from Senior Contract Manager role; including an annual £2,000 pay penalty.

(iii) Suspension without legal or legitimate for-cause humiliatingly being escorted from the premises

(iv) The respondent denied the claimant his right to access the documents required, to present his defence

(v) The claimant was summarily dismissed for GDPR breach despite the ICO confirming there was no breach

(vi) The claimant was summarily dismissed for client loss of confidence in the REM. He is an EM!

(vii) Having been suspended and disciplined 'for a breach of GDPR, namely at the location of Forest Gate, the respondent added further matters to the process to influence and enhance the rationale for summary dismissal. These matters were covertly added during the disciplinary hearing without having been subject to the whole procedure.

9.2 Was that treatment "*less favourable treatment*", i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances? The claimant relies on the following comparators and/or hypothetical comparators.

Claim a – Stuart McKinley and Karen Tibbs
Claim b – Amy Wheatley and

9.3 If so, was this because of the claimant's race?

10. <u>Unfair Dismissal</u>

10.1 Did the employer have a genuine belief in his guilt based upon reasonable grounds and following a proper investigation?

10.2 In all the circumstances, was the dismissal fair, including whether a fair procedure was followed?

10.3 Did the claimant do anything which contributed to his dismissal?

10.4 If a fair procedure was not followed, is there is a chance that the Claimant would have been dismissed in any event?

Facts

11. We have limited our findings of fact to those that were necessary for our conclusions. Where there was a dispute, if we have found in favour of one party over another it is because we preferred their evidence on this topic.

12. Unless the individual gave evidence to us, we have used initials to refer to the relevant individuals in this case. We have identified them below in a table according to their role:

Initials	**Job role/role in this case**
MA	Experience Manager at Erith
KC	Experience Coordinator at Forest Gate
KR	Experience Coordinator at Sebon
MK	Experience Manager at Sebon

13. This case essentially arises out of the claimant's dismissal for gross misconduct and the events leading up to that dismissal. The respondent operates a recruitment and worker provision service to many clients across industries including food production. This case involves their client, Hovis. To provide a service to Hovis they had on-site offices at some of the bigger factories. The relevant sites in this case were Sebon in Croydon, Forest Gate in East London and Erith in Kent..

14. The claimant identifies as Black British of African origin. He was employed as an Experience Manager whose only client at the relevant time was Hovis. He was originally employed by Adecco but his employment transferred to the respondent in 2009 under TUPE. His performance prior to 2019 appeared to be good and was punctuated by promotions and praise. His previous line manager held him in high esteem. There were no prior performance issues or conduct concerns.

The Claimant's role

15. There was a reorganisation across the respondent that took effect in or around March 2019. Prior to the reorganisation the claimant had been a Senior Contract Manager. This role, along with other Contract Managers, was moved and became called an Experience Manager. Before us there was some dispute as to exactly what the claimant's role entailed following the reorganisation and whether it amounted to a demotion.

16. The structure of the respondent's business after the reorganisation was not particularly clear. Whereas before there were contract managers and senior contract managers; after the reorganisation, there were only Experience Managers. The respondent's argument in this hearing was that some Experience Managers were more senior than others and the claimant was one of those 'senior' Experience managers albeit this was not recorded in his contract or in writing nor reflected in his job title. The respondent's witnesses

relied upon his higher rate of pay and his responsibilities prior to the reorganisation and said that his job remained exactly the same after the reorganisation but just had a title change. The respondent said that the claimant had responsibility for three Hovis sites:

(i) Sebon in Croydon (the biggest site where the claimant was based)
(ii) Forest Gate – where another experience manager was based, KC
(iii) Erith – where another experience manager was based, MA

17. The claimant asserted that he was just a mentor to the more junior experience managers and/or the Experience Coordinators and had no supervisory or line management responsibilities. We were not persuaded that this was the case. The claimant accepted in evidence that he was a senior member of the team and we find that given his car allowance, the requirement for him to travel to the other sites (albeit less often than Croydon) and the tasks that he generally performed, meant that he had line manager responsibility for the other sites. We do not accept that he was asked for permission for holidays etc. simply because he had extra staff at the Sebon site so he could loan people to other sites for cover purposes. We consider that he had line management responsibility for those at the other sites and this is why they asked him to sign him off.

18. We also rely on the email [page 83] from Ms Tibbs to the claimant dated 12 April 2019 which confirms the claimant's responsibilities. These responsibilities are clearly those of someone with line management responsibility and the claimant responded to this email at the time accepting that this captured their discussion and reflected his understanding of his role. The email includes the following bullet points as a summary of his role following the reorganisation:

"TJ to be seen as a senior support to clients and the onsite teams, a iinch pin to all 4 sites effectively operating — when you are on site it should run better than under the Experience Manager themselves
Ensure the well being of the team is top priority (if we have happy teams the rest will come naturally)
Holiday tracker to be put in place to ensure everyone is not only taking their holidays but that we are able to effectively resource during these times.
Monthly check on cascade to ensure people are taking holidays as a minimum 5 days a quarter
Holidays in excess of 10 working days will require 3 months' notice — again to ensure we are fully covered as above
Rota to be drawn up between sites to ensure everyone has time off over the weekends (when covering this can be taken back as Lieu)
When the opportunity arises allow the EMS to go to each other's sites and see how they work in order to support when needed
1:2:1s to be conducted every month with the team with objectives and goals to be clearly documented
TJ to look at the current resource and ensure the right people are in the right roles and if a development plan should be put in place to ensure this happens please do

Kamal to be set key objectives and actions as part of him being on a contract with Staffline as a permanent member of staff (please action this with People Team)
Ensure Forest Gate has a plan in place regarding the number of workers being taken temp to perm in April and May, please support Kamal with this and the client expectations
Karen to request site visits with other REM's in London for TJ to see how these operations work"

19. In addition at the disciplinary meeting there was an exchange between AW and the claimant as follows:

"AW You are experience manager for all Hovis sites
TJ Yes
AW Accountability sits with you
TJ But I didn't know it wasn't done"

20. Further, in his appeal letter (page 265) he states,

"My role as Experience Manager is to oversee three sites in London (including Forest Gate) to ensure that the client's experience is positive. When I first took this promotion, I was told that the Contract managers in each of the sites should be left to run the sites and that I should only be there for them to escalate matters if they required assistance in respect of the clients. I was told not to manage them on a daily basis and, indeed, the resource of me being able to do so while dealing with all three sites is limited. Nevertheless, I have prided myself on my ability to support my colleagues and the clients when necessary."

21. On balance we find that whilst it is regrettable that the respondent does not confirm such contractual changes and roles/responsibilities in writing with its staff at the time, the reality of the position was as set out in Ms Tibbs' email and confirmed by the claimant in the disciplinary meeting; that the Claimant had responsibility for the Forest Gate site and this was understood by him at the time. He had the responsibility of overseeing whoever was running the site at the time and was the senior contact for the client. It was not as the claimant asserted that he shared responsibility for the site with the other Experience Managers and that they took it in turns.

22. The move from Senior Contract Manager to Experience Manager was not a demotion. The claimant states in his appeal letter that he considered it a promotion. We accept based on the various documents already referred to above that, save for its title, the claimant's role remained unchanged following the reorganisation.

23. There was a change to the bonus scheme at the same time. The maximum potential bonus was decreased from £7,000 to £5,000. The claimant also received a pay rise of £1,500. The change to the bonus scheme was imposed on all the Experience Managers who had previously been eligible to the 'old'

bonus scheme. At no point prior to this claim did the claimant object to the pay rise or the change to the bonus scheme.

GDPR matters

24. Part of the respondent's service to its clients was to carry out the recruitment, training and vetting process for new staff. This included processing and holding potentially sensitive data from their workers/employees. In or around 2018 the respondent transferred all its personal data onto a digital system. We were provided with relevant policies and an email regarding the introduction of the policy and the implications [pg126-127]. The claimant was fully aware of this policy and the need to digitise the data.
25. The claimant's line manager was Karen Tibbs. She was appointed to this role in March 2019. On 14 June 2019 she attended the Forest Gate site. Whilst there she noted that there were a large number of papers contained in boxes stacked in the office with the personal details of staff on display. We accept that Ms Tibbs told the claimant and the manager of the site, KC, that these paper files were not acceptable and needed to be moved.

26. The presence of these boxes was clearly a breach of the respondent's internal data protection policies. Mr Charles insisted that there was no actual breach of GDPR because no external person had gained access to the data and no report had been made to the Information Commissioner's office. He also stated that it did not conform to the definition of a data breach on the ICO website.

27. However this assertion somewhat misses the point. We were taken to photos which we accept were taken of the boxes in the offices in June and then in November 2019. The personal data of probably 1000s of individuals was easily accessible, was stored with no security other than being in an office, and on occasion was on public display to anyone who may have come into the office. It was in dispute as to whether the office was a locked room or not. However this was a room on the site of a third party and was no doubt visited by external people at various points. Therefore the potential for someone to see any or all of this data and the potential for a breach of the GDPR was very high given that personal information including passport photos, National Insurance data and other highly personal information was readily visible. In addition what is clear is that this was a serious breach of the Respondent's internal policies and was a complete failure to digitise the documents as per the email requirement sent on 17 May 2018.

28. In November 2019 Ms Tibbs attended the site again and noted that the boxes were still there. The boxes had therefore remained in place like this for 6 months following Ms Tibbs' first request that they be removed and almost 18 months from when they ought to have been digitised.

29. We accept that it was primarily the employee on site's role to fix this and that had been KC in these circumstances. However we also accept that the claimant's role included overall management of the site and line management

of KC. He therefore had responsibility for ensuring that the data transfer took place. He was present when Ms Tibbs asked them to sort out the boxes. He may have delegated this to KC but it is clear that this did not work. We do not accept that he did not know whether KC had digitised the data or not. The boxes were in plain sight and every time he visited the site he would have seen that this task had not happened. No evidence was provided by the claimant, even in his witness statement, which suggested that he had taken steps to ensure that KC dealt with this situation during his employment.

30. When KC left in August 2019, he left this problem. As a result of KC's departure, other employees were sent to the site at various times though it appears that it was difficult to find someone to staff the site on a permanent basis. The claimant also attended the site more often. The claimant provided no evidence to suggest that he tried to tackle this situation once KC had left or that he asked other members of staff now on site to deal with it.

31. In or around November 2019, cracks appeared in the service that the respondent was delivering to Hovis at the Forest Gate site. We were not provided with detail but it appears that the lack of a person on site revealed problems to Hovis that perhaps they had not been aware of, not least that the claimant was not on top of the files and systems at the Forest Gate site. The problems appeared to come to a head when the claimant provided a hard copy file for an employee as opposed to a digital copy of the documents requested. This sparked concern within Hovis who it appears had already noticed other matters not being quite as they ought to be.

32. Hovis decided to carry out an in-house audit. That audit was a short one page print out (pg 236). We accept that this was an internal Hovis audit. Mr Charles tried to assert that it was not an audit on the basis that it did not look like an audit. We prefer the respondent's evidence that this was a Hovis internal audit and it raised very significant concerns about the lack of procedures being followed.

33. The audit occurred on 2 October 2019 which was before the claimant went on holiday on 5 October. He provided Hovis with documents they requested to undertake the audit. We do not accept that this occurred whilst he was on holiday and that this was the reason the audit did not succeed. The level of failure in the audit was high and meant that the respondent incurred significant cost in re-doing the induction and onboarding of several staff.

34. In summary we conclude that what happened at the Forest Gate site was, as was referred to in a meeting, a 'perfect storm'. However, it was a storm that showed the claimant's shortcomings in his oversight of the site. KC had primary responsibility for ensuring that the data protection policies were adhered to including the processing or destruction of the data in the boxes as well as the onboarding and processing of new staff. However, we find that the claimant was well aware of these shortcomings prior to KC leaving and were he not, he ought to have been. At the point at which KC left, the claimant was left to manage the site and that proved difficult when it was in such a poor state compliance wise. This led to a paper file being provided to Hovis

demonstrating the lack of digitisation and ultimately to the failure of the Hovis internal audit which showed the depth of the failed GDPR compliance issues. When confronted with this series of problems, the claimant's primary response was to say either that he did not know about the failures or that they were not his responsibility in any event.

35. The trigger for Karen Tibbs and VH to deal with the issues at the Forest Gate site were the concerns raised by Hovis at the meeting on 13 November 2019. Until that meeting, they were not considering that they needed to deal with the Claimant from a disciplinary point of view.

Have Your Say

36. The claimant was expected to log in to an online management tool called 'Have Your Say'. This was a management tool that the claimant had been expected to log into on a daily basis. It was the tool by which individual employees could escalate concerns to their managers. It was a clear requirement of the job that it was logged into every day. This was encouraged via email and by virtue of the fact that part of the bonus assessment was made according to how much the managers were logging in to the system.

37. The claimant had not been logging on to the system despite knowing that he ought to. He had raised with IT that he had problems logging on in August 2019 (pg 399) . They responded and stated that he ought now to be able to log in and asked him to get back to them to confirm that. The log demonstrated that they attempted to get hold of him regarding this matter on numerous occasions into September 2019. The claimant never responded to those emails and provided no adequate explanation of why he ignored those emails and continued to fail to log in to the system.

38. He stated that he used different techniques to stay in touch with this team. This may well have been true, but it did not account for why he refused to use the system that he had been asked to use by his managers and that all other managers were required to use too.

The Disciplinary process

39. The claimant was suspended and told that he could not access his laptop or contact colleagues. In his suspension letter he was told that he could not access any company systems unless permitted to do so by Karen Tibbs (pg 111). The letter also stated that if he had any questions about his suspension, he could ask Ms Tibbs. He did not ask any questions. When he was invited to a disciplinary meeting, he was told that he could provide documentary evidence if he wanted to. He did not do so, and he did not ask any questions about obtaining documents.

40. We accept that the claimant may not have been aware that he could request, prior to the meetings, that he should be allowed access to the system to

obtain specific emails had he wanted to. Although the letters from the respondent do say that he could ask for documents we do not think that the letters or policy are particularly explicit in this regard.

41. However we also find that he could have asked any of the managers with whom he met to clarify the situation if he thought that there was clear evidence that he wanted to rely on. For example, when he challenged the veracity of the letter from Hovis raising concerns about his performance, a letter was produced on headed paper from Hovis to confirm that they had expressed their concerns in that way. Further when he raised his concerns about the Have Your Say access, the emails to IT were obtained by Mr Berkshire. The claimant appeared to have a good relationship with Ms Tibbs up until this point (he cried on suspension and she hugged him) and we find that had there been specific documents he wanted, he could have asked her and that his failure to do so suggests that he did not have any particular documents or emails in mind as being helpful to 'clear' his name.

42. Whilst the tribunal was disappointed by the respondent's approach (and apparent lack of care) to disclosure in the preparation for this hearing, the claimant was not able to point to any document or piece of evidence that he says would have clarified or proved the points upon which he relied for the internal process. It is notable that he accepted that he had responsibility for the 3 sites, that he knew about the GDPR policies, that he knew about the in-house audit (though he did not accept he had taken part in it), and that he knew about the Have Your Say system and accepted that he had not logged on. Given these key concessions at the time, it is hard to know what documentary evidence the claimant says he could have relied upon to challenge any of these points. The documents that were provided to us as part of this hearing all support the concessions he made during the investigation and disciplinary hearing.

43. We do not accept that these concessions were made because of his state of mind at the time. Instead we find that the 'about turn' taken during these proceedings are indicative of the claimant wanting the facts to support his tribunal claim and realising that his concessions at the time damage that case.

44. The claimant's suspension was allowed for within the respondent's disciplinary policy. Hovis had communicated significant concerns about the claimant and the management at the Forest Gate site. The respondent had received serious concerns raised by the client about the safety of data and the recruitment process at the site. The Hovis internal audit failure was significant. It was going to cost the respondent a significant amount of money to rectify and the client had indicated that they no longer wanted to work with the claimant.

45. The suspension letter does state that an investigation is being carried out to consider a potentially serious GDPR breach [page 111**].** Nonetheless the substance of the meeting covers various issues including the GDPR breach, the Hovis internal audit and the Have Your Say matter. The notes of the meeting say as follows (page 112)

"3 key areas for suspension and discussion today. Firstly a breach of GDPR regulations, which led to a failed audit by the client and therefore by association a lack of process and procedure which has caused client concern and a loss of trust and confidence."

46. The notes reflect that all of these points were discussed both at the investigation meeting and the disciplinary meeting. Although Have Your Say is not explicitly mentioned at page 112, it is clearly discussed later in the meeting (page 115).

47. The disciplinary invitation letter (page 119) states as follows:

"As discussed we would like to consider your response in relation to your alleged gross misconduct, namely the serious data protection breaches that you have been accountable for, the failed Client audit (which has potentially serious repercussions) and your failure to follow reasonable management instruction as relates to Company processes (including Have Your Say)."

48. The disciplinary meeting took place on 25 November 2019. The letter informed the claimant of his right to be accompanied at the meeting by either a trade union representative or a colleague. He chose not to be accompanied. At that meeting he conceded that he had line management responsibility for the site. He also accepted that he knew about the boxes of paperwork and knew that this was not appropriate. Whilst the claimant is now denying that he said this and challenging the notes of the meeting, we prefer the respondent's evidence that these notes are accurate. The claimant raised no challenges to these notes at the time and could not accurately say to us what the problems with the notes were. Further, in cross examination, the claimant accepted that he had known about and had responsibility for the site and the boxes.

49. The disciplinary outcome letter (page 261) confirms that the claimant was dismissed and gives him a right to appeal which the claimant then did. The appeal hearing was held on 14 January 2020 by Mr Berkshire. We make the same point regarding notes of that meeting as we did to those regarding the disciplinary and investigation meetings and accept these notes as a true record of the hearing.

50. The claimant was entitled to be accompanied at that meeting and the respondent agreed to him bringing his friend, Mr Charles although Mr Charles was not an employee or a Trade Union representative. We note that at no point did the claimant or Mr Charles raise issues regarding access to documentary evidence at this hearing either, save that they challenged the veracity of the document from Hovis (pg 273). They also raised that the claimant had sent emails to IT regarding difficulties logging into Have Your Say that would prove his difficulties. Mr Berkshire considered the claimant's appeal.

51. A fresh version of the Hovis complaint was provided on headed paper confirming that this was their view and that there was a break down in their trust and confidence in the claimant. We remain bemused as to why Ms Tibbs had not simply provided the original email from Hovis (that we were finally provided with on the final day of the hearing) to offset the concerns that the claimant and Mr Charles had regarding the veracity of the document and why she had cut and pasted the original in the first place. It was also not adequately explained to us why this had not been disclosed during the disclosure exercise for this case. The steps taken regarding this email served no purpose and added fuel to the claimant's apparent conspiracy theories. It is unfortunate that Ms Tibbs took these steps and the problems the situation caused were entirely avoidable However it is clear from the documents we received in the course of the hearing that this was a genuine email and its contents were genuinely expressed by Hovis at the time of the claimant's suspension.

52. Mr Berkshire did investigate the issue around the IT logging in difficulties and the issues that the claimant raised around his line management responsibilities by obtaining the records of his attempts to contact IT and their attempts to assist him and interviewing the claimant's colleagues who confirmed that they viewed him as their line manager.

53. Following this additional investigation and consideration Mr Berkshire did not uphold the claimant's appeal. He wrote to the claimant setting out full reasons as to why he did not uphold the appeal stating that the concerns he had raised had been investigated and did not change his view that the decision to dismiss was fair.

The claimant's name

54. The claimant's full name is Olayinka Oketikun. He was known by the nickname 'TJ' or 'Teejay'. His evidence, which we accept, is that he has adopted this name in order to make his colleagues feel comfortable addressing him and in order to better fit in. He was candid in his evidence that he is now known by this name in wide circles, including socially and on social media and that he has effectively adopted this name as part of who he is. He accepts that he may well have introduced himself as TJ to his managers and all those witnesses who gave evidence. He never expressed any concerns or upset at being called TJ and used the nickname as his sign off on emails.

55. The documents that we have seen confirm that in emails with Mr Charles, (his representative today,) the claimant is called TJ and the same is true for his social media pages. The use of this nickname is not limited to those who are of a different ethnic background to the claimant and may therefore have difficulties pronouncing or knowing the claimant's first name. It is clear from social media posts we were taken to that friends from all backgrounds, from different nationalities and from a long time back in the claimant's life, use a variant of the nickname 'TJ'.
56. In June 2013, the claimant obtained a professional qualification [**page 383].** The certificate confirming this used the nickname 'TeeJay' as opposed to his

correct name. A further certificate also using the nickname TeeJay was provided (pg384) which is dated 2016. However, we were not given much evidence by the claimant regarding this certificate.

57. The claimant states that he emailed HR once, at around the time that the first certificate was issued, so that it would use his correct name. We accept that evidence. The claimant also accepts that he did not raise this matter again after that single email nor that he has raised any other concerns with HR or his managers regarding the use of the nickname. Although we were not provided with a copy of that email, we find on balance, that the email was sent to HR at around the time the certificate was issued in 2013, and that the respondent failed to reissue the certificate with the claimant's correct name on it.

The Law

Unfair Dismissal

58. Section 98 of the Employment Rights Act 1996 (ERA) provides as follows:

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair it is for the employer to show –
  (a) The reason (or if more than one, the principal reason) for the dismissal, and
  (b) That it is either a reason falling within subsection (20 or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it –
  (a) Relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
  (b) Relates to the conduct of the employee,
  (c) Is that the employee was redundant, or
  (d) Is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)
  (a) 'capability' in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental qualify and
  (b) 'qualifications in relation to an employee means any degree, diploma or other academic technical or professional qualification relevant to the position which he held.

(4) In any other case where the employer has fulfilled the requirements of subsection (1) the determination of the question whether the dismiss 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 reasonable 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.

59. The respondent's case was that this was dismissal for conduct. That is a potentially fair reason under s 98(2)(b) ERA. In the event that the respondent is correct in that context a determination of the fairness of the dismissal under s98(4) is required. This involves an analysis of whether the respondent's decision makers had a reasonable and honest belief in the misconduct alleged. Further a tribunal must determine whether there were reasonable grounds for such a belief after such investigation as a reasonable employer would have undertaken. The burden of proof is neutral in relation to the fairness of the dismissal once the respondent has established that the reason is a potentially fair reason for dismissal. The tribunal must also determine whether the sanction falls within the range of reasonable responses to the misconduct identified. This test of band of reasonable responses also applies to the belief grounds and investigation referred to.

60. The test as to whether the employer acted reasonably in *section 98(4)* is an objective one. We have to decide whether the employer's decision to dismiss the employee fell within the range of reasonable responses that a reasonable employer in those circumstances and in that business might have adopted (*Iceland Frozen Foods Ltd v Jones [1982] IRLR 439*). We have reminded ourselves of the fact that we must not substitute our view for that of the employer (*Foley v Post Office; Midland Bank plc v Madden [2000] IRLR 82*);

61. We have also reminded ourselves that this test and the requirement that we not substitute our own view applies to the investigation into any misconduct as well as the decision. (*Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23*. This means that must decide not whether we would have investigated things differently, but whether the investigation was within the range of investigations that a reasonable employer would have carried out. We know that we must assess the reasonableness of the employer not the potential injustice to the claimant *Chubb Fire Security Ltd v Harper [1983] IRLR 311*). and only consider facts known to the employer at the time of the investigation and then the decision to dismiss (W Devis and Sons Ltd v Atkins [1977] IRLR 31.)

<u>Direct Discrimination</u>

62. S9(1) Equality Act 2010 defines race as a protected characteristic under the Equality Act.

63. Section 13 of the Equality Act 2010 states that a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

64. S 23 Equality Act 2010 states that a claimant must show that it has been treated less favourably than a real or hypothetical comparator whose circumstances are not materially different to theirs.

65. The tribunal must consider the "reason why" the claimant was treated less favourably. It must consider what the employer's conscious or subconscious reason for the treatment? (*Nagarajan v London Regional Transport and others [1999] IRLR 572 (HL)*).

66. The discriminatory reason need not be the sole or even principal reason for the employer's actions. If race was a substantial cause, a tribunal can find that the action infringed the Equality Act 2010. The EHRC Code states that for direct discrimination to occur, the relevant protected characteristic needs to be a cause of the less favourable treatment "but does not need to be the only or even the main cause" (*paragraph 3.11*).

67. S123 Equality Act states that a discrimination claim must be brought within

(a)the period of 3 months starting with the date of the act to which the complaint relates, or

(b)such other period as the employment tribunal thinks just and equitable.

…..

(3)For the purposes of this section—

(a)conduct extending over a period is to be treated as done at the end of the period;

(b)failure to do something is to be treated as occurring when the person in question decided on it.

68. The claimant has to establish that there is a prima facie case that the treatment complained of was because of his race. Once he has established that prima facie case, the respondent must prove that the treatment complained of occurred for a non-discriminatory reason.

69. We are aware of the need for caution as set out in Igen v Wong [2005] ICR 9311, CA, and that the necessity of proof at this stage is a low bar. However mere difference of treatment is not sufficient to shift the burden. We have considered the guidance in Deman v Commission for Equality and Human Rights[2010] EWCA Civ 1279 at paragraph 19, that the "more" which is needed to create a claim requiring an answer need not be a great deal. However, the fact that an employer's behaviour calls for an explanation does not automatically get a claimant to stage 2 of Igen v Wong test. There still has to be a reason to believe that the explanation could be that the behaviour was "attributable (at least to a significant extent)" to the prohibited ground (B v A [2010] IRLR 400.

Conclusions

Race Discrimination

The Claimant's nickname

70. We understand that it is an all-too-common aspect of life within Britain that people with different racial backgrounds with 'non-Anglo Saxon or 'white'' names, feel in some way obligated to change their names to something easily pronounceable for the ease of their colleagues and that on occasion this is imposed on the individuals by their colleagues. However the claimant did not give any evidence that he had felt any pressure nor received any request for him to do this by anyone at the respondent and we note that the names of the individuals who were the claimant's colleagues suggest a racially diverse workforce where people felt confident to go by their real names in their emails and in person.

71. The claimant went by the name TeeJay. He introduced himself by that name, he signed his emails using that name, he uses the name socially including with those who share his racial background. He never corrected his colleagues around him and we consider that it was not because of his race that the claimant's colleagues called him TJ but because he introduced himself that way and used the name freely and frequently and in all forms of communication with them. Many may not have known or had any reason to know his correct name. None of those that worked with the claimant had any reason to consider that he was using the name TJ other than by positive choice. He accepted in evidence to us that this name was part of who he was. We find that someone who was white British and not of African origin who also used a nickname in the same way would have been treated in the same way by his colleagues.

72. Nevertheless, we find that the decision to use the claimant's nickname on an official document such as his qualification is reprehensible and ought not to have happened. The practice of using people's nicknames in such a way could amount to an indirectly discriminatory practice because it is far more likely that a non-white British person would use a nickname for the reasons set out above and therefore be more likely to be issued a qualification document that does not match their given name. However, the claimant did not bring an indirect race discrimination claim before us. In addition, any claim regarding the qualification certificates is significantly out of time as it occurred in 2013 and then possibly again in 2016. There was no ongoing series of events, these were isolated incidents. The claimant accepted in evidence that he had not raised any concerns about this certificate other than just after the 2013 certificate was issued. He gave no good reason as to why he had not raised it again or complained about it further and we do not consider that it is just and equitable to extend time to include this claim several years out of time. This part of the claim for race discrimination therefore fails.

73. We found that the claimant was not suspended without legal or legitimate cause; there had been serious shortcomings about the claimant's performance raised by a third-party client and the claimant's contract allows for suspensions. We also found that he was not escorted from the building in a humiliating way. This part of his claim for race discrimination therefore fails.

74. The claimant was not denied the right to access the documents he required and therefore this claim for race discrimination fails.

75. The claimant was not summarily dismissed for a GDPR breach despite the ICO confirming there was no breach. The claimant was dismissed for a potential breach of the GDPR and a serious breach of the respondent's internal data protection and GDPR policies and procedures and his refusal to follow them along with the fact that this had led to a failed client audit and the claimant's failure to use the Have Your Say management system. This claim for race discrimination therefore fails.

76. The claimant was not dismissed because a client had lost faith in the Regional Experience Manager. The claimant was dismissed in part, because a client had expressed that they lost faith in him. The use of the title Regional Experience Manager does not undermine the fact that the client was clearly referring to the claimant in the document. The respondent, who made the decision to dismiss the claimant was well aware of the claimant's position within the organisation and their decision was based on his conduct in his actual role and responsibilities and their expectations for someone performing that role. They did not dismiss him thinking that he was the Regional Experience Manager. This claim for race discrimination therefore fails.

77. The respondent did not add further matters to the process to influence and enhance the rationale for summary dismissal. The investigation into the claimant's conduct covered a potential breach of the GDPR but also considered issues around the failed audit and the use of the Have Your Say system. The letter inviting the claimant to the disciplinary meeting made it clear that all these factors were being considered. The claimant provided us with no evidence to suggest that the respondent considering these factors throughout the disciplinary process was because of his race or that he was treated less favourably than any comparator real or hypothetical.

78. Overall, we found that the majority of acts or omissions relied upon by the claimant as being acts of race discrimination did not happen as described by the claimant. Where they did happen or were partially correct, the claimant provided us with no evidence to suggest that they in any way occurred because of the claimant's race or that he had been treated differently from either a real or hypothetical comparator. There was no prima facie case established. There was no reason to believe that the explanation could be that the behaviour was "attributable (at least to a significant extent)" to the

claimant's race (B v A [2010] IRLR 400 or in fact that it could be attributable to race to any extent at all.

79. Therefore, apart from the use of the claimant's nickname, the claimant provided the tribunal with no evidence of any specific behaviour or an overall set of facts or circumstances from which it could be suggested that race played any role in the respondent's behaviour (conscious or subconscious). He did not shift the burden of proof to the respondent as he has not established a prima facie case that these events happened at all or if they happened were in any way related to his race.

Unfair Dismissal

80. We find that the genuine reason for the claimant's dismissal was the claimant's conduct. We accept that other employers may have approached the situation as one of capability/poor performance, however the decision by the respondent to view this situation as one of conduct was reasonable in all the circumstances, and we find, genuine. The claimant had a long employment history with the respondent. In that context Ms Tibbs discovered significant problems at one of the sites that the claimant was responsible for. When asked to rectify that the claimant failed to do so and failed to take responsibility for this and other shortcomings. It was reasonable that this set of circumstances was approached as a matter of conduct as opposed to capability.

81. The respondent undertook a reasonable investigation. Ms Tibbs interviewed relevant people, considered the relevant policies and interviewed the claimant to understand his point of view on the matters. We do not accept that Ms Tibbs ought not to have carried out the investigation because she was protecting her own reputation and ought to have been managing the Forest Gate site herself. The claimant's suggestion that it was in fact her shortcomings that had caused the situation were unfounded. She accepted in evidence that she perhaps ought to have given the claimant more warning before the situation with the non-digitised documents became so problematic, however we find that she did tell the claimant that the situation needed to change and he failed to do anything about it including appropriately managing his junior colleague. We also do not accept that Hovis had meant to indicate that they lost faith in her as Regional Experience Manager as opposed to talking about the claimant. This was not plausible and was clarified by Hovis in later documents.

82. The respondent followed a fair procedure. Ms Tibbs was the claimant's line manager, the client had raised their concerns with her, she was the person who knew the situation best and the disciplinary policy suggests that the line manager ought to be the person who investigates such a situation.

83. The letter inviting the claimant to the hearing informed him the of the charges against him, that dismissal was a possible outcome of the process and that he could be accompanied at the hearing if he wanted. The disciplinary hearing was handled by a different Regional Experience Manager from the person who had done the investigation. This was in accordance with the disciplinary policy. We do not find that the fact that she was Ms Tibbs' peer a matter that undermines the fairness of the process. She was independent of the situation having had no prior involvement with the claimant specifically, yet she understood the type of work and the role of an Experience Manager. She interviewed the claimant and gave him a fair opportunity to comment on the evidence.

84. The reasons given for dismissal were those that the claimant had been 'charged' with and had been covered in the investigation and disciplinary meetings and the letter inviting him to the disciplinary meeting. We find that Ms Wheatley's decision fell within the range of reasonable responses for an employer in all the circumstances based on the information that she had before her at the time. She considered the possibility of a final written warning but decided it was not appropriate in all the circumstances. She also considered the claimant's length of service but felt that this was not sufficient reason not to dismiss the claimant. The Tribunal must not substitute its opinion for that of the employer. Whilst we as a tribunal felt that the decision to dismiss was a harsh one given the claimant's length of service and good performance at the Sebon site, the decision to dismiss was not outside the range of reasonable responses in all the circumstances.

85. The appeals process was handled by an appropriate person given Mr Berkshire's position and we find that he did a very thorough examination of the original decision. When the claimant raised concerns regarding accessing the Have Your Say system and suggested that he was not the line manager responsible for those working at the Forest Gate site, Mr Berkshire researched the points and found evidence that contradicted the points the claimant had made. We therefore find that it was a fair appeals process and the decision to uphold the original decision was also reasonable in all the circumstances of the case.

86. The Claimant's claim for unfair dismissal is therefore not upheld and is dismissed.

Employment Judge Webster

15 June 2021