



EMPLOYMENT TRIBUNALS

Claimant

Mr O Fashakin

v

Respondent

Müller UK and Ireland Group LLP
trading as Müller Milk & Ingredients (Distribution)

Heard at: Bury St Edmunds (by CVP)

On: 03 and 04 June 2021
14 July 2021 (In Chambers – no parties in attendance)

Before: Employment Judge KJ Palmer

Members: Mr C Davie and Ms S Allen

Appearances

For the Claimant: In person.

For the Respondent: Ms Ferrario (Counsel).

RESERVED JUDGMENT

It is the unanimous Judgment of this Tribunal that the claimant's claim in direct race discrimination fails and is dismissed.

REASONS

1. The claimant was employed by the respondent as an HGV Driver between 20 April 2019 and 3 June 2020 when the claimant was dismissed purportedly by reason of gross misconduct.
2. The claimant pursues a claim for unlawful direct race discrimination under s.13 of the Equality Act 2010. He does not have the requisite continuity of employment to pursue a claim for unfair dismissal so the only claim before us is a direct discrimination claim under s.13.
3. The claimant presented a claim to this Tribunal on 9 September 2020. The claimant is unrepresented and the claim is homemade.

4. Essentially the respondent says the claimant was dismissed for incidents which took place on 7 May 2020. He was in the process of delivering milk to a store at Woodham Ferrers near Chelmsford in Essex. Due to his actions whilst in the process of effecting this delivery he by his own admission breached the respondent's Health & Safety Procedures and Operating Procedures. This resulted in a large trolley of milk falling off the tail lift of the lorry he was operating into a busy road narrowly avoiding causing a significant accident.
5. The claimant's argument is based on the fact that he says he was dismissed because of his race. The claimant is a black man of African origin.
6. It is worth pointing out that his ET1 is largely unparticularised and comparators produced subsequently have been done on a piecemeal basis right through to this trial and including during the trial. It is the respondent's case that his dismissal was by reason of gross misconduct and was not in any way a decision because of his race.
7. At this trial the claimant sought to rely on a number of other disciplinary incidents that had taken place at the respondent which he said illustrated that others who were not of similar race were treated differently.
8. The hearing was conducted by Cloud Video Platform and we heard live evidence from the claimant, a Mr Trevor Guggerty who acted as the claimant's representative at his disciplinary hearing and subsequent appeals. Mr Guggerty is a colleague and also an HGV Driver working for the respondent.
9. For the respondent we heard evidence from Elaine Hornigold an agency worker currently placed at the respondent and fulfilling a role focused on Health & Safety and Training. At the time of the claimant's dismissal she was employed by the respondent as a Distribution Shift Manager at the Northampton site where the claimant worked. She has significant experience in dealing with disciplinary matters and was the Dismissing Officer in this case. We also heard evidence from Ryan Reece and Kyle Rutter who dealt with the claimant's appeals of which there were two.
10. The hearing lasted for 2 days and Judgment was Reserved. The Tribunal met in Chambers on 14 July 2021 and were able to deliver this Judgment.

The Issues in the Claimant's Claim

11. The claimant's claim is based on s.13 of the Equality Act 2010.

“13 Direct discrimination

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

12. In this case the claimant relies on the protected characteristic of race (s.14(1)(d)).
13. The burden of proof is dealt with under s.136 of the Equality Act 2010.

“136 Burden of proof

- (1) This section applies to any proceedings relating to a contravention of this Act.
 - (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.”
14. This is the latest incarnation of what is commonly known as the test for the burden of proof in such cases as this.

Findings of Fact

15. The claimant was employed by the respondent as an HGV Driver between 11 February 2019 and 3 June 2020 when he was dismissed. The respondent argues that the dismissal was by reason of gross misconduct and is entirely justified. Whilst nothing turns on this the dates specified in the ET1 of his employment are 20 April 2019 to 8 July 2020. However it is clear from the documentation in front of us that the dates put forward by the claimant in his ET1 are not correct. The correct dates are those cited above. The dismissal was effected at the end of the disciplinary hearing on 3 June 2020 and confirmed in a letter dated 8 June 2020. Records clearly indicate that the claimant was employed 2 months earlier than he has indicated in his ET1.
16. The incident which led to the claimant’s dismissal occurred on 7 May 2020 when the claimant was delivering milk to a store in Woodham Ferrers near Chelmsford in Essex.
17. The Tribunal had the benefit of seeing a number of CCTV excerpts totalling 5 in all of the incidents which led to the claimant’s disciplinary hearing and subsequent dismissal. Essentially whilst purporting to deliver milk to the store in question the claimant was accused of breaching the company’s Health & Safety Policies and Operating Procedures in that he:
 - 17.1 Failed to lower the tail lift of the vehicle SF63RXV when putting empty trollies on and therefore breached the company’s disciplinary policy section 4.2.18 amounting to a serious neglect of duties, or a serious or deliberate breach of his contract or the company’s Operating Procedures.
 - 17.2 That he jumped off the tail lift of vehicle SF63RXV whilst it was in an upright position once again breaching the company’s disciplinary policy section 4.2.14 and constituting a serious breach of Health & Safety rules.

- 17.3 That he moved vehicle SF63RXV with the tail lift in the upright position with two full trollies of milk on that tail lift resulting in a trolley of milk falling off the tail lift into a busy road and nearly hitting a third party car. Once again a breach of the company's disciplinary policy section 4.2.13 causing loss, damage or injury through serious negligence.
18. A disciplinary hearing took place on 27 May 2020 chaired by Elaine Hornigold. We had before us notes of that disciplinary hearing, all relevant documentation surrounding the claimant's invitation to such a hearing, we were able to view the CCTV footage which was before the disciplinary hearing and formed part of it. We had photographs of the aftermath of the incident showing upwards of 30 bottles of milk lying in the road and evidence that some of the milk had splashed a passing car which had narrowly avoided colliding with the dislodged trolley and its contents. At that disciplinary hearing on 27 May the claimant was accompanied by Mr Guggerty who represented the claimant at the disciplinary hearing and subsequent appeal hearings. Mr Guggerty is a former Trade Union Shop Steward and he is well versed in representing colleagues in disciplinary processes. The disciplinary process was conducted by Elaine Hornigold from whom we heard evidence.
19. Having heard the claimant's explanation at the disciplinary hearing which was that he accepted the allegations against him but argued that he had not been properly trained in the tail lift procedure and was under pressure to deliver milk and was late in doing so, she concluded that his actions on that day amounted to gross misconduct sufficient to warrant summary dismissal. She informed him of this on 3 June 2020 having followed up on points raised during the disciplinary process. A confirmatory letter in detail was sent to the claimant on 8 June 2020.
20. The claimant then in a letter of 20 June 2020 appealed against his dismissal. This was the first time he raised any allegations that the dismissal may be tainted by race discrimination. The gist of the appeal was that the decision to dismiss in light of the misconduct had been too harsh and the claimant raised allegations essentially along the lines that white colleagues would not have been dismissed for the same misconduct.
21. An Appeal Hearing took place on 8 July 2020 at 11.00 am. The hearing was conducted by Kyle Rutter, Operations Manager. Mr Rutter considered what he heard at the Appeal Hearing and wrote to the claimant indicating his decision in a letter dated 9 July 2020. In it he dealt with several issues raised by the claimant in his appeal and concluded that there was nothing to justify overturning the decision to dismiss.
22. The claimant then pursued a second appeal in a letter dated 20 July 2020. The respondent then took the view that no new grounds of appeal had been raised and determined to decide the second appeal in writing. This appeal duly was considered on paper and the decision sent to the claimant on 27 August 2020. The original decision to dismiss was upheld. That

concluded the disciplinary process. The claimant presented his claim to this Tribunal on 9 September.

23. We heard detailed live evidence from the claimant on the first day of the hearing. We are bound to say that there were aspects of the claimant's evidence which we considered to be contradictory. We regard some aspects of the claimant's evidence to be unreliable. For example the claimant indicated that one of the reasons why he by his own admission perpetrated the three acts raised by way of the allegations against him in the disciplinary process was that he was under an awful lot of pressure to deliver milk to stores during the course of the pandemic. He said that on the day in question when he arrived at the Woodham Ferrers store there was essentially a large queue of people demanding milk putting pressure on him stop. He continually attempted to excuse his actions by saying he was under pressure. He said that the delivery was just before the country went into lockdown and people were panic buying and there was a queue of people shouting etc.
24. We do not find this evidence credible or reliable. The CCTV footage of the incident which was fully covered by that CCTV footage shows no queue of people outside the store only two people standing perfectly quietly in no queue. Moreover the incident took place not before lockdown but actually a month and a half into the first lockdown which was imposed on 20 March 2020.
25. The claimant also argued that he had not been trained on the operation of the tail gate but under cross examination fairly quickly accepted having been shown documents in the bundle confirming that he had in fact been recently trained on the operation of the tail gate. These were documents which he himself had signed indicating that the training had taken place. He then changed his evidence to confirm that he had attended such training but argued that the training had been only "tick box" and that he took no notice of it. He argued that he was dyslexic and therefore had difficulty in absorbing the training but accepted that he had never at anytime told anyone at Müller that he was dyslexic or that he had had difficulty absorbing the training. The Tribunal finds his evidence unreliable. Clearly he attended training and had signed appropriate documentation to confirm it. Initially he argued there was no training but accepted that there had been but argued thereafter that he had been unable to properly absorb it or that it was poor. We do not find these inconsistencies assist the claimant in his evidence. In fact the training had taken place only a week earlier.
26. We also found that the claimant attempted to exaggerate the pressure he was under in that the reason he moved the lorry and failed to secure the load that was sitting on the back of the ramp causing one of the trolleys of milk to fall into the road, was that he had been asked to move by a woman whose car he was blocking in. In evidence he said that he thought that she was a doctor with an autistic child and had an emergency but when

cross examined he resiled from this and said he was just speculating that she might have been. We did not find this helpful.

27. On the other hand we found the evidence of Elaine Hornigold to be clear and unambiguous. It is clear to us that she has considerable experience in handling disciplinary processes and we found her evidence to be entirely credible.
28. The claimant's claim is based largely on a variety of comparators cited by him at various points throughout the course of this case. At last count he had mentioned 14 names which he said were individuals working at Müller who had been treated differently to him whilst having committed similar offences. He said they were all white and that this constituted evidence to support his claim. However he has not produced any evidence before this Tribunal other than to say that his assertions are based on gossip within the yard at Northampton. No cogent evidence has been produced about these other disciplinary incidents. The only evidence we have before us is evidence produced by the respondent who have where possible dealt with those allegations by providing details of the disciplinary process of those purported comparators. It is therefore necessary that we deal with those purported comparators where we have evidence. This we do below.
29. It is also worth saying that the allegations of discrimination appear to have been something of an afterthought produced by the claimant after his dismissal. At no point during the disciplinary process prior to dismissal were any such allegations raised. It only appears to be something which occurs to the claimant when Mr Guggerty advises the claimant after the event that this is a line of argument he should pursue. In the evidence before us Mr Guggerty and the claimant argue that there was plenty of evidence of racism at Müller at the Northampton site yet at no point was it raised prior to the claimant's appeal against his dismissal. Mr Guggerty argued that it was something that was systemic. No formal grievance was raised and under cross examination Mr Guggerty said he had only raised it once during a Union meeting some 8 years ago. It was clearly not in the contemplation of either the claimant or Mr Guggerty at the disciplinary hearing, a fact which they admit. We consider that both the evidence of the claimant and Mr Guggerty is inconsistent and not plausible. Further arguments were raised about the disciplinary process but only at the second appeal. We find ourselves agreeing with the respondent's counsel that the allegations raised in this claim were very much of an afterthought. As to the 14 comparators raised by the claimant, the claimant has no direct knowledge of any of their disciplinary processes other than David Kelly to whom he says he spoke, the rest appears to be based on supposition and gossip with no evidence put before us. The only evidence as we say above is that raised by way of counter evidence by the respondent.

30. It is necessary that we deal with these:
- 30.1 Alan Twyman – the claimant claims that Alan Twyman was a white employee dealt with differently having committed similar offenses. Ms Hornigold in evidence said that she remembered well the case of Alan Twyman. She said he had released the handbrake on a vehicle and allowed it to move slightly away from the bay it was in. She said this was a very serious breach of Operating Procedures and she did consider dismissal as she had handled the disciplinary process. She determined to issue a final written warning instead and we had documentary evidence before us of this in the bundle.
 - 30.2 Steve Bryden – Ms Hornigold did recall Steve Bryden's case but not in great detail. She did handle the disciplinary process. She said she could not be certain why she issued a final written warning rather than dismissing him but it is important remember that his disciplinary process concerned a road traffic accident rather than a failure to adhere to Health & Safety Procedures and Operating Procedures when stationary. We have seen the disciplinary form in the bundle before us.
 - 30.3 Angus Ballentyne – this was an individual who was dismissed for attempting to punch another colleague after a disagreement over the use of the microwave in the kitchen. A full disciplinary process was conducted and the individual concerned was dismissed. We have the disciplinary details before us in the bundle.
 - 30.4 Dave Kelly – we have a disciplinary document before us and this was a road traffic incident not akin to the kind of incident the claimant was involved in.
 - 30.5 Gregg Chapman – we have the documentary evidence in front of us provided by the respondent in the bundle and this was also a road traffic incident.
 - 30.6 Pete Smith – the claimant avers that he put ad blue into a diesel tank by mistake costing the company £6,000 to replace the tank. He was not dismissed he was white and kept his job. There is no evidence before us concerning Pete Smith save for that mentioned in Elaine Hornigold's witness statement that she says she does not recall that incident and would not expect a mistake such as that to lead to dismissal.
 - 30.7 Arturas Syminas – this was an agency worker referred to as Arthur by the claimant. Ms Hornigold referred us to the incident form which was before us in the bundle. The form explains that there was a road traffic incident where Arturas was essentially forced to move over to the near side of the road to avoid passing cars and in doing so the front near side wheel of the lorry dropped off the concrete road into the grass verge which was very wet due to recent rain and caused his vehicle to run into the ditch. Once again this is a road traffic incident.

- 30.8 Neil Hammond – the claimant says this was a white person who pulled off a bay with a person on the back of the lorry and he was not dismissed. Mr Rutter gave live evidence to counter this suggestion as this comparator was only first mentioned in the claimant's witness statement at exchange. He said he was not actively involved but it was as he understood it an incident where a vehicle rolled forward but there was no one in the back of the vehicle. The individual received a final written warning.
- 30.9 Steve Furnell – once again the claimant said this was a white person who pulled off a bay and a women and someone else was in the lorry but he kept his job. Mr Rutter said he actually conducted that disciplinary hearing and once again this was an incident where the vehicle moved forward by accident, it was the mistake of Mr Furnell but there was no one in the back of the vehicle at the time.
- 30.10 Andy Tyre – the claimant argues that this was a white person who moved a lorry off a bay with 3 people in the back and 6 trollies of milk. He said trollies of milk fell off the back but he kept his job, he was white. Mr Rutter said he has no knowledge of Andy Tyre, he believes if there was an incident it occurred many many years before he joined probably 6 years before he joined. He said Mr Tyre is no longer employed.
31. With all of these comparators we do not consider that there is sufficient reliable evidence before us. Most of these incidents relate to road traffic incidents or minor accidents which are quite different to the misconduct which was levelled at the claimant. The claimant has not produced any evidence to support his assertions that these were reliable comparators treated differently to him because of race. We accept the explanations put forward by the respondent where they were able to respond to these comparators.

The Law

32. I refer to the earlier exposition of the statutory law. We were addressed in submissions by both respondent's counsel and Mr Fashakin.
33. Essentially Mr Fashakin's case is that the motivation for his dismissal was his race rather than the allegations ranged against him. In such a case we have to determine what the reason for the treatment the employee complains of is. We are guided by the authority in the House of Lords of Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL11, this is seen to be the starting point for our analysis based upon the legislation we have set out. If the answer is that the reason for the treatment complained of is a protected characteristic the finding of less favourable treatment will likely follow as a matter of inevitability. This essentially means that there has to be evidence before us which links the treatment in this case the claimant's dismissal to the protected characteristic in this case the claimant's race.

Conclusions

- 34. Having examined in detail the evidence before us and considered the live evidence we have heard and its reliability or otherwise, we are clear in our finding that there is no cogent or credible evidence before us at all to suggest that there is a link between the claimant's race and the treatment he received i.e. his dismissal. We were impressed by the evidence of the respondent's witnesses. A proper and detailed disciplinary process was conducted. Often that is not the case where an individual does not have 2 years continuity of employment. However they are a large international company and it is to be expected that in circumstances where an individual does not have the requisite continuity of employment to acquire statutory unfair dismissal protection they should adopt a disciplinary process as if that person did have such protection. This is what they did. There is not a single scintilla of evidence before us which leads us to believe that the decision to dismiss the claimant was in any way motivated by the protected characteristic of race.
- 35. The claimant has raised many comparators and we have looked at each one. In virtually every case the respondent has been able to convince us that those comparators are not in fact reliable comparators in that the incidents in which they were involved were materially different from the incident which led to the claimant's dismissal. The claimant in turn has not produced any proper evidence before us other than bare assertion that others were treated differently. This is simply not sufficient to satisfy us that the treatment was on grounds of race.
- 36. We are therefore very satisfied the reason for the claimant's dismissal was the allegations which were proven against him as to his management of the delivery on 7 May 2020 and that the dismissal was for no other reason.
- 37. As a result the claimant's claim must fail and is dismissed.

Employment Judge KJ Palmer

Date: 21 July 2021

Sent to the parties on: ...2/8/2021..

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For the Tribunal Office