Case No: 2501867/20

EMPLOYMENT TRIBUNALS

Claimant: Mr K Fleming

Respondent: Nestle UK Ltd

CERTIFICATE OF CORRECTION
Employment Tribunals Rules of Procedure 2013

Under the provisions of Rule 69, the sent to the parties on 21 June 2021, is corrected as set out in block type at paragraphs 9.

Authorised by Employment Judge **Pitt**

Date: 26 July 2021

Important note to parties:
Any dates for the filing of appeals or reviews are not changed by this certificate of correction and corrected judgment. These time limits still run from the date of the original judgment, or original judgment with reasons, when appealing.

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Claimant: Mr K Fleming

Respondent: Nestle UK Ltd

Heard at: Newcastle, via CVP **On:** 15th March 2021
Delibrations 31st March 2021

Before: Employment Judge AE Pitt
Mrs C Hunter
Mrs D Newey

Representation
Claimant: In Person
Respondent: Ms Clayton of Counsel

RESERVED JUDGMENT

1. The claimant's case for unfair dismissal is well founded.
2. The claimant's claim for Race Discrimination is not well founded and is dismissed.

REASONS

1. This is a claim by Mr Kirk Fleming, date of birth 26th March 1989, concerning his employment with Nestlé Ltd. He was employed between 1st June 2016 – 4th June 2020 as a Developed Operator. At the effective date of termination, his gross salary was £2,560; his net salary was £1,910 per month. The claimant makes claims for Unfair Dismissal pursuant to section 98 Employment Rights Act 1996 and Race Discrimination pursuant to Section 13 Equality Act 2010.

2. The Tribunal read witness statements and heard oral evidence from Chris Atkinson, Performance Manager Sugar Manufacturing, Richard Watson, Area Manager, Sugar and Logistics, Lindsay Knox, Factory Manager and the claimant.

3. The Tribunal had before it a bundle of documents which included the respondent's disciplinary policy and procedure, documentation about other employees who had been the subject of disciplinary procedures, investigation documents relating to the claimant's disciplinary including, notes of the disciplinary hearing, interviews with witnesses and outcome letters. The Tribunal was also shown CCTV footage of the incident under consideration; screenshots were also included in the bundle.

4. At the commencement of the Hearing, the Tribunal was invited to consider an order not to reveal the name of one of the comparators. The reason for this is the sensitive nature of some of the information disclosed during disciplinary proceedings against him. The Tribunal considered whether to make an order under Rule 50 Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013. In particular, the Tribunal noted, this person is still employed by the respondent and the disclosure of their name may be an interference with their Right to a Private Life under Article ^ Human Rights. Further, the Tribunal considered whether the claimant could have a fair hearing without referring to this person's name.

5. The Tribunal decided to ake an Order under Rule 50. The Tribunal concluded that this person would be referred to as Comparator 5. In determining the issue of comparators and consistency, the Tribunal does not need to know the actual name, so long as it was clear to whom witnesses were referring and to whom the Tribunal was referring in its Judgment.

The Facts

6. Many of the facts are agreed. However, where there is a dispute, in making its findings of fact, the Tribunal has taken account of the witness statements, the oral evidence of the witnesses, and the contemporaneous documents it was provided with. Where there was a conflict of evidence, the Tribunal determined it on the balance of probabilities.

7. The respondent is a confectionery maker and employs approximately 8000 staff in the UK. In the North East, there are two sites. The claimant worked at the site at Fawdon. The respondent has a dedicated human resource team for its different sites.

8. The claimant had previously worked in part of the factory known as "the starch room", although he was working in the CFP area at the time of his dismissal. He worked in a team of three, and there were times when one of those people would be surplus to requirements for a short period.

9. There was a conflict in the evidence concerning the claimant being spoken to regarding his behaviour on the shop floor. Mr **Atkinson** told the Tribunal he considered the claimant to be "a joker" within the workplace. He had on a number of occasions had 'coaching' conversations with the claimant about this. No written record was made of these conversations. The claimant denies being spoken to about his behaviour. The Tribunal concluded that if the behaviour was as persistent as alleged, Mr **Atkinson** would have brought it to the claimant's attention in a more formal setting. Therefore, the Tribunal concluded that if Mr **Atkinson** did speak to the

claimant, he has overstated the number of times he spoke to the claimant concerning his behaviour.

10. The respondent is conscious of health and safety in the workplace and has a number of rules, regulations, and policies to ensure it is adhering to the relevant statutory provisions and protecting employees. The Tribunal did not see the written policies, but it was referred to a number; "lock off, tag off" and the 3-metre exclusion rule when working around Forklift Trucks (FLT), as examples. A further rule specific to Covid-19 was introduced of a two-metre exclusion around each employee. There is a rule of challenge: if an employee sees a colleague acting in an unsafe manner, they should challenge that behaviour. If they do not challenge that behaviour, they may also be the subject of disciplinary action.

11. The incident with which we are concerned occurred on 18th May 2020. At this time, the respondent had introduced stringent rules regarding the Covid pandemic. The respondents had a requirement that employees maintained a two-metre distance from each other whilst in the workplace.

12. On 15th May 2020 at 14:44, an email was sent to all employees concerning the Covid-19 restrictions. It emphasised the need to follow the government guidance on the two-metre rule. It pointed out that there had been occasions when these instructions were not followed. It concluded, "If we find that individuals continue to ignore the measures this could be dealt with under the disciplinary policy with the potential for this to be treated as gross misconduct, we will continue factory walks and any violations of the two-metre instructions will continue to be logged." The claimant was not at work on 15th May and did not return to work until Monday 18th May 2020. His shift commenced at 6:45 am. The claimant told the Tribunal, and the Tribunal accepts, that the claimant was unaware that the email had been issued and was unaware that the respondents intended to pursue breaches of the two-metre rule as potentially gross misconduct.

13. The claimant arrived at work on 18th May 2020, and for the first part of the shift, he was the team member who was surplus to requirements. He decided to enter the starch room to speak to a colleague. There was a specific reason for him to do this as he owed that colleague money. While he was there, he can be seen on the footage engaging in light-hearted conversation with his colleagues. This concerned comments regarding one of their colleagues being similar to another. As a result, the claimant decided he would approach one of his colleagues who was driving his FLT and attempt to place ear defenders upon him. It can be seen on the footage the claimant approaches his colleague in an attempt to put ear defenders on his head. He fails; he approaches him a second time and succeeds. The colleague knocks them off his head, and then he stops his FLT to retrieve them from the floor. During this period, the claimant broke the 2-metre Covid rule and the 3-metre rule in relation to the FTL. It was clearly ill-advised and unsafe behaviour.

14. On the same day, the claimant was spoken to by Sharon Byrne, Shift Manager. He was suspended pending an investigation into an allegation of gross misconduct. An investigation was commenced by Mr Atkinson, who

spoke to a number of employees, including Craig Allen, Sean Ferguson and Cumbeeze Hormatash. These persons were the colleagues present at the time of the incident. He also spoke to the claimant, who freely admitted his behaviour. He told Mr Atkinson that he had gone into the starch room to discuss the payment of a debt. He accepted he was having a bit of banter because everybody's mood was down due to Covid -19, and he was trying to lift their spirits. He went on to say he had taken the 'mick' out of Glenn and Gary, commenting they looked like each other, and they would look more alike if Gary wore ear defenders. He removed ear defenders from one colleague, Craig, and approached Gary, who was driving an FLT, and he attempted to put the ear defenders on Gary. He apologised for his behaviour, saying it was a stupid mistake. He was under pressure because his wife had lost her job. He also said he had been with the company for eight years and had never been in any bother before. Mr Atkinson concluded all four employees should be the subject of disciplinary proceedings. The first three because they had failed to challenge the claimant's behaviour and the claimant because his behaviour constituted a breach of the three-metre rule and the two-metre rule.

15. By letter dated 27th May 2020, the claimant was required to attend a disciplinary hearing on 2nd June 2020. The hearing concerned his conduct, specifically a serious breach of safety rules or guidelines, which amounted to gross misconduct. As well as the letter, the claimant was given a number of documents which included investigation notes with his colleagues, images from CCTV footage and the accident report. He was warned that one of the outcomes available could be that of dismissal.

16. Richard Watson chaired the disciplinary meeting on 2nd June 2020 and the claimant was accompanied by his Trade Union representative. Julia Steel from HR was present to take notes. During the meeting, the CCTV footage was viewed, and the claimant was given an opportunity to speak to his Trade Union representative in private following the viewing. When the hearing resumed, the claimant explained his behaviour. In relation to banter, he told Mr Watson that he was not thinking of the consequences and "I can see what I have done is stupid, I know what I did was wrong. In normal circumstances, I would not have done that." He went on that he could not believe that he had acted in such a way and assured Mr Watson it would not happen again. He told Mr Watson there were issues at home because his partner had lost her job, they have three children, and they had debts and bills to pay. He added he had been with the company for seven years and asked for a second chance. On his behalf, his union representative asked Mr Watson to take account of the Covid pandemic, the claimant's clean record, his honesty throughout the procedure.

17. Following an adjournment, Mr Watson returned and informed the claimant he was dismissed because the claimant was fully aware of Nestlé's health and safety rules. This amounted to a serious breach of those rules amounting to gross misconduct. His employment was terminated immediately. The letter set out that the claimant had committed a number of acts, namely, leaving his place of work to go to the starch room, attempting to place ear defenders on a forklift truck driver's head whilst the truck was in motion, ignoring the 3-metre rule and the two-metre rule. He

repeated the claimant's mitigation and then set out his conclusion as follows "however your actions of that morning were totally unacceptable, and I believe the only appropriate action is to dismiss you on the grounds of gross misconduct with immediate effect. This summary dismissal is without notice or pay in lieu of notice."

18. By letter dated 2nd June 2020, the dismissal was confirmed in writing.

19. By letter dated 8th June 2020, the claimant appealed his dismissal on three grounds. First, he queried the 2-metre social distancing rule in particular in relation to the notice sent on 15th May. Secondly, the implications or consequences of his actions. Whilst they could have injured someone, no one was hurt. With regard to breaking the three-metre rule, he stated that rule was broken daily. He then set out further detailed mitigation in particular, saying, "I feel this is affecting me mentally, and this was never considered or taken into account during these unprecedented times." Finally, he raised inconsistency between fellow workers and set out four examples where people had been disciplined and not dismissed. Three involved breaches of the health and safety regulations.

20. Following the claimant's dismissal, a leaflet found in the male toilets was brought to the claimant's attention (page 103). He perceived it to contain racist comments directed at him. Having viewed the item, it is unclear whether it supports the claimant or not or whether it includes racist comments.

21. The appeal hearing was heard on 18th June 2020 by Lindsay Knox. In addition to the matters raised in his appeal letter, the claimant also told Ms Knox his son had major surgery during the recent past, and he was under a lot of stress.

22. Ms Knox dismissed the appeal. She confirmed her decision in a letter dated 26th June 2020. Ms Knox referred to the serious nature of the incident. Although the claimant had stated no one was hurt, Ms Knox described this as lucky, and the incident was a complete disregard for his and others safety. Referring to the claimant's mitigations, Ms Knox acknowledged the sincerity of the claimant's actions but questioned his level of understanding of the severity of the incident. In particular, she relied on the following facts to explain her decision; the claimant had left his work area, distracting others from their work who were themselves subject to disciplinary action because of his behaviour.

23. In relation to the leaflet found in the toilet, Ms Knox indicated that an investigation would be carried out, and the claimant notified of the outcome.

24. In relation to the allegation of inconsistency, Ms Knox wrote that each case must be determined on its own merits. She could not comment on individual cases, but 'they had been reviewed', and she was satisfied that no discrimination had occurred. Finally, she concluded 'the decision making in the outcomes reached in those cases would also not lead me to a different conclusions'.

25. In a letter dated 3rd September, Ms Knox stopped short of describing the leaflet as racist, although she did say it was unacceptable. The respondent was unable to establish who had placed the leaflet in the toilets. The claimant's evidence was he had not been subjected to any racist treatment during his employment with the respondent.

26. The claimant compares himself to five other employees; Sam English, Josh Clark, David Brown, Lee Atkinson and Comparator Five. All of these employees have been disciplined by the respondent within the last six years, and none have been dismissed. They are all white males. The claimant relies upon them as his comparators for the discrimination claim and also in relation to the argument on consistency.

27. Mr English was subject to a disciplinary procedure in 2017. He faced an allegation that he fell asleep whilst driving his forklift truck. The Tribunal noted at the time there was no CCTV that covered the area. A manager saw Mr English driving in an unorthodox way, as a result of which she believed he was asleep. The matter was reported, and disciplinary proceedings were commenced. Mr Richard Watson chaired the disciplinary hearing. He concluded that Mr English was asleep; however, he imposed a final written warning because it was the employee's word against his managers. It was also discovered during the proceedings that Mr English's FLT licence had expired.

28. The Tribunal was not impressed with the evidence of Mr Watson on this matter. It was put to him by the Employment Judge that he had concluded that Mr English was guilty of an offence of misconduct. In reply, Mr Watson prevaricated using phrases such as "I couldn't say for certain he was asleep." "In my belief, he had fallen asleep but potentially could have momentarily fallen asleep with his eyes shut." He went on to say he had a reasonable belief it had occurred. However, Mr Watson was unwilling to accept that he had found the allegation proven. He also made much of the fact that there was no CCTV available. During the investigation, it also came to light that Mr English had spoken to a colleague and asked him to undertake the driving duties that day because he was feeling tired. This suggested to the Tribunal that Mr English was aware he was not fit to drive. Further, English had not renewed his FLT license. Mr Watson evidence's was to absolve English or responsibility, noting that the company should have reminded him it was time to renew the licence. For his breach of health and safety, Mr English was given a final written warning.

29. In 2015 Josh Clark was disciplined for failing to follow the "lockout, tag out" procedure on a machine, resulting from which he was injured and lost a finger. He was issued with a final written warning for this failure. The allegation against him was that, when clearing a blockage in the choc wash system, he failed to follow the lockout, tag out procedure. He did not isolate the power to the choc wash pump, resulting in serious injury to himself. During the disciplinary proceedings, Mr Clarke admitted his failure. Although initially dismissed, he was issued with a final written warning for this breach of health and safety rules on appeal. Others who saw him carrying out this unsafe practice were also given final written warnings for failing to challenge his behaviour.

30. David Brown used an airline pipe to clean starch from his clothing. The evidence before the Tribunal was this had been a common practice but was considered a serious health and safety issue. As a result, employees were informed that the practice should stop and they may be subject to disciplinary proceedings if they were found to have carried out this action. During the disciplinary procedure, it was established Mr Brown had used the airline to remove starch from his clothing. He admitted this but, in mitigation, said it was a lapse in concentration. He admitted he was not wearing the correct protective clothing and that the act was prohibited. He had seven years experience of using the compressed air pump and believed that it was safe. In issuing a final written warning, the area manager stated Mr Brown did this activity whilst carrying out his work. He did not believe Mr Brown understood the potential consequences of his actions. Finally, he could not ignore the fact that Mr Brown, using the isolator to regulate the flow, did not lessen the hazard to himself. He was given a final warning.

31. Lee Atkinson removed chicken from a fridge that did not belong to him, and he ate it. He was subject to disciplinary procedures and was given a final written warning. During his disciplinary proceedings, he made initial denials about the theft; however, he admitted the theft before the disciplinary procedure itself. During the hearing, he acknowledged that it was unacceptable behaviour. He was ashamed, saying it resulted from a momentary lapse of behaviour because of financial issues at home. Mr Watson issued a final written warning.

32. Comparator 5 was disciplined for leaving his shift early. These disciplinary matters were being dealt with during 2020 and concluded after the claimant's dismissal. He was given a final warning. It came to light during the procedure there was a potential problem with alcohol and possibly drugs. This was dealt with as a welfare issue rather than a disciplinary matter. Comparator 5 was disciplined in effect for clocking offences. The claimant relies on him as a comparator because of potential alcohol/drug abuse, which may amount to a health and safety matter.

Issues

33. At a preliminary hearing conducted on 8th December 2020 by EJ Aspden, the issues were set out as follows:-
    In all the circumstances, did the respondent act reasonably in treating the claimant's breaches of health and safety rules on 18th May as a sufficient reason for dismissing the claimant, taking into account its size and administrative resources having regard to equity and a substantial case?
    This gives rise to the following issues:
    (a) did the respondent follow a fair procedure, taking into account the ACAS Code of Practice on Disciplinary and Grievance Procedures?
    (b) was the decision to dismiss within the band of reasonable responses which a reasonable employer might adopt?

34. By dismissing the claimant, did the respondent treat the claimant less favourably because he is a person of colour than it treated the individuals identified by the claimant in accordance with the order described above

than it would have treated others in circumstances that were not materially different?

35. At the commencement of the Hearing, the procedural issue was identified as the respondent's failure to deal with the claimant in a manner consistent with others who had been disciplined.

36. In relation to the race discrimination, those persons to whom the claimant claims comparator were those disciplined in an inconsistent manner to him. They were white males, as set out in the facts above.

The Law

37. Section 98 Employment Rights Act 1996, The Act, sets out the law concerning Unfair Dismissal. It is for the respondent to show the reason or principal reason for the dismissal and that it is a reason falling within section 98 (2) of the Act or is some other substantial reason for dismissal. Misconduct may found a fair dismissal. The Tribunal must then apply section 98(4) of The Act and consider whether the dismissal was fair or unfair, which depends on,
'Whether in the circumstances (including the size and administrative resources of the employers undertaking), the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and it shall be determined in accordance with equity and the substantial merits of the case.'

38. The approach to misconduct cases was formulated by Arnold J in **British Home Stores Ltd v Burchell [1980] ICR 303**. If the reason for the dismissal was misconduct of an employee and potentially fair, the Tribunal must ask itself the following questions.
    i) Did the respondent act reasonably in treating the employee's conduct as sufficient reason for dismissal in accordance with equity and the substantial merits of the case?
    ii) Did the respondent have an honest belief in the misconduct of the claimant?
    iii) Did the respondent have reasonable grounds to sustain that belief?
    iv) Did the respondent undertake as much of an investigation into the misconduct as was reasonable in all the circumstances?
    v) Did the respondent follow a fair disciplinary procedure?

39. **Iceland Frozen Foods Ltd v Jones 1982 IRLR 439**. In determining the fairness of a dismissal, the Tribunal must consider if dismissal fell within the range of reasonable responses. The Tribunal must not impose its view on the dismissal but consider whether a reasonable employer could have dismissed on the facts of the case.

40. **Post office v Fennell (1981) IRLR221** determined that the words "having regard to equity in substantial merits of the case" means employees who misbehave in much the same way should have meted out to them much the same punishments. Where one is penalised more heavily than those

who committed a similar offence, the employer does not act reasonably in treating that as a sufficient reason.

41. In **Hadjiioannou V Coral Casinos Limited (1981)IRLR 352**, the Employment Appeal Tribunal stated that a complaint of reasonableness based on consistency of treatment would be relevant in limited circumstances:-
    - where employees have been led by an employer to believe that certain conduct will not lead to dismissal
    - where evidence of other cases being dealt with more leniently supports a complaint that the reason stated for dismissal by the employer was not the real reason
    - where decisions made by an employer in parallel circumstances indicate it was not reasonable for an employer to dismiss

Race discrimination

42. Race is a protected characteristic pursuant to **Section 4 Equality Act 2010. Section 9 Equality Act 2010** identifies what may be encompassed by the word Race. Colour is one of the characteristics which is protected by section 4. and

43. **Section 13 equality act 2010** defines direct discrimination as follows:
    (1) a person (A) discriminates against another (B) if, because of a protected characteristic, (A) treat be less favourably than (A) treats or would treat others.

44. This requires the claimant to establish he has been subjected to less favourable treatment and that the less favourable treatment was because of his colour. The claimant must establish not only the less favourable treatment but also a causal connection between that treatment and his race. The less favourable treatment alleged in this case is the claimant's dismissal. The comparators are the employees who were disciplined for health and safety issues. The claimant must show that the reason why there was a difference in treatment was because of a difference in colour. The fact that there is a difference in treatment and a difference colour is not of itself sufficient. **Khan v Royal Mail Group 2014 EWCA CIV 1082.**

45. The Equality Act also contains a specific burden of proof in the equality act section 136(2) as follows:-

    '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.

    Section 136(3) goes on:-

    'But subsection (2) does not apply if A shows that A did not contravene the provision.'

This is referred to as the 'shifting burden of proof.' The claimant must first establish facts from which a Tribunal may conclude there was discriminatory treatment. If the claimant can do that, the respondent needs to show that it did not treat the claimant in a discriminatory manner.

46. Race should not be any part of the reasons for the treatment in question. If there is no explanation for the reasonable treatment, the absence of an explanation, as opposed to the unreasonableness of the treatment, might find an inference of discriminatory behaviour **Igen v Wong 2005 EWCA CIV 1082**

Submissions

47. Counsel on behalf of the respondent provided the Tribunal with written submissions, and we do not propose to rehearse them here. On the central point of consistency, the respondent's case is that the comparators were not valid comparators because the circumstances of their misconduct were not sufficiently similar. There was insufficient evidence of a link between the claimant being a person of colour and his dismissal to shift the burden of proof from the claimant to the respondent in relation to race discrimination.

48. In dealing with the issue of the comparators, the claimant set out why they should be considered comparators. They had all been disciplined for serious misconduct for which a possible penalty was dismissal. He relied partly on the finding of the leaflet he deemed to be racist to support his contention that the respondent's actions were because he was a person of colour.

Discussions

49. The thrust of the case is the inconsistent treatment between the claimant and other employees who had previously been disciplined. The claimant does not suggest that the disciplinary procedure itself was flawed or that he should not have been the subject of disciplinary proceedings. He made an admission as to his actions which can be seen on the CCTV footage. He relied in part upon his own personal mitigation for not being dismissed and the inconsistent treatment.

50. For the avoidance of doubt, the Tribunal is satisfied that the procedure followed by the respondent was such a procedure as a reasonable employer would follow. Further, Mr Watson, particularly in light of the admission by the claimant, had a belief in the guilt of the claimant. Finally, the investigation was reasonable and proportionate, bearing in mind the admissions. It was an investigation which a reasonable employer would conduct.

51. The questions for the Tribunal are; whether the decision to dismiss fell within the range of reasonable responses; in particular, whether the dismissal was unfair because it was inconsistent when compared of the previous outcomes of the comparators disciplinary hearings.

52. Having reminded itself, it is considering the reasonable employer, the Tribunal concluded that this case fell within the range of reasonable responses available to the respondent. That is not the end of the matter. The Tribunal must consider if the respondent's treatment of the claimant was inconsistent with the other employees previously disciplined.

53. The Tribunal examined each comparator to determine if circumstances were the same or sufficiently similar to be considered comparators for the unfair dismissal claim.

54. Mr Clarke was disciplined for a health and safety breach. It was a deliberate act where he failed to use the safety procedure known as 'lockout tag out.' As a result, Mr Clarke sustained a serious injury, and he potentially put others in danger. Colleagues who did not challenge him were also disciplined. His behaviour was different to the claimant's because it was not characterised as horseplay, and he was at his workstation. The Tribunal considered that there was sufficient similarity between Mr Clarke's situation and that of the claimant for him to be considered a comparator for the purpose of unfair dismissal proceedings. In particular, Mr Clarke was disciplined for a health and safety breach. It was a deliberate act. He himself sustained an injury and put others in danger, and colleagues were disciplined for failing to challenge him.

55. David Brown, was also accused of a health and safety breach. He had seven years of experience using the air hose equipment, which he used inappropriately. It was a deliberate act, although it may be considered to have an element of horseplay. The respondent had not previously imposed a disciplinary sanction for such behaviour. Mr Brown was at his workstation. In fact, it was equipment he used to carry out his work. Although it was a dangerous act, there was no apparent danger to anybody else. The Tribunal considered the situation similar to that of the claimant because it was a deliberate act as a health and safety breach. Mr Brown was an experienced operator.

56. Sam English was also disciplined for a health safety breach. He not only put himself in danger but others by his actions. Further, whilst it was considered mitigation by the respondent, the lack of licence aggravated the offence. Indeed, there was also evidence that Mr English was aware of his fatigue as he had asked someone else to undertake driving duties that day. The Tribunal concluded Mr Watson issued a final written warning because he was unsure whether Mr English was asleep.

57. Mr Atkinson was disciplined for a matter of theft. This is not a health and safety breach. Therefore, he cannot be said to be a comparator for the unfair dismissal claim.

58. Comparator Five was disciplined for lateness and not a health and safety breach. Whilst the Tribunal heard and considered the claimant's evidence about this comparators' issues with alcohol and drugs, these were not the subject of disciplinary proceedings. The Tribunal concluded he was not an appropriate comparator for the unfair dismissal claim.

59. Of the five people relied upon, three of the comparators were disciplined for breaches of Health and Safety. One involved a serious injury to the employee, and colleagues were also disciplined. One involved a potential to cause serious injury to others by driving whilst tired and falling asleep. As noted above, the offence was aggravated by his failure to renew his licence. One was disciplined for dangerous misuse of equipment.

60. The differences in behaviour were minor. All the comparators were at their work station. Two had in effect finished working, whilst one was engaged in his work when the incident arose. The comparators were not engaged in horseplay.

61. One significant difference was between the claimant and Mr English. Whilst the claimant made full admission about his actions and the serious nature of them. Mr English denied the matter throughout his disciplinary. Usually, an admission to wrongdoing mitigates a penalty. However, in this case, it did not because the Tribunal concluded Mr Watson was not sure Mr English was asleep.

62. The Tribunal concluded that the case of English, Brown and Clarke were sufficiently similar and genuinely comparable to the claimant for the respondent to consider them during the course of the disciplinary and appeal hearings.

63. The Tribunal concluded the respondent acted inconsistently between the claimant and the comparators for the reasons outlined above. The reasons for dismissing the claimant also applied to some or all of the comparators. All were disciplined for misuse of equipment. All were disciplined for actual injury or the potential to cause serious injury to themselves or others. All were deliberate acts. The differences were of such a minor nature that it did not prevent from them being comparators.

Race Discrimination

64. The Tribunal must consider whether the claimant has produced sufficient evidence to 'shift' the burden of proof to the respondent to show it did not act in a discriminatory manner.

65. The claimant relied on two factors to establish a link between the dismissal and his colour. First, he was the only person of colour who had been dismissed. Secondly, the discovery of the leaflet subsequent to his dismissal.

66. Dealing first with the leaflet. It is not clear whether it was aimed at the claimant or at those who had dismissed him. The Tribunal is satisfied that the respondent acted appropriately in carrying out an investigation as detailed in the letter of 3rd September. Although the respondent did not identify the person or persons involved, it acted reasonably in its investigation and took action to prevent a recurrence. The Tribunal is not able to conclude that the leaflet did contain racist comments. Even if it contained racist comments directed towards the claimant, it was discovered subsequent to the claimant's dismissal. The Tribunal concluded that the leaflet did not show the respondent had acted in a

racist manner towards the claimant. It is not evidence that would support the claimant's dismissal being based on his colour.

67. As already noted above, the claimant cannot point to any other incident, including words or actions which may be considered racist.

68. That leaves the fact of the dismissal itself. In applying **Khan v Royal Mail Group 2014 EWCA CIV 1082,** the Tribunal noted a difference in treatment between the claimant and the comparators. The mere difference in treatment is not of itself sufficient. The Tribunal is not satisfied that the claimant has established a causal connection between his dismissal and race. The burden of proof does not shift from the claimant to the respondent.

69. The Tribunal concluded that the dismissal was not because the claimant was a person of colour.

Conclusions

70. The claimant was unfairly dismissed

71. The claimant was not subjected to discrimination by reason of him being a person of colour.

Employment Judge AEPitt

Date 16th June 2021