



EMPLOYMENT TRIBUNALS

Claimant: Mr S A Khamis

Respondent: Gibbs Transport Limited

Heard at: Reading **On: 15, 16 June, (in chambers) 12 July 2021**

Before: Employment Judge Gumbiti-Zimuto

Appearances

For the Claimant: Ms F Almazedi, solicitor

For the Respondent: Ms R Jones, counsel

JUDGMENT

1. The claimant's complaints of direct race discrimination and harassment related to race are dismissed upon withdrawal by the claimant.
2. The claimant was wrongfully dismissed.
3. The claimant was unfairly dismissed.
4. The claimant's complaints about detriment because of making a protected disclosure and victimisation are not well founded are dismissed.
5. A remedy hearing shall take place on the 26 November 2021. The parties are to send to each other by 1 October 2021 any witness statements together with any documents that the parties will rely on at the remedy hearing.

REASONS

1. In a claim form presented on the 6 July 2020 the claimant made complaints of unfair dismissal, race discrimination, victimisation, harassment and notice pay. The respondent denied the claimant's complaints.
2. The claimant gave evidence in support of his own case. The respondent relied on the evidence of Mrs Emma Vinciguerra, Mrs Julie Provino and Mr Lloyd John. All the witnesses produced statements which were taken as

their evidence in chief. We were also provided with a trial bundle containing 122 pages of documents.

3. At the beginning of the case it appeared as though there was a dispute between the parties as to what the Tribunal was required to determine. Having heard the evidence and provided with written submissions from the parties the matters that the Tribunal have had to determine are; wrongful dismissal, unfair dismissal (sections 98 and 103A Employment Rights Act 1996), detriment because of having made a protected disclosure (section 47B Employment Rights Act 1996), and victimisation (section 27 Equality Act 2010).
4. The claimant withdrew his complaint about direct discrimination on the grounds of race and harassment related to race.
5. The claimant was employed by the respondent from January 2007 as a fork lift truck driver. The claimant was dismissed on the 9 April 2020.
6. On 30 March 2020 the claimant reported to the company secretary, Mrs Vinciguerra, that his colleague Mr John, a fellow fork lift truck driver, had attended work when he was drunk. Mr John was sent home by Mrs Vinciguerra.
7. At about 6.30 pm on 30 March 2020 the claimant was setting off home after a day's work. The claimant's evidence, which we accept on this aspect of the case was that

“As I exited the workplace, going through the yard I spotted Mr John who was pacing around waiting for me. Mr John seemed even worse now and it was clear that he had consumed even more alcohol I can only describe him as extremely drunk. Naturally I felt very intimidated by Mr John's presence and behaviour. When Mr John saw me, he immediately moved towards me in an extremely threatening manner.”

8. The claimant describes Mr John *“calling me a cunt and swearing ... making his dog get angry ... this was very scary for me I don't like dogs.”* The claimant describes Mr John setting his dog on him. The claimant then describes how he ran away. The claimant went into the main office where he found Mr Steven Vinciguerra and Mr Gary Collett. The claimant is described by Mr Vinciguerra and Mr Collett coming into the office and *“talking loudly and incomprehensibly”*. The claimant in fact asked them to call the police but they refused. The claimant left the office and went back to the yard to collect his bicycle and go home.
9. Mr John attempted to prevent the claimant getting on his bicycle, the claimant's bicycle was taken from him by Mr John, meanwhile Mr John's dog was behaving aggressively barking and growling. The claimant attempted to get away with his bicycle, Mr John pursued him with his dog. Mr John stamped on the claimant's bicycle and kicked the wheels. The

claimant got hold of piece of wood and hit Mr John with it and also threw a stone towards Mr John and his dog. With the intervention of Mr Vinciguerra and Mr Collett, the claimant was eventually able to get away from Mr John and make his way home. The claimant reported the incident to the police. The claimant says he was acting in self-defence.

10. The order in which these events occurred is not entirely clear. The Tribunal however note that this encounter was witnessed by Mr Vinciguerra and Mr Collett, whose account of the incident differs in some respects from the claimant's account but in our view broadly supports the claimant's account that Mr John was behaving aggressively towards the claimant.
11. On 31 March 2020 Mrs Vinciguerra was given a verbal account of the incident and at some point received the joint statement prepared by Mr Vinciguerra with Mr Collett (p72), a statement from Mr Phil Gibbs (who did not witness the incident) (p73), she also spoke to Mr John and heard his account of events and made a brief note of what was said (p74). Mrs Vinciguerra suspended the claimant on the grounds of "*assault on a work colleague with a weapon.*" In respect of this incident no action was taken in relation to Mr John.
12. The claimant, with the assistance of his partner, wrote to Mrs Vinciguerra setting out his version of events (p75).
13. The claimant was invited to attend a disciplinary meeting, initially on 3 April 2020 but was eventually to take place by telephone on 8 April 2020. The letter stated, "*At this meeting the question of disciplinary actions against you, in accordance with the Company Disciplinary Procedure, will be considered with regards your assault on a work colleague with a weapon.*" (p74) The claimant was sent a copy of the statement of Mr Gibbs and the joint statement from Mr Vinciguerra and Mr Collett. The claimant was not given a copy of the statement given by Mr John.
14. The claimant's disciplinary hearing was recorded and a transcript of the meeting has been produced. The transcript is largely accurate but has some missing segments where carefully listening of the recording is required to determine what was said. Miss Vinciguerra attempted to hold a video call with the claimant, it is clear from listening to the recording that the claimant had problems connecting and the call was dealt with as an audio only call. During the background preamble of the audio recording, Mrs Vinciguerra and another female (Linda) are heard to comment about the claimant "*he obviously has not got very good wifi at home*" (1:40) There are also indications that the claimant was having problems working the video call system as reference was made to the claimant being "*muted... you can see him talking but you cannot hear him*". After 4 minutes and 40 seconds the decision was taken to carry out the meeting by an audio call.

15. The claimant was told to give his version of events and did so. The claimant initially denied picking up a stick but then later accepted that he did so in self-defence. The claimant denied throughout the interview that he picked up a stone or brick as it was described, or a rock or boulder as it was also described by Mrs Vinciguerra. The claimant was told by Mrs Vinciguerra that “honesty is the key” before Mrs Vinciguerra, knowing that she did not have it, falsely stated on three occasions that she had video evidence of the incident. During the interview the claimant was interrupted by Mrs Vinciguerra on occasions when he appeared to be straying away from her questions. On one occasion towards the end of the interview the claimant was asked “*is there anything you would like to add or amend bearing in mind the video evidence, the CCTV evidence we have.*” The claimant began an answer speaking about Mr John which he appeared to be saying that he had reported Mr John many times for coming in drunk. Mrs Vinciguerra said that she would not discuss that matter with the claimant, and prevented him making whatever point he wished to make.
16. On 9 April 2020 the claimant was written to by Mrs Vinciguerra who informed the claimant that he was being summarily dismissed for gross misconduct (p87). The claimant was informed that he had the right to appeal. The claimant appealed (p88).
17. The claimant was written to by the respondent on 20 April 2020 and told that the appeal would be considered by Mr Gibbs on 24 April 2020. This appeal meeting was subsequently postponed to the 30 April 2020 and Mrs Julie Provino was appointed to carry out the appeal.
18. On 27 April 2020 Mrs Provino asked to speak to the claimant prior to the appeal meeting “*to ensure that I fully understand your reasoning around raising your appeal to fully investigate the matter.*” On 28 April 2020 Mrs Provino wrote to the claimant because she wished to re-schedule the meeting. The email included a number of questions which the respondent was asked to answer. Mrs Vinciguerra wrote to the claimant on 29 April 2020, this included information that had been provided to Mrs Provino. Among the documents provided to Mrs Provino was the transcript of the conversation between Mrs Vinciguerra and Mr John (p74). This latter document had not been previously provided to the claimant.
19. On 28 April 2020 Mrs Provino informed the claimant that she had asked for and been provided with clarification on a number of points(p100).
20. On 29 April 2020 Mrs Provino spoke to the claimant about arrangements for the appeal and then sent an email to the claimant confirming the arrangements (p98). The claimant had raised with Mrs Provino the possibility of attending the meeting with his girlfriend and his cousin to act as a translator. The claimant was sent an email link stating that the claimant could attend the appeal meeting on the 4 May 2020 “*via phone, computer or landline*”.

21. On the day of the appeal the claimant was under the mistaken impression that he would receive a telephone call from Mrs Provino to join the appeal meeting. Mrs Provino however expected the claimant to use the link to Zoom to join the meeting and after waiting for the claimant proceeded with the appeal meeting without the claimant in attendance. After the appeal meeting, the claimant contacted Mrs Provino making it clear that he had been expecting her to call him. She told the claimant that he could provide her with information she would consider before making her decision. The claimant wrote to the respondent indicating that he considered that the way that his appeal had been dealt with by the respondent had been unfair and asking for the meeting to be rearranged (p102).
22. On 7 May 2020 Mrs Provino wrote to the claimant confirming that his appeal had been unsuccessful (p112).

Wrongful dismissal

23. A wrongful dismissal is a dismissal in breach of the relevant provision in the contract of employment relating to the expiration of the term for which the employee is engaged. To entitle the employee to sue for damages, two conditions must normally be fulfilled namely: the employee must have been engaged for a fixed period, or for a period terminable by notice, and dismissed either before the expiration of that fixed period or without the requisite notice, as the case may be; and his dismissal must have been without sufficient cause to permit his employer to dismiss him summarily. An employer may dismiss summarily if the employee is in breach of contract and that breach is repudiatory - that is where the employee "abandons and altogether refuses to perform" the contract. For example where the employee does an act of gross misconduct. The common law claim for wrongful dismissal is to be considered separately from the statutory claim for unfair dismissal. In considering wrongful dismissal we are required to decide whether the misconduct actually occurred.
24. Mrs Vinciguerra explained her conclusion that the claimant was guilty of gross misconduct in the following way:

"On balance, I made the finding that all witness evidence was corroborative and consistent, save for the evidence given by the claimant and as such, I found the claimant to be guilty of the allegation of gross misconduct, namely, assaulting a colleague armed with a stick, causing injuries to his chest and left arm."

Dealing with the claimant's account about picking up the piece of wood and hitting Mr John with it, Mrs Vinciguerra stated that she considered the claimant's responses were evasive.
25. The Tribunal has had the opportunity of hearing the entire recording of the disciplinary hearing. The disciplinary hearing lasts 22 minutes 55 seconds. The Tribunal did not consider that the claimant was evasive in his responses. During her questioning of the claimant, Mrs Vinciguerra

interrupted the claimant on several occasions when she considered he was straying from the point. The claimant was stopped from giving views about Mr John attending work in drink. The Tribunal also note that the claimant's account of the incident was never put to Mr John. The claimant's version of what he said to Mr Gibbs was not put to Mr Gibbs.

26. The transcript of the interview of Mr John suggests that there had been a discussion with Mr John which was not recorded, this is evident in the way that the second question Mrs Vinciguerra asks as follows:

“On the 30.3.20 you were sent home from work, later that night I think you were taking your dog out for a walk can you in your own words tell me what happened.”

27. Mr John's account considered by Mrs Vinciguerra is encapsulated in 64 words as follows:

“No Said was cycling on his bike and I asked him why he was telling people to beat me up, he cycled down the entrance of the estate and stopped half way and picked up a large stick and hit me around the neck and arm, the stick broke, and then he picked up stone/brick and though (sic) that at me, this hit my chest.” (p74)

28. The account given by Mr John was not challenged or tested by Mrs Vinciguerra. The account of the incident set out in the joint statement of Mr Vinciguerra and Mr Collett was not put to Mr John. He was not asked to explain why Mr John was “*threatening*” the claimant or why after the claimant “*cycled off*” Mr John “*pursue(d) on foot*” or whether he agreed that he had “*stamped on the wheels of Said's bike*”. Even after Mrs Vinciguerra had spoken to the claimant she did not put his version to Mr John.

29. We had the benefit of seeing and hearing the claimant and Mr John give evidence. We preferred the evidence of the claimant. We considered the claimant a credible witness, more so than Mr John.

30. We accept the account given by the claimant and consider that he was acting in self-defence, being fearful that he was going to be attacked by Mr John and his dog. The claimant in our view did not behave in a manner that amounted to a repudiatory breach of contract. The respondent was not entitled to dismiss him without notice. The claimant was wrongfully dismissed.

Protected disclosure

31. A protected disclosure means a disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the matters set out in section 43B (1) Employment Rights Act 1996. The claimant relies on (a) that a criminal offence has been committed, is being committed or is likely

to be committed, (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject, and (d) that the health or safety of any individual has been, is being or is likely to be damaged.

32. Mrs Vinciguerra accepted that *“On the 30 March 2020, the Claimant approached me and accused a colleague, Mr Lloyd John, of being under the influence of alcohol whilst at work.”* Mrs Vinciguerra accepted in answer to question from the claimant’s representative that Mr John attending work in drink was a health and safety risk. Mr John and the claimant were fork lift truck drivers. Mr John would have been breathalysed by Mrs Vinciguerra but for Covid-19 which created uncertainty about infection risk. Mr John was issued with a first and final written warning because he was *“suspected to be under the influence of alcohol whilst at work.”*
33. The Tribunal is satisfied that the claimant made a protected disclosure on the 30 March 2020 by reporting that the claimant was under the influence of drink.
34. The claimant also relied on two further alleged protected disclosures, these were that the claimant had raised verbally on a number of concerns that Mr John was drunk at work and that the claimant had told Mrs Vinciguerra that the claimant was driving to work when he was over the limit through drink.
35. The claimant is unspecific in his witness statement and in his evidence to the Tribunal. The claimant has not spelt out the words used or to whom he made the reports that he seeks to rely on. The claimant’s evidence is vague and unspecific. Mrs Vinciguerra denies that the claimant had made any reports about Mr John prior to the 30 March 2020. The Tribunal is satisfied that the claimant did raise issues around his relationship with and the conduct of Mr John. This in our view is evident from two features of the evidence. The respondent accepted that the claimant and Mr John had a poor relationship. When specifically asked the question by Mrs Provino about whether the claimant had made official complaints, the following is recorded:
- “Has Mr Khamis made official complaints about his colleagues making fun of him. Were you aware of these being put on record, nothing official has been recorded, however we were aware that they did not get on.”*
36. The passage set out above is as it appears in the email of the 28 April 2020 (p94) and seems to elide the question and the answer. However, we consider that the passage can reasonably be interpreted as the question *“has Mr Khamis made official complaints about his colleagues making fun of him? Were you aware of these being put on record?”* And the answer *“Nothing official has been recorded, however we were aware that they did not get on.”* We consider that it is more likely than not that the claimant did

make complaints about Mr John despite the denial made by Mrs Vinciguerra. However, on the material before us we cannot be satisfied on balance of probability that there was a disclosure of "information", or what concrete factual information was conveyed other than on the 30 March 2020.

Unfair dismissal

37. What was the reason for the claimant's dismissal? The claimant contends that the reason for his dismissal was because he made a protected disclosure. The question for the Tribunal to determine is whether the making of a protected disclosure was the reason or for the dismissal, or if there is more than one reason the principal reason for the claimant's dismissal.
38. The Tribunal is not satisfied that protected disclosure was the reason or the principal reason for the claimant's dismissal in this case. The claimant was suspended following a clear incident involving an allegation that he had assaulted his colleague Mr John. The claimant's disclosure, as found by the Tribunal, was acted upon immediately by Mrs Vinciguerra leading to Mr John being sent home from work. No action was taken against the claimant at this stage. The claimant was not suspended until the day after the disclosure, the day after the incident, when at the time of reporting for work the incident with Mr John had been reported to Mrs Vinciguerra.
39. The claimant's closing submissions speculate on the reasons for the actions taken by the respondent and invites us to conclude that the reason for the claimant's dismissal was because he made a protected disclosure. We are unable to reach such a conclusion. It is the view of the Tribunal that the claimant was dismissed because of the conclusions that Mrs Vinciguerra arrived at in respect of the incident that had occurred on the 30 March 2020. The reason for the claimant's dismissal was conduct.
40. Section 98 of the Employment Rights Act 1996 provides that in determining whether the dismissal of an employee was fair or unfair, it shall be for the employer to show (a) the reason (or, if there was more than one, the principal reason) for the dismissal, and (b) that it is a reason falling within subsection (2) of section 98. The conduct of an employee is a reason falling within the subsection.
41. Where an employer has shown a potentially fair reason the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and (b) shall be determined in accordance with equity and the substantial merits of the case.

42. The Respondent must show that: it believed the claimant was guilty of misconduct; it had reasonable grounds upon which to sustain the belief; at the stage which it formed that belief on those grounds, it had carried out as much investigation into the matter as was reasonable in the circumstances of the case. It is not necessary that the tribunal itself would have shared the same view of those circumstances.¹
43. After considering the investigatory and disciplinary process, the Tribunal has to consider the reasonableness of the employer's decision to dismiss and (not substituting our own decision as to what was the right course to adopt for that of the employer) must decide whether the claimant's dismissal "fell within a band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair"². The burden is neutral at this stage: the Tribunal has to make its decision based upon the evidence of the claimant and respondent with neither having the burden of proving reasonableness.
44. We are satisfied that the claimant was unfairly dismissed. The investigation of the allegation against the claimant was in our view inadequate and not that which a reasonable employer would have conducted.
45. There was no investigation meeting with the claimant, the respondent went straight to a disciplinary hearing. The respondent did however have a statement from the claimant before the disciplinary hearing because he submitted to the respondent his email of the 31 March 2020 (p75). Despite this statement there was no effort by Mrs Vinciguerra to put the contents of the statement to Mr John when she interviewed Mr John. The interview of Mr John by Mrs Vinciguerra does nothing to address various features of his behaviour which should have been of interest to her if she was to have a complete picture of the incident that occurred on the 30 March 2020, these were the points arising from the joint statement of Mr Vinciguerra and Mr Collett, in addition to the claimant's version of events.
46. Despite being the person who carried out the investigation by speaking to all the witnesses from whom statements were taken, Mrs Vinciguerra went on to act as the person carrying out the disciplinary hearing. There were other people, who could have been responsible for carrying out the investigation, such as Mr Gibbs. There is no explanation that shows a need for Mrs Vinciguerra to carry out the investigation and the disciplinary hearing. We note that paragraph 6 of the ACAS Code of Practice provides that: "In misconduct cases, where practicable, different people should carry out the investigation and disciplinary hearing." It was practicable for someone else to carry out the disciplinary hearing.
47. The Tribunal considers that the claimant was disadvantaged by the way that the disciplinary hearing was conducted by Mrs Vinciguerra. On a

¹ British Home Stores Limited v Burchell [1978] IRLR 379

² Iceland Frozen Foods v Jones [1982] IRLR 439

number of occasions she interrupted the claimant when he was trying to give his account because she considered he was going off point, more seriously she cut the claimant off and refused to allow him to speak when he wanted to raise matters relating to the conduct of Mr John. Taking into account that the claimant, while perfectly able to understand and make himself understood in English, has poor English language skills, he cannot read and write in English, conducting the meeting in the way that she did was in our view unfair to the claimant.

48. The claimant gave Mrs Vinciguerra his account of the incident but she took no steps to investigate whether his account was right or wrong. Mrs Vinciguerra preferred the account of Mr Vinciguerra and Mr Collett, and also the account of Mr John without ever putting any aspect of the claimant's case to Mr Vinciguerra and Mr Collett, or to Mr John. The claimant provided an explanation for the evidence given by Mr Gibbs about a conversation where the claimant was supposed to have threatened to assault Mr John, something which the claimant denied. The claimant's explanation was not put to Mr Gibbs to see whether the claimant was capable of being right or whether he was wrong.
49. Mr Vinciguerra had taken a statement from the Mr John (p74) but she did not provide this statement to the claimant until the appeal stage. Mrs Vinciguerra accepted this statement as true but never gave the claimant the opportunity to comment on it.
50. The claimant's dismissal was in our view prejudged. The disciplinary investigation and disciplinary hearing was cursory. The time that Mrs Vinciguerra took to consider the claimant's case was 22 minutes and 55 seconds. The first 4 minutes and 40 seconds was spent trying to make connection with the claimant. This was an employee who had been employed by the respondent at the time of his dismissal for 13 years.
51. The claimant's appeal hearing was conducted by Mrs Provino. Mrs Provino contacted the claimant before the appeal hearing on the 28 April 2020 and in that conversation the claimant requested that he be accompanied by his girlfriend and also asked if his cousin could translate for him. Mrs Provino asked the claimant to confirm the cousin's "*professional details to see whether they would be apt to perform such translation for us.*" The concern for Mrs Provino was professed to be "*to ensure that the translations are professional and accurate so you have a full understanding of the meeting.*" When questioned Mrs Provino stated that she denied the cousin to attend and translate because the translation might be skewed or biased. Mrs Provino also said "*it was approved that we can hire an alternative translator, reached out to two companies to see if they can have Swahili interpreters.*" Mrs Provino took no further action and did not secure an interpreter for the claimant on the appeal. When asked why this matter was not in the statement she stated that "*This is not in my statement, so many things going on I do not know everything that is going to be raised.*"

52. Having recognised that there was a need for an interpreter, and refused the claimant request for his cousin to act as such, Mrs Provino did not take action to facilitate this support for the claimant. Had Mrs Provino taken action to address the language issue the problems which arose in respect of connection with the meeting on the 4 may not have occurred.
53. The claimant was sent a Zoom link to attend the hearing. The claimant thought that he was going to be telephoned by Mrs Provino when he was in fact expected to dial in or join online. At 12:03 Mrs Provino sent the claimant a text message "*to see when he would be joining us*". The claimant replied by saying "*OK thanks*". The claimant did not join the meeting. The claimant had misunderstood what was required and made this clear to the respondent after the event when he wrote to the respondent stating that he was waiting "*as arranged from 11am*". The claimant thought he was going to be called by Mrs Provino following her text message to him, he asked for the meeting to be rearranged and asked that the respondent ring him because "*I am not very good with technology so please ring me.*" Mrs Provino received a text message from the claimant one hour after she had carried out the appeal with Mrs Vinciguerra.
54. There was no reason why Mrs Provino, on being informed of the claimant's misunderstandings, could not have rearranged the appeal hearing or even simply conducted it when she did get to speak to the claimant. Instead what she did was to say to the claimant that she had assumed his absence meant he did not wish to represent himself and she went through her recommendations over the phone with him. She sent the claimant a recorded version of the appeal hearing and said that she would wait for his input until 12pm the following day before giving her final recommendation. When she did not hear back from him the claimant she sent the claimant his outcome letter.
55. The procedure followed by Mrs Provino in our view was unfair. A reasonable employer appreciating the following matters would not have acted as the respondent did. Those matters are, that the employee whose main language is not English who had indicated a desire for an interpreter to assist him with translation; that the employee had previously had technical problems and explained that they were not very good with technology; that the employee had asked for the meeting to be rearranged in circumstances where the employee had obviously got mixed up about what was to happen to make to the meeting take place; there was no impediment to the appeal being rearranged.
56. The transcript of the appeal hearing shows what took place by way of appeal. Mrs Provino took no account of the fact that the claimant was not given a copy of the statement that was made by Mr John, on the contrary she concluded that the claimant had been provided "*all the necessary statements*" this was wrong. Mrs Provino also was misled by the respondent to the extent that the impression was given that Mr John had been suspended for this incident. He had not. He was dealt with by the respondent in respect of the allegation that he attended work drunk. That

Mrs Provino was misled by the respondent is clear from the email of 28 April 2020

“4. Has there been any disciplinary or employment related action been taken against Lloyd? Not limited to his exclusion from work the work place? – Lloyd was suspended for 1 week pending a investigate, and was given a first and final written warning.”

57. This answer does not relate to the incident involving the claimant. The transcript shows that Mrs Vinciguerra made no attempt to clarify Mrs Provino’s misunderstanding of this suspension as relating to the incident with the claimant.

JP: ...Now the second piece is around Mr Khamis believing that he has been punished. Now on this particular point I have reviewed with particular attention to all the various statements as well as Mr Khamis entries on the transcript as to what he believes has happened. I have also asked you Emma for some clarifying points with regards to what happened to the other individual who was involved in this alleged fight and I understand Emma that there has been a separate disciplinary action with this individual and that this individual was also suspended at work.

EG: That is correct.

58. We note that the claimant’s role in the incident was considered in isolation. The involvement and role of Mr John was not considered in so far as it might provide some mitigation to the claimant for his reaction on 30 March 2020.

59. The conclusion of the Tribunal is that the claimant was unfairly dismissed by the respondent.

Victimisation

60. Section 27 (1) Equality Act 2010 provides that A person (A) victimises another person (B) if A subjects B to a detriment because B does a protected act, or A believes that B has done, or may do, a protected act. Section 27 (2) provides that a protected act is bringing proceedings under the Equality Act; giving evidence or information in connection with proceedings under the Equality Act; doing any other thing for the purposes of or in connection with the Equality Act; and making an allegation (whether or not express) that A or another person has contravened the Equality Act.

61. Did the claimant do a protected act? The claimant says that he reported, verbally, Mr John making racist comments to him about black people on a number of occasions to Mrs Vinciguerra. Mrs Vinciguerra denies that any such complaint was made to her by the claimant. There is no specific incident when such a complaint as referred to by the claimant is made. The written allegation of such a complaint was first made in the appeal

letter where it is stated that Mr John *“in the past ... made derogatory comments about black people.”* It is likely that a derogatory comment based around a person’s race is likely to come within section 27 (2). However, there is no clear indication of when that was. On the information presented to the Tribunal we are unable to conclude that there was a protected act carried out by the claimant before the appeal letter.

62. Was the claimant subjected to detriment because he did a protected act? To the extent that the appeal letter is a protected act we do not consider that it was the cause of any detriment to the claimant. The claimant’s appeal may have been poorly investigated and handled by the respondent but we do not consider that this was in any sense due to the nature of the appeal including an allegation that Mr John made derogatory comments about black people.
63. The conclusion of the Tribunal is that the complaint about victimisation is not well founded and is dismissed.

Detriment because of making a protected disclosure

64. The Tribunal is satisfied that the claimant made a protected disclosure on 30 March 2020.
65. The claimant refers to a number of events as being detriments because he made a protected disclosure. For liability to arise the claimant must show that the protected disclosure is a material factor in the respondent’s decision to subject the claimant to a detrimental act.
66. We do not accept that the claimant’s suspension and the accusation of gross misconduct was because the claimant made a protected disclosure. The reason for the initiation of the disciplinary action against the claimant was the confrontation between the claimant and Mr John. It was a matter that required investigation by the respondent.
67. The claimant contends that he was *“scapegoated to protect the Respondent who was aware of Mr Lloyds problems with alcohol and conscious of their inaction”*. While the Tribunal accepts that there were serious failings in the way that the misconduct allegations were dealt with by the respondent we do not consider that the evidence presented allows us to conclude that the respondent’s actions were due to the claimant making the report against Mr John. It was not a material factor in the decision to subject the claimant to the allegations.
68. The claimant’s written submissions list a number of further matters, these are as follows: failing to take any action against Mr John, failing to interview claimant, failing to explain the reason for suspension, failing to carry out a reasonable investigation, failing to investigate or take action against Mr John, falsely claiming that the claimant threatened to beat up Mr John, intimidating the claimant in the disciplinary hearing including claiming that there was CCTV, failing to carry out a fair appeal process,

not allowing someone to translate for the claimant in the appeal, failing to hear from the claimant during the appeal. We broadly accept the claimant's criticism of the respondent in these respects.

69. The respondent's failures and actions as listed immediately above are illustrations of the inadequacy of the respondent's disciplinary process, they show how badly the claimant was treated by the respondent in that process. We do not consider that this poor treatment of the claimant was because of the claimant making a protected disclosure. For liability to arise the claimant must show that the protected disclosure is a material factor in the respondent's decision to subject the claimant to the detrimental act. The protected disclosure is not a material factor in the respondent's failure to carry out a fair and competent investigation.
70. There are two further detriments relied on by the claimant these are failing to call the police and manipulating/embellishing the evidence. In respect of the first of these, Mr John's actions in waiting for the claimant were because of the protected disclosure. Mr Vinciguerra and Mr Collett were not influenced by the protected disclosure in their reaction to the claimant coming into the office and asking that they call the police by the protected disclosure. Mr Vinciguerra and Mr Collett appear not to have understood what the claimant said and only noted his entrance into the office, his incomprehensible comment, and then followed him out. As to the allegation that the respondent embellished and manipulated evidence, we are unable to conclude that the respondent did this. Statements were made, however there is no evidence they were embellished or manipulated by the respondent.

ACAS Code

71. ACAS Code of Practice 1 at paragraph 6 provides that notification of the requirement to attend a disciplinary meeting should contain sufficient information about the alleged misconduct and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include statements with the notification.
72. The claimant was written to by the respondent on 1 March 2020 the letter did not provide copies of statements and did not include any information about alleged misconduct except of the following: "The question of disciplinary actions against you ... will be considered with regards to your assault on a work colleague with a weapon" No statements were attached, no mention of possible consequences was made. The claimant was written to again by the respondent on 3 April 2020. The claimant on this occasion was provided with the joint statement made by Mr Vinciguerra and Mr Collett, plus the further statement of Mr Gibbs. The claimant was not provided with the statement made by Mr John. There was again no mention what the possible consequences are.

73. The ACAS code requires that the employee is given an opportunity to appeal. The employee should have an opportunity to be heard at the appeal meeting. There was a mix up resulting in the claimant not engaging in the appeal with Mrs Provino. Instead of rearranging the appeal the respondent continued to issue the decision based on Mrs Provino's one sided review of the matter. The claimant was deprived of an appeal hearing because of the way things were arranged by the respondent.
74. In all the circumstances we are of the view that there was a failure by the respondent to comply with the ACAS code. The Tribunal invite submissions from the parties on whether there should be an increase in any compensatory award and if so how much?
75. The conclusion of the Tribunal is that the claimant was wrongfully and unfairly dismissed.

Employment Judge Gumbiti-Zimuto

Date: 20 August 2021

Sent to the parties on: ..31 August 2021.
THY

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For the Tribunals Office

Public access to employment tribunal decisions:

All judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the Claimant(s) and Respondent(s) in a case.