EMPLOYMENT TRIBUNALS

Claimant: Ms C Simpson

Respondents: CW Kingfisher Day Nurseries Ltd

Heard at: Croydon (by cloud video platform) **On:** 21 to 23 July 2021

Before: Employment Judge Nash
Ms M Oates Hindes
Ms N Beeston

Appearances
For the claimant: Mr Ehujor, solicitor
For the respondent: Mr Williams, representative

JUDGMENT having been sent to the parties on 29.7.21 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS – LIABILITY

Background

1) Following ACAS Early Conciliation from 3 May to 2 June 2019, the claimant presented her claim to the Tribunal on 28 June 2019.

2) At this hearing the tribunal heard evidence from the claimant only on her own behalf. She provided two witness statements.

3) From the respondent the Tribunal heard from:-

Ms A Green, a former colleague;
Ms C Howland, the claimant's line-manager;
Ms J Sadid, the second in charge at the claimant's nursery; and
Ms Correia, a manager who heard the disciplinary hearing.

4) The Tribunal had sight of a bundle. There were issues with the bundle as follows.

5) The claimant at the beginning of the hearing stated that she wanted to apply for two documents to be removed. These were text messages and Facebook postings at pages 136 and 139. The respondent was on notice that the claimant had raised concerns, but no application had been made to the Tribunal. This was despite the fact that the claimant had made a number of applications to the Tribunal, including an application for disclosure on 16 June which was chased on 16 July.

6) The Tribunal was unclear on what basis the claimant objected to the documents. Mr Ehujor for the claimant originally stated that the documents attracted privilege. Upon questioning by the Tribunal, he withdrew this. After Tribunal questioning, the claimant agreed that, in fact, she objected to the documents under Article 8 of the Human Rights Convention in respect of her right to privacy of correspondence. The claimant was unable to explain why no application had been made prior to the hearing.

7) The Tribunal explained the difficulties caused by making such an application without notice on the first day of a three day discrimination hearing. The listing was not over-generous for a liability and remedy hearing with five witnesses. In such cases, another Tribunal might be expected to consider the documents in order to determine the claimant's application. This other tribunal would carry out the balancing exercise necessary between the claimant's Article 8 rights, if engaged, and the respondent's Article 6 rights, if engaged.

8) Mr Ehujor stated that he would not make the application but would rely on these matters during cross-examination and submissions. In the event, the claimant made no reference to Article 8 in submissions.

9) Other documents were marked 'disputed' in the bundle, but the Tribunal ascertained that, in fact, neither party objected to these being in the bundle.

The Claim

10) The two complaints were for:-

a) Unfair dismissal under Section 98 Employment Rights Act 1996;

b) Direct race discrimination under Section 13 Equality Act 2010.

The Issues

11) With the parties, the Tribunal identified the issues as follows:-

Race discrimination

12) Did the acts relied upon by the claimant occur:

a. The claimant was searched for a phone when no one else was searched;

b. The respondent's investigation or lack thereof before proceeding to a disciplinary, in particular, a failure to search or to interview other staff members;

c. The disciplinary hearing and the imposition of the sanction of a final written warning;

d. The failure to investigate or discipline other members of staff being Ms Holland, Ms Green and two colleagues referred to as Stacey and Simone;

e. The appeal; and

f. The dismissal?

13) Did any such acts amount to less favourable treatment because of the claimant's race in that she was black Caribbean?

14) The claimant confirmed that she relied on a hypothetical comparator in addition to the actual comparators.

Unfair Dismissal

15) Was the claimant was dismissed?

16) If not, was she constructively dismissed?

a. Was there a fundamental breach? The claimant relied upon a letter of 30 May 2019 at page 117, the sending of her P45 on 23 April 2019, any acts of race discrimination found, the conduct of the investigation, the disciplinary and the sanction.

b. Which if any of those acts occurred and if so, did they amount separately or cumulatively to a fundamental breach of contract?

c. Did any fundamental breach(es) cause the claimant to resign?

d. Did the claimant waive any fundamental breach(es)?

17) It was accepted that any dismissal, constructive or otherwise, would have been unfair.

The Facts

Background

18) The respondent is a nursery with about forty-five employees across three sites, of whom about fifteen work at the claimant's site in Thornton Heath. The claimant started work as a nursery nurse on 1 August 2006.

19) The respondent has a rule that all staff must hand in their personal mobile phones at the start of a shift and collect them at the end. The phones were locked away. The reason for this was stated to be safeguarding.

20) After close questioning, the Tribunal ascertained that the respondent's stated reason was a fear that staff would take photographs of the children in a state of undress and make these available to paedophiles in some way, perhaps by making the photos available on the internet. At no time had anyone in the respondent organisation been charged with, or investigated, or disciplined for having a phone, or misusing a phone in any way.

21) The claimant's position was that many staff got around the rule by handing in one phone to the respondent and keeping their second (and real) phone on them during the working day. This is what the claimant did.

22) On 18.6.15 the claimant signed a receipt stating that she had received a number of respondent policies, including the phone policy. The claimant denied that she had in fact received the phone policy. The claimant said that she had not received any training on mobile phone policies. However, the respondent's case was that she was at a staff meeting in 2018 when she was told that all staff phones must be signed in and out and not kept on the employee's person.

23) In any event, the Tribunal found that the claimant was in no doubt about the rule regarding phones, otherwise she would not have handed in what was, in effect, a "dummy" phone and kept her real phone with her. If she did not know of or understand the rule, there was no reason to hand in a dummy phone.

24) Further, the claimant said that she used to hand in her "real" phone, but because it was damaged in the respondent's keeping and had to be repaired at her own cost, she was no longer willing to do this. This further showed that the claimant was aware that she should hand in her phone.

25) The Tribunal did not accept that the claimant had any other reason to have two phones.

<u>The investigation</u>

26) Ms Howland, a new younger manager, started work in December 2018. On 16 January 2019 another employer told Ms Howland that the claimant had a second phone which she had not handed in. Ms Howland questioned the claimant who said 'no, she only had one phone', and nothing came of it.

27) On 1 February 2019 Ms Howland said that she received a tip-off that the claimant had a second phone with her in contravention of the rule. She then carried out a search. There was a dispute about who was searched. The claimant said that Ms Howland only searched the claimant. Ms Howland said in her witness statement that she had searched all staff. However, before the Tribunal Ms Howland said that she only searched those in the same room as the claimant, another two members

of staff. However, it was agreed that it was only the claimant who was found in possession of a second phone.

28) Ms Howland said she carried out an investigation and decided to proceed to a disciplinary.

The disciplinary procedure

29) On 4 February a letter was sent inviting the claimant to a disciplinary meeting on 8 February. It was unclear what documents were sent to the claimant with this letter. Ms Howland's evidence was that she thought she put all relevant documents in with the invitation letter but said that her memory was not good two and a half years later, so the tribunal was unable to rely on her evidence in this regard.

30) The claimant denied receiving any investigation notes or the mobile phone procedure before the disciplinary meeting.

31) Ms Correia gave inconsistent evidence as to whether she checked at the start of the disciplinary hearing that the claimant had received all relevant documents. She said several times that the notes were sent but not that she had checked. Ms Correia then said that she had checked with the claimant whether the claimant had all documents. However, this was not recorded in either set of meeting minutes. Ms Correia accepted that the claimant was not given enough time to prepare for the disciplinary meeting.

32) The tribunal did not accept the respondent's case that it had prepared investigation minutes and sent these to the claimant before the meeting. There was no explanation as to why the notes were not before the tribunal. Another document was, the respondent accepted, inaccurately labelled investigation notes in the bundle index. Accordingly, the Tribunal found that there were no investigation notes which were provided to the claimant.

33) The claimant also said that she had not received the mobile phone procedure before the meeting. The Tribunal found on the balance of probabilities that she did receive this. Unlike the investigation notes, it was not disputed that this document did exist, and it was the obvious document to enclose.

34) Ms Correia, the manager of the respondent's Coulsdon branch, held the disciplinary meeting on 8 February 2019. The Tribunal had sight of two sets of minutes. One was brief, handwritten during the meeting, and then Ms Correia typed up lengthier minutes later.

35) Ms Correia's evidence was that the claimant was very "off-hand" during the meeting and did not appear to take the matter seriously. Ms Correia told the tribunal that she therefore concluded that the claimant could not be trusted not to keep a second phone contrary to the respondent's rule. Therefore, it was appropriate to issue the claimant with a first and final warning (page 52).

36) The letter confirming the warning was somewhat unclear as to the reason the claimant was warned. However, the claimant's appeal showed that she had no doubt that she had been warned because she had her phone with her, and it was not locked away.

37) The claimant sent in grounds of appeal. This appeal contained the only reference that the Tribunal could find to race or race discrimination. In her appeal the claimant stated that a manager, Ms Howland, being allowed to use her phone was white privilege. She did not refer to any other comparators.

38) The appeal was heard by Face to Face, a wholly-owned subsidiary of Peninsula, the company which represented the respondent before the Tribunal.

39) Face to Face held lengthy appeal interviews with all relevant persons including the claimant, Ms Howland and Ms Correia. The tribunal had sight of the minutes.

40) The claimant said relatively little of substance during her appeal meeting. She concentrated on her contention that she had done nothing wrong with her phone. All she had done was keep her phone with her at work. In effect, she admitted that she gave a dummy phone to the respondent - which she did not mind them damaging - while keeping her real phone with her.

41) There was no reference to race in the meeting.

42) The appeal officer upheld the original decision.

43) The claimant came into work on 27 March to drop off her daughter, who was a pupil at the nursery. She met with Ms Howland and there was a dispute about what was said. According to Ms Howland, the claimant said that she would not be returning to work as she did not need the job and '[the respondent] will need her before she needs [the respondent]'. Ms Howland told the claimant that she did not want her to resign, but the claimant said that she would send her resignation. The claimant said that she had said none of these things at this meeting.

44) The Tribunal found that the claimant was very angry in the meeting of 27 March. She did not understand the reason for the warning as she thought she had not done anything seriously wrong (which remained, essentially, her case before the Tribunal). She had lengthy service and an unblemished record, and was very hurt by what had happened. Accordingly, the Tribunal found that she did say the things she was alleged to have said, with one exception. The tribunal found that she did not mention a letter of resignation. The reason for this was that the Tribunal accepted the claimant's evidence that she needed the job, she had a child to support, and it was therefore unlikely that she mentioned that she would resign.

45) The tribunal had sight of a back-dated sick note from 26 March 2019 which the claimant obtained later.

46) Following the 27 March meeting, the claimant sent emails to her friend and colleague, Ms Green, stating that she had walked out of the job, 'I have left today.

I am done now with that place'. The Tribunal accepted that this was a private conversation and not intended to come to the attention of the respondent.

47) However, Ms Green gave evidence that she was then asked by Ms Howland if she knew what was going on with the claimant and Ms Green gave Ms Howland a screenshot of these text messages. The Tribunal accepted that the claimant was unaware that this was happening.

48) The claimant's case was that, at this point, as shown by the text messages, she was angry and upset. She was, in effect, "venting" to Ms Green and there were other problems in her life at that time. She did not intend to resign. She needed to work.

49) The claimant then went on pre-booked annual leave from 1 to 8 April abroad. The respondent made a number of attempts to telephone her which the claimant said she ignored because she said she was on annual leave.

50) The claimant returned from holiday on 8 April 2019 and attended the respondent to hand in her sick note which was valid from 26 March to 26 April. The claimant had a conversation with the respondent not about her employment situation but about paying the nursery fees. There was no suggestion from anyone that there was any discussion on this day about resignation, dismissal or about the claimant's employment situation.

51) The respondent's evidence was that it then sent two letters to the claimant. One on 9 April at page 137 and the second on 10 April at page 138. The respondent's case was that it sent the letters by ordinary post and by email. Although there was an email receipt for later emails, the respondent did not disclose any email receipts for these letters. The claimant denied receiving the letters.

52) The tribunal had sight at pages 120 and 121, of what was described in the bundle index as meta-data for these two letters. There was no sworn evidence or any explanation as to how these documents might fit with pages 120 and 121. Ms Howland stated that she had no knowledge of them. The Tribunal attached little weight to the bundle index itself because the minutes of the disciplinary hearing were incorrectly described in the index as investigatory notes. Accordingly, the Tribunal disregarded pages 120 and 121.

53) The first letter made a reference to the sick note that had been received the day before and invited the claimant to a sickness welfare meeting.

54) The second letter - of 10 April - stated that the respondent was surprised to hear that the claimant had resigned verbally on 27 March. There was no reference to the claimant being on sick leave. The letter went on:-

'If you want to consider resigning, let us know in five days at the latest. If not, we will process your termination'.

55) The respondent, it was agreed, heard nothing further from the claimant. Ms Howland on the 23 April had Payroll issue a P45. This was sent by email to the claimant.

56) The claimant, when she received the P45, viewed this as meaning the employment relationship was over. Ms Howland also said that she viewed the relationship as being over once the P45 was sent.

57) The claimant's sick note duly ran out on 26 April.

58) Ms Howland sent a further letter dated 30 May to the claimant stating:-

'I have tried on multiple occasions to contact you by email and post. Please can you let me know if you are thinking of coming back by close of business tomorrow'.

59) No witness gave any meaningful evidence as to this document. Ms Howland was unable to explain why this letter was written. The claimant did not say if she had received it or refer to it in any way. The Tribunal noted that ACAS early conciliation had started on 3 May.

The Law

60) The relevant law is found in respect of unfair dismissal at Section 98 of the Employment Rights Act 1996 as follows

> **98 General**
>
> (1)In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
> (a)the reason (or, if more than one, the principal reason) for the dismissal, and
> (b)that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2)A reason falls within this subsection if it—…
> (b)relates to the conduct of the employee,
> **…**
>
> (4) Where the employer has fulfilled the requirements of subsection (1), 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.

61) The relevant law is found in respect of race discrimination at Section 13 of the Equality Act 2020 as follows

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.

(2)If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.

(3)If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.

(4)If the protected characteristic is marriage and civil partnership, this section applies to a contravention of Part 5 (work) only if the treatment is because it is B who is married or a civil partner.

(5)If the protected characteristic is race, less favourable treatment includes segregating B from others.

Submissions

62) Both parties made brief oral submissions.

Applying the Law to the Facts

Unfair Dismissal

63) The first issue for the tribunal was whether or not the claimant was dismissed. The respondent contended that the claimant resigned, whether by words or by conduct. The claimant contended that she was dismissed, whether by words or by conduct.

64) The first occasion which could have amounted to a resignation was the meeting on 27 March. The Tribunal considered whether what the claimant had said was ambiguous.

65) The Tribunal reminded itself that words that are capable of being interpreted as a resignation may not necessarily amount to such in the circumstances. The Tribunal directed itself in line with the Employment Appeal Tribunal case of *Chapman v Letheby & Christopher Limited 1981 [IRLR 440 EAT].* According to the Employment Appeal Tribunal, in respect of ambiguous words, the Tribunal's task, *'should not be a technical one but should reflect what an ordinary, reasonable employee would understand by the words used'*. Further, ambiguous words '*must be construed in light of the facts known to the employee at the date he [is in receipt of the ambiguous words]'.*

66) The test whether ambiguous words amount to a dismissal or resignation is an objective one. A Tribunal must take into account all the surrounding circumstances both preceding and following the incident, and the nature of the workplace. If the words are still ambiguous then the Tribunal must ask itself, how a reasonable employer would have understood them in light of those circumstances.

67) Further, it is a well-established principle in the construction of commercial contracts that any ambiguity will be construed against the party seeking to rely on it. In this case, this was the respondent who contended that the claimant had resigned. The Employment Appeal Tribunal in *Graham Group plc v Garratt EAT 161/97* held that this principle should be applied to ambiguous words or acts in the context of a dismissal or a resignation.

68) The Tribunal considered the context of the words on 27 March. The claimant was very angry in the meeting of 27 March. She did not understand the reason for the warning as she thought she had not done anything seriously wrong (which remained, essentially, her position before the Tribunal). She was extremely upset as a long-serving employee with an unblemished record to receive a final warning. The respondent was in no doubt that the claimant was angry.

69) The claimant then went on her pre-arranged annual leave and as soon as she returned, submitted a sick note on 8 April. This sick note was not rejected by the respondent. On 9 April it was impliedly accepted by way of the letter of 9 April which invited the claimant to a sickness welfare meeting. None of this was consistent with the claimant having resigned or the respondent understanding that the claimant had resigned.

70) The Tribunal considered what a reasonable employer would have understood. The Tribunal found that this employer was genuinely and legitimately confused about the claimant's intentions, and it was legitimately concerned about staffing going forwards. However, in the circumstances the respondent would not have understood the claimant to have resigned. This finding is corroborated by the respondent's not having treated the claimant as having resigned.

71) The Tribunal discounted the text/facebook messages as going to the respondent's understanding. The messages were not addressed to the employer and were sent on the claimant's personal phone and accounts. Notwithstanding any issues with regard to Article 8, on which no submissions were made, a reasonable employer would have been cautious about relying on such messages to determine whether an employee was actually resigning. This was particularly in circumstances where the employer only had sight of the messages because of a breach of confidence.

72) A reasonable employer knows that what staff say to each other in private is very different from what they say to their employer, especially when feelings are running high. Had these texts been addressed to the employer, the Tribunal might well have viewed them differently; however, the texts were a private conversation.

73) Accordingly, the Tribunal found that the claimant had not resigned on the 27 March. She then went on annual leave and then handed in a sick note on 8 April which was accepted. All this was consistent with an on-going employment relationship.

74) The second opportunity when the claimant may have resigned was her conduct following the letter of 10 April. She was expressly told to contact the respondent and tell them what was happening. She did not reply. Accordingly, this could not be a resignation by words but only by conduct.

75) According to *Harrison v George Wimpey and Co Ltd 1972 ITR 188, NIRC*:-

"Where an employee so conducts himself as to lead a reasonable employer to believe that the employee has terminated the contract of employment, the contract is then terminated'.

76) The NIRC also held that an employer is under a duty to make enquiries and to warn the employee of its intentions.

77) The Tribunal accepted that this is what the respondent sought to do. The claimant had not told the respondent that she did not want to be contacted nor had she not told the respondent that she would not be in contact.

78) However, the claimant at this point was on sick leave. The Tribunal, in particular taking into account the experience of its lay-members, took the view that a resignation by silence could not be inferred in these circumstances when the claimant was on sick leave. Therefore, the claimant did not resign.

79) Accordingly, the Tribunal considered what happened next, which was that the respondent sent a P45, which both Ms Howland and the claimant accepted was inconsistent with continued employment. It is not in every circumstance that the sending and receipt of a P45 is in and of itself determinative of dismissal. For instance, there may be discussions between the employer and the employee before or after which may set the P45 in context. However, there were no such discussions in this case. The respondent did not follow up the P45 with the claimant.

80) The claimant, the Tribunal accepted, saw herself as dismissed. Save for the letter of 30 May, the respondent did nothing inconsistent with the contract having been terminated.

81) As to the letter of 30 May, the Tribunal found that this letter was too late to change anything. By this time the claimant had already gone to ACAS. It was too late to have an effect on the employment relationship between the claimant and respondent. The Tribunal was bolstered in this finding by the fact that the respondent gave the claimant a one-day deadline, which was not consistent with a serious desire to find out what the claimant wanted to do.

82) Accordingly, the claimant found that the claimant was dismissed by means of being sent a P45. Therefore, the tribunal found that she was unfairly dismissed.

<u>Race Discrimination</u>

83) The claimant identifies as black Caribbean. The comparison that she sought to make was not stated in the list of issues or in her witness statement. However, in her claim form she stated that she was black and Caribbean, and she compared herself to other members of staff who were white or who were of a different race or ethnic origin.

84) The Tribunal had significant concerns about the discrimination claim. No allegation of race discrimination was put to any respondent witness. When the claimant was asked why she thought her treatment was due to race, she simply said that she was treated differently but referred to being treated differently to other staff of black Caribbean origin, i.e., staff who shared her protected characteristic.

85) The claimant did not say in either of her witness statement that she was discriminated against because of her race. She said at paragraph 13:-

"I believe I was discriminated against by the manager, Ms Howland, because she does not like me or want anyone challenging whatever she is doing wrong".

86) This in and of itself was not necessarily incompatible with a racial motivation. However, when the claimant set out the motive for the difference in treatment in her witness statement, she referred to a specific motive (a personal dislike) and did not refer to race at all.

87) The claimant only referred to race discrimination in response to specific Tribunal questioning. When she was asked by the Tribunal why she was mistreated, she said it was because of her race but only in the context of her complaint that no one else was searched. The Tribunal had found that other staff were searched.

88) The rest of the staff at the nursery had mixed racial and ethnic backgrounds, including the three staff in the room where the search took place. The other members of staff were a person of black African origin, and the third in command, Ms Yvonne Douglas. The Tribunal was unable to take Ms Douglas into account because the parties did not tell us her race.

89) The tribunal applied the following case law.

90) The acts relied upon were not inherently discriminatory, therefore (as *per James v Eastleigh Borough Council* [1990] IRLR 572) the Tribunal must look for the operative or effective cause. This requires consideration of why the alleged discriminator(s) acted as they did. Although their motive will be irrelevant, the Tribunal must consider what consciously or unconsciously was their reason? This is a subjective test and is a question of fact. See *Nagarajan v London Regional Transport* 1999 1 AC 502. See also the judgment of the Employment Appeal Tribunal in *Amnesty International v Ahmed* [2009] IRLR 884.

91) The Tribunal directed itself in line with the guidance of the Court of Appeal in see *Igen Ltd v Wong and Others* CA [2005] IRLR 258. At the first stage, the Tribunal has to make findings of primary fact. It is for the Claimant to prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent has committed an act of discrimination. At this stage of the analysis, the outcome will usually depend on what inferences it is proper to draw from the primary facts found by the Tribunal. It is important for Tribunals to bear in mind in deciding whether the Claimant has proved such facts that it is unusual to find direct evidence of discrimination. Few employers would be

prepared to admit such discrimination and in some cases the discrimination will not be an intention but merely an assumption.

92) The Court of Appeal reminded Tribunals that it is important to note the word "could" in respect of the test to be applied. At the first stage, the Tribunal must assume that there is no adequate explanation for those facts. At this first stage, it is appropriate to make findings based on the evidence from both the Claimant and the Respondent, save for any evidence that would constitute evidence of an adequate explanation for the treatment by the Respondent.

93) However, the burden of proof does not shift to the employer simply on the Claimant establishing a difference in status and a difference in treatment. Those bare facts only indicate a possibility of discrimination. "Could conclude" must mean that a reasonable Tribunal could properly conclude from all the evidence before it; see *Madarassy v Nomura International* [2007] IRLR 246. As stated in *Madarassy*, "the bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal could conclude that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination".

94) If the Claimant does not prove such facts, the claim will fail.

95) If, on the other hand, the Claimant does prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent has committed the act of discrimination, unless the Respondent is able to prove on the balance of probabilities that the treatment of the Claimant was in no sense whatsoever because of her protected characteristic, then the Claimant will succeed.

96) In *Laing v Manchester City Council* [2006] ICR 1519, the EAT stated that:

> "No doubt in most cases it will be sensible for a Tribunal formally to analyse a case by reference to two stages. But it is not obligatory on them formally to go through each step in each case… An example where it might be sensible for a Tribunal to go straight to the second stage is where the employee is seeking to compare his treatment with a hypothetical employee. In such cases the question whether there is such a comparator – whether there is a prima facie case – is in practice often inextricably linked to the issue of what is the explanation for the treatment, as Lord Nicholls pointed out in *Shamoon* …. it must surely not be inappropriate for a Tribunal in such cases to go straight to the second stage. … The focus of the Tribunal's analysis must at all times be the question of whether or not they can properly infer race discrimination. If they are satisfied that the reason given by the employer is genuine one and does not disclose either conscious or unconscious racial discrimination, then that is the end of the matter. It is not improper for a Tribunal to say, in effect, "there is a nice question as to whether or not the burden has shifted, but we are satisfied here that, even if it has, the

employer has given a fully adequate explanation as to why he behaved as he did and it has nothing to do with race"'

97) The Tribunal now turns to the acts of discrimination upon which the claimant relied.

The Search

98) The claimant's case was that she alone was searched for a phone. Firstly, the Tribunal considered who was searched on 1 February 2019. The claimant's evidence was consistent – only she was searched. The tribunal considered if Ms Howland's evidence was inconsistent. In her witness statement and before the tribunal she said both that all staff were searched but also just those in the same room as the claimant. However, the Tribunal found that it was more likely than not that the witness statement was not clearly drafted, and Ms Howland had meant that all staff in the room were searched. Further, it would be unwise for Ms Howland to search only the claimant out of all the staff in the room. This would cause difficulties and ill-feeling in the workplace. It would also be an unwise thing to do as it might indicate that there had been a specific "tip off".

99) The other people searched at the same time as the claimant were a student who, on the claimant's case was of Somalian or Ethiopian origin, and the third in charge, Ms Douglas, whose race we were not told. The Tribunal noted that the claimant did not rely either on the student or Ms Douglas as express comparators, whilst she had relied on other express comparators in other complaints.

100) The Tribunal accepted Ms Howland's evidence that the reason she carried out the search was that she was tipped off. This was because this was the second time that Ms Howard received an allegation that the claimant kept her phone with her at work. This was a workplace, on the evidence, in which one member of staff shared a private message from the claimant with the employer. In those circumstances, it was plausible that someone might, in effect, "inform" on the claimant.

101) The tribunal considered whether there were facts from which the Tribunal could conclude, in the absence of an adequate explanation, that there an act of discrimination. The claimant was searched with two others. The parties did not inform us of the race of Ms Douglas, so the tribunal was unable to take this into account. It was agreed that the third person searched was black African. The tribunal noted that the claimant identified as black Caribbean, however, there was no explanation or contention as to why there might be differential treatment between someone who was black Caribbean and someone who was black African.

102) As the respondent was, in effect, tipped off about the claimant, this provided a non-discriminatory and highly plausible explanation for the search. This was particularly in the context of the earlier tip off on 16 January when the claimant denied having a phone.

103) Accordingly, the Tribunal found that the search was not an act of race discrimination.

The lack of an effective investigation before a disciplinary, including a failure to interview other staff members

104) The claimant did not rely on any actual comparator. Both claimant and respondent were unaware of any member of staff who was found with a second phone who was treated differently. The others who were searched did not have a phone.

105) The tribunal considered whether there were facts from which it could conclude, in the absence of an adequate explanation, that there an act of discrimination.

106) The Tribunal considered what further investigation the respondent could have done. The claimant was, in effect, found red-handed - she handed in a phone but had a second phone in her possession. This was in plain contravention of the respondent's rules. The fact that she had handed in a "dummy" phone strongly indicated that she was deliberately and knowingly flouting the phone rule. There was nothing at all remarkable about the respondent's moving to a disciplinary procedure at that point.

107) Accordingly, the Tribunal found that this was the reason the respondent proceeded to a disciplinary, it was not the claimant's race. This was not an act of race discrimination.

The Disciplinary Hearing and the Sanction

108) The tribunal considered the disciplinary hearing and the sanction of a final written warning. The tribunal had already determined that proceeding to a disciplinary was not an act of race discrimination.

109) The Tribunal found that there were shortcomings in the disciplinary process. Ms Correia accepted that there was a lack of notice, and the claimant was not provided with full documents. The respondent referred to investigatory notes that did not exist. The two sets of minutes of the meeting were incompatible and were both unreliable, according to the evidence.

110) However, the question was not whether this was a fair procedure but whether there were facts from which the Tribunal could conclude, in the absence of an adequate explanation, that there an act of discrimination.

111) The claimant was caught red-handed with a phone. The respondent, albeit after significant questioning by the Tribunal, was able to provide some coherent explanation as to why it had the phone policy. It was not for the Tribunal to determine whether such a policy was necessary or wise. However, the policy was not inherently or obviously incomprehensible. It related to an objective concern – child abuse. The evidence showed that the respondent did seek to enforce this policy. This was indicated by the claimant's taking deliberate steps to try to circumvent it.

112) The Tribunal accepted the evidence of Ms Correia that the claimant's general attitude at the disciplinary meeting was that she did not think that what she had

done was a serious matter. The reason was that this was essentially the claimant's case during her appeal and during the Tribunal proceedings.

113) Accordingly, the Tribunal accepted Ms Correia's explanation that the reason she chose a final written warning as a sanction was because she was not satisfied that the claimant understood how seriously the respondent viewed the matter. There was no evidence that race played any part in this and accordingly, the Tribunal found that this was not an act of race discrimination.

The Failure to Investigate or Discipline other Members of Staff

114) As actual comparators, the claimant relied on Ms Holland, Ms Green and two colleagues called Stacey and Simone.

115) The first difficulty in a complaint of race discrimination was that Stacey, Miss Green and Simone were of the same ethnic group as the claimant. They were black Caribbean.

116) In evidence the claimant relied mostly on Ms Green and Ms Howland.

117) There was some evidence that may have pointed to Ms Green having her phone on her during working hours. Ms Green's evidence in this regard was unsatisfactory. She denied that her own mobile phone number was hers for some time under cross examination. There was evidence that was consistent with her using her phone to contact the claimant whilst at work. Nevertheless, there was no evidence that Ms Green was actually at work at the time, and it was entirely possible that she was not at work. However, the fatal problem with Ms Green as a comparator in the race complaint was that she was of the same ethnic group as the claimant.

118) The tribunal went on to consider Ms Howland who was white. In the view of the Tribunal Ms Howland's circumstances were materially different from those of the claimant. She was a manager. Further, she had used her phone at work but in very different circumstances. She did not have two phones and was not therefore seeking by subterfuge to avoid the respondent's phone rule. She had used her acknowledged phone in the view of another member of staff to call a GP. She provided a credible explanation as to why she did not use her work phone to do this as she wanted to keep the work phone free. Further, it was not in dispute, that there were no children nearby who could be filmed or photographed.

119) These significant differences in the circumstances therefore provided a non-discriminatory reason why the claimant and Ms Howard were treated differently. To put it another way, Ms Howland was not a true comparator.

120) The tribunal could find no reason why a white hypothetical comparator would have been treated more favourably. The respondent had a mobile phone policy which the evidence, including the claimant's conduct, showed they enforced. The claimant was in plain breach. Ms Howland did not constitute a *Shamoon* "building block" as a hypothetical comparator because her circumstances were entirely different.

121) Accordingly, the Tribunal found that this did not amount to an act of race discrimination.

The Appeal

122) Little evidence was led on the appeal. There was no suggestion as to why the conduct of the appeal might be related to race discrimination or why the appeal officer might have reached a different decision or proceeded in a different manner for someone in the claimant's position who was not black Caribbean.

123) The claimant's attacks on the impartiality of the appeal officer - who worked for a wholly-owned subsidiary of the organisation representing the respondent before this Tribunal - provided an alternative and non-racial explanation for any shortcomings in the appeal process.

124) Further, there was nothing remarkable about the appeal decision in and of itself. Accordingly, the Tribunal found that the appeal was not an act of race discrimination.

Dismissal

125) The tribunal found that the claimant was constructively dismissed. The tribunal considered whether there were facts from which it could conclude, in the absence of an adequate explanation, that dismissal was an act of discrimination.

126) The respondent had been seeking to clarify the claimant's employment situation since 27 March. The claimant had not provided them with a clear and unambiguous statement of her employment status. She had gone on annual leave and then she been absent on sick leave. As a result, she had been out of the workplace for over a month, and had not clarified her intentions. This was in the context of her having received a final written warning for having failed to comply with the mobile phone procedure because the respondent did not trust her to comply in future. In addition, the respondent had sight of messages in which the claimant was evidently angry with the respondent, and so the respondent had a real reason to doubt the claimant's commitment.

127) In the view of the tribunal this provided ample explanation for why the respondent dismissed the claimant. It was simply not prepared to wait any longer. It needed clarity in staffing going forward.

128) Accordingly, the Tribunal found that that dismissal was not an act of race discrimination.

129) As none of the acts of race discrimination were made out, the race discrimination complaint was dismissed.

REASONS - REMEDY

130) Without the respondent's conceding on liability, the parties agreed the award, based on the tribunal's findings on liability.

131) The parties had only two issues in respect of remedy for the tribunal to determine as follows:

a. Should there be an adjustment to the award under Section 38 Employment Act 2002 because the respondent had failed to provide, within two months, a statement of terms and conditions compliant with Section 1 of the Employment Rights Act 1996; and

b. Should there be any uplift to the award for failure to comply with the ACAS procedure.

Section 38 Employment Act 2002

132) The respondent relied upon a written contract of employment in the bundle which it said it had provided to the claimant within two months of her starting work. The claimant denied she had seen or received this document.

133) The Tribunal accepted the claimant's evidence that she was not given the contract within two months of her starting work because the contract stated that her hours of work related to the year commencing 1 April 2019, a number of years after her start date. Accordingly, the Tribunal found that it was highly unlikely that she had not been provided with this contract within two months of starting work. Therefore, the respondent had failed to provide a statement of terms and conditions compliant with Section 1.

134) As there were no exceptional circumstances, Section 38 Employment Act 2002 was engaged. The Tribunal had to decide whether the Claimant should be awarded the lower amount or the higher amount.

135) This was a complete failure to provide a Section 1 statement within two months. The law provides that the Tribunal, save in exceptional circumstances, should award two weeks' wages in the event of a single failure - for instance a reference to incorrect hours of work.

136) As this was a complete failure, it was just and equitable to award the higher amount of four weeks' gross wages. This was the claimant's gross weekly wages of £321.23 x 4 being £1284.92.

The ACAS uplift.

137) Section 207A(2) TULR(C)A provides that: 'If, in any proceedings to which this section applies, it appears to the employment tribunal that — (a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,

(b) the employer has failed to comply with that Code in relation to that matter, and (c) the failure was unreasonable, the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25 per cent.'

138) The Tribunal agreed with the claimant that its power to make an uplift was engaged because there was a failure to comply with the ACAS procedure in circumstances where the proceedings, being unfair dismissal, were listed in Schedule A2 - Section 207A(1) TULRA.

139) The Tribunal, however, did not find that the employer's failure to comply was unreasonable. This was because the claimant did not co-operate satisfactorily with the respondent's attempts to contact her, as set out above and below, and this failure led to the dismissal.

140) However, for the avoidance of doubt, in the event that the employer's failure was unreasonable, the Tribunal would not find it just and equitable to uplift the award for the following reasons.

141) The Tribunal, when deciding whether it is just and equitable to make an uplift to an award, must consider three factors.

142) Firstly, it must consider the extent of the failure to comply; whether the procedures were applied to some extent or ignored altogether. In this case, there was no procedure relating to the dismissal although there were a number of attempts to contact the claimant prior to dismissal.

143) The second factor is whether the respondent's failure to comply with the procedures was deliberate or inadvertent. In the view of the Tribunal, whilst this was not a deliberate failure, it was somewhat more than an inadvertent failure. The respondent knowingly sent the claimant a P45 and took no steps to put this in context.

144) The final, and for the Tribunal, determinative, factor was whether there were any circumstances that mitigated the blameworthiness of the failure to comply.

145) In the view of the Tribunal, the following factors mitigated the blameworthiness of the failure to comply.

146) The claimant had made ambiguous statements as to her employment intentions at the meeting on 27 March. After that the respondent made significant attempts to clarify the situation. However, the claimant did not make her position clear. The claimant went on annual leave knowing that she had left her employer unclear about her intentions and she failed to respond to telephone calls. The respondent wrote her letters, and she did not reply.

147) This made it very difficult for her employer to plan, with inevitable adverse consequences for the business.

148) In these circumstances, the Tribunal found that it would not be just and equitable to apply an ACAS uplift to the award.

Employment Judge Nash

Date 3 September 2021

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